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TRANSCRIPT OF PROCEEDINGS

O/N H-910736

MR B. WALKER SC, Royal Commissioner

IN THE MATTER OF THE MURRAY-DARLING BASIN ROYAL COMMISSION

ADELAIDE

10.16 AM, WEDNESDAY, 18 JULY 2018

Continued from 17.7.18

DAY 10

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

MR BEASLEY: I think we are all here now, commissioner.

THE COMMISSIONER: Very well. Shall we proceed?

5 MR BEASLEY: Before we begin we acknowledge this land on which we meet on
today is the traditional land of the Kaurna people and that we respect their spiritual
relationship with their country. We also acknowledge the Kaurna people as the
custodians of the Adelaide region, and that their cultural and heritage beliefs are still
10 as important to the living Kaurna people today. We pay respects to the cultural
authority of Aboriginal people visiting or returning from other areas of South
Australia or Australia that are present here.

Commissioner, today we have three witnesses: Mr Hooper, who is the Chair of
NBAN; Monica Morgan, who is the CEO of Yorta Yorta Aboriginal Corporation;
15 and Mr Steve Whan, who is the CEO of the National Irrigators' Council. I intend to
call Mr Hooper first and then Ms Morgan, but I can probably get to Mr Whan after
lunch. Before I do though, to set the context of – given we're in a public hearing,
just set the context of the first two witnesses to have today, can I take you through
some of the important parts of the Water Act and the Basin Plan concerning
20 Aboriginal people.

I think we can start with – although it's not – it doesn't mention Aboriginal people
directly, but the objects of the Act include giving effect to Australia's international
25 agreements. That of course includes the Biodiversity Convention which has
obligations to respect, preserve and maintain knowledge and innovations and
practices of Indigenous and local communities embodying traditional lifestyle
relevant for the conservation and sustainable use of biological diversity. More
specifically, section 20A of the Act, again mentions giving effect to relevant
international agreements and section 21(4)(c)(v) in the following terms

30

Subject to subsections 1, 2, and 3 –

this is in relation to the general basis upon which the Basin Plan must be developed.

35

*Subject to subsections (1), (2) and (3), the Authority and the Minister must, in
exercising their powers and performing their functions under that division –*

which would mean not only in the creation of the Basin Plan but, of course, also in
the implementation of the Basin Plan, the recent adjustment to the Basin Plan
40 through the SDL adjustments, or the Northern Basin Review as an amendment:

*Must, in exercising their powers and performing their functions under this
division –*

45 (v):

Have regard to the following, social cultural Indigenous and other public benefit issues.

I will come back to the words “have regard to” in a moment.

5

THE COMMISSIONER: I’m sorry to interrupt.

MR BEASLEY: That’s all right.

10 THE COMMISSIONER: In the Biodiversity Convention, which is the operative provision?

MR BEASLEY: 8(j)

15 THE COMMISSIONER: That’s – so that - - -

MR BEASLEY: Do you have a folder that’s called international Agreements?

20 THE COMMISSIONER: I have got 8(j) in front of me. 8(j) requires Australia so far as possible and as appropriate – but subject to its national legislation, to respect, preserve, etcetera, etcetera.

MR BEASLEY: Yes. I don’t read that as meaning you can shut that out by legislating, I - - -

25

THE COMMISSIONER: So it’s the regulation rather than abolition of that obligation?

30 MR BEASLEY: I think so. It would make no sense at all if you could sign up to this treaty and then pass legislation that absolved you from fulfilling the obligations you’ve just signed up to.

THE COMMISSIONER: In private contractual law it would appear to be illusory to say, “I promise to do something unless I don’t want to.” Yes.

35

MR BEASLEY: Yes. It can’t possibly mean you can shut out the obligations.

THE COMMISSIONER: I just wanted to draw to your attention, as well, article 10.

40 MR BEASLEY: Yes.

45 THE COMMISSIONER: Which requires Australia so – as far as possible and as appropriate to protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements, as well as to support local populations to develop and implement remedial action in degraded areas where the biological diversity has been reduced. Those two would appear to be - - -

MR BEASLEY: Relevant also.

THE COMMISSIONER: Relevant as well as appear to be a basis – if the Commonwealth needed an external affairs power to legislate for the provisions
5 you’ve drawn to my attention in paragraph 21(4)(c) of the Water Act. Thank you.

MR BEASLEY: Well, if the Basin Plan isn’t implemented in our international obligations, as you discussed the other day, the Water Act is still going to have validity but the Basin Plan may not.
10

THE COMMISSIONER: Yes.

MR BEASLEY: I said I would come back to the words “have regard to” and I will. I just want to keep going through the relevant sections of the Water Act. Section 22
15 is – talks about the mandatory content of the Basin Plan and you will see 22(1), item 1:

Matter that must be include: a description of the basin water resources and the context in which those resources are used.

20

B:

The uses to which the Basin water resources are put (including by Indigenous people).

25

I will come back to that.

THE COMMISSIONER: So the Basin Plan has to have that description of uses of the Basin water resources by Indigenous people?
30

MR BEASLEY: Correct.

THE COMMISSIONER: And by other people.

35 MR BEASLEY: And by other people.

THE COMMISSIONER: Yes.

40 MR BEASLEY: And whatever it means:

Have regard to Indigenous issues.

I will come back to that. You might recall I have referred to a document produced by the Basin Authority about that in opening which I thought I tendered. I will come
45 back to that and I will tender it this morning.

THE COMMISSIONER: Thank you.

MR BEASLEY: The Basin Plan, although chapter 10 is the key chapter, there are some provisions that should be considered prior to that in chapter 8, which is the chapter concerning the environmental watering plan. Chapter 8 - - -

5 THE COMMISSIONER: Before you get to chapter 8, is it chapter 2 – which I think occupies all of one page – that is the purported compliance with that compulsory description?

MR BEASLEY: I don't think so – no. I think it's chapter 10, parts 52 to 54.

10 THE COMMISSIONER: I'm just looking at chapter 2, which is two and a half lines long.

MR BEASLEY: Yes. No, that can't possibly be it.

15 THE COMMISSIONER: The description of the Basin water resources and the context of which those resources are used, item 1, is set out in schedule 1.

MR BEASLEY: Yes, I'm going to go to schedule 1 because that talks about cultural flow.

20 THE COMMISSIONER: Yes. So it's schedule 1 where we find – why I was asking is that item 1 in section 22 strikes me as a very daunting task. You've got to describe the water resources and the use by everyone, including specifically Indigenous people.

MR BEASLEY: Yes. I don't mean to be disrespectful but when the Water Act was prepared in 2007 it's pretty clear that Aboriginal interests were dealt with in an almost tokenistic way. And people might have to forgive me for saying that, but that is the way it's drafted.

25 THE COMMISSIONER: Well, I will consider that. But if I look at schedule 1 and think what section 22 says, is which is requiring something to be in a Basin Plan. We know the Basin Plan can be amended but it has to be promulgated up front. So this is a snapshot – I don't mean that disrespectfully, but it's a view taken at the time the Basin Plan is prepared and it will necessarily – won't it – describe if they exist, areas of degradation.

MR BEASLEY: Yes. But, I mean, what 22(1), item 1 says you have got to include in the Basin Plan is merely a description.

THE COMMISSIONER: I know.

MR BEASLEY: Not a - - -

45 THE COMMISSIONER: I'm very sympathetic to those who had to do it. It occupies, I think, nine pages of text.

MR BEASLEY: Yes.

5 THE COMMISSIONER: Some 53 paragraphs. And to the credit of those who prepared it, it is then followed by three and a half pages of bibliography. Many of which are only tangentially relevant. Some of which are centrally relevant, and some which are very considerable works of science and scholarship. I suppose - - -

MR BEASLEY: Yes. It's unusual for a legislative instrument, you would have to say that, but that - - -

10 THE COMMISSIONER: To have a bibliography.

MR BEASLEY: Yes.

15 THE COMMISSIONER: But you can see their point, because why I'm obviously interested is that it can't just have been sadism on the part of those who drew the Water Act to require those who were preparing the water plan to describe the water resource. That is, it must be in there for a purpose. So it must be a description that informs a number of the Water Act obligations and the Basin Plan obligations and, in
20 this topic you've opened to me, just now, one would therefore expect this description, in order to be useful, to say something about the use – the customary use, to use the treaty expression, the Indigenous use, to use the statutory expression – they are probably the same – and also to focus on some areas of degradation, which they do in general terms in paragraphs 17 and following of schedule 1.

25 MR BEASLEY: Yes. They have a go at describing the Basin itself, commencing at (3). Whether it's a particularly useful document in relation to uses to which water resources are put by Indigenous people is another issue, because that's dealt with in two paragraphs but, perhaps, that seems like a monumental task.

30 THE COMMISSIONER: Yes.

MR BEASLEY: To include, in a legislative instrument. So I don't want to offer it too much criticism about that.

35 THE COMMISSIONER: No. You've just referred to paragraphs 30 and 31, I think.

MR BEASLEY: Yes.

40 THE COMMISSIONER: Yes.

MR BEASLEY: So given we're there, Indigenous uses include – well, it says:

45 *For cultural social, environmental, spiritual and economic purposes.*

But that doesn't really help you to – they are labels.

THE COMMISSIONER: I know. As I say, I'm sympathetic with those who were required to make this description because you could not – you could write not only one book but a number of books about this.

5 MR BEASLEY: You could fill volumes. If you have to set out the uses to which the Basin water resources are put to either Indigenous people or all people, it would become a slightly ridiculous exercise. And then the concept of cultural flow that's in 31 is taken from the, I think, Echuca declaration.

10 THE COMMISSIONER: Yes, I know. The first sentence of 31 provokes me to this comment: that I don't find the concept of cultural flows does help me to translate the complex relationship described above into the language of water planning and management.

15 MR BEASLEY: No. I think - - -

THE COMMISSIONER: That baffles me, I have to say.

MR BEASLEY: I don't know what that means.

20

THE COMMISSIONER: I'm interested to know about the - - -

MR BEASLEY: I think the definition of cultural flow is relevant and has become increasingly so given recent publications by NBAN and MLDRIN regarding cultural flow that you will hear about today.

25

THE COMMISSIONER: Yes.

MR BEASLEY: And that has been an ongoing issue.

30

THE COMMISSIONER: Yes.

MR BEASLEY: Ms Morgan has written papers on cultural flow that I will take her to and there has been submissions made about how cultural flow should be legalised, if I can put it that way, into something concrete.

35

THE COMMISSIONER: Yes. One thing is clear, as paragraph 30 makes clear. What I call their "Indigenous economic interests" are regarded as appropriately – to be specifically - - -

40

MR BEASLEY: Addressed.

THE COMMISSIONER: Addressed. Yes.

45 MR BEASLEY: Yes.

THE COMMISSIONER: Thank you.

MR BEASLEY: Basin Plan, I was – had gone to chapter 8, which is the environmental watering plan. And, in particular, we can commence with 815(4). It doesn't take us much beyond the Act:

5 *Preparation of Basin-wide environmental watering strategy.*

Matters to which the Authority must have regard for:

10 *When preparing the Basin-wide environmental watering strategy, the Authority must have regard to each of the following: ... (e) Indigenous values and Indigenous uses.*

THE COMMISSIONER: I would add to that – as, no doubt, overlapping – 4(d)(1), the use of local communities.

15

MR BEASLEY: Yes. Indigenous uses and Indigenous values are actually defined terms, I have reminded myself, but in entirely unhelpful ways which I will come to.

THE COMMISSIONER: What, in the Plan?

20

MR BEASLEY: Yes. They're in the Plan - - -

THE COMMISSIONER: Right.

25 MR BEASLEY: - - - but we will get to it. Indigenous uses is defined as having the meaning, given in 10.52 which won't enlighten you much and Indigenous values is defined as given the meaning in 10.52 and that may not enlighten you much either. 8.35, still in the environmental watering plan, principles to be applied in environmental watering. 8.35:

30

Subject to the principles of sections 33 and 34(b)(iv), maximise multiple environment benefits, environmental watering and maximise its benefits and effectiveness by having regard to Indigenous values.

35 Whatever that means.

THE COMMISSIONER: We are told, as you say, in 10.52 - - -

40 MR BEASLEY: We are. I will get there. I just want to get through the environmental watering plan. And I just draw to your attention also - - -

THE COMMISSIONER: Sorry, just to add, though, it's not just (iv) in 83 (b), it is also (iii) which is - - -

45 MR BEASLEY: Yes, you're right.

THE COMMISSIONER: - - - utilising local knowledge and experience.

MR BEASLEY: And probably – yes, you are right. Yes.

THE COMMISSIONER: As well as the social and economic outcomes, which includes Indigenous interests.

5

MR BEASLEY: I – in drawing these subparagraphs or subsections of the Plan to your attention – I’m not meaning to exclude others - - -

10 THE COMMISSIONER: No, I’m sure you are not. I just want to put it on the record that local knowledge and experience and social and economic outcomes - - -

MR BEASLEY: Of course.

15 THE COMMISSIONER: - - - neither exclude Indigenous values nor do Indigenous values fail to include them. They overlap.

MR BEASLEY: Local knowledge can be local knowledge by Indigenous people, of course. 8.53, principles and methods to determine priorities environmental water. Principle 1A reflect principles of not be inconsistent with international agreements. I underline that because the drafting seemed curious to me. Given that the Water Act commands an implementation of international obligations, somehow that has been translated in the environmental watering plan as not being inconsistent.

20

THE COMMISSIONER: Yes.

25

MR BEASLEY: Which is clearly not the same thing.

THE COMMISSIONER: No.

30 MR BEASLEY: And I’m just having it pointed out by Mr O’Flaherty that 8.41, relevant international agreements, environmental watering should be undertaken in a way that is “not inconsistent” with relative relevant international agreements, rather than being consistent with. There must be a reason for drafting it that way, but I’m - - -

35

THE COMMISSIONER: The note says - - -

MR BEASLEY: Perhaps there’s not.

40 THE COMMISSIONER: - - - that it’s a – this provision is a further check to ensure that that the purpose of giving effect to relevant international agreements is achieved.

MR BEASLEY: Yes, by not being inconsistent.

45 THE COMMISSIONER: And I guess that’s right.

MR BEASLEY: Yes.

THE COMMISSIONER: One way to check whether you are implementing an agreement is to start with the pessimistic question, “is this inconsistent with the agreement?” I agree.

5 MR BEASLEY: Yes. It’s not the most direct approach, I wouldn’t have thought, but anyway – chapter 10 is, in terms of Aboriginal people, the most – obviously the most important part. Chapter 10(14), commencing at 10.52, heading Indigenous Values and Uses – and this is in relation to the preparation of Water Resource Plans.

10 THE COMMISSIONER: Now, my red pen has tended to highlight the word “cultural” that you find twice, I think, in the definition provisions of 10.52(2)(a) and (b).

MR BEASLEY: Yes.

15

THE COMMISSIONER: I’m interested to know whether as I suppose to be the case, cultural values in that expression should be understood as including economic interests.

20 MR BEASLEY: That is my understanding but there’s people better placed to answer that than me.

THE COMMISSIONER: Quite. And so I will be very interested to hear about that.

25 MR BEASLEY: Yes. So the plans must identify objectives of Indigenous people, outcomes for management desired by Indigenous people, identify regard must be had to social, spiritual, cultural values as determined through consultation with the relevant Indigenous organisations. I mean, “consultation” is a word that may mean different things.

30

THE COMMISSIONER: I’m so sorry, I’m – sorry – yes, yes, yes.

MR BEASLEY: As determined through consultation with relevant Indigenous organisations, including MLDRIN and NBAN.

35

THE COMMISSIONER: It is interesting, isn’t it? The consultation is required for the determination of the Indigenous values and Indigenous uses, but not specifically in relation to the objectives and the outcomes that are desired.

40 MR BEASLEY: No.

THE COMMISSIONER: But again, I suppose they overlap.

MR BEASLEY: The – perhaps, but you’re right. The consultation is - - -

45

THE COMMISSIONER: I don’t know how you would know what the objectives of Indigenous people are without not only asking but being bound by what they say and,

similarly, how you identify the outcomes desired by Indigenous people by not only asking but by being bound by what they say.

5 MR BEASLEY: Yes. Then there is the discretionary provision that a “person or body preparing a Water Resource Plan” – I think “person or body” should probably be read as “state”, but perhaps it’s an individual drafting it. I don’t know.

THE COMMISSIONER: Yes.

10 MR BEASLEY:

May identify opportunities to strengthen the protection of Indigenous values and Indigenous uses.

15 Then 10.53 deals with, I suppose, outlining what is considered to be consultation in preparing a Water Resource Plan.

THE COMMISSIONER: It’s because of the “having regard” there, that I raised the question I did about 10.52(1).

20

MR BEASLEY: Yes.

25 THE COMMISSIONER: I honestly don’t understand, at the moment, how you can identify the objectives of people or the outcomes desired by people without being bound by what they say. So long as you would assume they are being sincere.

MR BEASLEY: Yes. And I - - -

30 THE COMMISSIONER: I don’t understand how you can drop down to simply “having regard” to those views.

35 MR BEASLEY: I forgot to take you, in 10.52, to those defined terms “Indigenous values” and “Indigenous uses”. “Indigenous values” is defined as the social spiritual and cultural values. That’s pretty much saying “values are values”.

THE COMMISSIONER: Yes, it’s a useful provision, isn’t it?

MR BEASLEY: No.

40 THE COMMISSIONER: And the next one says, “uses are uses”.

MR BEASLEY: And “the uses are uses”. So not a lot of information provided there.

45 THE COMMISSIONER: What does “where appropriate” mean about the consultation? Is that a regional question?

MR BEASLEY: I - - -

THE COMMISSIONER: Is that a demarcation point?

5 MR BEASLEY: Where are you looking?

THE COMMISSIONER: It says “including” – it’s:

10 *Determined through consultation with relevant Indigenous organisations
including, where appropriate - - -*

MR BEASLEY: You could read that a number of ways. One it could be “area”, but it could be just “knowledge” as well.

15 THE COMMISSIONER: Yes.

MR BEASLEY: It could be that those groups have taken responsibility for certain matters. Or have taken a representative role for certain matters. But - - -

20 THE COMMISSIONER: If you go back to a matter talked about yesterday in the evidence about connectivity, it might be dangerous to neglect what I might call an “adjacent group”, if you are asking about a particular place.

MR BEASLEY: Of course, yes. Yes. So – yes – 10.53. I won’t read it out.

25 THE COMMISSIONER: Yes.

MR BEASLEY: Then 10.54 is the provision dealing with cultural flows, which says a Water Resource Plan must be prepared having regard to the views of Indigenous
30 people with respect to cultural flows. Which, of course, falls short of any directive that anything more than perhaps listening - - -

THE COMMISSIONER: I’m so sorry, I think this has been discussed before.
35 10.54, in its stipulation about cultural flows, is used in an expression we don’t have defined; is that correct?

MR BEASLEY: Well, I take it to be a reference to schedule 1, paragraph 31 - - -

40 THE COMMISSIONER: I see.

MR BEASLEY: - - - that we went to. Because you won’t find cultural flow defined in the definition section of the Plan. So I - - -

45 THE COMMISSIONER: But paragraph 30 of - - -

MR BEASLEY: Schedule 1?

THE COMMISSIONER: Sorry, of schedule 1 - - -

MR BEASLEY: Has the definition of cultural flow that's currently used by NBAN
and MLDRIN. Which is curious, because it actually does – you're right to come
5 back to that, because it does talk about water entitlements that are legally and
beneficially owned.

THE COMMISSIONER: Well, I recognise that language and I'm just concerned
that we haven't engaged in some kind of meaningless circularity. Where do I find –
10 yes. And it's the "legally and beneficially owned" that troubles me, obviously
enough.

MR BEASLEY: Troubles you in what sense?

15 THE COMMISSIONER: Well, I don't know what it means. Is it as an aspirational
matter or is it a matter of property law?

MR BEASLEY: I view that as an assertion of a right of ownership to a flow of
water described a cultural flow, is the way I - - -
20

THE COMMISSIONER: Well, you – why I'm worried about meaningless
circularity is this - - -

MR BEASLEY: It doesn't translate into anything concrete.
25

THE COMMISSIONER: If it's a matter of the law of the land, there is no thing
called a water entitlement that is legally and beneficially owned by Indigenous
Nations. Then the definition is of no purport. It advances nothing.

30 MR BEASLEY: It doesn't advance anything, but I think it is of purpose to the
Aboriginal people.

THE COMMISSIONER: I'm sure it is.

35 MR BEASLEY: Yes.

THE COMMISSIONER: And I don't for a moment suggest that those who
promulgated paragraph 31 of schedule 1 of the Plan were being cynical at all, but
there is a task for me trying to give it meaning so that the stipulation in - - -
40

MR BEASLEY: Well, as currently drafted, all it means is if you combine 10.54
with 31 of schedule 1, is that the person or state preparing the Water Resource Plan
has to have regard to that definition, and then do nothing.

45 THE COMMISSIONER: Yeah. Which couldn't be right, I'm sure.

MR BEASLEY: Well, I'm pretty sure – I'm comfortably satisfied that's the way it's been interpreted.

THE COMMISSIONER: Thank you. Which may not help.

5

MR BEASLEY: Speaking of that - - -

THE COMMISSIONER: Which may not contradict what I just said.

10 MR BEASLEY: No, it doesn't necessarily. But in opening I referred to a Murray-Darling Basin Authority publication that we certainly – which I was able to access from their website, that I think - - -

THE COMMISSIONER: I've got this somewhere. It's all right.

15

MR BEASLEY: - - - one of the – the Chair of MLDRIN might have drawn to my attention during a discussion I had, which is a document entitled Basin Plan Water Resource Plan Requirements, position statement 1B - - -

20 THE COMMISSIONER: Yes, I have it.

MR BEASLEY: - - - interpreting having regard to - - -

25 THE COMMISSIONER: Yes, I've read that. Now, this is a document intended for the guidance of people preparing Water Resource Plans.

MR BEASLEY: I would have thought so.

THE COMMISSIONER: Yes.

30

MR BEASLEY: So - - -

35 THE COMMISSIONER: And it has – it has an MDBA devised categorising of requirements to have regard into categories A, B and C, about which we will hear later, I assume.

40 MR BEASLEY: Well, the curiosity is that category A is the lowest category in terms of how much regard you have to have to something and category C is the highest, which is an unusual way of approaching things. But nevertheless, I suppose it's an available option. We have our coloured boxes, but in this case I don't think that means anything in particular. And when it comes to the section – sorry, the provisions of the Basin Plan that I've just taken you to, 10.52, 10.53, 10.54, they are regarded as category A having regards to, which is - - -

45 THE COMMISSIONER: So that, according to this guideline, would mean – and this has some fair relation to administrative law, I would have thought, that the

relevant decision maker must give those matters proper genuine and realistic consideration, but being category A with no additional requirements.

5 MR BEASLEY: Yes. Well, you've added words that aren't - - -

THE COMMISSIONER: I'm quoting from the - - -

MR BEASLEY: - - - in category A.

10 THE COMMISSIONER: No, doesn't that come from paragraph 1? If the Basin Plan requires that a person 'have regard to'?

MR BEASLEY: Sorry, yes.

15 THE COMMISSIONER: It means the relevant legislation must give those matters proper realistic genuine consideration, but then you drop down, and with category A, with no additional requirements.

20 MR BEASLEY: Yes. That's right.

THE COMMISSIONER: Category B requires you to describe or explain how – what they say – that requirement was complied with.

25 MR BEASLEY: Yes.

THE COMMISSIONER: That's not very useful. And then category C requires you to include specified additional matter - - -

30 MR BEASLEY: That's right.

THE COMMISSIONER: - - - depending upon the regard being had. I'm bound to say I'm not sure that any of that is sound, either administrative law or interpretation. If you give proper, genuine and realistic consideration to something, that may produce your opinion that something ought to be in the Water Resource Plan. That
35 would be category C, I would have thought.

MR BEASLEY: I was certainly not referring to this document as a template for the correct approach to matters of construction and procedural fairness or administrative law generally.
40

THE COMMISSIONER: Does having regard to go beyond the familiar administrative law requirement to take relevant considerations into account?

45 MR BEASLEY: Generally, it should – it has to depend on the subject matter, doesn't it? And this is an important subject matter.

THE COMMISSIONER: Yes.

MR BEASLEY: So I would have thought that category A may not be the appropriate category here, but anyway, that's the – only my view.

THE COMMISSIONER: We will see.

5

MR BEASLEY: Not the Basin – but I tender that document formally.

THE COMMISSIONER: Thank you.

10 MR BEASLEY: So I'm tendering the MDBA document issued 23 March 2017, Basin Plan Water Resource Plan Requirements Position Statement 1B Interpreting "having regard to".

15 THE COMMISSIONER: Now, we have no known track record of anybody using that guideline in the preparation of a Water Resource Plan, do we?

MR BEASLEY: We don't. Because there is only one been prepared so far and as for the rest I would say things are in relative state of mystery as with other acts of the Authority in relation to adjustments and what-not. The answer is I don't know, is perhaps - - -

20

THE COMMISSIONER: Can you explain the statement in the note that commences part 14 of the plan:

25 *If a Water Resource Plan is prepared by a Basin state –*

now that's a default position, isn't it, I think?

MR BEASLEY: Yes.

30

THE COMMISSIONER:

35 *...it's expected that the Authority will consult with relevant Indigenous organisations in relation to whether the requirements of this part have been met for the purposes of paragraph 63(3)(b) of the Act.*

MR BEASLEY: Yes.

THE COMMISSIONER: So 63 is about accrediting Water Resource Plans.

40

MR BEASLEY: Yes.

THE COMMISSIONER: And - - -

45 MR BEASLEY: What does "it is expected" mean?

THE COMMISSIONER: I know. 63(3)(b) requires the Authority, that is the MDBA, to prepare recommendations for the Minister on whether the Water Resource Plan should be accredited.

5 MR BEASLEY: Yes.

THE COMMISSIONER: Putting two and two together I gather those responsible for the note think, and probably correctly I suppose, that if you haven't consulted with Indigenous – with relevant Indigenous organisations, then the Authority should
10 not recommend to the Minister that the Plan should be accredited.

MR BEASLEY: I agree.

THE COMMISSIONER: There are more direct ways of saying that though, aren't
15 there?

MR BEASLEY: There are. "Must" would be one way.

THE COMMISSIONER: Yes, or is it a prerequisite or may not be accredited
20 unless.

MR BEASLEY: Correct. Just finishing off some remarks before I call Mr Hooper, I have been only this morning given a document that I will either tender now or take the witness to. But the Murray Lower Darling rivers Indigenous Nations produced a
25 discussion paper called "Ensuring Equity in the Development and Assessment of Water Resource Plans", dated April 2016. Although for – given Mr Hooper is here, it does say that it was – this document arose out of a joint meeting in October 2015 between Basin state representatives and the MDBA and MLDRIN and NBAN. One of the matters it addresses at page 10 is the subject matter we've just been discussing.
30 And that is the words "having regard to", in chapter 10 of part 14.

THE COMMISSIONER: Yes.

MR BEASLEY: And the document states that:
35

*MLDRIN's understanding is that the requirement to "have regard to" a matter means that a Water Resource Plan may not even need to explicitly address the matter, that is matters concerning Indigenous objectives and outcomes, in a substantive way. While chapter 10, part 14 requires a Water Resource Plan to
40 identify Indigenous objectives and outcome, how a plan addresses those matters is largely discretionary. This is extremely problematic from the perspective of traditional owners who have aspirations to see their interests reflected in the content of plans.*

45 And goes on to make a proposal that "proper, realistic and genuine consideration" entails addressing and responding substantively to matters or issues raised in consultation with Aboriginal people. And the content of the Plan should align with

objectives, outcomes and views expressed by Aboriginal people during consultation. So in that way expresses a view in relation to “Having regard to”. I will probably come back to that document before I tender it. The other thing I wanted to draw to your attention before calling Mr Hooper, Commissioner, is I think – very recently
5 some reports have been prepared by the Cultural Flows Planning and Research Committee, and I will discuss with the witnesses what that organisation is.

But I know that these documents have had input from both MLDRIN and NBAN but they have published three publications in relation to cultural flows. One is called –
10 and someone will correct me about how I pronounce this, but ‘Dhungala Baaka’, which is – as I understand it – Dhungala the Murray River, Baaka the Darling River. ‘Rethinking the future of water management in Australia’. I’m just not sure it has got a date that I can easily identify. Someone will help me with that. The other document is ‘Cultural Flows: a Guide for First Nations’.

15 And the other document is ‘A Pathway to Cultural Flows in Australia’. These are – and I will talk to the witnesses about them, but they are guideline documents for assisting Aboriginal Nations in either, as I understand it, having cultural flows recognised in Water Resource Plans or the cultural flows type plan that recognises an
20 actual – a real flow of real water for Indigenous uses and cultural purposes, including not just environmental uses but also spiritual and economic. That, however, has been on the back of other representations in relation to cultural flows and it dates back quite some time. But in a submission to the review of the Water Act in 2014, NBAN – and at the time Cheryl Buchanan was the Chair of NBAN – 30 July 2014, and this
25 is a document that’s behind tab 3 of the brief for Mr Hooper.

In NBAN’s submission to the review of the Water Act 2007, amongst other matters, cultural flow is discussed and a request in paragraph 22 is made of the Federal
30 Government to encourage state governments to consider allocating 5 per cent of each Water Resource Plan water entitlements to Aboriginal people as cultural flows, with 3 per cent of that water coming from the environmental water and 2 per cent from within the SDL allocation. It is recommended that initially this water comes from water already purchased or recovered by the Commonwealth Government. Those
35 figures are not mentioned in the three more recent documents I have discussed in terms of percentages, so I will discuss with the witness – with the witnesses what the state of play is in relation to that particular submission that was made back in 2014.

THE COMMISSIONER: Thank you.

40 MR BEASLEY: I’m just being told that the cultural flows – the three documents in relation to cultural flows that I referred to were published on 29 June, on the MLDRIN website. So brand new.

THE COMMISSIONER: Thank you.

45 MR BEASLEY: That takes us to Mr Hooper.

THE COMMISSIONER: Please.

<FREDERICK ARNOLD HOOPER, AFFIRMED

[10.57 am]

5

<EXAMINATION-IN-CHIEF BY MR BEASLEY

10 ASSOCIATE: Please state your full name?

MR HOOPER: Frederick Arnold Hooper.

THE COMMISSIONER: Please sit down, Mr Hooper

15

MR BEASLEY: Mr Hooper you are the Chair of the Northern Basins' Aboriginal Nations, Chair of the board?

MR HOOPER: Yes.

20

MR BEASLEY: And how long have you had that position?

MR HOOPER: Currently second – second stint, three and a half years.

25 MR BEASLEY: And I think – and is it okay if I call it NBAN? Is that - - -

MR HOOPER: Yes.

MR BEASLEY: NBAN was formed in 2010?

30

MR HOOPER: Yes.

MR BEASLEY: Were you the part of the foundation of NBAN?

35 MR HOOPER: Yes, I was the inaugural Chairman of NBAN when it was incorporated in 2012.

MR BEASLEY: And can you give the Commissioner some background in relation to NBAN: who it represents and what it does?

40

MR HOOPER: Yes. The Northern Basin Aboriginal Nations represents 22 sovereign First Nations of the northern part of the Murray-Darling Basin. We are a collective organisation that speaks with one voice in regards to a number of issues, including natural resource management and water issues, within the Murray-Darling Basin. NBAN was formed out of a meeting back in 2009 which brought over, I think

45 it was 400 First Nations representatives together in Moree.

MR BEASLEY: Is that where NBAN's head office is?

MR HOOPER: That's where NBAN's head office is, and NBAN was established along the same lines as MLDRIN, the Murray Lower Darling Rivers Indigenous Nation, in terms of its representation and its representing the First Peoples of the northern Basin and their Nations.

MR BEASLEY: All right. Can you we just get some – before I take you further with that, can we get some further background in relation to your background. I understand you were in the navy for a while?

MR HOOPER: Yeah. I spent six years in the Royal Australian Navy and spent nine years in the public service.

MR BEASLEY: And what were your roles in the public service?

MR HOOPER: I was a Senior Field Officer in regards to economic and community development back in the early and late 90s. Primarily working with Aboriginal communities across a number of states. I've worked in South Australia, out at a place called Ceduna, and my primary role there was to re-establish the – or assist in re-establishing the community of Oak Valley, up around Maralinga. And then in south-west Queensland, in employment programs and I – I implemented a – I was a part of a team that implemented a \$40 million employment program in south-west Queensland, and a \$1 million program around traineeships and apprenticeships in south-west Queensland.

MR BEASLEY: You have provided or – sorry, NBAN has provided a submission to this commission dated 17 May 2018.

MR HOOPER: Yes.

MR BEASLEY: Do you have a copy of that?

MR HOOPER: Yes, I do

MR BEASLEY: Good. During the course of any of my questions if you want to refer to that or any other document, please don't hesitate to do so. Just let us know. I will tender, Commissioner, the NBAN submission to the Murray-Darling Basin Royal Commission, 17 May 2018, which I think it was behind tab 1, I think.

THE COMMISSIONER: Yes, it is. Yes. Thank you.

MR BEASLEY: Can I – if we can go directly to cultural flows and the document you – you would have heard – you were sitting in court when I went through all of the introductory - - -

MR HOOPER: Yes.

MR BEASLEY: - - - commentary in relation to - - -

MR HOOPER: Yes.

5 MR BEASLEY: - - - the Water Act and the Basin Plan and the discussion we had – I had with the Commissioner about cultural flows as it is set out in schedule 1 - - -

MR HOOPER: Yes.

10 MR BEASLEY: - - - of the Basin Plan, which is – you’re familiar with. Do I understand – would I be correct that you have had an involvement in the three documents that I referred to regarding cultural flows that have recently been published?

15 MR HOOPER: Yes.

MR BEASLEY: Can you explain what role you played? First of all, can you tell us who is the Cultural Flows Planning Research Committee?

20 MR HOOPER: The Cultural Flows Planning Research Committee was a committee established to look at a research program to put science on the table – to give First Nations people a chance to sit around the table, in a – in a way that we can adequately put science and our own research to other stakeholders within the process.

25 MR BEASLEY: Yes. Sorry to interrupt, but by “science”, do you mean hydrology flow requirements – the sort of things that the Basin Authority has discussed in relation to flows being necessary to meet certain watering requirements which are predicted to have certain ecological outcomes? Is that the sort of science we are talking about?

30

MR HOOPER: Yes. So it looked at both sciences. It looked at First Nation science and it looked at contemporary science, which included hydrology.

35 MR BEASLEY: Sorry to interrupt again, can you explain what you mean by “First Nations’ science”?

MR HOOPER: First Nations’ knowledge and First Nations’ practices over thousands of years in regards to understanding the environment that’s around us, in understanding the dangers of certain plants and certain trees and, you know, that – that process of - - -

40

MR BEASLEY: Historical environmental knowledge?

MR HOOPER: Yes.

45

MR BEASLEY: Historical ecological knowledge?

MR HOOPER: Yes. And also historical flow knowledge as well. There's - - -

MR BEASLEY: Knowledge about how the river - - -

5 MR HOOPER: How the river ran and how the river flowed and what caused the river to flow, because rivers just don't flow, there's ways of – you know, making rain and so on. And there's ways that rain falls inland of the Great Dividing Range as well. So that knowledge that came from our old people – that has been handed down through our traditional ways of teaching as well.

10 MR BEASLEY: I perhaps should have asked you this earlier. You live, yourself, in Moree do you?

MR HOOPER: No, I live just out of Tamworth.

15 MR BEASLEY: And do you have – have you spent a lot of time on the rivers? Do you have personal connection with the rivers?

MR HOOPER: Yes. Yes. I - - -

20 MR BEASLEY: Can you explain that to the Commissioner?

MR BEASLEY: As a child I grew up in a little place called Weilmoringle on the Culgoa River, sort of about 85ks south of Cubbie Station and Dirranbandi. As a child we would play in the river, we would fish, we would - - -

25 MR BEASLEY: Which river?

MR HOOPER: The Culgoa. We would make tin boats and try to go out to the river and patch them up with mud so the water wouldn't come in. So yes, we spent a lot of time on the river. My mother used to – also when I was growing up I lived in what we call a tin humpy. We never had electricity, we never had, you know, means of electricity or running water, or septic as well.

35 So my mother would go down to the river with the old Chinese yokes – you see them, they – they've got a bucket on either side. She would go down to the river and get the river out of the water – the water out of the river and she would bring it up and fill up a 44 gallon drum. And one of the things that my dad would do is – one of the plants in our country is gidgee wood so they would burn the gidgee wood and use the ash to clear the sediment of the water or in the water so we could use the water for drinking.

40 THE COMMISSIONER: So a flocculent?

45 MR HOOPER: Yes. It – you would put it on top of the water and – yes.

MR BEASLEY: I should have checked beforehand, but I just want to ask, did I pronounce Dhungala correctly?

5 MR HOOPER: That's not my word. So – the person that you would have to ask is sitting in the - - -

MR BEASLEY: Did I pronounce Baaka correctly?

10 MR HOOPER: Yes. Yes.

MR BEASLEY: Baaka is the Darling River.

MR HOOPER: The Darling.

15 MR BEASLEY: That's your river.

MR HOOPER: That's – no, that's the Barkandji name for the Barwon – Darling River.

20 MR BEASLEY: The Barkandji is one of the Nations that are a member of NBAN, correct?

MR HOOPER: They are members of MLDRIN at the moment as well.

25 MR BEASLEY: Right.

MR HOOPER: They were - - -

MR BEASLEY: So both?

30 MR HOOPER: Both.

MR BEASLEY: Is that because of their geographical location where they are in – sort of in between the northern and of southern Basins or is there another reason?

35 MR HOOPER: No, they are – they applied to NBAN in the beginning and there was some administrative processes but they have now decided to join MLDRIN and so they are now officially members of MLDRIN and no longer members of NBAN.

40 MR BEASLEY: Can I ask you – and I apologise for this, it's an incredibly broad question but I think the Commissioner will be interested in – in your words the significance, in every way, spiritual, economic, whatever – things you wish to consider of the rivers of the basin?

45 MR HOOPER: Well - - -

MR BEASLEY: To Aboriginal people.

MR HOOPER: Okay.

MR BEASLEY: And to your people.

5 MR HOOPER: On the continent of Australia there's three types of people: there's
the saltwater people – I'm talking about our mob. There's saltwater people, there's
the river people and then there's the desert people. We are the river people. We
survive from the river. The river are the veins of Mother Earth so the rivers are the
ways of sustaining the landscape that we are a part of. It – without the river and
10 without the water we would not survive.

And I think, spiritually, for us it's also a mechanism that allows us to practice our
law and our customs. And, spiritually, there's connections for the Muruwari people
that rely on water running across certain parts of the country frequently to keep those
15 certain plants and those certain trees alive. I will give you one example is the Red
River Gum and the Red River Gum for the Muruwari people are very significant.
It's a – it has a – the highest spiritual value for us because it's a vehicle for us to
communicate with our elders that have passed before us and have gone to the sky
camp.

20 So the old people would sit down under the Red River Gums and they would talk to
the ancestors in the sky camp and also the significance of that is – the old people
would tell them when the spirits could come back to earth and in Muruwari – within
the Muruwari, we believe that when somebody passes away their spirits go to the sky
25 camp and they wait to be reborn on earth. Once a baby is conceived and it's within
its mother's womb, the baby doesn't have a soul. It doesn't have a spirit.

So those old people communicate with those ancestors and the spirits in the sky and
when a new baby is born or before the baby is born, the spirit returns on a falling star
30 and that spirit then hides behind the tree. And then when that baby is born that spirit
jumps into the baby's body and gives it its spirit and its soul and that first breath as
well. So that's – from a Muruwari perspective – and other Nations have different
values on a whole heap of different things. We also did a program where we looked
at the value of plants to First Nations and in particular, you know - - -

35 MR BEASLEY: Wetland plants?

MR HOOPER: Wetland plants. A whole range of plants. And we come up with a
number of values: spiritual values ceremonial values, food values and we didn't rate
40 the values. The only values that we rated were exceptional values such as the Red
River Gum. And across 147 plants, or 143 plants, the majority of those plants were
in floodplain country. So those floodplain plants relied on floodwaters coming down
the river. And so - - -

45 MR BEASLEY: Overbank flows.

MR HOOPER: Overbank flows, in bank flows. The other – the other connection we have is the Rainbow Serpent which is – that connects all of the Nations, I think, in the Murray-Darling basin. The Barkandji call him the Natji. We call him the Munddaguddah. Other people call him the Wurri, so there is a whole heap of names
5 for the Rainbow Serpent. And, our old people would say, like “That Rainbow Serpent – the Munddaguddah lives – he doesn’t live in the river. It lives in a waterhole 80-odd ks away from the river.”

And at least four times a year the river would flow a banker and allow that Rainbow
10 Serpent then to come out of the home and then traverse the rivers as well. So the Munddaguddah would come out and traverse the rivers. So the Munddaguddah had that freedom. And on average that would happen once every – I suppose it would happen four times a year. Currently, we are – we are not even seeing it once every four years. So - - -

15 MR BEASLEY: Sorry, I don’t mean to – I was going to ask you whether – and I imagine it’s anecdotally – whether your elders have discussed with you changes that they have noticed to - - -

20 MR HOOPER: Yes.

MR BEASLEY: - - - the condition of the – the rivers during the course of their lifetimes and whether you can tell us anything about that?

25 MR HOOPER: Yes. You know, I suppose one of my old elders, there’s a – he tells the story about how he cut a canoe tree with his father in one of the trial sites with the cultural flows research. And in that document and in that story he tells of the amount of wildlife that was in that – in that – you know, that swamp and how they would go out and they would collect the eggs and they relied on that swamp, you
30 know, as well, after big floods.

They also told us that the overland flows, you know, the floods. And historic records are showing that they would happen at least once every three years and we would
35 have those in-river flows once ever – four times a year, roughly four times a year. So – and then they tell us the stories about, you know – there’s a member of NBAN, an old gentleman, he’s about 85 year old and he tell us the story about when he was growing up in a place called Killarney, up near Warwick, which is ahead of the Condamine.

40 And when we first had our meeting in Moree, we were sitting there and all he was talking about was trees. And me and another guy were sitting there and he said to me – he said, “Fred, we are at a meeting about water.” You know, he said, “What has trees got to do with water?” So anyway, we asked him this question – why he was talking about trees? And he said, “Well, as a kid when I was growing up at
45 Killarney, I would see those big rainclouds coming over the mountains.” He said it would rain for days around Warwick and Killarney.

He said “As I grew up and they cleared the trees from the western part of the range, the clouds no longer came over the mountains with the frequency that they used to. And he said all that water flowed down there to that – that – South Australia.” So certainly we have seen dramatic changes, you know, over the years. And we have
5 seen dramatic changes in recent years, particularly in that Condamine system in regards to water flows and water coming down the river.

And water flowing on then down to the – to the – to the Darling River. There is one important thing that we were told, and we were told there is a water law. We had our
10 own water law and we were responsible to let that water run to the Nations and the people down below us. So there was a certain height in the river that we couldn’t divert the river; we had to let that water flow down. And that was – that was the unwritten common law or continental law that a gentleman by the name of Uncle Herb Wharton explains in a – in a video that we have.

15 MR BEASLEY: How do you describe that flow, is that a cultural flow, is that a - - -

MR HOOPER: Well, you know, I say to people, “We don’t have definitions. Water
20 is water.”

MR BEASLEY: Yes.

MR HOOPER: It’s – the people that came here that put those words on water. It’s
25 those people that have – that have – that have segregated the water out and started putting words on them for their own use. So for example, environmental water. It’s – it’s water. Irrigation water – it’s water. It’s just the purpose that they use that water for that they put names on it.

“Cultural flows” is a definition that came out of the Echuca declaration and a
30 meeting on the Murray River. NBAN adopted the “cultural flows” definition because we felt the cultural flows definition encompassed everything that we, I suppose, know about water. As well. And we understand in a contemporary society that we have to look at economics and we have to survive in a contemporary society as well.

35 MR BEASLEY: All right. Can I ask you, what role did you play or did NBAN play in the preparation – in the projects that have led to the preparation of the three cultural flows documents that I’ve referred to that were published at the end of June?

40 MR HOOPER: NBAN was there from the beginning. I, myself, attended a meeting with Minister Wong at the time – Penny Wong.

MR BEASLEY: So this is now 2013 or something.

45 MR HOOPER: 2010. ’11. 2011.

MR BEASLEY: I think Mr Burke might have been the Water Minister then.

MR HOOPER: Yes. Sorry.

MR BEASLEY: But I could be wrong. It doesn't matter.

5 MR HOOPER: Yes. It was when Penny Wong was the Water Minister.

MR BEASLEY: Yes.

10 MR HOOPER: We met here in Adelaide. There was myself, then there was a Chair of MLDRIN at the time, Uncle – a gentleman from South Australia. I won't mention his name because he has passed on. So he was a former Chair of MLDRIN. Both him, myself, a gentleman by the name of Uncle Henry Atkinson and an employee of the Murray-Darling Basin Authority, Neil Ward, met with Minister Wong.

15 MR BEASLEY: Sorry, what position did Mr Ward have in - - -

MR HOOPER: Mr Ward was the – he was the director of the Aboriginal Partnerships Unit within the MDBA at the time.

20 MR BEASLEY: Right.

MR BEASLEY: We met with Minister Wong and explained the concept of the project and Minister Wong instructed Mr Ward to go away and find the money to develop the program. He - - -

25 MR BEASLEY: A program for cultural flows

MR HOOPER: For cultural flows.

30 MR HOOPER: So - - -

MR BEASLEY: For them to be included in some way in the Water Resource Plans?

35 MR HOOPER: Well, they had to be – yes, to put the science on the table. To put our science on the table as well. Because, you know, at the time where they were talking about - - -

40 MR BEASLEY: Perhaps – to put the date of this meeting, had the Basin Plan been enacted at the time?

MR HOOPER: No.

MR BEASLEY: Okay. So we know it was before 2012.

45 MR HOOPER: It was before 2012 and I'm pretty sure it was either late 2010 or early 2011.

MR BEASLEY: All right. I apologise. I interrupted you.

MR HOOPER: Yes, that's all right. So we had to put our science on the table as well, because, you know, they were talking, at the time, that they were developing the Basin Plan around science, and we had to put our science on the table to have – to have a seat at the table and to have an influence on the Basin Plan and the development of the Basin Plan as well. So they went away and got the money. We formed a – a plenary committee in the initial stages who the committee, sort of, looked at all of the processes and, you know, how we would conduct the research, how - - -

MR BEASLEY: Who were members of the committee?

MR HOOPER: Look, I'm not sure. I know a couple of people that were on the committee was Sue Jackson, Poh-Ling Tan. They are professors at some universities. Cheryl Buchanan was on the committee at the time.

MR BEASLEY: So she was – was she the Chair of NBAN or just a – she was on the board?

MR HOOPER: No, she was actually our representative - - -

MR BEASLEY: Right. I see. Yes.

MR HOOPER: - - - on the committee at the time. And there was a few others. I couldn't tell you who they were.

MR BEASLEY: Yes.

MR HOOPER: So NBAN was required to nominate a person to sit on the cultural flows research committee, so they developed the concept and they developed the scope of the research and then we actually formed a committee to run the research.

MR BEASLEY: Right.

MR HOOPER: So we got the money and then we had to form a committee to run the research. So NBAN and MLDRIN and an organisation in the north called NAILSMA, Northern Australia Land and Sea Management Association, also appointed a member to the research committee. Initially it was one member from each organisation, but there was a review conducted into – into the cultural flows project.

MR BEASLEY: Was the Basin Authority involved in any of this?

MR HOOPER: Yes. And then after the review we would – we nominated two people to sit on the cultural flows research committee and they were responsible for guiding the research to, I suppose, give advice and guidance to the research and the

project partners of the research as well. And to assist in the development of the three documents that were – that were produced out of the research as well.

5 MR BEASLEY: All right. Prior to the publication of those three documents are you familiar with the submission NBAN made in July 2014 that – when Ms Buchanan was the Chair of the board to the Water Act Review Secretariat, Water Reform Division, Department of the Environment, which made some requests in relation to cultural flows being incorporated in Water Resource Plans. Got general familiarity with that?

10 MR HOOPER: Yes, I have got a general – yes, understanding that – yes.

MR BEASLEY: Perhaps if the witness can be – perhaps if Mr Hooper can be given the document. It's in the – it's actually in his brief at tab 3. I should probably
15 preface this. In – I know you have had two stints as the Chair, in July 2014 were you on the NBAN board?

MR HOOPER: No, I wasn't.

20 MR BEASLEY: Right. Okay. Did you have any role with NBAN at the time?

MR HOOPER: No. I was a delegate of NBAN.

MR BEASLEY: Right.

25 MR HOOPER: But I wasn't on the board.

MR BEASLEY: All right. Okay. Does that mean you weren't having – were you involved in discussions in relation to this submission in relation to the Water Act?

30 MR HOOPER: No, no.

MR BEASLEY: Okay. Are you familiar, though, with the desires expressed?

35 MR HOOPER: Yes, yes.

MR BEASLEY: So one of the – that submission itself calls for a new section. I'm on page 4 of it at the moment. A new section 21(2)(a)(iii) of the Water Act.

40 MR HOOPER: Yes.

THE COMMISSIONER: I'm sorry – I see, the page is at the bottom. Yes. Thank you.

45 MR BEASLEY: Page 4. Yes, it has got little - - -

THE COMMISSIONER: I've got it. Thank you.

MR BEASLEY: Yes:

Recommendation 1: amend the Water Act.

5 So I think, Commissioner, this is the part of the Water Act that has the statutory facts.

THE COMMISSIONER: The legislative fact indeed.

10 MR BEASLEY: Yes.

THE COMMISSIONER: Yes.

MR BEASLEY: So the statutory fact that the:
15

Basin water resources has had, and has likely had, significant adverse impacts on the conservation, sustainable use of diversity, statutory fact, that Basin water resources require. As a result and require special measures to manage their use to conserve biodiversity.

20 This submission seems to have picked up that language.

MR HOOPER: Yes.

25 MR BEASLEY: And:

The fact that the cultural rights of Aboriginal people have been adversely impacted, as a result, requires special measures to ensure consistency with relevant international agreements.

30 The document has already referred to the relevant international agreements including the Biodiversity Convention and in particular article 8(j) that I spoke of earlier this morning with the Commissioner. By special measures, Mr Hooper, does that include the idea of cultural flow being included in a Water Resource Plan? Or is it broader
35 than that?

MR HOOPER: It's broader than that. It's our legal right under common law.

40 THE COMMISSIONER: Do you mean at a common law or do you mean preceding the arrival of common law?

MR HOOPER: No, common law.

45 THE COMMISSIONER: Common law. English common law.

MR HOOPER: English common law. We have a view on what is – what is continued after the arrival of common law.

- THE COMMISSIONER: Native title and interests as I think your submission, with respect correctly, points out, are not common law rights. They may be recognised by the common law, but they predate - - -
- 5 MR HOOPER: They predate the common law. Also the Echuca Declaration leans towards that as well. The Echuca Declaration at the last part of the Echuca Declaration talks about our inherent rights.
- THE COMMISSIONER: Yes. That they - - -
- 10 MR HOOPER: And our inherent rights - - -
- THE COMMISSIONER: They are inherent by reason of circumstances that existed before the common law arrived in Australia.
- 15 MR HOOPER: But also if – Commissioner, if you look at R v Bonjon in 1845, I think it was, Willis J in his judgment in Bonjon, referred to us as sovereigns of the soil. He also - - -
- 20 THE COMMISSIONER: That’s not the common law. That’s the state of affairs before the common law arrived.
- MR HOOPER: Well, no, in - - -
- 25 THE COMMISSIONER: And then the common law, in circumstances, will recognise that.
- MR HOOPER: Yes. In his judgment, yes.
- 30 THE COMMISSIONER: It’s not something we should delay on.
- MR HOOPER: Sorry, yes. But - - -
- THE COMMISSIONER: May I say, my understanding of the situation is that it is not just of doctrinal importance but of political significance that Native Title rights and interests are not creatures of the common law.
- 35 MR HOOPER: No.
- 40 THE COMMISSIONER: They are in certain circumstances - - -
- MR HOOPER: Outside of common law.
- THE COMMISSIONER: - - - recognised by the common law.
- 45 MR HOOPER: Yes, yes. And my reasoning for going to Bonjon is that there is a precedence with Bonjon that - - -

THE COMMISSIONER: I'm not so sure that that - - -

MR HOOPER: Sorry, the common law.

5 THE COMMISSIONER: That that enjoys continued authority.

MR HOOPER: Yes. So the common law at the time could not – could not find
Bonjon guilty of a charge under common law or under admiralty law or law of the
day. Therefore the High Court also says that we get our – our native title from our
10 own processes, which have been – we have inherited over thousands and thousands
of years. The NBAN - - -

THE COMMISSIONER: If it helps, I appeared as counsel in Ward; I appeared as
15 counsel in Akiba.

MR HOOPER: Yes.

THE COMMISSIONER: So I have some memory of it.

20 MR HOOPER: Yes. So the High Court also recognised that the Crown did not gain
absolute beneficial ownership of the land. Therefore, did not – did not have claim to
the allodial title of the land as well, and we believe that water is also a part of that,
that judgment. So the other thing is, is that we have also – we are under the
impression that water rights have not been – have not been dealt with under Mabo, so
25 only under native title after Mabo. So certain sea country that water rights were
looked at in terms of Mabo.

THE COMMISSIONER: I think you are talked about Akiba.

30 MR HOOPER: Sorry?

THE COMMISSIONER: After Mabo there was Akiba, which referred to sea rights.

MR HOOPER: Yes. Yes.

35 THE COMMISSIONER: Well, now, it's only fair to point out that I have enough
on my plate. I'm unlikely to undertake either an exposition of, or proposed reforms
to, native title in this country.

40 MR BEASLEY: Yes.

THE COMMISSIONER: Your submission does contain some interesting matters at
the end concerning it. I promise I will attend to those matters, but I don't want
anyone to think this is a Royal Commission which will seek to undertake a root and
45 branch examination of the Murray-Darling Basin water resource and Native Title.
There will be reference to it, but I don't regard my terms of reference as requiring, as
I say, a radical reassessment of those matters.

MR HOOPER: Yes. I'm not asking for a radical reassessment, Commissioner.
What I'm - - -

5 THE COMMISSIONER: I'm sorry. I should – that's my expression. What I mean
is an assessment which starts with first principles.

MR HOOPER: Yes, yes. What I'm trying to explain is that the word our inherent
rights, means that we have inherited the rights to water under our law and custom
and not under common law.

10 THE COMMISSIONER: Yes. No, I understand that, and - - -

MR HOOPER: And what we are asking for is common law to recognise that right.

15 THE COMMISSIONER: Yes. Well, what I'm trying to tell you is I think you may
have succeeded in that already. That is, I think the common law does recognise
rights. Could I ask you about this word "cultural", would you mind? The definition
of "cultural flow" that you see reproduced in paragraph 31 of schedule 1 of the Basin
Plan, repeats this expression "spiritual, cultural, environmental, social and economic
20 conditions". Would I be right in understanding that, when the Indigenous
organisations advanced that description, they understood spiritual, cultural,
environmental, social, and economic conditions as overlapping categories, not
mutually exclusive? That something that may be both social and economic,
environmental and cultural, spiritual and social, etcetera, etcetera?

25 MR HOOPER: Yes, yes.

THE COMMISSIONER: Thank you.

30 MR HOOPER: I can't – I can't, I suppose, confirm what they thought at the time
when they were writing the Echuca declaration.

THE COMMISSIONER: Tell me your view.

35 MR HOOPER: My view is it encompasses everything. So it's our cultural
obligation - - -

THE COMMISSIONER: The words are not intended to describe individually
identifiable and mutually exclusive matters.

40 MR HOOPER: No, yes.

THE COMMISSIONER: It's a deliberately broad, overlapping - - -

45 MR HOOPER: Yes.

THE COMMISSIONER: - - - phrase that you read as attempting to be as comprehensive as possible of the overall singular connection of the people to the water.

5 MR HOOPER: Yes. And our cultural obligations to that water - - -

THE COMMISSIONER: Thank you.

MR HOOPER: - - - as well.

10

MR BEASLEY: So I kicked off that discussion, we just had, by asking you whether in relation to the proposed new section 21, whether special measures meant more than legal recognition of cultural flow, and you were explaining it was broader than that. Had you completed your answer?

15

MR HOOPER: Well, my understanding is that – is that the Act only refers to Native Title, that’s my understanding of the Act. And we need something more substantial in the Act than just Native Title. And I’m unaware – I haven’t got the Act in front of me – and the section of the Act says that they have to take into consideration Native Title or can’t diminish Native Title in preparing Water Resource Plans or

20

establishing the Basin Plan. The Act has been amended, I’m not aware of all of the amendments of the Act. So our understanding is that the cultural flows in the Basin Plan is the instrument that delivers the water or aspects of water to First Nations.

25

THE COMMISSIONER: Could cultural flows, in your personal view, include an allocated and accounted entitlement to take water for irrigated agriculture?

MR BEASLEY: To help you with that, you might want to have a look at what’s at paragraphs 21 and onwards of the document I’m taking you to from pages 8 and 9.

30

MR HOOPER: Yes. It’s within the definition of the Echuca Declaration. And economics – economics covers a whole range of issues.

35

THE COMMISSIONER: I can understand why you say it, and I draw to your attention that paragraph 30 of the schedule 1 of the Basin Plan - - -

MR HOOPER: Yes.

40

THE COMMISSIONER: - - - which describes aspects of Indigenous use, says this:

Indigenous economic interests include –

and you drop down to the end of that sentence:

45

...the use of water to support businesses and industries such as pastoralism and horticulture.

MR HOOPER: Yes.

5 THE COMMISSIONER: So however I should understand the definition, if definition is necessary, of the expression cultural flow I should be clear, shouldn't I, that in your view that will certainly embrace Indigenous communities, or organisations, or individuals having access to water for irrigated agriculture.

MR HOOPER: Yes.

10 THE COMMISSIONER: Thank you.

MR HOOPER: But currently there's no provisions within the states.

15 THE COMMISSIONER: No, I appreciate that.

MR HOOPER: And the state legislation to do that.

THE COMMISSIONER: I appreciate that.

20 MR HOOPER: A lot of the licences are for cultural purposes and specific – they have specific requirements, they can't use any of that water for cultural purposes as well. So in the Water Resource Plans, when they're developing the Water Resource Plans, I know New South Wales don't have any specific – particularly in the Murray-Darling Basin, they don't have any – any specific economic water for First Nations' people, but they do have on the coast.

25 THE COMMISSIONER: Well, paragraphs 51, 52 of schedule 1 of the Basin Plan describes the Basin's river systems of being of critical importance to the social, cultural and economic life of Indigenous people, and describes the labour force and income indicators for Indigenous people as being relatively poor. And gave an example from 2006 of four times the unemployment rate.

MR HOOPER: Yes.

35 THE COMMISSIONER: All of which would rather indicate to me that it wouldn't be out of place for the critical importance of the river systems to the economic life of Indigenous people to be met by water use of a kind that would create employment.

40 MR HOOPER: Yes. Yes. But there's a whole range of ways you can use water to create employment, not just an irrigated industry.

THE COMMISSIONER: Absolutely.

45 MR HOOPER: There's an environmental industry that – that we're are not looking at within the Murray-Darling Basin.

THE COMMISSIONER: Environmental, recreational.

MR HOOPER: Yes, recreational as well.

THE COMMISSIONER: Yes, yes.

5 MR HOOPER: But also I think in terms of irrigated purposes there is a property
around Mungindi that uses their water for economic purposes. But they have a
specific licence under the economic framework within New South Wales. So
cultural flows, there could be a number of licences that could be held for cultural
flows. And water that can be – or allocated under cultural flows, whether it's – it's
10 water, water bought back.

MR BEASLEY: It doesn't have to be included in a Water Resource Plan.

MR HOOPER: No. No, not for economics. But I must say in the in
15 Queensland, the Water Resource Plan that's been accredited, there is some – some –
some provision in that to provide economic water for – for Aboriginal uses, and it's –
it's only a small percentage of the supplementary water. The Act in Queensland also
has a requirement in it that says that Aboriginal people in Queensland can take as
much water as they want out of the system for cultural purposes and the cultural
20 purposes are specifically defined within the Act.

THE COMMISSIONER: That's one of the reasons why I was asking.

MR HOOPER: Yes.
25

THE COMMISSIONER: Clearly, when that expression is being used in that
context, it doesn't mean irrigated agriculture.

MR HOOPER: No, no, it doesn't.
30

THE COMMISSIONER: No.

MR HOOPER: But cultural flows and the definition of cultural flows broadens that,
in a – in a contemporary society. Because we – we understand that in a
35 contemporary society we have Aboriginal people that work in a whole range of
industries, and in a submission to the House of Representatives, which was Chaired
by – I think Tony Windsor – when we were starting to look at the Basin Plan, NBAN
put in their submission that there was a huge underrepresentation of Aboriginal
people in the irrigation industry since the advancement of technology within that
40 industry, so around cotton.

THE COMMISSIONER: You appreciate my interest in the notion of cultural flows
that I have to look at in the terms of the reference involve – require me to – you want
me, I gather, clearly to understand that within the broad concept of cultural flow will
45 be some allocation of water for irrigated agriculture as Indigenous organisations,
bodies, or individuals may choose?

MR HOOPER: Yes.

THE COMMISSIONER: Thank you.

5 MR BEASLEY: And are the – is the submission that’s made in paragraphs 22 to 27 of this document still current in terms of NBAN or has it been overtaken by the recent public occasions?

10 MR HOOPER: I think it has been overtaken.

MR BEASLEY: Yes.

MR HOOPER: And I think that, you know, we – we – within NBAN, we understand the complexities of the Murray-Darling Basin. It’s a complex system, and – and governments have made it complex. So we have to – we have to operate in a – in a – in a system that requires a range of measures to, you know, to get an allocation of cultural flows as well. It means that – you know, it was the same as the environmental water. You know, the government just didn’t go to the irrigators and say, “We’re going to take all this water off you now.” They bought it back on a willing seller/willing buyer basis. And I think that in this current way of doing things we would have to look at that as well, for economic purposes.

And it’s how we use that water. It’s water that’s owned by us, and it’s water that is controlled by us, and it’s water that’s for our purposes, not for purposes that are – that are put on us. I think at that stage we were looking at a range of options as well, and the cultural flows research project now have taken us further on with – from that submission, and the cultural flows research has taken us back to the Nations. And it’s taken us back to the Nations and saying to the Nations, “What are your watering requirements, what are your water needs?”

30 MR BEASLEY: And that’s what those publications are directed to, a guide to assist.

MR HOOPER: Yes. And along with that announcement, or the announcement within the deal sheet they are calling it, there was some money for us to do that as well.

MR BEASLEY: You are talking about the recent – is “deal” the right word?

40 MR HOOPER: Well, the agreement between Labor and – and – and – and the government.

MR BEASLEY: In relation to the east deal adjustment which also - - -

45 MR HOOPER: Yes.

MR BEASLEY: I will come to that. Perhaps we will – we might do that after a break, Commissioner. Is that a convenient time?

5 THE COMMISSIONER: Yes, certainly. Yes. Could I give you a question on notice for you to think about over the break, which will just be 15 minutes. On page 8 of your submission - - -

MR HOOPER: Yes.

10 THE COMMISSIONER: You repeat the suggested amendment of section 21 of the Water Act and then on page 5 you draw to attention, the middle of the page and footnote 13, the repetition in 2017 by the Productivity Commission's issues paper of the 2014 National Water Commission finding that back then there had been no material increase in water allocation for Indigenous, social, economic or cultural
15 purposes. And putting all that together, what I want you to think about on notice – and tell me what your response is when you come back, is what do you want to put forward to me for my consideration in my report about how to address that position?

MR HOOPER: Okay. Yes.

20

MR BEASLEY: When are we coming back?

THE COMMISSIONER: We will come back at noon.

25 MR HOOPER: Sorry, Commissioners. Page 5 of the original submission?

THE COMMISSIONER: No, of your – of your submission.

MR HOOPER: My current submission?

30

THE COMMISSIONER: Your current submission.

MR HOOPER: Yes.

35 THE COMMISSIONER: Yes. The references are at page 5, and the middle of that page and page 8, the middle of that page.

MR HOOPER: Okay. So it's insert at 21?

40 THE COMMISSIONER: Yes. Insert on page 8, and on page 5, more recently in 2017.

MR HOOPER: Okay.

45 THE COMMISSIONER: So that seems to be a position that, if you inserted that into the Act, you would be recognising something adverse which on all the material

to date remains adverse and hasn't been remedied. So I would like to know what I would tell me I should say about that.

MR HOOPER: Okay.

5

THE COMMISSIONER: Thanks.

ADJOURNED

[11.43 am]

10

RESUMED

[12.03 pm]

15 MR BEASLEY: Ready when you are, Commissioner.

THE COMMISSIONER: Mr Hooper, are you happy to answer the question I asked before the break?

20 MR HOOPER: In this way, Commissioner: is that we would like the Commonwealth and State Governments to live up to their obligations under international agreements.

THE COMMISSIONER: Yes. And - - -

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MR HOOPER: In terms of - - -

THE COMMISSIONER: - - - specifically in relation to giving some concrete form to special measures to recognise adverse effects on Indigenous access to water, what then?

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MR HOOPER: Yes. But also to the ownership of water as well, and our ability to use that water for our own purposes. Not purposes that are imposed on us by state and federal governments. Because – cause me, those stairs are and in particular, too, which goes to the – to certain articles of the rights of Indigenous peoples as well, and our right to choose our own destiny.

35

THE COMMISSIONER: That last reference was to the declaration?

40 MR HOOPER: Yes. The Declaration on the Rights of Indigenous Peoples. You know, in terms of choosing our own destiny and being able to fulfil our aspirations under our own structures and our own processes, to meet the requirements of our people as well. And I think that the law as it stands at the moment falls well short of that, and I notice in particular in regards to certain parts around water planning and – and – and state commitment as well. There is a – there is a, I suppose an open door for the states to sneak out the back and - - -

45

THE COMMISSIONER: You mean by that to have regards to things, but without any concrete response?

5 MR HOOPER: Well, without any concrete processes in place to enact it. So they can have regard to it but, you know, we had some very good discussion around this when they were developing the Basin Plan and it was - - -

MR BEASLEY: Discussions with the Basin Authority or - - -

10 MR HOOPER: Within ourselves and with members of the Basin Authority. Not the authority itself, but the Murray-Darling Basin Authority.

MR BEASLEY: And State Government officials?

15 MR HOOPER: No, State Government officials weren't involved.

MR BEASLEY: No. Right, sorry, right.

20 MR HOOPER: But in particular the word – you know, the difference between “must” and “Must have regard to”. So “must” is a word that puts a concrete foundation into something; having regard to merely puts a concrete in, but the concrete doesn't harden. So must, they have got to harden the concrete to make sure that the foundations are stable, but having regard to, they can put concrete in that doesn't – that doesn't set.

25 THE COMMISSIONER: And if, as I think is the case, it's the law of the land, of which the Water Act is part, to which we will turn to find out what the law provides for Indigenous interests in the water resources of the Basin, and if there is to be a response more concrete than an obligation to have regard to those interest in making, say, Water Resource Plan, one obvious possibility is that there be an obligation to provide by way of allocation, or any other way that seems appropriate, water for the Indigenous interests.

35 MR HOOPER: Yes. I - - -

THE COMMISSIONER: But that immediately leads to this question, which is what I'm interested to hear from you: do you have a proposal as to how the nature – that is location, season, etcetera, and amount of any such Indigenous water should be determined?

40 MR HOOPER: That – that needs to be determined by the Nations through a process that we have developed through the cultural flows research.

45 THE COMMISSIONER: I understand that part of the answer, but I have in mind – as you know these plans are sometimes called Water Sharing Plans.

MR HOOPER: Yes.

THE COMMISSIONER: And sharing, perhaps is a rather benevolent way of rather describing the allocation by division between what would otherwise be competing claims. Irrigators compete with the environment, compete with Indigenous. It's an ugly construct, but it seems to be what is involved if there is understood to be a whole which will be divided into parts, and some parts will be at the disposal of some interests and some other parts will be at the disposal of some other interests. If Indigenous interests are to be considered as disposing of and accounting for one of those parts, I suppose my question is: do you have a suggestion to me as to how we would determine as between all of the interests who wish to decision possess of parts of the whole?

MR HOOPER: Yes.

THE COMMISSIONER: How would be the Indigenous part be quantified?

MR HOOPER: That would be quantified through the "Guide for the Nations".

THE COMMISSIONER: But it can't just be – you can't presumably have one of the claiming interests determining, unilaterally, the size of its part, any more than you can have any of the others determining, unilaterally, the size of their parts.

MR HOOPER: When I say it's determined by the "Guide for the First Nations", in the northern Basin our plan is to have the Nations complete the "Guide to the First Nations", which requires them to identify the significant areas, the most important areas, and they would then have to look at, through that process, what areas they would need watered. And what are the water requirements that Nation would need for – I suppose three categories. One would be cultural purposes. So their cultural responsibilities and their obligations under their cultural law. The other one would be their environmental objectives. So, you know, what environmental objectives would they like to see out of an environmental flow down the river or whatever. And then what are their economic objectives as well, in terms of, you know, using water for economic purposes, to fulfil their requirements of their Nations or their communities economically and then they would actually – the idea of that is that then we can have a collective view of the northern Basin on the watering requirements. And then - - -

THE COMMISSIONER: How would that translate to a measured part of the available water resources?

MR HOOPER: For example, we would be looking at where – where a Nation would require an infrastructure to fulfil a cultural requirement, as well, so for example in the cultural flows research project the site in the north Currumbin swamp, to have that swamp watered or inundated we require at least 10,000 megalitres of water per day to flow past the pump – the gauge at so that's an overland flow that would then flow out into the swamp and fulfil that cultural purpose.

THE COMMISSIONER: So that requires something of the nature of a regulator, does it?

MR HOOPER: No. That's – that requires a major flood.

5 THE COMMISSIONER: You mean as the water – yes.

MR HOOPER: Yes. As the water. So one of the options could have been – one of the options that we will put up within the cultural flows research, which was rejected by – by – by the mob, was, "Let's put a pump in the river." Because the requirement – requirement, the hydrology requirement of Currumbin Swamp or the water requirement of Currumbin swamp was 123 megalitres. So to get that 123 megalitre asset, if you like to call it, water, there had to be 10,000 megalitres a day flowing down the river. But that also took care of a whole heap of other cultural requirements, but that's – that's – that's a major flood.

10 15 MR BEASLEY: What you are describing is really set out in the "Cultural Flows: a Guide for First Nations" document isn't it? About the guide to - - -

20 MR HOOPER: Yes.

MR BEASLEY: - - - get the people together that you need, work the values you want to protect.

25 MR HOOPER: Yes.

MR BEASLEY: What your objectives are, whether they are an environmental objective, a cultural objective, an economic objective.

30 MR HOOPER: Yes.

MR BEASLEY: And then you will get the scientists in who will do the hydrologic modelling?

35 MR HOOPER: Yes.

MR BEASLEY: In the same way that the - - -

MR HOOPER: The environment - - -

40 MR BEASLEY: - - - Basin Authority has.

MR HOOPER: Yes.

45 MR BEASLEY: With a footnote - - -

THE COMMISSIONER: In the same way as the Basin Authority is supposed to have done. Yes.

MR BEASLEY: Yes.

5 MR HOOPER: Yes.

MR BEASLEY: And that will tell you the flow indicators that need to be met, etcetera.

10 MR HOOPER: And the water requirements.

MR BEASLEY: And the water requirements.

15 MR HOOPER: So, for example, if - - -

THE COMMISSIONER: Sorry, what I'm trying to get at is this: I gather what you are proposing is this to be allocated in priority before general irrigation; is that right?

20 MR HOOPER: Yes.

THE COMMISSIONER: Thank you.

MR HOOPER: Yes. And I think that from our perspective the cultural and the social – the cultural and the environment takes more precedence than the economics as well.

25 MR BEASLEY: So that - - -

30 THE COMMISSIONER: Thank you. Well, that's the economics other than that which is cultural.

MR HOOPER: That's right, yes.

35 THE COMMISSIONER: By which I mean Indigenous cultural.

MR HOOPER: Yes. Our cultural economics. So, for example, when water – water runs over fish traps.

40 THE COMMISSIONER: I understand. Yes.

MR BEASLEY: So the "Guide for First Nations" cultural flows and, having gone through that process, indicates that any Nation going down this path, by the end of it, will have a detailed modelling report and a comprehensive technical report about what are the water requirements to achieve the objectives that have been identified.

45 MR HOOPER: Yes. To the extent of the resources that are available to do that.

MR BEASLEY: Of course, yes.

MR HOOPER: And, from an NBAN perspective, NBAN is looking at the establishment of a water trust within the northern Basin.

5

MR BEASLEY: Yes. No, I will come to that.

MR HOOPER: Okay.

10 MR BEASLEY: Because that comes out of that agreement where - - -

MR HOOPER: But it also – it also goes to this as well.

15 MR BEASLEY: Of course. But just to follow through the pathway, the third document, “A Pathway to Cultural Flows”, identifies in legal terms how things might be achieved, whether it’s a grant of a water licence or something else.

MR HOOPER: Yes. A change of legislation within the states.

20 MR BEASLEY: A change of legislation.

MR HOOPER: You know - - -

25 MR BEASLEY: Creating – and also cultural reserves, and also the proposal to create a cultural water holder, as an analogy to the Commonwealth environmental water holder; correct?

MR HOOPER: Yes – yes.

30 MR BEASLEY: Right.

MR HOOPER: And the other issue, I think at a legislative level, is – as they did with Native Title in terms of land – they have a special Native Title Act. So within the Water Act there needs to be some provision to recognise under common law our rights to water under our common – under our own continental law as well.

35

MR BEASLEY: All right. Can I – just before I ask another question, can I just give some details of a question that and answer exchanged between the commissioner and the witness. There was a reference to the four pack, which is to the Queensland Water Resource Plan 16 for the Warrego, Paroo, Booloo, and Nebine, section 13 of which provides that:

40

Indigenous outcomes for water in the plan area are:

45 *(a) availability of water for traditional owners who are dependent on water resources in the plan area to achieve their economic and social aspirations; and*

(b) maintenance of flows of water that support water-related cultural and recreational values of traditional owners.

5 However, sections 22 and 23 of that Water Resource Plan makes it clear that the allocation for Indigenous uses that I've just described is unallocated water.

MR HOOPER: Yes.

10 MR BEASLEY: In other words, supplementary water. So if there's something left over after the consumptive use has been taken care of, and environmental requirements have been met, then section 13 kicks in. But in circumstances where there may not be much rain and not much water, then there may be no unallocated water.

15 MR HOOPER: Well, that's right. And that clearly goes to giving regard to, you know, Aboriginal values and uses of First Nations values and uses within that system and then saying, "Yes, we have had regard to it, but we are going to put it at the bottom of the pile and we will come back to it at a later stage."

20 MR BEASLEY: And that's not what you're after. Yes.

MR HOOPER: No, no. You know, a lot of people also say, "We have a priority right to water." So our inherent right is our priority right to water, and then everybody else can take that water after we've used it as well.

25 MR BEASLEY: Yes. And I'm just being – it has just been pointed out to me, also, that unallocated water is not purely for Indigenous purposes, but it can be allocated for a community purpose.

30 MR HOOPER: Yes.

MR BEASLEY: Which I suppose might also be an Indigenous purpose.

35 MR HOOPER: Yes.

MR BEASLEY: But it seems to be something different in this, because it's separately described.

40 MR HOOPER: Yes.

MR BEASLEY: But another minor matter is Senator Wong was the Minister for Water from 3 December 2007 to 3 September 2010. So that probably places your meeting - - -

45 MR HOOPER: Yes, 2010.

MR BEASLEY: - - - before September 2010. Mr Burke took over 14 September 2010, happily for him just as the “Guide to the Basin Plan” was coming out, and he ceased to be the Minister on 1 July 2013.

5 MR HOOPER: Yes.

THE COMMISSIONER: I’m so sorry. I keep coming – forgetting this date. When did the Basin Plan take effect by registration?

10 MR BEASLEY: October 2012, I believe. Someone will tell me if I’m wrong about that, but I think that’s the – can I go – just go back to page 9 of your submission, which we haven’t discussed.

MR HOOPER: The old submission or the current submission?

15

MR BEASLEY: The submission that I - - -

MR HOOPER: From Cheryl Buchanan?

20 THE COMMISSIONER: Sorry. Just for the record it’s 23 November 2012.

MR BEASLEY: Right. Thank you. 17 May 2018 submission.

MR HOOPER: Yes.

25

MR BEASLEY: So page 9 is headed ‘The Conference of the Parties’.

MR HOOPER: Sorry, I’m working off my copy. Is there a copy in the papers?

30 MR BEASLEY: Yes, there is. It’s behind tab 1, I believe.

MR HOOPER: Sorry. And where is it?

35 MR BEASLEY: So go to tab 1, page 9. Tell me when you are. So you have got a heading ‘The Conference of the Parties’. And you have set out some of the principles from there, I think it is pronounced Akwe Kon principles.

MR HOOPER: Yes.

40 MR BEASLEY: At least that’s what Wikipedia told me.

MR HOOPER: Akwe Kon.

45 MR BEASLEY: Is that right? I had it both ways. I will take your word for it. What I noticed is the principles set out there on page 9 are identical to the submission that we were discussing from 2014 behind tab 3.

- MR HOOPER: Yes.
- MR BEASLEY: At page 7 for an amendment to section 1053(3) of the Basin Plan.
Do you see that?
- 5 MR HOOPER: Page 3?
- MR BEASLEY: Page – no, page 7 behind tab 3.
- 10 MR HOOPER: Yes. Page 7.
- MR BEASLEY: Yes. You've got a recommendation 3, amend the Basin Plan - - -
- MR HOOPER: Yes
- 15 MR BEASLEY: - - - in relation to the requirements for consultation.
- MR HOOPER: Yes.
- 20 MR BEASLEY: Picking up all the matters that are mentioned to us at page, is that still a recommendation you seek, that amendment to 10.53?
- MR HOOPER: Yes, because that strengthens the states' requirement to engage and to – to properly consult and give appropriate time and appropriate resources to engaging Aboriginal people.
- 25 MR BEASLEY: All right. What I wanted to ask you about was in terms of your knowledge, and to the extent that you know the corporate knowledge, if I can call it, of NBAN in relation to the issue of consultation and engagement between the Basin Authority and NBAN in relation to the development of the Basin Plan, and also the recent SDL adjustment and northern Basin review. Dealing firstly with the preparation of the Basin Plan, were you involved at that stage in relation to consultations and engagement with the Basin Authority?
- 30 MR HOOPER: Yes. We were working with the Basin Authority to engage First Nations throughout the Murray-Darling Basin. In particular the northern Basin which - - -
- 35 MR BEASLEY: Did they have specific people allocated to engage with you and consult with you about the preparation of the plan?
- 40 MR HOOPER: Yes – yes. The MDBA or Murray-Darling Basin Authority established the Aboriginal Partnership Unit.
- 45 MR BEASLEY: Right.

MR HOOPER: Which was the lead section within the MDBA in terms of chapter 10, part (14) and developing chapter 10, part (14), and other parts of the Basin Plan, such as, you know, chapter 8 in terms of environmental values and uses as well. So we worked closely with that particular unit within the MDBA.

5

MR BEASLEY: All right. I know it's a tremendously broad question, but were you satisfied that there was proper engagement and thorough engagement and real consultation in relation to the preparation of the Basin Plan from NBAN's perspective with the Basin Authority?

10

MR HOOPER: In the northern Basin there was, from the Authority. The – one of the – one of the key components of that as well, as the Chair of NBAN at the time, I had direct – had a direct link to the Chair of the MDBA.

15

MR BEASLEY: Who was it at the time?

MR HOOPER: Craig Knowles.

MR BEASLEY: Right.

20

MR HOOPER: So there were some issues in terms of the acknowledgment within the front of the Basin Plan where the Authority acknowledges the traditional owners and their Nations. We were having some issues around the wording within that, and so we contacted Craig and through that connection we – we actually got them to

25

accept our version of the acknowledgment.

MR BEASLEY: Did – was it Mr Knowles that recommended to you to approach Mr Burke to seek some amendments to the Water Act, or was that Mr Burke himself? This is going back a fair way.

30

MR HOOPER: In the initial stages?

MR BEASLEY: Yes.

35

MR HOOPER: It was our recommendations to Mr Burke.

MR BEASLEY: Right. I know I have chopped and changed a bit.

MR HOOPER: Yes. I'm – I'm not – I'm not aware of any conversation with Craig Knowles in regards to that.

40

MR BEASLEY: All right.

MR HOOPER: And in particular the submission - - -

45

MR BEASLEY: Yes.

MR HOOPER: - - - that was written by Cheryl Buchanan.

MR HOOPER: Yes.

5 MR BEASLEY: I'm not aware of any conversations that took place then in regards to that. I'm only aware of a conversation that we had with Tony Burke earlier this year, in February, where he asked us to maybe look at some type of amendment in terms of cultural water.

10 MR BEASLEY: Right.

MR HOOPER: Which we provided to Tony Burke at the time.

15 MR BEASLEY: Right. In relation to the Northern Basin Review, that's been a review NBAN has taken a particular interest in, for obvious reasons.

MR HOOPER: Yes.

20 MR BEASLEY: And it was a – in terms of the outcome of the review, it was something that NBAN opposed.

MR HOOPER: Yes.

25 MR BEASLEY: Opposed the 70 gigalitre reduction. And behind tab 2 of the folder, you will find a letter that you've written to Mr Andrews, the Chair, that's a letter dated – is it dated? It must to be dated somewhere. Perhaps it's not.

MR HOOPER: It was dated, yes. When I signed it I think I dated it, sorry.

30 MR BEASLEY: All right. This would have been – tell me, was this letter sent before the vote in the Senate?

MR HOOPER: Yes.

35 MR BEASLEY: Right, okay. Did you get a response?

MR HOOPER: No.

40 MR BEASLEY: None at all?

MR HOOPER: Well, the response that we did get was that Neil Andrews gave us a commitment that NBAN would be the last people that they would talk to in regards to – well, before they made a decision on the amendments.

45 MR BEASLEY: They would consult with you?

MR HOOPER: No. They would have a meeting with the board of the Murray-Darling – of NBAN, which took place in Canberra at the MDBA offices.

MR BEASLEY: Did you attend that?

5 MR HOOPER: Yes, yes.

MR BEASLEY: And who was that meeting with?

10 MR HOOPER: It was with entire board. So the Authority - - -

MR BEASLEY: Of the MDBA?

MR HOOPER: Of the MDBA.

15 MR BEASLEY: So Mr Andrews, Mr Glyde, and the other board members.

MR HOOPER: Mr Glyde and the other board members, yes.

20 MR BEASLEY: And that – so what was discussed at that meeting?

MR HOOPER: Well, it was basically discussing our letter to the Northern Basin Review. So what we provided to them in writing, we were then – they gave us the courtesy to come and tell them in, I suppose, face-to-face as well. So - - -

25 MR BEASLEY: All right. Did they provide any scientific or other justification for the 70 gigitalre reduction that you can recall, or - - -

MR HOOPER: No, no. Not at that – not at that meeting. They didn't indicate at that meeting that they were reducing the amount from 390 to 320. We were only

30 aware of it when it was released.

MR BEASLEY: Right.

35 MR HOOPER: So - - -

MR BEASLEY: So this is a meeting before - - -

MR HOOPER: Any decision was made in regards to the northern basin.

40 MR BEASLEY: Anything publicly released about what the outcome of the basin would be in terms of the impact on recovery of water – environmental water.

MR HOOPER: Yes. And I think that there was – there was something about the

45 decrease of water that was being put around as well.

MR BEASLEY: All right. Then was that the extent of the consultation in relation to the northern basin review, that letter and the one meeting?

5 MR HOOPER: There was a couple of things that happened within the Northern Basin Review.

MR BEASLEY: Yes.

10 MR HOOPER: One was that at one meeting I can remember asking for a socio-economic assessment of Aboriginal people within the northern part of the Murray-Darling Basin and how all this stuff would affect the most disadvantaged people within the Northern Basin. The MDBA responded with a sociocultural survey, which was undertaken in Brewarrina, and St George.

15 MR BEASLEY: Right.

MR HOOPER: So there was a whole heap of questions that were devised - - -

20 MR BEASLEY: Specifically in relation to Aboriginal people or - - -

MR HOOPER: Yes, yes.

MR BEASLEY: Right.

25 MR HOOPER: Yes.

MR BEASLEY: Yes.

30 MR HOOPER: And then there was a report produced, which I think went to the – to the – to the board as well. And it was around a different – different method of using the water and using the river than just irrigation and economics. So it was our attachment to the water, our access to the water, and one of the biggest – the biggest things that came out of that was access where the State Governments were actually fencing off public access to waterways and handing it over to private landowners as well. So that was one of the biggest issues that came out of that, was – was access.

35 MR BEASLEY: All right. Did – there was a Northern Basin consultation committee for the Northern Basin Review. Did NBAN have anyone on that committee or have any meetings with that committee?

40 MR HOOPER: Yes. I was initially on what they call NBAC, the Northern Basin Advisory Committee.

45 MR BEASLEY: Was this the one Chaired by Mr Peters?

MR HOOPER: Yes.

- MR BEASLEY: Yes.
- MR HOOPER: I resigned for personal reasons.
- 5 MR BEASLEY: Right.
- MR HOOPER: And I was replaced by a Jason Wilson who was – who was then on NBAN at the time as well.
- 10 MR BEASLEY: Right. Okay. All right. And – all right. The sustainable diversion limit adjustment for the supply measures – 65 gigalitre adjustment. Was that something that NBAN opposed, or did you not have a position?
- MR HOOPER: The southern SDL?
- 15 MR BEASLEY: Yes.
- MR HOOPER: Yes.
- 20 MR BEASLEY: Yes. We supported our sister organisation in the south. So we supported what MLDRIN - - -
- MR BEASLEY: Right. Who were opposing it?
- 25 MR HOOPER: Who were opposing it.
- MR BEASLEY: Yes. All right.
- MR HOOPER: Yes, we did support them in their opposing of it.
- 30 MR BEASLEY: That led to something that touched on earlier regarding wanting a trust set up rather than having money handled by the Indigenous land corporation.
- MR HOOPER: Yes.
- 35 MR BEASLEY: If we go to the core documents brief behind tab 17 - - -
- MR HOOPER: Sorry. Yes.
- 40 MR BEASLEY: This is the deal that emerged – part of the deal that emerged from the agreement between the Labor Party and the Liberal Party in relation to not – what do you call it again, opposing the SDL adjustment. Yes.
- MR HOOPER: Not supporting the disallowance.
- 45 MR BEASLEY: Not supporting the disallowance. Thank you very much. Is this – this is now – has this agreement now been formalised?

MR HOOPER: Yes.

MR BEASLEY: It has. Okay. And do I take it in relation to the \$40 million
5 commitment, to be administered through the Indigenous land corporation, you
mentioned a – like a cultural water holder trust. Has that been agreed or is that still
in negotiation?

MR HOOPER: It's still in negotiation. We have – we have had two meetings with
10 the Prime Minister and Cabinet and Department of Agriculture.

MR BEASLEY: Right.

MR HOOPER: We have asked them to park the \$40 million and any decision about
15 the \$40 million until NBAN has an opportunity to go through the deal sheet and fully
comprehend what's in the deal sheet and then work on a structure that would give the
maximum benefit back to our Nations through that – well, in the north it's \$20
million within that trust.

MR BEASLEY: Yes. \$40 million between Northern and Southern Basins.

20

MR HOOPER: Yes.

MR BEASLEY: Can I ask, was this offer tabled without any form of negotiation, or
25 were you involved in a negotiation to get the offer made?

25

MR HOOPER: No, we weren't.

MR BEASLEY: Right. So it was – in terms of what's headed this without
30 prejudice document, this is how it was presented, without negotiation?

30

MR HOOPER: Well, when I say “without negotiation” - - -

MR BEASLEY: Perhaps you explain the background.

35 MR HOOPER: Okay. The background was that we were the face of the
disallowance within the Senate of the Northern Basin amendments to the Basin Plan.
And during that process Minister Littleproud's office at the time rang me when the
vote was going through the Senate and offered a range of measures, including a \$10
40 million fund for NBAN and MLDRIN to purchase water. So roughly \$5 million
each.

40

In our – in our lobbying of the Senators, you know, in regards to the disallowance
45 motion and for the Senate and the Labor Party to disallow the Northern Basin
amendments, we did meet with Tony Burke as a part of that lobbying. We had a
very, very good discussion with Tony, but the only – the only thing that we
recommended in regards to this deal would have been the \$1.5 million allocated and
the two positions allocated to implement the cultural flows.

MR BEASLEY: Right.

MR HOOPER: That was – that was basically what we said to them is that we have had this research going for so long, we now need – need funds to be able to
5 implement the outcome of the research. So that was the only thing that we talked to them about in regards to – to any part of this. This deal.

MR BEASLEY: Right. You may have answered my next question then, by saying that was the only part of the deal discussed. But I'm just wondering whether at any
10 stage during this process – and I note that part of the offer is setting up a Northern Basin Commissioner to audit, report on, progress and delivery of the Northern Basin Review outcomes and what's described as the toolkit works and measures. Was there any discussion had as to how those toolkit measures, from a scientific or other basis, represented 70 gigalitres of water or did that just not come up?

15 MR HOOPER: Not to my knowledge.

MR BEASLEY: Right.

20 MR HOOPER: I was asked to attend a meeting in Sydney at – in the Qantas rooms of the Sydney Airport. In regards to the toolkit measures with the states – and I think the Department of Agriculture was present – there were a number of things that they put up, New South Wales and Queensland. One was a fish passage program which involved Indigenous people being employed through that process. I'm not aware of
25 whether that toolkit measure has been taken up with this new processes that are going on to – to re-enter the Northern Basin Amendments back to the Parliament.

MR BEASLEY: All right. And it may not – I know you said you supported your sister body in the Southern Basin, MLDRIN, who were opposing the SDL
30 adjustment and so this may not have come up – was there any discussion during the course of the negotiations over this agreement that provided any further or better explanation about the science behind the SDL adjustment, the 605 gigalitres?

35 MR HOOPER: No, not to my knowledge.

MR BEASLEY: All right. I do note that the agreement, though, provides for some technical workshops to be held - - -

40 MR HOOPER: Yes.

MR BEASLEY: - - - to better explain the SDL to – to read the quote:

To build confidence in the scientific integrity of the projects.

45 MR HOOPER: Yes. I was invited to a meeting in Canberra a few weeks ago but I was unable to attend.

MR BEASLEY: Right.

MR HOOPER: I did not – it was that SDL technical processes, I think.

5 MR BEASLEY: What is your preference for a cultural water holder trust as distinct from the Indigenous land corporation in terms of handling the \$40 million?

MR HOOPER: NBAN is under – well, we are look at a Northern Basin water holder and that water holder being a Northern Basin First Nations water trust. We have developed a draft document which is going to be presented to the board – to the
10 NBAN board on Saturday – this coming Saturday at our board meeting. The draft document sets out the trust and it sets out what the trust is for.

MR BEASLEY: Right.

15

MR HOOPER: So it basically we are looking at a trust that will consist of seven trustees. Three – three of the trustees will be appointed – will be NBAN board members and the other four trustees that will be also appointed by the NBAN board and the delegation will be other people in areas of expertise.

20

You know, a legal representative, an accountant, a water trader and somebody with political, you know, connections and all of that type of stuff. So that's the way that we are looking at – and we see as the most effective and beneficial way to provide benefits to our – you know, the people of the northern Basin through their Nations.

25

MR BEASLEY: All right. I just want to see whether there is anything else I haven't covered. The one thing I did want to raise with you – the question that the Commissioner asked you to take on notice at the coffee break, I'm just wondering, your submission pre-dates the recent cultural flows publications at the end of June?

30

MR HOOPER: Yes.

MR BEASLEY: I'm wondering whether you would like to take up the opportunity of further taking on the Commissioner's question on notice. Have – now having
35 access to those publications and perhaps put a short submission in writing again to the Commissioner on that particular question?

MR HOOPER: Yes, we can do that. Yes.

40 MR BEASLEY: Does that seem a satisfactory means of dealing with that?

THE COMMISSIONER: It does. One way of pointing the matter, that has further occurred to me, is to go to the document produced by the MDBA in October 2016.

45 MR BEASLEY: What tab are we on?

THE COMMISSIONER: It's tab 7, in Mr Hooper's evidence bundle.

MR BEASLEY: "Our water, our life."

THE COMMISSIONER: "Our water, our life". This is a study which was carried on in very close cooperation with NBAN, I think, Mr Hooper; is that right?

5

MR HOOPER: Yes. Yes.

THE COMMISSIONER: If you turn - - -

10 MR HOOPER: But it wasn't the study that was done during the Northern Basin Review.

THE COMMISSIONER: No.

15 MR HOOPER: So – yes.

THE COMMISSIONER: May I go to – it's page 83, please. You will see that starts section 4 'Conclusions'.

20 MR HOOPER: Yes.

THE COMMISSIONER: In the second paragraph, third line, there is a short sentence that it would help me for you to think about in responding to what counsel assisting has just asked you:

25

What do they –

that is the claims made by traditional owners –

30 *mean to decisions about SDLs?*

MR HOOPER: Yes.

35 THE COMMISSIONER: And that puts in a very pointed statutory way the matters I was trying to raise with you earlier about the concrete manifestation of cultural flows, cultural water, Indigenous interests as they would affect allocations under the Water Act.

40 MR HOOPER: Yes. Okay.

THE COMMISSIONER: I don't mean by that, please don't misunderstand me, to be disrespecting or ignoring the point that you have made several times and, appropriately, you have repeated it, namely that these are interests that are inherent, by reason of circumstances, predating the arrival of the common law. So don't be
45 distracted by - - -

MR HOOPER: Yes.

THE COMMISSIONER: Fearing that I am overlooking that. I am not overlooking that. You may assume that I accept that, but now I'm asking in relation to the law of our land, which includes the Water Act, what would you like me to take into account. Thank you.

5

MR HOOPER: Yes. Thank you.

MR BEASLEY: Now, Mr – just before you leave, Mr Hooper, I've asked you a number of questions but I'm just wondering whether there is anything further you would like to tell the Commissioner that's relevant to the terms of reference or the matters we have been discussing today about Aboriginal objectives in relation to the Basin Plan?

10

MR HOOPER: The Northern Basin Review was a very distinct review of the northern Basin. The MDBA, under the Chairmanship of Craig Knowles, established a committee, which was called the Northern Basin Advisory Committee, Chaired by Mal Peters.

15

MR BEASLEY: Mr Peters. Yes.

20

MR HOOPER: I was initially a member of that committee and the objectives of that committee was to do a fair and accurate assessment of the northern Basin and then report to the Murray-Darling Basin Authority on what changes they would like or what changes that could be put up to the Parliament for the amendment of the Basin Plan.

25

After leaving the committee, or resigning from the committee I was able to see some stuff from outside and we were on a particular path and the path included a whole range of aspects within the northern Basin, including Aboriginal – stuff that affected Aboriginal people in the Basin. When – when the water portfolio was handed over to a new minister and the water portfolio and then the Murray-Darling Basin replaced the Chair of the Authority, I seen a distinct shift in the way that business was being done. In terms - - -

30

MR BEASLEY: Who is the new Minister?

35

MR HOOPER: It was then Barnaby Joyce.

MR BEASLEY: Right. Okay.

40

MR HOOPER: There was a distinct change in the way that the things operated and what was the outcome that was going to be achieved in the northern Basin through the Northern Basin Review. It went from a holistic view of the Basin to I think it was three or four specific sites within the Basin – within the northern Basin Dirranbandi, and St George and I think Warren as well. It changed from a review in the northern Basin into how the recovery of water would effect the economics of those towns.

45

THE COMMISSIONER: You mean based upon irrigated agriculture?

MR HOOPER: Based on irrigated agriculture. Our submission to the Murray-Darling Basin Authority in regards to the Northern Basin Review was saying that we
5 wanted that water to increase. So instead of decrease - - -

THE COMMISSIONER: So which water to increase?

MR BEASLEY: The recovery of water for the environment.
10

MR HOOPER: The recovery water – the 390.

MR BEASLEY: You said 440, I think, in your submission.

MR HOOPER: Yes. 415 or something like that. We wanted – because the Basin
15 Plan allowed the water recovery targets to be adjusted by five per cent. So either five
per cent up or five per cent down, depending on the review of the outcomes of the
review. And we have seen – I seen the - - -

MR BEASLEY: 440 was what you suggested.
20

MR HOOPER: Yes. 440.

MR BEASLEY: 415 was a figure that was actually modelled rejected. Yes.
25

MR HOOPER: Yes. So it went from a broad review to a specific review based on
economics. And irrigated economics. And I think that when I look at the areas that
were – that were taken into consideration, you know, Dirrabandi, St George and
some other areas, the Minister at the time had contacts with those areas. I'm not
30 saying that the Minister influenced any of the decisions; that's not what I'm saying.
I'm saying that the focus of the Northern Basin Review then narrowed to that. And
I'm sure that when – Mal Peters' submission to the Northern Basin Review reflected
that as well, I think.

MR BEASLEY: He's going to give evidence. We've seen those submissions.
35

MR HOOPER: So I think, you know, from somebody outside seeing that – and I
was party to a number of meetings that took place in regards to the Northern Basin
Review, and being a parts of the Northern Basin Advisory Committee at the time
40 there was certain influencers there from irrigation as well. So I had seen it shift from
a broad area, focused on irrigation and the effect that the recovery of that water
would have on the irrigation.

Unfortunately at the time when we put our submission to the Murray Darling Basin
45 Authority, we did not have the evidence that was produced by the National Cultural
Flows Research Committee in regards to Cooramin swamp where the research
clearly shows that predevelopment in that river system, Cooramin swamp will be

inundated at least 85 times in 100 years. So that was the scientific hydrology that they had researched. Currently it's 29 times in 100 years with the current development.

5 And we could increase that to 48 times in every 100 years with the full implementation of the Basin Plan. And what I'm saying is the full implementation and the full water recovery of the 390 - - -

10 THE COMMISSIONER: Well, that's not the Basin Plan though, is it, 390?

MR HOOPER: It was the Basin Plan's target.

THE COMMISSIONER: It was. It isn't anymore.

15 MR BEASLEY: It's 320, I think, is what - - -

MR HOOPER: It is 320 now with the amendments to the northern Basin.

20 THE COMMISSIONER: That's what I mean. It has been amended. Yes.

MR HOOPER: Yes. So that's why we severely opposed the amendment to the Basin Plan and we supported the disallowance in the Senate of the amendments for the Basin Plan. So - - -

25 MR BEASLEY: I think the MDBA's own – to the extent that it has released least analysis of model scenarios of 320 and 390 and 415, I'm not sure any of those scenarios actually hit all of the environmental watering requirements that they've identified, but - - -

30 MR HOOPER: No, they don't. And some of the things that were put around, that, "Oh, look, South Australia is only going to get three per cent of whatever is, you know, taken out of up here of anyhow." So – and I think the – the other reason why we opposed the northern Basin review amendments were they were taking 50
35 gicalitres out of one river system, and that river system is also – has been depleted and unfortunately we weren't able to use the evidence out of the cultural flows research to put into our submission to the northern Basin review.

That information was available. I don't know why the Murray-Darling Basin Authority did not request that information off the – off the research committee, and –
40 because that study had been done and in the processes of being drafted, yes, with – when – when – when they made the decision. So there was a lot of our science that weren't taken into consideration with the northern Basin review. Our submission – 99 per cent of our submission was rejected, we feel. The only part of the submission was the weirs at Wilcannia and Cunnamulla. So, through that process, we feel that
45 our views weren't taken into consideration, even though we had sound points to put up to the – to the MDBA. The MDBA and – yes. So that's - - -

MR BEASLEY: Can I just finish by asking you this? I asked you with – in the context of the agreement that we were discussing but – at any stage in relation to your time either on the committee in – consultation committee for the Northern Basin Review or at any time after that, including up to when you are making submissions to the Basin Authority regarding the Northern Basin Review, did anyone ever explain to you how the toolkit measures represent a 70 gigalitre reduction?

MR HOOPER: No.

MR BEASLEY: All right.

MR HOOPER: All they said was that at that one meeting that I had where they explained the fish passage as a toolkit measure, that was the only – only information
- - -

MR BEASLEY: That doesn't sound like it takes much H2O, but I could be wrong about that.

MR HOOPER: Yes. Yes. Yes.

MR BEASLEY: All right. Thank you.

MR HOOPER: Thank you.

MR BEASLEY: Thank you very much for coming.

THE COMMISSIONER: Yes. I'm much obliged for assistance and for your elaboration of the submission. Thank you.

MR HOOPER: Yes. Thank you.

<THE WITNESS WITHDREW

[12.53 pm]

THE COMMISSIONER: I wonder whether it wouldn't be better to adjourn till a quarter to 2.

MR BEASLEY: Whatever you want to do. I just might - - -

THE COMMISSIONER: Well, it's 5 to 1 now.

MR HOOPER: All right.

THE COMMISSIONER: So if we make it 1.45.

MR BEASLEY: Yes.

THE COMMISSIONER: I hope that's enough time for people. Yes.

MR BEASLEY: Yes. All right. Thank you.

5 THE COMMISSIONER: We will adjourn to 1.45 to hear Ms Morgan's evidence.

MR BEASLEY: Yes. And Mr Whan.

10 THE COMMISSIONER: Yes, and Mr Whan. Yes.

ADJOURNED **[12.53 pm]**

15 **RESUMED** **[1.46 pm]**

MR BEASLEY: So we're ready. I was being pressured to tender documents, then, Commissioner. But I'm resisting, and we will do it with the comfort of some extra time, when the pressure is not on.

THE COMMISSIONER: Stay strong.

25 MR BEASLEY: I will. There's no breaking me down on this one. Okay.

<MONICA MORGAN, AFFIRMED **[1.47 pm]**

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

MR BEASLEY: Ms Morgan, you're the CEO of the Yorta, which is Y-o-r-t-a, Yorta Nation Aboriginal Corporation.

35 MS MORGAN: That's correct.

MR BEASLEY: The head office is in Shepparton in Victoria?

40 MS MORGAN: One of our offices, yes, is in Shepparton.

MR BEASLEY: Right. That's where I certainly met you first.

45 MS MORGAN: Yes. Yes, you did.

MR BEASLEY: Is that usually where you work?

MS MORGAN: Most – three days a week, yes.

MR BEASLEY: All right. How long have you been the CEO of the corporation?

5 MS MORGAN: Only since April 2018.

MR BEASLEY: And you have been a human rights campaigner for most of your life; correct? Is that how you like to describe yourself?

10 MS MORGAN: Yes.

MR BEASLEY: And amongst the things you have done is worked for two years with UNESCO.

15 MS MORGAN: I was on an expert panel with UNESCO, yes.

MR BEASLEY: For cultural diversity.

MS MORGAN: Yes.

20 MR BEASLEY: But with a - - -

MS MORGAN: In water.

25 MR BEASLEY: With particular emphasis on international hydrological - - -

MS MORGAN: Yes.

MR BEASLEY: - - - projects; correct?

30 MS MORGAN: Yes.

MR BEASLEY: And when was that?

35 MS MORGAN: 2008 to about 2010.

MR BEASLEY: All right. And you have also been – you have worked for the Murray-Darling Basin Commission.

40 MS MORGAN: At one point I did, yes.

MR BEASLEY: 2003 to 2005.

MS MORGAN: Yes.

45 MR BEASLEY: What did you do – what was your job with the Commission?

- MS MORGAN: I came there to develop the Indigenous program. They had – the first time they ever had an Indigenous perspective, and I took with me the workings that we have done at Yorta Yorta and with MLDRIN, and in trying to look at, from a human rights perspective the rights of Indigenous peoples as First Nations.
- 5 MR BEASLEY: And you've also been a representative from time to time on the New South Wales Aboriginal Lands Council?
- MS MORGAN: I did that in about '94. I was on – I was a state counsellor for about three years.
- 10 MR BEASLEY: And perhaps I should also ask you: the Yorta Yorta Nation Aboriginal Corporation, what is its role and who does it represent?
- 15 MS MORGAN: It's the white interface to a black organisation. So the traditional owner, sovereign nation, which is represented by 16 family groups and a Council of Elders. So we're the white world of interface and have a lot of projects and programs which support looking after our cultural and environmental heritage.
- 20 MR BEASLEY: All right. Can Ms Morgan be given a copy of the brief that's been prepared for her? Can I just ask you to go to tab 8? You will see some tabs. It has got a map. That identifies Yorta Yorta land?
- MS MORGAN: Yes. That's our traditional country.
- 25 MR BEASLEY: Riverine Plains of the Goulburn-Broken Catchment including the junction of the Goulburn and Murray Rivers that extends into New South Wales and obviously the northern part of Victoria.
- 30 MS MORGAN: Yes.
- MR BEASLEY: Can I just ask you, have you – did I pronounce Dhungulla correctly?
- 35 MS MORGAN: Yes, Dhungulla.
- MR BEASLEY: Right. That's Murray River.
- MS MORGAN: That's the name for the Murray River for Yorta Yorta people. Yes.
- 40 MR BEASLEY: Yes. And have you lived on the Murray River for a large period of time or most of your life?
- MS MORGAN: Yes. Majority of my life.
- 45 MR BEASLEY: And are you able to tell the Commissioner what you've noticed in relation to changes in the River, in the part of the land that you live, from the time

when you were a young girl through to now in terms of any changes to the environment, ecology those sorts of things?

5 MS MORGAN: Absolutely. I spent majority of my life – but first off, before I get into all this, I forgot to acknowledge the traditional owners of the Kurna People and their elders past and present. So I didn't do that. As a Yorta Yorta traditional owner, I have grown – I have been reared and been around my elders since a very long time, and I also have had a lot of contact with the Murray River directly, and the tributaries. And what I've been able to see during that time is a loss of – a real loss
10 of agency of the river itself. It has become less of a waterway and more of a channel. There are changes in the water levels, most certainly with the high flows in the summer and the low flows in the winter, has turned around and really affected - - -

15 MR BEASLEY: Is that the opposite to what it used to be?

MS MORGAN: Absolutely the opposite, yes. Has greatly affected not only our cultural heritage sites but also our ability to hunt, gather and fish. Myself - - -

20 MR BEASLEY: It's not just the opposite to what it used to be; it's the opposite to what it should, isn't it?

MS MORGAN: Should be. Seasonally, it's totally reversed, and has had a detrimental effect. And so how it's happened is very – you have got very subtle processes that will bring into season particular events. I would be told as a young
25 child, as fishing, about an observe – you know, the duck weed coming down, and of course the duck weed would come down at a certain time of the year which would indicate that there are swan eggs available. That no longer occurs. There would be times in which special grasses would grow that we would know that the I'm emus are laying and we would collect some emu eggs for a deadly scone, a sponge, and now,
30 today, uncle was – Uncle Colin was only saying things are so out of order with the seasons, climate change as well as water, that they are breeding three times a year.

So it seems like there's an escalation in change that's – it was slower when I was a child. I mean, of course it was a regulated river even then, but I think the
35 consumptive users – I mean, the extraction has happened at a higher rate, because you've got much more of a velocity of water coming down now in the summer months, which is eroding away midden shells, our trees, where we would go and fish and we would know where the Murray Cod are breeding. All those types of things are all changed. Everything has changed. Yes.

40 MR BEASLEY: Right. Thank you. Amongst the things you've done in the course of your career you've written about a couple of things. One is the topic of engagement and consultation with Aboriginal people concerning the use of the waterways. That's one thing you have written about.

45 MS MORGAN: Yes.

MR BEASLEY: Correct. And you have also written about cultural flows.

MS MORGAN: Mmm.

5 MR BEASLEY: Just say yes for the transcript.

MS MORGAN: Yes. Sorry, yes.

MR BEASLEY: Can I just take you – and some of that, I assume, was work that
10 came out of the time you spent with the Basin Commission.

MS MORGAN: Prior to that.

MR BEASLEY: Prior to that?

15 MS MORGAN: Yes. Prior to that and during that, yes. I – I came to the Basin
Commission after our native title application, which Murray-Darling Basin was one
of the respondents, and many of the states, including South Australia.

20 MR BEASLEY: This is the Yorta Yorta people.

MS MORGAN: The Yorta Yorta people. We formed the Murray Lower Darling
Rivers Indigenous Nations. But first off the Yorta Yorta held a gathering of all
nations. So I was a part of - - -

25 MR BEASLEY: The Yorta Yorta was formed in '98, I think; is that right?

MS MORGAN: Yes – yes – yes – yes. It wasn't incorporated until much later.

30 MR BEASLEY: Sure.

MS MORGAN: But it was informing the – I was on the Murray Darling Basin
Commission community forums at that stage and I worked with VEAC in Victoria,
so I brokered a lot of agreements on the ground and that's why I was –

35 MR BEASLEY: Tell me what VEAC is.

MS MORGAN: Victorian Environment Assessment Council.

40 MR BEASLEY: Thank you.

MS MORGAN: Yes, committee. And because of my work on the ground in
enacting agreements, working on MOUs, and working with catchment management
authorities, I was actually head-hunted by Murray Darling Basin Commission.

45 MR BEASLEY: Okay. One of the publications I wanted to take you to is behind
tab 5 of that – it's a – you co-authored this document with Lisa Strelein – is it?

MS MORGAN: Yes.

MR BEASLEY: And Jessica Weir.

5 MS MORGAN: Yes.

MR BEASLEY: This is a 2004 publication.

MS MORGAN: Yes.

10 MR BEASLEY: Australian Institute of Aboriginal and Torres Strait Islander Studies. Was it commissioned by them?

MS MORGAN: No, it was commissioned by myself. I went to IATSIS when I was
15 with the Murray-Darling Basin Commission and I also went with – to CAPER,
which is the Australian University has the centre for Aboriginal Economic –
whatever – and asked them to help provide this background paper. So actually all
the work that was done was done for nothing for the Murray-Darling Basin. Aren't
20 they lucky?

MR BEASLEY: Right. Yes. This actually came out of the Living Murray Project,
I think. Was that right?

MS MORGAN: Yes, that's correct. Yes.

25 MR BEASLEY: And in it you discuss what Aboriginal peoples' expectations are in
relation to consultation and engagement - - -

MS MORGAN: Yes.

30 MR BEASLEY: - - - in matters concerning the rivers.

MS MORGAN: Yes, that's correct.

35 MR BEASLEY: And if I can take you to page 5, as an example, procedural rights,
the right to be engaged in decision-making – what you were seeking there is, as you
say in the first sentence, “more than consultation”.

MS MORGAN: I think consultation has been done to death. It's an insult to not
40 only First Nations people, but I think to majority of people. I think government are
very, very flippant with the use of the process.

MR BEASLEY: I want you to keep going. I'm going to interrupt you though, just
to say - - -

45 MS MORGAN: Yes.

MR BEASLEY: - - - is the answer you are giving, when you say sick “of consultation”, do I take it that it would include - - -

MS MORGAN: It’s a token gesture.

5

MR BEASLEY: - - - the words like “have regard to” in the Water Act and the Basin Plan.

MS MORGAN: Yes. Absolutely.

10

MR BEASLEY: All right. Sorry, I interrupted you. You go on.

MS MORGAN: It’s a very tokenistic concept. During my time before this was written, I had attended I was part of the prepcom for the Rio de Janeiro water summit in New York as part of the Indigenous delegation for Yorta Nation and many other nations around the world. And the work that we done there – and also work with Madam Erica Irine Diaz on cultural heritage, a whole variety of work that we have done over many years needed to be placed front and centre within here. So it’s really based around a very strong – following the conventions of the United Nations in relation to how things should be done.

15

20

MR BEASLEY: So this – if I understand this correctly, what you are calling for here is not really consultation, but an active role in the process of making - - -

25

MS MORGAN: Yes.

MR BEASLEY: - - - decisions and determinations - - -

MS MORGAN: And the right to veto.

30

MR BEASLEY: - - - around the use of the water resources.

MS MORGAN: It’s called free prior informed consent. The very process of it is that all the information is provided upfront before you actually come and meet with us. That prior knowledge is given to us - - -

35

MR BEASLEY: Now, that’s so - - -

MS MORGAN: - - - and it’s informed.

40

MR BEASLEY: - - - that you can actually have an informed discussion because - - -

MS MORGAN: Yes.

45

MR BEASLEY: - - - unless you are given information prior to a meeting to discuss any particular aspect of managing water resources, you’re not – it’s difficult to have a proper conversation without having - - -

MS MORGAN: It's a one-way conversation.

MR BEASLEY: It's a lecture.

5 MS MORGAN: Yes.

MR BEASLEY: All right. Sorry, go on. I interrupted you again.

10 MS MORGAN: No, basically, that's it and to do things in a non-discrimination way and also we wanted to apply the environmental components of precautionary principles and not just base it around cultural heritage as well as around – which they like a lot more, but it's really about substantive rights of Indigenous peoples.

15 MR BEASLEY: Well, ecologically sustainable development which incorporates the precautionary principle - - -

MS MORGAN: Yes.

20 MR BEASLEY: - - - did find its way into the Water Act.

MS MORGAN: Yes.

25 MR BEASLEY: Query how it's being implemented, but that's a side issue. What hasn't found its way into the Basin Plan, I assume, is the sort of consultation procedures that you were expressing in this document - - -

MS MORGAN: Absolutely.

30 MR BEASLEY: - - - 14 years ago.

MS MORGAN: This document was informed by - - -

35 MR BEASLEY: I should say the sort of “more-than consultation”.

MS MORGAN: Yes, yes. So this document was actually informed by a very robust process of informed concept with all the Nations along the Murray River. And also we – I had undertaken, before we had pulled this together, a consultation process all over the Basin with 45 Nations. And though it was focused towards the Living Murray, it is really applicable to all Indigenous peoples.

40 MR BEASLEY: Yes. And you would say, is still relevant in relation to what should be the more-than consultation procedures in relation to both the preparation of the Basin Plan but also, importantly, to any changes that are made to the Basin Plan or adjustments made to the Basin Plan.

45 MS MORGAN: Absolutely. And I went to great pains – myself and my other co-writers – in trying to establish – because the one thing that happened from the Rio de

Janeiro, you know, the agenda, 21(j)(8), was that includes communities and is to really show the difference between First Nations and other Aboriginal communities and other peoples. That we have a distinct right as inherent as was stated before by Fred - - -

5

MR BEASLEY: Can you just explain that more clearly, about the distinction between First Nations and - - -

MS MORGAN: Yes, so it's in here. Well, it's like the governance processes. I think if you – somewhere in here, it's in here is that - - -

10

THE COMMISSIONER: Is it page 21?

MS MORGAN: 21. Could be. Thank you. Yes, the distinguishing between the two - - -

15

MR BEASLEY: There we go.

MS MORGAN: - - - it's called the understanding of diversity of Indigenous interests. And today we – we say Indigenous on a global level, but for us we say Aboriginal or First Nations.

20

MR BEASLEY: Yes.

MS MORGAN: That there's two constructs. And everything is a construct because of invasion, as we know, but what we are finding is that even if it is the very low scale consultation, it's happening in an atmosphere of every community member or Aboriginal person where – living in a community has the same status. And we say that their status as citizens is one that all people have under Australian law but the statuses of First Nations inherent holder is completely different within the context. So having Murray-Darling Basin Commission at that time understand that difference was very important and led to that MOU that was signed off by all the states and the Commonwealth – recognise Indigenous Nations. Very first time that was ever done.

25

30

MR BEASLEY: Hence the reference to the page the Commissioner has directed - - -

35

MS MORGAN: Yes, yes.

MR BEASLEY: - - - your attention to, “involvement by traditional owners is critical”, etcetera.

40

MS MORGAN: Yes. Yes.

MR BEASLEY: I'm – will – so I don't get in trouble again, I am actually going to, as we go, I will tender this document, research discussion paper, 'Indigenous Rights

45

to Water in the Murray-Darling Basin’, authors Monica Morgan, Lisa Strelein – did I say that correctly?

MS MORGAN: Strelein.

5

MR BEASLEY: - - - and Jessica Weir.

MS MORGAN: Yes.

10 MR BEASLEY: Dated 2014. I just draw the Commissioner’s attention to page 62. Further reading, Native Title in an International Perspective by an author called S. Pritchard.

THE COMMISSIONER: Thank you.

15

MS MORGAN: Is that under 6 – is that under tab 6 or something else?

MR BEASLEY: No, it’s in tab 5.

20 MS MORGAN: Back there. Okay.

MR BEASLEY: Yes. Now - - -

MS MORGAN: So what is the page, sorry?

25

MR BEASLEY: No, you don’t have to go to that.

MS MORGAN: Okay. No worries.

30 MR BEASLEY: I was just having fun

MS MORGAN: Thank you.

MR BEASLEY: Tab 7, I wanted to take you to, though.

35

MS MORGAN: Okay. Sure. Yes.

MR BEASLEY: This is a paper you’ve written about cultural flows.

40 MS MORGAN: Yes. I did this for the water culture diversity global environmental change with the – when I was on the UNESCO.

MR BEASLEY: Now, what years did you say – I have already forgotten what years you said you were at UNESCO, because I can’t - - -

45

MS MORGAN: 2008 to 2010.

MR BEASLEY: The reason I'm asking is that – this is actually dated copyright UNESCO 2012.

5 MS MORGAN: 2012. Well, yes, I was on the committee for them and then we collaboratively wrote this but it wasn't published until then.

MR BEASLEY: All right. I see. I see.

10 MS MORGAN: Yes, yes, yes.

MR BEASLEY: Sorry, when you say you “collaboratively wrote it”, it only identifies you as the author.

MS MORGAN: It's a whole book and it is a whole book and - - -

15 MR BEASLEY: I see.

MS MORGAN: - - - I'm just chapter 5.3.

20 MR BEASLEY: This is chapter 5.3. Yes. No, I'm with you now.

MS MORGAN: And all the – it was a – very extensive - - -

MR BEASLEY: Hence the fact that your article actually starts on page 453 - - -

25 MS MORGAN: That's right.

MR BEASLEY: - - - that should have tipped me off it was part of a much larger document. And, again, in this document you talk about what's needed to be – from the perspective of MLDRIN and Indigenous people in terms of policy development surrounding the Basin Commission and decisions being made in relation to water resources. And I'm looking in particular at page 457:

30

35 *Informed consent requires more than mere consultation. Instead, it required that Indigenous people have*

MS MORGAN: Yes.

MR BEASLEY:

40 *Meaningful roles in the process as well as power*

MS MORGAN: Yes.

45 MR BEASLEY:

in determining the decisions and outcomes - - -

MS MORGAN: Yes.

MR BEASLEY:

5 *Indigenous peoples want substantive involvement in the implementation of decisions, direct role in environmental management. Cultural environmental and social values should be given equal status with economic values.*

10 Mr Hooper was asked to give his understanding of the word “cultural”. What would you – what does “cultural” mean in the way you are using it in this chapter?

15 MS MORGAN: It’s – it’s our identity it’s who we are. It’s the base of our being. So it can – it can be an intangible thing like the creation story for our river, which is Dhungulla, which is the same all the way through. We have the Rainbow Serpent, we have Mother Earth. It is the – those passing down of memories and knowledge and culture and traditions. And also it’s tangible cultural objectives, whether it’s looking after mitten shells, burials. So it can be a whole array of - - -

20 MR BEASLEY: All right.

MS MORGAN: It’s a very encompassing term.

MR BEASLEY: I will come to it again - - -

25 MS MORGAN: Yes.

30 MR BEASLEY: - - - when I discuss cultural flows with you. But over the page, 458, there’s a section ‘5.3.3 Reviving the River, Environmental and Cultural Flows.’ That – even the heading is immediately telling me that - - -

MS MORGAN: Yes.

MR BEASLEY: - - - there’s a distinction - - -

35 MS MORGAN: Yes, absolutely.

MR BEASLEY: - - - between the two. Can you just explain that firstly?

MS MORGAN: Well - - -

40 MR BEASLEY: They might - - -

MS MORGAN: They are the same.

45 MR BEASLEY: I can understand that cultural - - -

MS MORGAN: To me they’re the same, yes.

MR BEASLEY: That a cultural flow could also be an environmental flow - - -

MS MORGAN: Yes, absolutely. Yes, yes, yes.

5 MR BEASLEY: - - - but is there a distinction? Is one broader than the other? A cultural flow broader than an environmental flow?

MS MORGAN: Look, I come from – the very first paper that we talked about, when we did the consultation with all the Nations, Ngarrindjeri, all the way up to the
10 head – the mountains with the Wiradjuri – all the elders started talking about a need for a flow of water that recognises – that is able to deliver what we haven't got there now. And so the thinking was that 80 per cent of the water has been captured for consumptive users and the other 10 per cent for towns and water and so 10 per cent is left.

15 And so our elders are very pragmatic, and if we are going to be talking about environmental flows that sustain the culture and our cultural economy, and everything that we live for – is that there was a need to bolster that with a cultural flow. I agree with Fred that all water is flow. So we would expect that the 100 per
20 cent would be an environmental flow, and then from there you would extract and take away that water that you may need for irrigation after that, because, in fact, if you want your river to live and our identity and culture to survive, then we would have to look at it in reverse. So it was really a – at the beginning, just talking about a concept that is constructed. Everything is constructed.

25 MR BEASLEY: One of the things that tells me you are right about the fact that you wrote this paper before it was published, is on page 458 because you mention that the reference point of 500 gigalitres, for - - -

30 MS MORGAN: Yes.

MR BEASLEY: - - - increased environmental flows is unsatisfactory. But then you go on to say even the top reference point at 4,000 - - -

35 MS MORGAN: Yes.

MR BEASLEY: - - - gigalitres has only a low – I think you are wrong to say it's a moderate – but a low probability restoring the health of the river system. That's clearly a reference to - - -

40 MS MORGAN: Yes.

MR BEASLEY: You must have seen the Guide to the Basin Plan in the course of - - -

45 MS MORGAN: No, I haven't seen the Basin Plan. This goes back to the Living Murray.

MR BEASLEY: No, the Guide. The Guide - - -

THE COMMISSIONER: No, the Guide to the Basin Plan - - -

MR BEASLEY: - - - to the Basin Plan.

5 MS MORGAN: - - - preceded the Basin Plan.

MS MORGAN: Yes, yes, yes.

10 MR BEASLEY: Because that identified - - -

MS MORGAN: Yes.

MR BEASLEY: - - - that the range of water required - - -

15 MS MORGAN: Yes.

MR BEASLEY: - - - for the environment was, in round terms, 4,000 gigalitres of
- - -

20 MS MORGAN: Yes.

MR BEASLEY: - - - what's described as a low probability - - -

25 MS MORGAN: Yes. Yes.

MR BEASLEY: - - - of achieving environmental water targets and - - -

MS MORGAN: Yes.

30 MR BEASLEY: - - - 7,000 gigalitres with a high probability of achieving them.

MS MORGAN: Yes, yes.

35 MR BEASLEY: So is that a memory you have of seeing that document or
something like it or – or being informed that that's what it contained?

MS MORGAN: Being informed. Yes, yes, yes.

40 MR BEASLEY: All right. Okay.

THE COMMISSIONER: Could I just ask this: at page 463 - - -

MR BEASLEY: That's what I was going to. Yes.

45 MS MORGAN: Okay.

THE COMMISSIONER: There is a reference to an allocated cultural flow – the middle of the page. And by “allocated”, I take it you mean in accordance with whatever - - -

5 MS MORGAN: You would have to just show me - - -

THE COMMISSIONER: - - - the governmental regulations is involved?

MS MORGAN: I haven’t seen this before.

10

MR BEASLEY: So 463 you’ve got three bullet points and then you have got:

The concept of cultural flows has been developed.

15 And then there’s a bullet point underneath that - - -

MS MORGAN: Yes.

MR BEASLEY: - - - that the Commissioner is taking you to.

20

MS MORGAN: Yes. Now, I had an – I had Marcus Barber, who was with the NAILSMA, help edit this and he added this.

THE COMMISSIONER: He may have written it indeed - - -

25

MS MORGAN: Yes.

THE COMMISSIONER: - - - but it refers to a policy statement from the Northern Australian Indigenous Land and Sea Management Alliance.

30

MS MORGAN: Yes, yes, yes.

THE COMMISSIONER: NAILSMA. And you see that the quotation from that policy statement has, as its first dot item, an allocated cultural flow. Do you see that?

35

MS MORGAN: Yes, yes. Articles 8 to - - -

THE COMMISSIONER: Is that something that you urge or not?

40 MS MORGAN: Well, I think that a culture flow needs to have – if we are going to have a river that’s going to survive and maintain First Nations or any Aboriginal peoples’ relationship to the river, and if the consumptive user portion is not going to be lowered, then what we are going to have to do is call for a cultural flow allocation, absolutely.

45

THE COMMISSIONER: And by an “allocation”, and you refer to that on - - -

MS MORGAN: Yes.

THE COMMISSIONER: - - - 462/463 as well, by an “allocation” you are referring to a designation of a certain volume of water – perhaps time and place as well – for Indigenous organisations - - -

5

MS MORGAN: No, Indigenous Nations.

THE COMMISSIONER: Well, for Indigenous - - -

10

MS MORGAN: Yes, yes, yes.

THE COMMISSIONER: - - - interests, if I can put it that way.

15

MS MORGAN: Yes. “Interests”. Yes.

THE COMMISSIONER: However described. In the same way – is that what you’re suggesting – as they may be allocated, say, to consumptive users?

20

MS MORGAN: I – must say that I have never talked in that way myself.

THE COMMISSIONER: Right.

MS MORGAN: I was referring to the MLDRIN statement, but I’m referring more with the cultural flow to – to actually be added to an environmental flow. That’s what we were talking about at that time. Sufficient adequate quality – quantity and quality maintain spiritual, cultural, environmental, social and healthy livelihoods. Most certainly we have a – a cultural economy, might I say, and that cultural economy entails that if there is sufficient water available to us then we can not only – we can gather our foods, we can hunt, and we can gather, and we can have a – a subsistence economy on that, but there has been more thought about that, more than what I’ve provided, in relation to how water should also go towards a cultural flow that in – advances economic reasoning – economic interests for Indigenous peoples beyond that.

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30

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THE COMMISSIONER: So that could include used for irrigated agriculture - - -

MS MORGAN: It could - - -

40

THE COMMISSIONER: - - - or not?

MS MORGAN: - - - but I have not – I have not written this in that way.

THE COMMISSIONER: No. I see you use the - - -

45

MS MORGAN: Yes.

THE COMMISSIONER: - - - expression at 462, second-last line of the text above the picture of the Mouth, that you talk about the allocation may be used to generate a more independent economic base for the people. Do you see that?

5 MS MORGAN: Yes – yes.

THE COMMISSIONER: Do I – should I take it that’s a general expression that might include - - -

10 MS MORGAN: It might. Yes. I - - -

THE COMMISSIONER: - - - for example, irrigated agriculture.

MS MORGAN: I never wanted to cut things off, that - - -

15

THE COMMISSIONER: No, no.

MS MORGAN: Yes.

20 THE COMMISSIONER: But might it be that?

MS MORGAN: Yes, yes.

25 THE COMMISSIONER: Thanks. Now, there is a reference in the quotation from the NAILSMA policy statement at 463 to a number of articles from the United Nations Declarations on the Rights of Indigenous Peoples. Those are matters, of course, that are not binding on Australia as a matter of international obligation.

MS MORGAN: In what way aren’t they binding?

30

THE COMMISSIONER: Well, the declaration is not.

MS MORGAN: The declaration is not but the convention on biodiversity, the Ramsar - - -

35

THE COMMISSIONER: I’m not up to that.

MS MORGAN: So you’re not – yes.

40 THE COMMISSIONER: I’m just talking about the declaration itself at the moment.

MS MORGAN: The declaration, absolutely.

45 THE COMMISSIONER: But I take it that you are urging reference to those provisions as what ought to be the case?

- MS MORGAN: Yes. I think that the declaration was written looking at a variety of other conventions such as the ILO conventions, the biodiversity, the cultural, and it was – and, of course, self-determination. Self-determination is already explicit anyway within the human rights, so it’s kind of expanding on many of those concepts and I think the declaration on the rights of Indigenous peoples may in itself not be – you know, demanding on governments, but you would think that if they signed off on it then they would most certainly be obliging in at least recognising how they are going to implement them.
- 5
- 10 THE COMMISSIONER: And finally, on that same page – I don’t want to spend too much time on this, but from the Echuca statement, there is that phrase that there has already been a deal of evidence about water entitlements that are legally and beneficially owned by Indigenous peoples.
- 15 MS MORGAN: Yes.
- THE COMMISSIONER: Now, to me as a property lawyer, legally and beneficially are terms of art. They’re technological expressions that refer to the relationship between things capable of being owned and entities capable of owning things.
- 20 MS MORGAN: Yes.
- THE COMMISSIONER: So that I might be the legal and beneficial owner of my fountain pen.
- 25 MS MORGAN: Yes.
- THE COMMISSIONER: And the difference between legal and beneficial are technical terms that describe, for example, the difference between the legal ownership that a trustee enjoys and the beneficial ownership that the beneficiary of the trust enjoys. For those reasons, I must say - - -
- 30 MS MORGAN: It’s contradictory.
- 35 THE COMMISSIONER: Well, or circular or, more to the point, self-defeating. Because if I’m correct, I should understand cultural flows as being asserted entitlements - - -
- 40 MS MORGAN: Yes.
- THE COMMISSIONER: - - - regardless what has happened to interrupt the traditional owners’ enjoyment of them since settlement and development?
- 45 MS MORGAN: Yes – yes.
- THE COMMISSIONER: Thank you very much. Right. Thank you.

MR BEASLEY: I will tender that chapter '5.3, Cultural Flows: Asserting Indigenous rights and Interests in the Waters of the Murray-Darling River System, Australia.' Just before I move on to my final topic, you would have heard me discuss with Mr Hooper the recent publications concerning cultural flows - - -

5 MS MORGAN: Yes. Yes.

MR BEASLEY: - - - that were published on – at the end of June this year.

10 MS MORGAN: Yes.

MR BEASLEY: Did Yorta Yorta have any input in relation to the preparation of those documents?

15 MS MORGAN: I think Yorta Yorta came off MLDRIN for some time and we have come back on in – late 2016. So I became aware of them – I was aware of the process - - -

MR BEASLEY: Yes.

20 MS MORGAN: I first saw those documents at a meeting or just a week before a joint meeting of NBRAN and MLDRIN. And I, for Yorta Yorta, requested that there be an informed consent process that we can take them back to our Nations. I think we had a month. So during that month our elders were able to have a look at them and put any of our changes, our observations to them and put them back to the main body.

25 MR BEASLEY: Right. Okay. Thank you. I just want to finish by asking you about engagement between Yorta Yorta and the Basin Authority. I understand you, on behalf of Yorta Yorta Nation Aboriginal Corporation, attended a meeting in, I think, September last year regarding – that was convened by the Basin Authority to discuss the SDL adjustment.

30 MS MORGAN: Yes, that's correct.

35 MR BEASLEY: And was that as a result of you being specifically invited by the Basin Authority?

MS MORGAN: No I received a flyer that was sent out from Yarkuwa Aboriginal Centre, that is a group that are in Deniliquin, an Indigenous group.

40 MR BEASLEY: I will just get the associate to show you the - - -

MS MORGAN: But I was – I was informed by an email that was sent to me when I asked questions about Shepparton, yes.

45 MR BEASLEY: All right.

MS MORGAN: So yes, I did receive both a flyer and then I did receive after that an email in relation to - - -

MR BEASLEY: All right. Let's just divide that up.

5 MS MORGAN: Where are – have you got copies of it in here?

MR BEASLEY: It's probably not in there. What I'm showing you is a – is a – it's probably not in there.

10 MS MORGAN: No. That's okay.

MR BEASLEY: This is a document - - -

15 MS MORGAN: Yes – yes – yes.

MR BEASLEY: This is a document you have given to the Commission which is - - -

20 MS MORGAN: Yes, yes.

MR BEASLEY: - - - the flyer I think you are referring to –

MS MORGAN: Yes, yes. The flyer. That's exactly right. Yes.

25 MR BEASLEY: This is headed 'Aboriginal Information Session.'

MS MORGAN: Yes, yes.

30 MR BEASLEY: Where:

The Basin Authority will be in your region on 18 September to provide information on the Plan and the particular – in particular, the sustainable diversion limit adjustment mechanism.

35 MS MORGAN: Yes.

MR BEASLEY:

40 *And representatives from other government agencies will also be in attendance. This is a meeting at the Indigenous Knowledge Centre at Deniliquin.*

MS MORGAN: Yes, that's correct. Yes.

45 THE COMMISSIONER: Starting at midnight.

MS MORGAN: 12 pm, yes.

THE COMMISSIONER: There's no such thing as 12 pm. They mean 12 noon, I assume.

MS MORGAN: 12 noon, yes.

5 MR BEASLEY: Who knows?
THE COMMISSIONER: ...it wasn't midnight, though was it?

MS MORGAN: No. It wasn't

10 MR BEASLEY: Daytime – daytime meeting?

MS MORGAN: It was the daytime, yes

15 MR BEASLEY: Right. Thanks.

MS MORGAN: I would – I definitely wouldn't go if it was midnight.

20 MR BEASLEY: But can I just ask you: this flyer, you received from the Indigenous centre; correct?

MS MORGAN: Yes, that's correct.

25 MR BEASLEY: Not from the Basin Authority.

MS MORGAN: No. Not from the Basin Authority.

MR BEASLEY: You mention Shepparton; that is a separate meeting, is it?

30 MS MORGAN: There was a meeting held in Shepparton a few days prior to this one. I didn't attend that meeting. Again, it was called an Aboriginal information session, what I understand. Yes.

35 MR BEASLEY: Okay. All right – all right.

MS MORGAN: So they had two of them. I didn't attend the one in Shepparton.

MR BEASLEY: All right. The one in – and, sorry, you got an email about that

40 Shepparton one, but after you had made an inquiry about the Deniliquin one.

MS MORGAN: Yes – yes – yes – yes.

MR BEASLEY: And the email was from the Basin Authority?

45 MS MORGAN: Yes.

MR BEASLEY: Who was it from?

MS MORGAN: I just forget her name, sorry.

5 MR BEASLEY: All right.

MS MORGAN: I'm not quite sure.

MR BEASLEY: Sorry, we have actually got it.

10 MS MORGAN: You have got a copy here. I sent you a copy.

MR BEASLEY: Tab 1, I'm told.

15 MS MORGAN: Tab 1. Good. Remind me now.

THE COMMISSIONER: As I read that email, and it is with considerable difficulty, it's actually from someone at MLDRIN.

20 MS MORGAN: Yes, Will sent it to me. Yes, yes, Will sent it to me.

MR BEASLEY: Will Mooney is the Executive Officer of MLDRIN.

MS MORGAN: Yes. Yes, that's right.

25 MR BEASLEY: He's giving evidence tomorrow, right? So - - -

MS MORGAN: Yes, October 24. And it – this meeting that he was proposing for me to go to was after these ones and it was at Aboriginal Advancement League and again, I wasn't going to go out of my way to go all of the way to the Advancement League in Melbourne.

30 MR BEASLEY: There is actually

35 MS MORGAN: But there was that email that I did receive - - -

MR BEASLEY: Is that the email over the page at tab 2 from Maxine Kerr to you.

MS MORGAN: That's it – that's it, yes – yes – yes – yes.

40 THE COMMISSIONER: That's from the MDBA.

MS MORGAN: Yes, yes.

45 MR BEASLEY:

Good afternoon Monica. Thank you for your time on the phone just now.

So you have rung?

MS MORGAN: Yes.

5 MR BEASLEY: And that was about – you rang because you had seen this flyer and I – you want some information about what was going to be discussed?

MS MORGAN: Yes. And also because at that time I had been asked about doing a welcome to country.

10

MR BEASLEY: Who had asked you that?

MS MORGAN: The Murray-Darling Basin Commission had asked me about doing a welcome to country, but it wasn't quite clear what the welcome to country was.

15

MR BEASLEY: Yes.

MS MORGAN: And when this Yarkuwa event fitted in, because I heard both of them were Murray-Darling Basin. So basically I was just asked to do a welcome in Finley, that's when I received some information at Yarkuwa.

20

MR BEASLEY: Right. Now, Finley is a separate meeting again?

MS MORGAN: Finley was an irrigators meeting.

25

MR BEASLEY: Right. Just stop there.

MS MORGAN: Yes.

30 MR BEASLEY: Stop there, we will come back to that.

MS MORGAN: Yes.

35 MR BEASLEY: The Deniliquin meeting you attended?

MS MORGAN: I did attend the Deniliquin meeting.

MR BEASLEY: And who was there from the Basin Authority?

40 MS MORGAN: No one of any high stature. Neil Ward was there.

MR BEASLEY: Who's Neil Ward?

45 MS MORGAN: Neil Ward is a non-Indigenous person, but he runs the Aboriginal Partnership Unit at Murray-Darling Basin Commission.

MR BEASLEY: He might have a different view about his stature, but anyway - - -

MS MORGAN: Well, he's not there now; he's resigned.

MR BEASLEY: All right. Okay. Sorry, he was the senior person from the Basin Authority?

5 MS MORGAN: That was it. Him and another female, Sue, and basically they gave a slide show.

MR BEASLEY: Just pausing there. Are they both from the Aboriginal – did you say Aboriginal Engagement Unit?

10 MS MORGAN: I'm just – it's the Partnership Unit.

MR BEASLEY: Partnership Unit.

15 MS MORGAN: Yes – yes – yes – yes.

MR BEASLEY: I'm sorry. My mistake. Both of them from there?

20 MS MORGAN: I think Sue was a consultant working with him.

MR BEASLEY: Right. In that unit though or - - -

MS MORGAN: Works with Neil from that unit at that time, yes, yes.

25 MR BEASLEY: Okay. With – was that the extent of the attendance by the Basin Authority at the Deniliquin meeting?

MS MORGAN: That was it. Yes, yes.

30 MR BEASLEY: Where it says in that state officials will:

Representatives from other government agencies will be in attendance.

35 Were there any other - - -

MS MORGAN: I do not recall any other people from government agencies, no.

MR BEASLEY: And how well attended was this?

40 MS MORGAN: It was myself from Yorta Yorta Nation and some people from Deniliquin.

MR BEASLEY: All right. And - - -

45 MS MORGAN: Associated with Yarkuwa.

MR BEASLEY: And what was the explanation provided to you about the sustainable diversion limit adjustment mechanism?

5 MS MORGAN: Really, we didn't get much information, it was a little bit of an overhead. He got into other stuff, so of course Neil works on AWAs and Aboriginal waterways assessments and a whole lot of other things.

MR BEASLEY: Well, just sticking with the SDL adjustment mechanism, were you – for example were any of the supply measures individually discussed - - -

10 MS MORGAN: No.

MR BEASLEY: - - - that you recall?

15 MS MORGAN: No, absolutely not, yes.

MR BEASLEY: Was a figure given as to how much water these supply measures would replace?

20 MS MORGAN: Off the top of my head, I can't recall that, no.

MR BEASLEY: All right. Was there any explanation given as to how the supply mechanism actually works?

25 MS MORGAN: No. And there was a great deal of debate, and I must say I got a bit angry at some times.

MR BEASLEY: Do I take it that – do I take from that that you were asking - - -

30 MS MORGAN: Yes.

MR BEASLEY: - - - “How does this this work?” And you weren't being given an answer that either you understood or that was – had any detail about it?

35 MS MORGAN: No, no. I was not given adequate detail of anything.

MR BEASLEY: Were you told there were 36 or 37 projects?

MS MORGAN: There was a number of projects, but I was specifically asking about Yorta Yorta country and why didn't they come and meet with us at Yorta Yorta. Really about the process and about how they have gone about engaging people.

40 THE COMMISSIONER: Deniliquin is just outside Yorta Yorta country, isn't it?

45 MS MORGAN: Yes. This is another people's country.

MR BEASLEY: From what you've told us I'm going to assume, and you will tell me if I'm wrong, that business cases for these supply measures weren't discussed with you.

5 MS MORGAN: Absolutely not.

MR BEASLEY: All right. Okay. Or - - -

MS MORGAN: It was a dumbed down kind of process, I reckon.

10 MR BEASLEY: Did the people from the MDBA discuss with you any concerns they had about environmental risks from the supply measures?

MS MORGAN: No. It appeared to me that Neil was just passing on the message, that he had - - -

15 THE COMMISSIONER: What was the message being passed on?

MR BEASLEY: Okay. Right.

20 MS MORGAN: That this was going to happen.

MR BEASLEY: Right.

25 MS MORGAN: It was basically a - - -

THE COMMISSIONER: That it was going to happen?

MS MORGAN: Yes, it just felt like, "This is it, this is what's going to happen." I – at that time, to tell you the truth, hadn't realised that - - -

30 THE COMMISSIONER: It was more information than consultation, it sounds like.

MS MORGAN: Absolutely. There was no mechanism given whatsoever for us to reply to it. There was no process in place how we could put a submission to it.

35 THE COMMISSIONER: Perhaps I used the wrong word. Not information, but notification.

40 MS MORGAN: No notification, no. This was – this was the first, and it just sounded like it a fait accompli.

MR BEASLEY: Did you come away from the meeting - - -

45 MS MORGAN: Frustrated.

MR BEASLEY: Okay. But did you come away with any understanding how the SDL adjustment mechanism was – it was said to work?

5 MS MORGAN: It didn't clarify anything to for me. If anything, it confused and actually heightened my sense of anxiety around what the hell was going on with our river.

10 THE COMMISSIONER: Did you understand, as a result of what you were told at that meeting through the slide show or what was said, that there would be a pretty considerable reduction in the amount of water to be recovered from consumptive use?

15 MS MORGAN: That's – that's that there would be a reduction from environmental flow. That's how I saw it. That they were actually forfeiting or moving away from the original agreement.

20 THE COMMISSIONER: Did anyone at the meeting ask the people who were conducting the session, how the amount to be deducted from return to the environment - - -

MS MORGAN: Was to be calculated?

THE COMMISSIONER: Calculated or reached.

25 MS MORGAN: Yes, I'm sure there was questions. I'm sure I raised that question. I don't think - - -

30 THE COMMISSIONER: Do you recall anything, do you recall the substance of what you were told, if anything, in response?

MS MORGAN: No. And I believe that, by sending Neil, they didn't send suitable representatives who could have been able to provide that information.

35 MR BEASLEY: Why do you say that?

40 MS MORGAN: I think Neil was just carrying out their duties as a – from the Aboriginal Unit, and no Aboriginal person in that unit of course, but there was no one from the actual Murray-Darling Basin around this area that actually is working on - - -

MR BEASLEY: This is no criticism of Neil. And as it turns out he's right, this did happen, but this is no criticism of Neil, but did Neil have a science background?

45 MS MORGAN: No, absolutely not. No.

MR BEASLEY: I say it's no criticism, because neither do I, but was – there was – neither of the people there from the Basin Authority as far as you could understand had a scientific understanding of - - -

5 MS MORGAN: Absolutely none. Yes, I think Neil was just sent to deliver this process and tick a box to call it informed – you know, consultation.

THE COMMISSIONER: You went to the – you went to the irrigators meeting.

10 MS MORGAN: Yes, I did.

THE COMMISSIONER: At Finley; is that right?

MS MORGAN: Yes, much more comprehensive.

15

MR BEASLEY: Just before we get there, I'm sorry, Commissioner, you mentioned an overhead. Was there any form of document given to you at the time of the meeting?

20 MS MORGAN: I don't recall having any documents, no. I've tried looking for them.

MR BEASLEY: If you were given one it is likely you might have kept it. You are pretty good at keeping records, are you?

25

MS MORGAN: Yes, I am. I think it was just about the agenda for the day.

MR BEASLEY: All right. Sorry. Now, the Commissioner was drawing your attention to the Finley meeting.

30

THE COMMISSIONER: At the irrigators meeting, as you have called it at Finley.

MS MORGAN: Yes – yes.

35 THE COMMISSIONER: I take it you didn't have to be an irrigator to attend, did you?

MS MORGAN: No. But they were all irrigators, yes.

40 THE COMMISSIONER: And do you now remember the - - -

MS MORGAN: That's where it became - - -

THE COMMISSIONER: Let me – let me finish the question, first.

45

MS MORGAN: Sorry, sorry.

THE COMMISSIONER: Do you now remember the position or positions – the expertise of anyone who attended that meeting from the MDBA?

5 MS MORGAN: Yes. Tony – what’s his name - - -

THE COMMISSIONER: I miss all the names.

MR BEASLEY: McLeod?

10 MS MORGAN: Yes. That’s him, Tony McLeod. Yes.

MR BEASLEY: Was Mr Glyde there.

MS MORGAN: Mr Glyde was there. He was – I sat right next to him. I sat next to
15 him. And - - -

MR BEASLEY: So he’s the Chief Executive.

MS MORGAN: Yes.

20 MR BEASLEY: You sat next to him? Right, okay.

MS MORGAN: Yes, yes. I sat next to him, and - - -

25 MR BEASLEY: By his invitation, or - - -

MS MORGAN: No, because I was doing the welcome to country.

MR BEASLEY: Right. Okay. All right.

30 THE COMMISSIONER: And was there anybody who appeared to be a hydrologist or environmental scientist?

MS MORGAN: There was a few people there, its – I think there was somebody. I
35 mean, I wasn’t really introduced to anyone. When you – when you actually do welcome to country.

THE COMMISSIONER:

40 MS MORGAN: I don’t remember.

THE COMMISSIONER: That’s all I – that’s all I need to know.

MS MORGAN: But I do remember that there was one of the irrigators was up the
45 front.

THE COMMISSIONER: No, no. I’m not – I didn’t ask about that.

MS MORGAN: Yes. Okay.

MR BEASLEY: Did Mr McLeod, was he – did he identify himself as having some speciality in hydrology or science of any kind? Or you can't recall.

5 MS MORGAN: I can't recall.

MR BEASLEY: Who did - - -

10 MS MORGAN: I'm wondering if it was – actually he was at this meeting.

THE COMMISSIONER: That's all right.

MR BEASLEY: All right. Don't worry about it.

15 THE COMMISSIONER: If you can't recall - - -

MS MORGAN: No, I can't recall.

20 MR BEASLEY: Who spoke from the MDBA at the meeting?

MS MORGAN: Well, he's now the CEO, is he. Phil Glyde?

MR BEASLEY: Mr Glyde is. He was the CEO even then.

25 MS MORGAN: Yes, yes.

MR BEASLEY: Was he the main talker?

30 MS MORGAN: Yes. Yes, he did - - -

MR BEASLEY: And was he the only talker from the MDBA?

MS MORGAN: No, there was a panel of people.

35 MR BEASLEY: A panel from the MDBA?

MS MORGAN: Yes.

40 MR BEASLEY: How many are you talking about when you say panel?

MS MORGAN: I'm thinking about – there was about three main speakers. Yes.

MR BEASLEY: All right. And - - -

45 MS MORGAN: I can't recall the other one.

MR BEASLEY: And was this meeting for the same purpose: to discuss the SDL adjustment mechanism?

MS MORGAN: Yes, absolutely.

5 MR BEASLEY: And did this – when you say they were all irrigators, you knew that how? Do you know them personally, or - - -

MS MORGAN: Well, the main person sitting at the front was one of the irrigators from the rice mob - - -

10 MR BEASLEY: Right.

MS MORGAN: - - - that I had already had past dealings with him before.

15 MR BEASLEY: Right.

MS MORGAN: I could tell, just by looking at the mob, they just coming off the – you know, come out – and - - -

20 MR BEASLEY: All right. They looked like farmers, did they?

MS MORGAN: Yes. They were farmers, yes, yes.

25 MR BEASLEY: And how many people approximately were at this meeting?

MS MORGAN: There was – there would have been vicinity of about 40, 40 or more.

30 MR BEASLEY: And was it the same presentation as the one at Deniliquin or was it different?

MS MORGAN: Different. It went into a lot more detail.

35 MR BEASLEY: All right.

MS MORGAN: And I spent most of my time kind of fuming a bit, because the information that was there was a lot fuller, more around what was going to be happening.

40 MR BEASLEY: Were individual supply measures mentioned there or do you not recall that?

MS MORGAN: No, I can't recall individual supply measures, no.

45 MR BEASLEY: All right. Was there a discussion about reduction of water for the environment?

MS MORGAN: Yes.

MR BEASLEY: Was there a discussion about how that would be replaced by an environmentally equivalent measure or project or building - - -

5 MS MORGAN: Works and measures, yes.

MR BEASLEY: Yes. All right.

10 MS MORGAN: Yes, yes.

MR BEASLEY: And how much detail did that meeting go into in relation to how that process worked?

15 MR BEASLEY: In comparison – either - - -

MS MORGAN: In comparison.

MR BEASLEY: As you can remember or in - - -

20 MS MORGAN: Yes – yes – yes.

MR BEASLEY: - - - comparison with the meeting at Deniliquin.

25 MS MORGAN: Look, in comparison there was a lot more discussion available. A lot more interaction. And I think it was because the – the level of knowledge around it was probably at a higher level than what we were able to have with the previous meeting.

30 MR BEASLEY: So the audience was asking more questions?

MS MORGAN: Yes. They were asking quite a few questions, yes.

MR BEASLEY: And did you ask questions?

35 MS MORGAN: I was doing the welcome to country, so I'm kind of like the token.

THE COMMISSIONER: No, just were you asking questions?

40 MS MORGAN: No.

THE COMMISSIONER: That's all we want.

MS MORGAN: I didn't ask questions, no.

45 MR BEASLEY: Did you have a conversation with anyone from the authority after the meeting?

MS MORGAN: After I gave my welcome to country, which I went very heavy on the importance of environmental water.

MR BEASLEY: Yes.

5 MS MORGAN: And what it meant to me as a traditional owner.

MR BEASLEY: Yes.

10 MS MORGAN: I think Phil congratulated me. That was about it.

MR BEASLEY: Right. But – and that was the extent of the conversation?

MS MORGAN: Probably, yes, yes. There wasn't a lot.

15 MR BEASLEY: All right. And no further discussion with anyone at the Basin Authority there? All right.

MS MORGAN: No, just hellos.

20 MR BEASLEY: All right. I don't have any further questions about that meeting, Commissioner.

THE COMMISSIONER: Could I ask about the memorandum of understanding between MLDRIN and the Murray-Darling Basin Commission.

25 MS MORGAN: Yes.

THE COMMISSIONER: You will find it at tab 9 in the bundle for your evidence. I may be missing it; it doesn't seem to have a date.

30 MS MORGAN: I think it was 2007 to memory. I wasn't - - -

THE COMMISSIONER: I'm so sorry, it does have a date.

35 MS MORGAN: Is it? Yes. Where is - - -

THE COMMISSIONER: I apologise. Page 2, 23 March 2006.

40 MS MORGAN: 2006, yes – yes – yes.

THE COMMISSIONER: Now, in – in clause 9.1.2, on page whatever.

MS MORGAN: Yes, yes, yes.

45 THE COMMISSIONER: 6. It says it is going to be reviewed after a period of three years from the date of signing.

MS MORGAN: Yes.

THE COMMISSIONER: And I take it that means may be renewed subject to agreement by both parties.

5 MS MORGAN: Yes.

THE COMMISSIONER: What happened?

10 MS MORGAN: I wasn't aware of - - -

THE COMMISSIONER: Was it reviewed and was it renewed?

MS MORGAN: I have no idea if it was reviewed or renewed.

15 THE COMMISSIONER: So far as you are concerned is this memorandum of understanding just a matter of history or does it currently apply to dealings between MLDRIN and the Murray Darling Basin Authority?

20 MS MORGAN: You would have to ask the Chairperson of MLDRIN that question. Yes.

THE COMMISSIONER: So this is not within your knowledge on the part of Yorta Yorta concerning MLDRIN?

25 MS MORGAN: I was part of the – no, I was – I was part of the drafting of this and a Yorta Yorta person has signed off, but after 2006, I didn't.

THE COMMISSIONER: You don't know.

30 MS MORGAN: I didn't have any - - -

THE COMMISSIONER: Thanks very much.

35 MR BEASLEY: I'm just asking someone to check about the Basin Authority has taken over the entity, it was the Commission.

THE COMMISSIONER: Well, there are a number of – I call them complex, but there are a number of very detailed succession provisions both in the agreement and in the Act and in the Plan.

40 MR BEASLEY: Yes.

THE COMMISSIONER: And in the regulations.

45 MR BEASLEY: Mr O'Flaherty can clear that up.

THE COMMISSIONER: Which I don't want to spend time on it now.

5 MR BEASLEY: No. Ms Morgan, I invited Mr Hooper at the end of his evidence to say anything further that he thought was relevant to the Commissioner's terms of relevance and the issues that are being explored by the Commission. So I would make the same invitation to you: is there anything you feel like you want to say to the Commissioner?

10 MS MORGAN: I think the process that happened on the Living Murray, with the Murray-Darling Basin Commission, and the intent that – of signing off on this MOU, and all the work that was done, was to try and lift up to a much higher level the experiences of First Nations in working on country. In that process I think it has been let down. I think that the Commission has not had its duty of care to - - -

15 MR BEASLEY: The Commission or Authority?

MS MORGAN: The Authority, sorry. Its duty of care to Aboriginal peoples. It hasn't kept to the intent in relation to the rights that First Nations or Aboriginal peoples have in relation under the convention of the biodiversity. They are quite 20 eager to tick the boxes but they are not eager to actually sit down and discuss and go through the planning stages at all with Indigenous peoples. I think that we have been set back under this process by maybe about 20 years of hard work that our people have been working towards to try and get some good processes in place that not just looked at how we dialogue with each other, but actually had some substantive rights 25 coming through. But that is all kind of gone with this phase of the Water Act.

MR BEASLEY: All right. Thank you. I don't have anything further, Commissioner.

30 THE COMMISSIONER: No, thank you very much.

MR BEASLEY: Thank you very much.

35 THE COMMISSIONER: I'm much obliged. Thanks for your help.

MS MORGAN: Thank you.

40 <THE WITNESS WITHDREW [2.43 pm]

MR BEASLEY: Mr Whan has been waiting all day. So we might move on to him.

45 THE COMMISSIONER: Yes, please.

<STEPHEN JAMES ROBERT WHAN, AFFIRMED [2.43 pm]

<EXAMINATION-IN-CHIEF BY MR BEASLEY

MR WHAN: Known as Steve.
5

THE COMMISSIONER: Thanks, Mr Whan. If you don't mind, I will preserve the formality.

MR BEASLEY: Mr Whan, you're the Chief Executive Officer of the National Irrigators Council.
10

MR WHAN: Correct.

MR BEASLEY: And you've held that position since January 2017?
15

MR WHAN: Yes.

MR BEASLEY: Before that you were the Manager of Australian Chamber Tourism.
20

MR WHAN: Yes.

MR BEASLEY: What did that involve?

MR WHAN: Essentially working at the Australian Chamber of Commerce as – essentially, similar to what I do at the moment. Peak body, but in the tourism sector.
25

MR BEASLEY: And for 12 years you were a member of the New South Wales Parliament?
30

MR WHAN: Correct.

MR BEASLEY: And during the course of those 12 years you had a number of portfolios, including being – please tell me whether these were at the same time or separate times – Minister for Primary Industry, Minister for Emergency Services, and Minister for Rural Affairs?
35

MR WHAN: Yes, I was Minister for Rural Affairs and Emergency Services and Small Business from 2009, January 2009. I picked up primary industries in – at the end of 2009 and went through to the election in 2011. Then as a shadow - - -
40

THE COMMISSIONER: You then took a long holiday, I assume.

MR WHAN: I took a bit of a break due to the voters casting their judgment. Then I went into the upper house for four years – or nearly four years, and I was Shadow Minister for Primary Industries and Water, and a range of other things.
45

MR BEASLEY: During the time you were Minister for Primary Industry or Minister for Rural Affairs, did – sorry that was 2009 to 2011, that period.

MR WHAN: Yes.

5

MR BEASLEY: Did those portfolios have any involvement in the Basin Plan - - -

MR WHAN: Yes.

10 MR BEASLEY: - - - or water resource planning?

MR WHAN: I wasn't Water Minister - - -

MR BEASLEY: No.

15

MR WHAN: - - - but I was involved in a number of discussions about the Basin Plan and its creation and at New South Wales level, including briefings from Commonwealth officials and also as part of the Prime Minister's ministerial council.

20 MR BEASLEY: And I suppose, as opposition spokesman for rural water, there must have been some involvement in the Basin Plan?

MR WHAN: I was certainly watching, although as is the case in opposition, not privy to a lot of the process.

25

MR BEASLEY: Yes. All right. Can you explain the role of the National Irrigators' Council?

30 MR WHAN: The National Irrigators' Council is a peak body for the irrigation – or irrigators. So we represent the people who use water to produce crops. Our members are – we have 32 members. They are corporations not individuals. So that includes your – the not-for-profits. Most of the members are not-for-profit.

THE COMMISSIONER: By which you mean - - -

35

MR WHAN: Sorry?

THE COMMISSIONER: - - - co-ops, in effect?

40 MR WHAN: The cooperatives or similar structures.

THE COMMISSIONER: That is, they hope to not make a loss, though.

45 MR WHAN: They certainly – I'm not sure if the right word. Anyway, they're not - - -

MR BEASLEY: I understand what you mean.

MR WHAN: They are – so the irrigation corporation, for instance, Murrumbidgee Irrigation, Coli, various others. We also include peak bodies, such as Cotton Australia, Rice Growers' Association and others – Almonds Board.

5 THE COMMISSIONER: It is across the whole of the continent?

MR WHAN: Yes.

10 THE COMMISSIONER: Including Tasmania? They don't need a lot of irrigation there, no.

MR WHAN: Theoretically, but, no, we don't have any members in Tasmania.

15 THE COMMISSIONER: Right.

MR WHAN: At the moment, most of our members are focused in the Murray-Darling Basin. We also include some of the community representative bodies, groups like Southern Riverina Irrigators and others.

20 THE COMMISSIONER: Do you extend to the north-west - - -

MR WHAN: We have - - -

25 THE COMMISSIONER: - - - of the country.

MR WHAN: I would like to. No, at the moment. We have – our only members outside of the Murray-Darling Basin at the moment are in Queensland, and they're coastal river irrigators and primarily their concerns and reason they're with us is electricity prices rather than water policy.

30 THE COMMISSIONER: Thanks.

MR BEASLEY: And your role as CEO involves what in general terms?

35 MR WHAN: We are a very small organisation. We have myself, plus one part-time person. So we spend a lot of time doing submissions, media, talking to members, talking to – you know, essentially my job as a peak federal lobby group is to be influencing decision-makers at a federal level.

40 MR BEASLEY: All right. Speaking of submissions, the council has supplied a submission to the Royal Commission dated April 2018. Correct?

MR WHAN: Correct.

45 MR BEASLEY: Is that – are you the author of that submission or a – did someone else contribute to it?

- MR WHAN: I am the author of the submission with contributions from the – from Joy Thomas who works in our office as well.
- MR BEASLEY: Right. Okay. And what's her position?
- 5 MR WHAN: She's our research and policy.
- MR BEASLEY: Right. Okay.
- 10 THE COMMISSIONER: And should I take it - - -
- MR WHAN: But I sign off on the submission.
- MR BEASLEY: Yes. Understood.
- 15 THE COMMISSIONER: Of course. Should I take it, being a peak body that what you author is intended genuinely to represent the consensus position of your members?
- 20 MR WHAN: Yes, that's correct. And our board and members have the opportunity to comment on all our submissions before they go in.
- THE COMMISSIONER: You have this in mind – and don't misunderstand the way I'm putting it – you have just described yours as a “small organisation”. Well, perhaps more accurately it's a small secretariat for a pretty large organisation if you look at the reach of all your members, isn't it?
- 25 MR WHAN: It's certainly a large organisation geographically, I think, in terms of economic impact on Australia and production, certainly our members represent a very big slab of the production of food and fibre in the Murray-Darling Basin.
- 30 THE COMMISSIONER: If you leave the and other north-western irrigators out of the picture, you are the peak body for nearly all the irrigators, aren't you?
- 35 MR WHAN: We are the only peak body for Australian irrigators, in that sense. So – yes. We have a – there is an Irrigation Australia Limited who represents the people who build irrigation systems and those sort of things. So we are it when it comes to national representation of irrigation.
- 40 THE COMMISSIONER: Thank you.
- MR BEASLEY: Before I turn to your submission, the submission has two appendixes. One is the NIC submission to the Productivity Commission and the other is the submission to the Senate inquiry. Senate Rural and Regional Affairs Committee Inquiry on the Murray-Darling Basin, September 2017. So I will tender the National Irrigators' Council submission to the Royal Commission, April 2018 as the one tender, but including the two appendixes.
- 45

THE COMMISSIONER: Yes.

MR BEASLEY: So they're behind tabs 2 and 3 in the bundle.

5 THE COMMISSIONER: Yes. And what about the material between tabs – after tabs 4 and 5? They are submissions to the House of Reps Standing Committee of March 2017 and to the Productivity Commission of April 2017.

10 MR BEASLEY: I'm happy to tender them if Mr Whan wants me to. But they weren't actually attached to - - -

THE COMMISSIONER: Well, can I have – I would like them to be tendered, so - - -

15 MR BEASLEY: Right. Well, you can have a say as well, I suppose.

THE COMMISSIONER: Yes.

20 MR WHAN: I have no objection to any public material of ours being - - -

THE COMMISSIONER: Let me make it clear, there's no trap there. I just want all of – because I was very interested to read all of it and so I would like it all to be on the record here.

25 MR BEASLEY: In that case, permission is granted for the tender of all of the documents behind tabs 1 through to 5 - - -

THE COMMISSIONER: I'm very grateful.

30 MR BEASLEY: - - - in the bundle for Mr Whan.

THE COMMISSIONER: Thank you.

35 MR BEASLEY: Can I ask you this, Mr Whan, and I know you're not – and I think you've said this – not a lawyer and so I don't intend to cross-examine you about statutory construction. But you are in a unique position, I think, of having been a minister in a government and hence would have been used to being given briefing notes and recommendations from department heads or other people in the bureaucracy saying, "We recommend you make this decision." And in relation to
40 making those decisions you would have been keen that they were lawful decisions?

MR WHAN: Of course, yes. Sorry.

45 THE COMMISSIONER: I mean, it does go without saying, but we need to put it on the transcript.

MR WHAN: Yes.

THE COMMISSIONER: Yes.

MR BEASLEY: There is a level of obviousness on that you didn't want to be acting on provisos yes. But one of the immediate things that attracts anyone's attention to in your submission is the – and this isn't a criticism, but the repetitious use of the phrase “triple bottom line”. Which you say, I think, at page 10 of the submission is that:

It's important to remember that the triple bottom line is included in the objects and purposes of the Basin Plan.

Can I ask you first, what – I know this is a phrase that that's used by the Basin Authority but what does “triple bottom line” mean to you?

MR WHAN: To me, I think I have probably used it as a phrase in some of our submissions as well, which essentially says that we see the objective of the Basin Plan as being to ensure the environmental health of the river, the health of communities and a continuing capacity to produce food and fibre for Australia.

MR BEASLEY: And does that – is there an aspect of compromise between those three things that you've just mentioned?

MR WHAN: Inevitably, yes.

MR BEASLEY: Yes. And is your understanding in relation to the way you say the Water Act should be interpreted – is that based on the position the Basin Authority has taken or is it based on some form of separate advice the Irrigators Council has received?

MR WHAN: We haven't - - -

MR BEASLEY: Or your own interpretation.

MR WHAN: It is my interpretation and I think many others who have observed the implementation of the Basin Plan over many years and it goes back to the intent of the Water Act and the intent of the Basin Plan which were made very clear at the time and Prime Minister Howard – when he announced that they were going to have – there was going to be a Water Act and Basin Plan said amongst other things that our goal is to do more with less – to increase agricultural production with less water use.

He made it clear that it was about balance, so did Tony Burke when he announced the Plan and so did the then-Minister for Water in introducing, in the second reading speech in 2007, the current Prime Minister who also acknowledged the importance of the multiple objectives and, indeed, I think just from memory in that speech used those famous words of “having regard to” at various times.

MR BEASLEY: Right.

MR WHAN: So he – and - - -

5 MR BEASLEY: But not class A, B and C.

MR WHAN: So the – “having regard to” – I’m not sure who dreamed it up but I have noted it has been the topic of some conversation. I certainly – and as you correctly point out, I’m not a lawyer, but in my reading of the Act the use of “and”
10 through out it to me makes multiple objectives all objectives of the Act, not subservient to each other and the structure of the Act obviously is designed around the powers that the Commonwealth felt it had to put this in place with the situation as existed then which, as I understand it, was Victoria didn’t want to sign over its powers.

15 MR BEASLEY: All right. Without – go on.

MR WHAN: So I personally don’t have any doubt that the objectives that are in the Basin Plan and the – the triple bottom line objective, as I and many others call it, is a
20 legitimate objective of the Act. And I think the critical thing about that, is no matter how the Act interpreted later on by people, it was the clear intent of the people who introduced it and the negotiations which took place with a view to putting a Basin Plan in place.

25 THE COMMISSIONER: The three elements that lead us to call it “triple” are environmental, social, and economic. Is that right? Are they the words that you would use?

MR WHAN: Correct. Yes.

30 THE COMMISSIONER: Is social – I think sometimes they use the word “community”.

MR WHAN: Yes, look, I think – for – when I – the definition I gave a few minutes ago is probably, I think, makes it a little from – a little clearer about where I would see it – as the objectives as being. But it’s certainly – “triple bottom line” being a very commonly used phrase in so many things.

40 THE COMMISSIONER: I don’t find it a very informative - - -

MR WHAN: It is not a very enlightening - - -

THE COMMISSIONER: - - - figure of speech.

45 MR WHAN: - - - figure of speech at times, that’s true. Which is why I tend – I just have say in my media comment and things talk about it being about environmental health, community health and capacity to produce food and fibre.

5 THE COMMISSIONER: Well, now, it occurs to me more and more as I have thought about this, that if we just take environmental, social and economic, one thing is clear, that they aren't separate areas of discourse from each other. How you could ignore the environment with society and vice versa, I've got no idea. And as for ignoring economics with society, or society with economics, that just bewilders me.

10 MR WHAN: Absolutely. I entirely agree and it is – it is – you know, there is massive crossovers in all of them and, from the point of view of the National Irrigators' Council, the health of the rivers is one of our key objectives.

THE COMMISSIONER: Well, now, the statute poses to those who were bound by it, the simple-sounding admonition to optimise environmental, social and economic outcomes.

15 MR WHAN: Yes.

THE COMMISSIONER: And I have called it simple-sounding but I think that's

20 MR WHAN: It's an incredibly complex process.

THE COMMISSIONER: --- a piece of mental acrobatics, isn't it?

25 MR WHAN: I think what you are touching on there is exactly the process. I've heard some of the previous discussion about the Act and in 2007 when the Act was put in place it would have seemed to a lot of people that actually getting an agreement between the states for a Basin Plan was a ---

30 THE COMMISSIONER: Major achievement.

MR WHAN: --- going to be a major achievement – and is a major achievement, absolutely.

35 THE COMMISSIONER: No, it is. Okay. Sure, you are pushing at an open door. This is an historical achievement.

40 MR WHAN: Yes. And so I suspect that some of the – the – when it was framed I think there was probably a bit of a fair bit of room given to move in it. In the end the plan as it – as it emerged and I'm not – I guess I'm speaking from my political experience here and not as CEO of the NIC – was a document which involved a lot of negotiation, a lot of compromise, and it was a negotiated agreement and I guess that's one of the core points that we consistently make. There is aspects of the Basin Plan which irrigators don't like, but we accept that it is a Plan as a whole and we can't pick and chooses the parts that we do like.

45

THE COMMISSIONER: Would you mind – and take as long as you like on this, I really want to try to understand this – what are those aspects that if they had their druthers, as you see it, irrigators would prefer not to exist?

5 MR WHAN: Look, I have – you would have seen when the Plan was first proposed – when the Guide to the Plan was proposed, there was a lot of community angst about having a Plan at all. So I think that the irrigation community has moved along quite a lot since the Plan started and we are now at a situation where we see the certainty of the Basin Plan as being something that's very important. However, you will still
10 certainly find people who don't like the fact that there is a 450 gigalitres of efficiency
- - -

THE COMMISSIONER: Upwater.

15 MR WHAN: Of so called upwater.

THE COMMISSIONER: Yes.

MR WHAN: I wasn't sure whether to start with the – start with the Basin Plan
20 language or not.

THE COMMISSIONER: No, no. I think we understand the upwater.

MR WHAN: You've well and truly delved into it by now, so - - -
25

THE COMMISSIONER: Tell me, with the upwater – and I am picking up some language of yours that I found - - -

MR WHAN: Can I say – before you say that though, of course, having said that we
30 – that irrigators wouldn't have liked it, as I said before, we accept that the Plan is the Plan.

THE COMMISSIONER: Yes. Well, it's the law.

35 MR WHAN: And we need to - - -

THE COMMISSIONER: It's the law. But my terms of reference include not only the question of the – of the Plan being fulfilled, but also whether the Plan itself would fulfil the requirements of the Act. Because this is an Act that was legislated
40 after a referral of power by, among other places, South Australia. So – so it's the matching of the Act and the Plan, as well as both of them to the desired outcomes. A part of my terms of reference that I've got to address. And so it is obviously important to bear in mind what a group, as important as the group you represent, think. It's central importance to me.

45 In relation to the upwater – I'm sorry, I can't lay my hands on it at the moment, but somewhere you've used the language that it's critical that there be observed a

guarantee that it will happen only if it can be shown beforehand that measures are in hand to produce neutral or enhanced socio-economic conditions as a result of the 450 gicalitres upwater. Have I got that correct, have I?

5 MR WHAN: Largely correct, yes.

THE COMMISSIONER: I think your own language puts it emphatically as a guarantee: it's critical that that guarantee be observed.

10 MR WHAN: Yes, that's correct. And - - -

THE COMMISSIONER: Right. Now, that – I'm sorry to cut you off, please be – speak as a length as you like in answer to the next question. It would follow then, wouldn't it, that you would want to see the decision-makers who determine whether
15 that 450 gicalitres, or perhaps an amount less than that, is to be delivered as upwater – you would want to see that they satisfied themselves that there would be the neutral or enhanced socio-economic outcomes?

MR WHAN: Yes.
20

THE COMMISSIONER: That's what you mean by the guarantee; is that right?

MR WHAN: Satisfy themselves and communities to an extent. I guess one of the themes of the way that I – can I go back a step and just highlight the flaw, as we see
25 it at the moment, in the current – in the original – sorry, because it has moved on since the last ministerial council meeting and since last year, there was a single property test essentially for socio-economic neutrality. So essentially that said if a farmer is willing to accept some funding for an efficiency project then that's deemed as satisfying socio-economic neutrality. Our view - - -

30 THE COMMISSIONER: That's for that farmer.

MR WHAN: Well, no, that was it. So our view was that the guarantee that was made by then Prime Minister Gillard and Tony Burke when they announced the 450
35 gicalitres of upwater was very clearly that there would be in the terms you said, neutral or better.

MR BEASLEY: Sorry. To assist, I think bottom of page 9 and top of page 10 of the – sorry, bottom of page 8 and top of page 9 of the submission is the part of the
40 submission I think you were trying to get to, Commissioner. And I think that's what the witness is touching on now.

THE COMMISSIONER: Yes. That's one of – that's one of the places I've read it, yes.
45

MR WHAN: Yes. So I guess we have been concerned that – that the test as it stood, and if the program was implemented purely through an on-farm program, that

that would produce negative impacts for communities in those areas. That was on the basis of strong feedback from our communities. That's not to say that efficiency projects on farm aren't – haven't been an important part of the plan, they have, and they've produced some benefits. But for this component of it we were certainly very
5 keen to see the off-farm opportunities for efficiency, and they were outlined in the Ernst & Young report, pursued first. And we were keen to see governments spend a lot more time and effort in actually working through with communities what their issues were with particular programs.

10 So our message really on the 450 was, "Progress on it, but be willing to put in the resources and the work to talk to communities to work through issues and to design programs which suit particular communities and particular areas. Make sure that as you are implementing those you are testing them against a broader socio economic test definition." Which New South Wales and Victoria Governments are currently
15 working on. So they are working on defining the socio-economic neutrality test to take into account flow-on impacts of programs throughout communities.

And while there is obviously still some resistance to the 450 in – from some irrigators and from some communities, we would essentially be saying to
20 government we are willing to work with government, we are willing to work with communities, to try and work out ways of achieving that that don't have a negative impact. And if that takes some time to do that, and takes some resources, then that's what governments should be willing to do.

25 THE COMMISSIONER: Now, you've expressed in the passage that Mr Beasley drew to your attention, a concern that the Basin Plan definition doesn't meet the commitment which is no negative socio-economic impacts. It's not – this is not a test, but can you help me what are the parts of the plan which you are drawing attention particularly there?

30 MR WHAN: Okay. There is – and I cannot remember the number and – but there is a section of the plan which has three points in it and point number 2 is the section – is a point which says that the – if a – if an offer is accepted, essentially, then that deem is deemed as accepting – as meeting the test. And then there is a point 3 after
35 that, which essentially says "or any other definition or method as the states may agree".

THE COMMISSIONER: I think and I will – Counsel Assisting will correct me if I
40 am wrong, I think you are referring to – I'm sorry to sound technical, but I need to get it on the record, in the Plan, 717(2)(b). Is that:

The efficiency to the proposed adjustments achieve neutral or improved socio-economic outcomes, compared with the outcomes under benchmark conditions of development, as evidenced by:

45 *(1) the participation of consumptive water users in projects that recover waters through works to improve irrigation, water use efficiency on their farms; or*

(1)(a) the participation of consumptive water users in projects that recover water through works to improve water use efficiency off farm; or

5 (2) – so in the way of Parliament we have got three items, the third of which is number (2):

Alternative arrangements proposed by a Basin state assessed by that state as achieving water recovery with neutral or improved socio-economic outcomes.

10 Is that the - - -

MR WHAN: Yes, that sounds right.

15 THE COMMISSIONER: I'm much obliged. Now, take your time. Could you just talk me through what – anything you want to elaborate, explain to me about your concerns in relation to that approach.

20 MR WHAN: Yes. Our concern about the single property test, as I put it in shorthand, which is the first of those, it's deemed as being accepted if somebody – if somebody accepts the money. Our concern about that is that if you do, for instance a coffee scheme, which is the trial scheme being undertaken in South Australia at the moment where landholders are able to put forward efficiency projects. Now, our concern about that is that it doesn't then take into account whether there is flow-on impacts for the rest of the community.

25 So for instance if you're in one of the areas where they have lost quite a lot of water already, there's a fair bit of sensitivity about the long term viability of irrigation schemes, so that Swiss cheese effect that might be out there or, for instance, less consumers – people using less water and therefore paying less fees to the irrigation corporation which is running it. Therefore - - -

30 THE COMMISSIONER: The infrastructure may not have shrunk accordingly.

35 MR WHAN: Exactly. Infrastructure costs may not have shrunk, so there may be an issue which affects the long term viability, or leaves other uses with a bigger bill to overcome it.

THE COMMISSIONER: This is kind of a critical mass problem in reverse, is it?

40 MR WHAN: Yes. Well, it's a little bit like the same issue as the electricity network, with people going off grid and others ending up having to pay more for the maintenance of the grid.

45 THE COMMISSIONER: Without, I hope, the gold plating. But yes.

MR WHAN: Well, I don't think our irrigation corporations have had the ability to do the gold plating.

THE COMMISSIONER: No. Not yet.

MR WHAN: So that that's one of the issues. The other issues are around how you – how you design those schemes. So if for instance a scheme enables people to get efficiency money and then become dry land farmers, for example, you might move from a cropping situation or – which employed a number of people, to a situation where you then just had the family running a property. So you may have an employment impact from that. So a number of those – so if you design an efficiency scheme so that it is – it is taking into account firstly those issues of viability and community impacts. Secondly, perhaps ensuring that production is increased if possible to actually have a flow-on positive impact into a community, as many of the efficiency schemes did in the lead-up to this and you have heard - - -

THE COMMISSIONER: This is pre-Basin Plan.

MR WHAN: No. In the Basin Plan a lot of the water recovery, or some of the water recovery – about 14 per cent of the water recovery has been from on farm efficiency.

THE COMMISSIONER: Yes.

MR WHAN: Those efficiency schemes have returned substantial quantities of water to the environment, but they also allowed people to make their production more efficient and therefore often expand production. And that's helped to generate economic activity. And you can see in irrigation areas where that's been done well, and when you look at the Murray-Darling Basin Authority's social – economic impact work they have done in community profiles, you can see quite different impacts in communities depending on whether or not the water was simply purchased and taken out or whether it was – whether it was gained through efficiency programs.

THE COMMISSIONER: What's an example? So, what, has the Griffith region done well?

MR WHAN: The – certainly, you would say the Murrumbidgee irrigation area has done reasonably well. The Coleambally system has done well. Parts of the Murray and Goulburn/Murray saw water purchased through simply buy-back, and - - -

THE COMMISSIONER: And this is – some of the purchases are before the Plan itself.

MR WHAN: Yes. Well, in actual fact a lot of it was before the Plan. There was a lot of water being purchased from the time the announcement of the Plan was going to be made. So we saw many purchases undertaken prior to the actual Plan coming in, which is why, as – in introducing the Plan the then-Minister Tony Burke made a point of saying that because the – most of the rest of the water was going to be obtained through efficiencies, that they didn't need to be a lot of – didn't need to be a

lot of structural adjustment funding included in the Plan. So he was saying that the efficiency measures meant that you could continue to produce, therefore there was less negative impact on communities.

5 So if you go to an area, I have got a figure here, Wakool Shire, where most of the water was removed through buy-back and they, according to the recent – I have got this here somewhere. Wakool and that area around there is one of those areas where you certainly hear a lot of communicated angst about any possibility of future water purchase and you also hear about efficiency funding through the – as part of the 450
10 now. And that’s because they – according to the Murray-Darling Basin Authority’s recent assessment – lost 38 per cent of their productive water as a part of the Plan implementation. And that – that’s really the high end of the figure.

15 THE COMMISSIONER: So that’s pretty much up the top, isn’t it?

MR WHAN: That would be – that’s the top that I’ve seen, certainly. And so you’ve got quite different impacts on communities depending on how the water has been recovered, often, and that I think highlights the fact that going forward, and
20 implementing the rest of the Plan, we need to work with communities and design programs at community level to make sure that we are actually talking to people and engaging them and doing things which ensure that there’s no negative impacts.

25 THE COMMISSIONER: Now, the buy-back of course was lawfully undertaken without a prerequisite of demonstrating no negative socio-economic impact.

MR WHAN: Yes.

THE COMMISSIONER: That’s correct, isn’t it?

30 MR WHAN: Yes, that’s right.

THE COMMISSIONER: Could I raise this with you – we use the word “efficiency” in a number of different ways. Just as productivity can be looked at in a number of different ways, but with all productive enterprise that involves cost, and that’s all
35 productive enterprise that I know of. Labour is usually a major part of the balance sheet. Do you agree with that?

MR WHAN: Yes – yes.

40 THE COMMISSIONER: And traditionally, and I mean for a longer time than Australia has been settled by Europeans, cutting your labour costs has been a way of becoming more efficient or more productive.

45 MR WHAN: Yes.

THE COMMISSIONER: And we live in a society, fortunately, where actually lowering wages or salaries is not popular.

MR WHAN: And not good practice either, can I say, as a former Labor politician.

THE COMMISSIONER: Well, you get no pushback from me there. By which it follows that productivity is increased, and in one sense efficiency is increased, by
5 reducing the number of your employees, notwithstanding those who survive on your payroll don't have their wages reduced. That's just the way things happen, isn't it?

MR WHAN: Look, I think - - -

10 THE COMMISSIONER: I'm not – I'm certainly not inviting you to say or try to get you to say that's a good thing.

MR WHAN: No, no. But we have certainly seen in agriculture, and agriculture has certainly had – and we have seen the impacts on regional towns. Agriculture has
15 transformed massively over the – you know - - -

THE COMMISSIONER: Well, there's what used to be called mechanising, historically, moving from oxen and horses to tractors is obvious; is it not?

20 MR WHAN: Yes.

THE COMMISSIONER: There is more than that. There is chemistry and seed genetics and there's husbandry and tilling techniques that actually require fewer people to be involved in producing the same calories or kilos of food or fibre.
25

MR WHAN: Yes. And I think one of the important things about the work that the MDBA did recently on community profiles was that they have tried to separate out the - - -

30 THE COMMISSIONER: They have. I have read that.

MR WHAN: The transition agricultural workforce changes from impacts to Basin Plan.

35 THE COMMISSIONER: Quite so. Quite so. My point is, perhaps – well, you have significantly pointed to that very question: in a sense when the MDBA's socio-economic researchers tried to distinguish between the socio-economic impact, particularly of reduction of employment caused by the Plan, as opposed to what I'm going to call the general changes of technology, science, and business practice. They
40 are distinguishing, aren't they, between the supposedly adverse impact of the Plan and the supposedly adverse impact of what I'm going to call progress. But the impact is, in both cases, reduction of employment.

45 MR WHAN: Yes. And we could have an – I'm sure we could have an interesting philosophical discussion on the impact of technological change, as well. But yes, they did and I think they have done a reasonable job at that.

THE COMMISSIONER: So that seems odd, doesn't it?

MR BEASLEY: We do – but - - -

5 THE COMMISSIONER: The Plan says, "Please be as efficient as you can in producing food and fibre for consumption here and preferably before export to China. And visit as many adverse impacts as you can to become efficient and productive, but when it comes to the Plan there's not to be the adverse economic impact of, again, reduction in employment." That seems odd to me.

10 MR WHAN: Well, I think there very clearly has been an adverse economic impact. And - - -

15 THE COMMISSIONER: You may – again, you're pushing an open door. You may assume that I regard it as socially very damaging - - -

MR WHAN: So there's – so I - - -

20 THE COMMISSIONER: - - - for individuals to lose their jobs.

MR WHAN: Yes.

25 THE COMMISSIONER: It doesn't mean that it's socially damaging for society to render its productive processes more efficient.

MR WHAN: Well, I think you need to – I think can look at a few aspects of this. Now, agricultural - - -

30 THE COMMISSIONER: Please. And that's why I'm inviting you to.

MR WHAN: Agricultural productivity certainly will see jobs – which reduce jobs in some country towns and things. If you are getting more productivity you may then increase your jobs in processing, your economic benefit for the country, and generating jobs in other areas.

35 THE COMMISSIONER: To put it very crudely, you may make the farmer employer richer at the expense of the former employees.

40 MR WHAN: That may be the case, in some areas. I think when you look at irrigated agriculture you are looking at many crops which are actually employing people still, and if you are looking at a lot of other areas where – are family businesses, and most of our irrigators are still family businesses, some of them are quite large. But if you look for instance at irrigated agriculture producers, 80 per cent, more than 80 per cent of Australia's vegetables, that's still an area which is
45 becoming more efficient, better products, exporting, but employing a lot of people.

THE COMMISSIONER: Quite. By the way, when you and I were talking about employment, I take it you are happy for me to understand that as including contract labour as well?

5 MR WHAN: Yes, yes. I won't get into the - - -

THE COMMISSIONER: Yes.

10 MR WHAN: So I – when we look at irrigation efficiency, the irrigation sector also wants to see efficiency of production. So in it – in that we would generally though, when we are talking about that, talk about putting on the precise amount of water that you need to get that plant to be as productive as possible, and no – and no more.

15 THE COMMISSIONER: Doesn't it also mean not employing more people than you need to?

MR WHAN: Well, that's the businesses. From the businesses' point of view no doubt they are also looking at how they can become more efficient and productive. From the point of view of irrigation and irrigation efficiency we are generally
20 looking at the amount of water you are using to produce a particular crop. Delivering that efficiently, getting the best technology there to ensure that, for instance, if you are in one of the those modern flood irrigation areas, one of the gravity areas, which is using the larger gates, so instead of a smaller outlet they use a larger outlet, very well-metered. They can deliver the water quicker to the area - - -

25 THE COMMISSIONER: Sometimes by remote control.

MR WHAN: By remote control. So farmers don't have to get up in the middle of the night as much anymore and that's a good thing for them.

30 THE COMMISSIONER: But it may also – that may lead to a reduction in employment.

MR WHAN: Yes, it may do. And - - -

35 THE COMMISSIONER: Is that a bad thing in terms of adverse socio-economic outcome?

MR WHAN: It certainly has – certainly reduction in employment, overall, has
40 negative socio-economic outcomes. If it is – I have to say for many country towns the issue – obviously it tends to shift sometimes, where it is, but yes, there are going to be changes. And no one denies in this process there are changes. But it's very clear that the Basin Plan itself led to reductions in productive – has led to reductions in employment and population in some communities. And as with anything like that,
45 and I've seen many debates over forest policy and many other policies, fishing industry and so on, we are talking about sustainability of resources, you always need to take into account the negative impacts of that.

That doesn't say you won't have any ever, but it does say that you will do your best to avoid them. Now, as we have been through the Basin Plan, we have seen already negative impacts and communities like Durambandi and St George in Queensland where if you look at it, the impact on those communities about 18 to 20 times the size of the impact on Adelaide of the closure of Holden. Those are things that you should take into account. And ameliorate. Now, with the 450 agreement and commitments that were made, it was made very clear that there would have to be neutral or no – neutral or better than. And - - -

10 THE COMMISSIONER: I agree with you historically, and I think as a matter of law that's very plain. That's why I'm so interested in what you want to say.

MR WHAN: But it's certainly accepted in achieving the Basin Plan there was negative impacts and that that was unavoidable.

15 THE COMMISSIONER: What I suppose I'm so interested in, it's negative impacts of precisely the same kind that improved productivity will bring about.

MR WHAN: To an extent, except you would hope in Australia in agriculture, anyway, you would certainly hope that our continuing ability to produce, be more productive, might generate jobs as well. We have an almond industry now which is booming in South Australia, and southern New South Wales and parts of Victoria which has now got processing factories in various centres which didn't have those sort of facilities before. Now, they may have shifted from other areas, but, you know, no one – I think the point you are saying, there is no – no one is going to sit here and say employment and its profile in Australia will never change. It will. And, yes, businesses will drive for their lowest cost possible to lift their product. But when we look at the Basin Plan we need to be very conscious of the impacts that that has as well.

30 THE COMMISSIONER: Yes. I presently must say I've got a real concern that submissions I've read, not only from you on behalf of irrigators, but things I've heard from individual irrigators, and from specific leaders of irrigation communities, are very clear in their identification of reduced employment as an outcome of reduction in irrigation water as a result of the Plan. And not very clear, or perhaps I really mean to me not very persuasive distinguishing between that reduction of employment and the reduction of employment brought about by otherwise praiseworthy improvements in productivity. In particular, for example, you know I'm sure better than anyone there have been fairly recent technological advances, almost of a step change kind in the harvesting of cotton which has had a very large effect on the numbers of people required usually by way of contracting, to harvest. That's right, isn't it?

MR WHAN: Well, I think right across agriculture you have seen technological change. And I guess you could probably also say that if Australia wasn't an early adopter of those changes we wouldn't be as competitive internationally.

5 THE COMMISSIONER: Please don't get me wrong, I'm not a luddite. I would have thought that both nationally, and at a very micro level, that is, for the individual enterprise, that is unequivocally a good thing, so long as you are mature enough to accept that those good things will always have implications that are damaging to other people.

MR WHAN: Sure. And probably the implications of those – I mean, they are – they do evolve over some time; they are not sudden shocks.

10 THE COMMISSIONER: It would be a sudden shock when somebody buys a harvester that means that there won't be a contract for the person who has been harvesting for the last 15 years.

15 MR WHAN: Well, a lot of those people are contractors, so they are probably actually driving – they are probably actually providing that. But look, there's a – I accept that there – I don't necessarily see that there is a contradiction. I don't see there is a contradiction in being concerned about the employment impacts of the Basin Plan, but still working to be the most efficient agricultural producers that we can be.

20 THE COMMISSIONER: And with respect, I see the logic that you can take so much reduction in employment but it doesn't mean you won't resist yet more. I understand that.

25 MR WHAN: Look, and we have made it very clear, sort of National Irrigators Council certainly worked, you know, we have worked – kept in close consultation with the MDBA as it has done its social economic assessments and we certainly appreciate the effort they have gone to separate those elements so that you can be clear about it. And we don't – you know, I've been a – in my previous career, was a
30 representative of regional New South Wales. I have certainly seen the impacts of shrinking populations on communities in regional New South Wales. It's very, very difficult for those communities. There is social trends that are going on in regional centres which are quite different to those that we see, you know, for instance, the very small communities seeing their populations drift into the larger centres is a very
35 common thing. So there is change that is ongoing but there is also communities which have viable irrigated production, which are producing jobs and income and wealth for those communities. And we want to make sure that they are not – you know, they are not negatively impacted by the next phase of this process.

40 THE COMMISSIONER: Well, now you've explained, if I may say so, aspects of your concern about 717(2)(b)(1) in particular. Can you look at it from a different point of view and overall for me? In your view, on behalf of the irrigators, could the 450 gigalitres upwater ever happen if it could happen only without adverse socio-economic outcomes? Could that ever be imagined?

45 MR WHAN: Yes.

THE COMMISSIONER: Producing the productive availability of water by 450 giga litres with no adverse outcome socio-economically?

MR WHAN: Broadly, yes.

5

THE COMMISSIONER: How would that happen?

MR WHAN: By first of all working through the off-farm options that are available. So that includes – Ernst & Young did some fairly simple work. It had a lot – it has got a lot more depth that's needed to it.

10

THE COMMISSIONER: You've recommend it needs to be elaborated.

MR WHAN: Absolutely. And I see that as being the job of the Basin State Governments and Federal Government to actually put in the resources to do that. But they need to engage communities to do that as well. So they have recommended a number of off-farm areas which could be looked at to find that water, including some urban water savings, industrial water savings, and system-wide efficiency type things which they could look at.

20

THE COMMISSIONER: That's so as to produce an outcome where there is no less water to irrigation?

MR WHAN: Yes.

25

THE COMMISSIONER: Thank you.

MR WHAN: That's right. So, yes, it's other users, essentially, although some management of system issues, so for instance the one that you may have seen, the sort of, I guess, a fairly high profile one is that they suggested there was potential to – for the Federal Government to assist South Australia to run the desal plant more in Adelaide and return some water to the system through that. That would be something which would be – has obviously a number of detailed things to look at in terms of the energy costs involved and making sure that's renewable. Canberra had a similar situation where they may be able to return some water. From what we've suggested is those options need to be explored first and then we need to see at – sorry, South Australia and Queensland have also indicated that they wish to continue with some on farm work. And they are going ahead with that.

30

35

In New South Wales and Victoria there really needs to it be a lot more work on the ground as I said before with communities to design programs so that if you decide – if in the long term it is necessary to go back and do more on farm efficiency work to recover that 450, that those programs are designed in a way which overcome some of those problems I mentioned before, in terms of the concerns that are in communities about agricultural productivity in their area about jobs and flow-on impacts into those communities. Now, at the moment it would be fair to say that some communities, particularly around the Shepparton area and the Murray are absolutely

45

opposed to any further on-farm work. But there is no doubt there is other areas where there is – other communities where there is people who are saying they would like to see some further onfarm work. Now, the critical thing is - - -

5 THE COMMISSIONER: Can you explain to me – yes. Fine.

MR WHAN: The critical thing really is, as I said, to say to government, “You need to actually get in” – I guess the problem that I had, the Irrigators Council had particularly with the coffee scheme was that it was a broad one-size-fits-all offering.
10 This is about individual communities with different needs, and you need to design the programs to reflect that.

THE COMMISSIONER: So in the – I think you said the Shepparton area – what’s your understanding of the gist of the opposition to on-farm efficiency measures?
15

MR WHAN: The – and I just point out for the record that we don’t have a National Irrigators Council member from the Shepparton area, so that’s not an area that’s directly represented on our Council. But my understanding of the concern there is that they have seen quite a lot of water recovery from buy-back in the area. They
20 feel that there is – they feel that the viability of their scheme will be affected by further on-farm efficiency work. And that they may lose essentially elements of – so essentially the story I was talking about before. Potentially people going to dry land farming rather than irrigation, losing the enhanced economic value that some of those more intensive agricultural operations see. And you need to, I think, look at that in
25 the context, that different areas and different commodities obviously face different terms of trade.

So it’s – so there’s an area – so in that area you have got a largely dairying and fruit – dairy has certainly not had very good terms of trade over the last few years.
30 You’ve now got a water – you have got a fully commercial water market, so there is competition from crops who can afford to pay more for their water, and that just adds to pressure. And I think that anybody in working through a reform process, any sensible government working through a reform process takes into account what’s happening in communities and talks to them to try and reassure them and design
35 programs with them rather than imposing things from above.

THE COMMISSIONER: Now, a farmer going to dry land, however, is not participating in a project to improve irrigation water use on their farm.

40 MR WHAN: No, you wouldn’t think so. But that, as I understand it is, you know, a potential outcome of offering up water.

THE COMMISSIONER: I’m not suggesting it’s not, but what I’m saying is 717(2)(b)(1) talks about participation of consumptive water users in projects that
45 recover water through works to improve irrigation water use efficiency on their farms.

MR WHAN: Yes.

THE COMMISSIONER: So that's not the case of a farmer who gives up his allocation - - -

5

MR WHAN: All together.

THE COMMISSIONER: - - - in order to go to dry land.

10 MR WHAN: I wouldn't think it was either, but my – the view that's been expressed to me is that the – that a simply – a simple efficiency program can actually do that. So the – I guess you would find – and as I said our – many irrigators' position, National Irrigators Council position is that the on-farm scheme things in New South Wales and Victoria need to be after we have exhausted all the off-farm opportunities.
15 To give them a better chance of acceptance in the long term, it needs to be a scheme which is designed to ensure or enable at least continuing if not increased production. And that is the history of what a number of efficiency schemes have done. And that's – that's something which produces a mutual benefit, because you return water to the system and you enable increased production, exactly, in fact, as John Howard
20 said in 2007 when he announced the Water Act.

MR BEASLEY: Can I just ask you your views on how the Commissioner should treat these two issues. One is the Commission has received a number of submissions from economists that in fairly strong terms suggest that the Basin Authority socio-economic analysis in relation to both the Northern Basin Review and also aspects of the southern Basin is deeply flawed for a number of reasons. The first reason – and this is not us going out and finding these economists; these are people that are coming to us and giving submissions. The first reason they say it's a deeply flawed analysis is that it does something that's described as – what one witness has said is a
25 – just lacking any basic understanding of economics, and that is it assumes a proportional relationship between a reduction of water and a reduction in farm production. And the criticism is that farmers adapt to having less water, and what should be looked at instead is a loss of revenue or a loss – reduction in profits to get a better gauge of what job losses or economic impacts might be.
35

The other criticism that I can recall are that the modelling that's been used by the Basin Authority fails to incorporate some fairly basic inputs such as you have been discussing with the Commissioner, mechanisation or technological change, urbanisation, even climate change. And then the criticism is made that the analysis
40 fails to recognise any positive benefits of buy-back, such as that in the majority of cases buy-backs have involved buying partial entitlements, that farmers have therefore stayed, they have spent the money locally, they have reduced their debt, they have reduced their interest payments, they are less likely to go bankrupt, and I know this is a complicated question, but I'm throwing it all out there for you to
45 respond, it overestimates any – the – it underestimates the negative impacts of efficiency measures. Forget return flows for a moment, I know that's - - -

MR WHAN: I'm happy to come to that though.

MR BEASLEY: I know that's a controversial subject.

5 THE COMMISSIONER: We will.

MR BEASLEY: We will. It's a controversial subject, but it puts to the side the much greater expense of an efficiency measure compared to buy-back and fails to consider any aspect of what might be positive economic benefits to a local
10 community by spending to save money on transport, health, education etcetera. So that's – that's the summary of the criticism that's been put.

MR WHAN: I have seen some of that.

15 MR BEASLEY: Yes.

MR WHAN: And I think that it's quite wrong in a number of aspects and obviously it's not my job to come here and defend the MDBA's analysis.

20 MR BEASLEY: No, I'm just - - -

THE COMMISSIONER: But we are interested in your opinion.

MR BEASLEY: We're interested in your view. Yes.
25

MR WHAN: My opinion, my opinion about that is that several – I think it's wrong on several fronts. Firstly it's very clear that the MDBA's analysis does take into account other structural change which has gone on in agriculture and in country communities.
30

MR BEASLEY: I should have – in completing what I said, I should have said it's not just a criticism of the MDBA but also some of their consultants' reports. KPMG, etcetera.

MR WHAN: Yes. And I have seen one economist who has made those types of criticisms and their criticism, I thought, was a very superficial analysis in itself. Whereas the MDBA has certainly put a lot of effort into making the analysis. None of these things, as with any of the estimates in this process, are an exact science, but the MDBA's socio-economic impact results have been criticised from the other side
40 of the fence as not showing enough impact. And - - -

THE COMMISSIONER: I suggest they have got it just about right.

MR WHAN: Well, this might be the balancing act that you have. And certainly
45 they show less impact than some of the ones undertaken by the Victorian Government in Shepparton and those sort of areas which are also undertaken. So having had a number of discussions with the MDBA during the process, and a

number of briefings from them about the work that they were doing and detail of the work they were doing to try to separate out the impacts, I think you can be confident that they have done as good as job as is possible to try to separate the impacts of structural change occurring in country communities from the impact to the Basin
5 Plan, and to actually present those. The argument about money being spent on efficiency has – I have seen that put forward by Quentin Grafton and what he – and it may have been put forward by others, but I haven't seen others

10 MR BEASLEY: The general consensus is probably two and a half times more expensive than a buyback.

MR WHAN: It is more expensive than a buyback. There is absolutely no doubt about that. But the argument that says – the assessment that I've seen of that then failed to actually undertake any analysis of what the flow-on economic impacts were
15 of buyback rather than efficiency.

So when you do buyback, if the money is – you know, if you go out of agriculture then you have not taken into account the fact that increased agricultural production allows you to keep generating job and income in a community and provide an
20 economic base, I would absolutely reject the argument that communities would have got more benefit by investing that in services, for example. For a start if you – for a start, it's capital funding, and many of the services that that person in particular was recommending required recurrent funding to actually keep up their viability.

25 THE COMMISSIONER: It requires both, doesn't it? In many cases.

MR WHAN: Well, it may require a component of capital but it certainly requires recurrent funding to continue the service, so it's a deeply flawed argument which says that you can substitute one-off capital funding and get an ongoing benefit from
30 something which needs recurrent funding when that's not available. The second aspect to that, of course, is that by funding – funding, essentially, government services as they were talking about in an area – yes, we would all like to see a well-funded hospital in the community but if the population isn't there you are not going to keep that service in the long term.

35 THE COMMISSIONER: You won't get a new hospital for a declining population.

MR WHAN: That's right. You – schools close when the population declines. They don't – they're not artificially kept open and, you know, again, as a person who
40 represented regional New South Wales for a long time, I've seen the angst that causes in communities. So I think that was a deeply flawed criticism, and a very superficial criticism of the MDBA's work. Which I – I from the work that I've seen is – while probably not perfect, the best available work that we have got available to assess the economic impacts.

45 MR BEASLEY: All right. Can I ask you how the Commissioner should deal with this, and I'm coming back to the triple bottom line, because I think we are interested

in your view as to how the Commissioner deals with the – what you advocate is the triple bottom line in these circumstances: that the – the Water Act directs that the Basin Plan be – can put together in relation – having regard to a couple of statutory facts.

5

One is that there has been – and these are my words, paraphrasing – but an over-allocation of the – of water which has had a – a severely damaging effect on environment ecology and, hence, special measures are needed now to restore the environment and ecological systems. The Basin Plan also – the Water Act also

10 directs that it's a mandatory requirement, as we know, for the Basin Plan to have a long-term average sustainable diversion limit and it mandates that that long-term average sustainable diversion limit must reflect what's called the environmentally sustainable level of take.

15 I'm sure it's a definition you have probably seen in the Water Act. That definition in the Water Act sets entirely environmental criteria and doesn't mention – any taking into account of economic or social optimisation. So in relation to the triple bottom line in terms of the setting of an SDL which has to reflect an environmentally

20 Water Act and still come out with a triple bottom line approach? Is that question clear enough?

MR WHAN: Yes. I'm not – I am not sure that I would agree with your interpretation of the Act requiring that the – that the environmental outcome takes

25 precedence over all others. But that's probably not for me to determine in the long term.

MR BEASLEY: That's - - -

30 MR WHAN: That's something which others may determine.

MR BEASLEY: That's a separate issue. I'm - - -

MR WHAN: But the - - - - -

35

MR BEASLEY: - - - really talking about in terms of how it says you have got to set your sustainable diversion limit on – which must reflect a environmentally sustainable level of take and that - - -

40 MR WHAN: Yes. And that – as I think it may – I have certainly – certainly am aware there is varying opinions on what an environmentally sustainable level of take is.

MR BEASLEY: Sure.

45

MR WHAN: There is no disputing that one of the reasons that the Plan was put in place was that there was clear evidence in many catchments over many years, and it

actually pre-dates the plants. You could go back to the nineties in water reforms and water markets to try to deal with over-allocations and the national water initiative as well. So it actually didn't – it actually is something which was an ongoing process to try and ensure that we had a system which was sustainable.

5

It is – I guess when I go to how we best achieve the outcomes that Australians expect the Basin Plan to achieve in the long term, I would say it is by sticking with what's in the Basin Plan. I don't believe that there is scope, even if you could do two things which I think will be very difficult. One being firstly to say that the sustainable – the
10 SDL which is in the Basin Plan is not valid because some people argue that it should be a much lower figure. That's a very difficult argument to prove in the first place, given there is a lot of input that goes into the development of that.

There was a lot of consideration about it as the plan went through. It is people's – it
15 some people's opinion that the 2,750 to 3,200 – or 3,200 for – as the figure that we might settle with for now – should have been 4,000. That's often – that's their opinion. It's not the opinion that the Basin Authority came up with, having regard to its job that it was given by the Water Act which, in my view, was to come up with an outcome which – which is triple bottom line.

20

MR BEASLEY: Well, I think the difficulty, though, that the Commissioner has got to grapple with on that issue, though, is in – in setting a sustainable diversion limit which reflects an environmentally sustainable level of take, which is a defined term in the Act, it's not ever going to be a good thing if that's not done in accordance with
25 a proper construction of the Water Act. And the setting of the SDL – let's forget the numbers at the moment, but in terms of a process – doesn't seem to be directed to any aspect of optimising – at least in the text of the Act – optimising a social outcome or an economic outcome.

MR WHAN: I think that an interpretation that's open to argument and certainly I've
30 seen argument from the Minister who introduced the plan and from the current Minister that disagrees with that. I'm not in a position to make – you know, at the end of the day that will probably be a judgment. But I guess where I take you with that is, what's the outcome if somewhere along the line someone was –
35 hypothetically – to be able to show that the Basin Plan didn't meet the objectives of Water Act?

Where would that take Australia in terms of restoring health to this river? It would
40 take us to a situation where rather than having a Plan which we are all intent on the implementing as stands out; providing certainty for communities; providing outcomes for the environment – we would go back into a process of another decade or so of argument over what was to replace it.

And I think one of the – one of the key things which we managed to resolve over the
45 last six months – where are we, July – eight months or nine months, is that the democratic processes have eventually managed to negotiate a few points where there

was a threat that the Basin Plan might not continue and that some states may not stay engaged in it.

THE COMMISSIONER: That threat still exists, doesn't it?

5

MR WHAN: Well, no. Not – no, not now that the SDLs, the SDLAMS have been approved by the Parliament and there has been an agreement between the government and opposition about the Northern Basin Review – Northern Basin Amendments. So I think there is relative certainty, of course there is still a part of that process which is subject to disallowance, but - - -

10

THE COMMISSIONER: Leaving aside disallowance – that's in the relatively short term, one advantage of disallowance you yourself have pointed to – my words not yours – the need to wait and see concerning the achievement of outcomes intended to be delivered by recovery of water for the environment. I think that's fair, is it?

15

MR WHAN: Yes, that's certainly - - -

20 THE COMMISSIONER: And you've pointed to, I think is what is popularly and probably accurately called an audit in 2024?

MR WHAN: Two different - - -

25 THE COMMISSIONER: Or a reconciliation, it's sometimes called.

MR WHAN: Slightly – two different things there. I think, in terms of the long-term impact of the Basin Plan and whether it achieves its environmental outcomes is something we won't be able to judge by 2024. As many - - -

30

THE COMMISSIONER: You anticipate my point. Elsewhere you say “decades”.

MR WHAN: Yes, decades to do that. And many scientists who do support what's happening with the plan and who are working on it, will back up the work that the MDBA has done on that, where they said, “We are seeing positive early results but it will take some decades.”

35

THE COMMISSIONER: 2024 is a time at which there would be what I think you – adopting the language of other people – have called a reconciliation.

40

MR WHAN: A reconciliation of the sustainable diversion limit adjustment.

THE COMMISSIONER: A reconciliation here doesn't mean that everyone is going to like each other.

45

MR WHAN: No, no, no.

THE COMMISSIONER: It means it's a – it's in the accounting sense.

MR WHAN: This is not a reconciliation in the sense of being all good mates.

5 THE COMMISSIONER: No. No. This is an accounting exercise.

MR WHAN: Yes. And this is in terms of the 605 gigalitres of SDL adjustment measures which are being – have been approved.

10 THE COMMISSIONER: Well, you can see where I'm headed. This is the reconciliation that could make people feel very bad about things. Because it may – I think you've pointed this out yourself – it may involve discovering in 2024 that the 605 was an excessive reduction in environmental recovery. That's a possibility.

15 MR WHAN: Can I just separate – the two points you are making about the long-term environmental outcomes and the way the SDLAM is going to be measured. Now, we- I have made the point that there is a risk. The risk in the SDLAM projects not working is being borne by irrigation communities because there could be a – because there is – because there could - - -

20 THE COMMISSIONER: Is that right?

MR WHAN: I believe it is.

25 THE COMMISSIONER: Only by them? Certainly by them, but only by then?

MR WHAN: Well, if you assume that these measures fall short, that water will be recovered, then - - -

30 THE COMMISSIONER: That's exactly what I was asking you about.

MR WHAN: Yes.

THE COMMISSIONER: That's an assumption that you do make as one of the possibilities as early as 2024.

35 MR WHAN: Yes. Well, 2024 is the date set for that – for those projects to be finished. Now - - -

40 THE COMMISSIONER: Is it finished or start?

MR WHAN: Well, it's when the reconciliation needs to take place.

THE COMMISSIONER: I appreciate that.

45

MR WHAN: If you would like to recommend some extension of timeframes, I think that would – in a number of areas, they will probably be quite helpful. But the
- - -

5 THE COMMISSIONER: But, I mean, jokes aside, there is a real serious question there, isn't there?

MR WHAN: But can I – yes. But can I clarify what the process, as I understand it, with the SDLAM projects is going to be and why it's different to the long-term
10 environment benefits. Now, when they – when the Murray-Darling Basin Authority calculated the 605 – which it could have been 650, but they calculated 605, they did it by inputting all those projects into a larger model because they had to build a model which actually was able to look at a whole system impact. So - - -

15 THE COMMISSIONER: Have you seen these calculations, have you?

MR WHAN: I've been – had them described to me.

THE COMMISSIONER: By whom?
20

MR WHAN: Well, by the Murray-Darling Basin Authority and I've heard them describe them to - - -

THE COMMISSIONER: Speaking through whom?
25

MR WHAN: Through – well, I'm not sure who it would have been but I have heard them also described to Senate estimates and a number of others.

THE COMMISSIONER: We know who speaks at Senate estimates.
30

MR WHAN: It's a senior official of the Authority would be describing it.

THE COMMISSIONER: Outside of Senate estimates, who, on behalf of the Authority, has described the way the calculations were made to you?
35

MR WHAN: I could not tell you who particularly, but I am aware of the way that it operates. I – the modelling of it would be far too complex for me to understand how it works. But that's the reason why you don't see a figure that says, for instance, the – "Project X for a wetland in Victoria is worth X number of megalitres or gigalitres."
40

MR BEASLEY: We do. We do. We do.

MR WHAN: Because they link together.

45 MR BEASLEY: For Menindee Lakes there is a NSW Government and MDBA document says it is 106 gigalitres.

MR WHAN: There is a – Menindee Lakes might be a little easier because of its – you know, where it is. But the rest – a lot of them interact together.

MR BEASLEY: Your basic point is right. They are treating the environmental
5 equivalency and the 605 gicalitres by considering all the projects as one.

MR WHAN: That’s right.

THE COMMISSIONER: I don’t think - - -

10 MR WHAN: So – so – when I – so when I come back to - - -

THE COMMISSIONER: I don’t think I would dream of saying you shouldn’t take an aggregated, overall, holistic, comprehensive, broad view. All of those
15 epithets are like motherhood. You have got to agree with them and I do. However, I don’t understand how you can take any of those views without being able to understand each of the components.

MR WHAN: And what each – my understanding of the process was that each – the
20 states nominated a number of projects and gave the MDBA the relevant information to run this. Now, what’s going to happen from now – and this is why it is absolutely critical that everyone engages in the process to make these work, is that as they are implemented they will be consulting and telling people how they go, so that we - - -

25 THE COMMISSIONER: But why do you say that? They haven’t to date.

MR WHAN: They have had – they had a meeting or – they have actually already convened a meeting.

30 THE COMMISSIONER: They have not revealed to the public at all how they have calculated this.

MR WHAN: They haven’t – they have revealed the detail of projects that they have available.

35 THE COMMISSIONER: No, they haven’t. They haven’t done that either.

MR WHAN: They did. It is on the website, and you can go through - - -

40 THE COMMISSIONER: Well, sorry, if you think that’s revelation, so be it. I’m surprised - - -

MR WHAN: There is a lot of detail in some of them, and I’m not going to – I mean
45 - - -

THE COMMISSIONER: I’m surprised in your position you would regard that what they have revealed constitutes detailed - - -

MR WHAN: No - - -

THE COMMISSIONER: - - - revelations so as to enable other people to help them to make it work.

5

MR WHAN: No, that's not what I - - -

THE COMMISSIONER: I find that very surprising.

10 MR WHAN: That's not what I said. Let me – let me make my point. There is a number of projects for which there is information available – Menindee is one of those – but there is a lot of work to go with these projects. Over the next few years we expect to see community engagement in this process. I have made a number of public statements which have called for that, already since the decision was made by
15 the Parliament to approve that, the MDBA has held a meeting of the peak groups plus those who are interested in this process to say how they will proceed with the consultation and the reporting-back - - -

20 THE COMMISSIONER: When you say a decision by parliament, you mean - - -

MR WHAN: The decision - - -

THE COMMISSIONER: - - - the loss of a motion of – for disallowance in one of the Houses.

25

MR WHAN: Correct.

THE COMMISSIONER: Thank you.

30 MR WHAN: Yes.

THE COMMISSIONER: Shorthand for the democratic input into the delegated legislation

35 MR WHAN: Yes, that was a fairly critical part of the process.

THE COMMISSIONER: No. Very important.

40 MR WHAN: So I would certainly not say that there was enough information on all projects in communities. And I would certainly agree that there is a number of those projects where the lack of information caused concern. I have absolutely no argument with that whatsoever. I'm certainly not an apologist for those governments who have – who have failed to make that effort. There is many projects which are very difficult. The constraints projects are extremely difficult. They have - - -

45

THE COMMISSIONER: the more that is made known to, in particular, the local communities, the better.

MR WHAN: Yes. Absolutely.

THE COMMISSIONER: I think that is part of your submission.

5 MR WHAN: It is.

THE COMMISSIONER: Local communities are likely to be a source of not only considerable knowledge, expertise, and experience, but also the kind of sentiment for or against that is essential to engage.

10

MR WHAN: Yes.

THE COMMISSIONER: Is that right?

15 MR WHAN: Yes, absolutely. And, you know, you actually have to go to the level of consulting with individuals when you are talking about constraints. There is absolutely no doubt about that.

THE COMMISSIONER: How do you feel about that paddock being flooded?

20

MR WHAN: You need to talk to – there is, we have had the point I'm sure – I'm sure and MLDRIN will have already made, or will make the point that you have to talk about Indigenous communities about sites and plans and landholders nearby. So there is an awful long way to go on this and I made the point in a number of public statements.

25

MR BEASLEY: Just picking you up on that, an awful long way to go. If there is an awful long way to go on these projects, has the Basin Authority ever explained to you how it was satisfied, A, that these projects would be 605 gigalitres of water, but how there is environmental equivalency between the base line?

30

MR WHAN: Well, they have a model which they use to do it. I don't know the detail of that.

35 THE COMMISSIONER: Well, nobody does.

MR WHAN: Frankly, for the six – frankly, from an irrigator's point of view, we would have liked it to have been 650.

40 MR BEASLEY: Sure. But that's a different point. I mean, that's a really different point.

MR WHAN: So the key thing now is that we have 605 gigalitres worth that they have assessed, independently assessed as they are an independent Authority. It is now critical that the State Governments who have to deliver those projects go into the communities. A number of projects are already operating. We are aware of that.

45

We know that. A number of projects have a lot of information out there. There's been information on the Menindee Lakes project available since 2007.

5 MR BEASLEY: Some of them, though, are just concepts, aren't they?

MR WHAN: There is a number of those which have – have a huge amount of work to do. The process set out in the Plan made it clear that the Authority did have to meet certain deadlines, they did have to make estimates. The 605 is the figure that they came up with. Why I say that the risk is on communities is because if they get
10 to 2024 and they only assess it as being worth 550, then there is then going to be pressure to recover that water.

THE COMMISSIONER: When you say pressure - - -

15 MR BEASLEY: But meeting deadlines and being under pressure is not a reason for not complying with the law; you would agree with that, right? You have got to still – got to follow the law.

MR WHAN: I'm not aware of where they – of where the law has not been - - -
20

MR BEASLEY: No. No. I'm not accusing anyone. But as a general principle, pressure and a deadline is not a reason for not following a statute; correct?

MR WHAN: Correct.
25

MR BEASLEY: Yes.

MR WHAN: Although - - -

30 THE COMMISSIONER: It might be a reason to try to change it.

MR WHAN: I did want to say – I do want to say that - - -

MR BEASLEY: It may well be. You might - - -
35

MR WHAN: There is a number of elements of the Basin Plan which you would say, and they have quite strict time frames on them, and where you would say that that – that they will be difficult to comply with. And – and I think we would probably all agree and that particularly where that comes to water resources plans, where there is
40 a strict deadline coming up, that it would be better to get them right than rush them through.

MR BEASLEY: Sure.

45 THE COMMISSIONER: So in a parliamentary democracy with a rule of law, though, rather than defy the law, you move to change it. Don't you?

MR WHAN: If you can get that – certainly if you can make sensible changes that can actually be achieved, yes.

5 THE COMMISSIONER: But governments can never declare that they are going to proceed contrary to the law because it is too much trouble to get it through parliament.

MR WHAN: Of course not. I don't even think that's a - - -

10 THE COMMISSIONER: What Counsel Assisting and I are asking you about has this significance: that the provisions of the Basin Plan, 717 and 720 in particular, do require satisfaction by the Authority of what are called the criteria in 717. That makes them sound very bloodless and technical, but they are, as I think you've been pointing out, very large matters involving contestable judgments. And can I draw to
15 attention the one for the supply contributions, of which you say Menindee Lakes is one. And that is, that they must achieve equivalent environmental outcomes compared to the benchmark environmental outcomes. And that authority has to be satisfied. The words are actually "the Authority may make a determination to propose adjustments only if it is satisfied the proposed judgments meet the criteria
20 under 717", and I have just read to you one of them.

Now, if you recall Mr Beasley's early question to you this afternoon about your ministerial experience of requiring that those who make recommendations to you can demonstrate that the course you are being recommended to take is in accordance with
25 the law, you would – you would agree, wouldn't you, with your ministerial experience, that those provisions for the supply contributions that make up the 605 gegalitres of so called downwater, that they required in terms for the Authority to be satisfied of the equivalent environmental outcomes. You don't have – you don't have to be a lawyer to understand that, do you?

30 MR WHAN: No. And – but I don't see that there is – I also don't see that I could – I don't see that anybody can show that they have not been satisfied.

35 THE COMMISSIONER: Well, that's as may be and that may happen in another place.

MR WHAN: It is also not for me to make that judgment. The minister – you know, from the point of view of the National Irrigators Council, the downwater was – is a critical part of the Basin Plan.

40 THE COMMISSIONER: Yes.

MR WHAN: Absolutely critical.

45 THE COMMISSIONER: I understand.

MR WHAN: It was the exchange for the 450 in the horse trading that went on in developing the Plan.

5 THE COMMISSIONER: How does one horse-trade to an environmentally sustainable level of take?

MR WHAN: Well, first of all there was – there was a figure determined by the Basin Plan Authority. Now, I obviously wasn't involved in this, but I think we need to remember that we live in a democracy. There is absolutely no doubt that for those
10 who are watching it, publicly, and I was not involved in the negotiation of the plan being developed in 2012, that there was a discussion about the 2,750 being a figure which met the definitions in the Plan. That was – that was put forward. South Australia wanted 3,200, as I understand it. In exchange for the 450 to get to the 3,200, the government of the day, with the agreement of the opposition and the
15 Parliament, introduced the downwater component as well.

And I think we need to be very clear that without – without that downwater component we wouldn't have had a 450 upwater component. And as I – the point I made before, is should somebody be able to – should somebody succeed,
20 hypothetically, in getting a decision that said that the Plan was invalid, where does that take us? It does not help the environment to be starting from scratch with the Basin Plan. We have a Basin Plan. Our best chance of achieving environmentally positive outcomes for the river system and certainty for the communities along that is to implement the Basin Plan as it stands.

25 MR BEASLEY: Yes, but the Basin Plan would be declared invalid, would it? You would just have a different figure for recovering water for the environment.

30 THE COMMISSIONER: We are talking about a decision as to the ESLT.

MR WHAN: That is – no. That is – the water figure in the Basin Plan is a critical part of the Basin Plan. And so –

35 MR BEASLEY: Of course it is. No one is going to disagree with that. In fact it may be the core part of the Plan.

THE COMMISSIONER: Sorry, can I just slow you down. Let's get our terminology correct. The Basin Plan doesn't actually contain 2,750, or 605, or 450. You're correct, with great respect, that the politics and the social discussion, which is
40 a matter of history and notoriety, certainly had those figures among others in the air. But the Basin Plan actually calls for those figures to be – the Basin – sorry. The Water Act calls for those figures to be determined.

45 MR WHAN: Yes.

THE COMMISSIONER: And then they – the Basin Plan stipulates allocations which add up to various amounts.

MR WHAN: Correct. Yes.

5 THE COMMISSIONER: Those stipulations don't actually say that unless there is 605 or 650 supply contributions recognised, there can't be 450. I understand the politics that you've talked about. In fact, it's rather different, isn't it: that the 450 is available only if there is neutral or enhanced socio-economic outcomes; correct?

MR WHAN: Correct.

10 THE COMMISSIONER: And the 605 or 650 is available only if there is equivalent environmental outcomes?

MR WHAN: Correct.

15 THE COMMISSIONER: And that's all what's governed by 717 and 720. So you won't move off 2,750 up or down, unless those prerequisites are met. That was the theory.

20 MR WHAN: Leaving out the northern Basin adjustment as well, yes.

THE COMMISSIONER: You are quite well. Whether one calls it anomalous or different or special doesn't matter at the moment. Let's just think about the down-water adjustment.

25 MR BEASLEY: But when the water resource plans are accredited next year on 1 July '19, assuming they are - - -

THE COMMISSIONER: Yes.

30 MR BEASLEY: - - - and I know there is some doubt, but they will reflect 2,750 less 605.

THE COMMISSIONER: As adjusted.

35 MR BEASLEY: As adjusted.

THE COMMISSIONER: But they have to. They are bound to.

40 MR BEASLEY: They are bound to at the moment. Can I just – on this topic, 2,750, and I'm asking you also with your experience and views as a former member of Parliament, I think one of the difficulties that a huge number of scientists have been saying to us in submissions that they have been making to us is this: that when the Authority has determined that 2,750 is the figure that the environment needs as extra water, they have produced reports where they have said we have got this framework
45 for determining an environmentally sustainable level of take and we set our – we determine our key environmental assets and our ecosystem functions and we run our

modelling and they then say we then do the triple bottom line, we throw in social and economic considerations, and the figure is 2,750.

5 What the Basin Authority has never explained in terms of anything I've read, and anything that a number of the scientists that have made submissions to the Commission is, what role social and economic considerations played in reaching the figure of 2,750. And the concern, I think – and I think it's a broad concern amongst Australia's scientific community – is that we don't know whether that 2,750 for the environment is part of an environmentally sustainable level of take because we can't
10 test it.

So we can't prove its right. We can't prove it's wrong. Is there any reason why the Basin Authority shouldn't be 100 per cent transparent in how it reached that figure of 2,750, to claim it is an – it will reflect an environmentally sustainable level of take as
15 water to go back to the environment and show all the modelling and all the inputs that were put into the modelling? Is there any reason that the Irrigators Council could – that would consider that they wouldn't make everything available so that our other scientists can look at it and say, okay, we now understand how that figure was reached.

20 MR WHAN: I can only – no. I don't see any reason why it's not – but it is also not really for me to – you know, from as far as I'm concerned, I would like maximum transparency right through all processes. I don't think that scientific consensus is necessarily the way that you have suggested. There is a number of scientists who
25 work – who are working on the Basin Plan who are strong supporters of the Plan.

MR BEASLEY: There are many that are supporters of the Plan - - -

30 MR WHAN: And - - -

MR BEASLEY: - - - there are many that aren't supporters of the way it's implemented. They're different.

35 MR WHAN: There's also – there's also many – and – who can – who point to strong positive outcomes. Environmental outcomes.

MR BEASLEY: There's no doubt that returning some water for the - - -

40 THE COMMISSIONER: I think we are getting off track a bit here.

MR WHAN: But – yes – look. No, I'm – and really - - -

THE COMMISSIONER: I think we're talking about 2,750.

45 MR WHAN: Really, I have no comment that I can make about the transparency of that.

MR BEASLEY: All right. Yes.

MR WHAN: Because - - -

5 MR BEASLEY: On that, then - - -

MR WHAN: - - - my default position is that you would be transparent about things but I don't want to make a judgment about the MDBA's processes.

10 MR BEASLEY: Surely, though, the Irrigators' Council would have in relation to the SDL adjustment where we have just discussed the projects that Parliament has been asked to deal with this matter in circumstances where business cases for supply measures have not been made publicly available and the MDBA's – and in fairness to you – these documents only became available after you put in your submissions.
15 I'm not being critical about that.

But the MDBA's own analysis of many of these supply measures wasn't made publicly available until they were forced to produce them in the Senate. Surely that –
20 and tell me if I'm wrong, but the Irrigators' Council would take the view, wouldn't it, that those documents – is there a good reason why the business cases for the supply measures in the MDBA's concerns about environmental outcomes from them – hasn't been made available in the Parliament until compelled in the Senate?

MR WHAN: I – not a question I can answer. I mean, from our point of view the importance of the 605 and the Parliament's consideration of a disallowance motion
25 on that was that it was an overall figure; the security that they had in that is that there is a reconciliation as they are implemented. The key thing for irrigators was that we did see the 605 so that there wasn't further water recovery in the valleys.

30 MR BEASLEY: Yes – but - - -

THE COMMISSIONER: Now, can I try and bring this to a head. The reconciliation you and I have been talking about, 2024, is in 711 of the Basin Plan. And in relation to 711, under 721 there can't be a decision in relation to any further
35 adjustment in 2024 unless there has been consideration by the Authority of submissions from members of the public.

As you might expect. The same thing was true, in a slightly different form, for the original determination of adjustment. Now, from what you and I have been
40 discussing at various points, you appreciate that in 2024, as the date is presently set, there will be, I think, to adapt your language, the possibility in light of, say, environmental disappointments, of pressure to increase water for the environment. I think that's what you were referring to earlier?

45 MR WHAN: The - - -

THE COMMISSIONER: Is that – have I understood that correctly?

MR WHAN: Yes. Look, I'm not sure I would say in "the light of environmental disappointments". I think the measurement, one of our fundamental criticisms some of the ways this is structured is so many of the indicators are actually just about flow, not actually about outcomes.

5

THE COMMISSIONER: I will come to that.

MR WHAN: But - - -

10 THE COMMISSIONER: I think that's an important point I will come to tomorrow.

MR WHAN: Yes. So - - -

15 THE COMMISSIONER: I just want to get to this point. The –there are equivalent environmental outcomes, to use the legislated words. And - - -

MR WHAN: Yes. Which are often – which – as my understanding, and I may not have the full expertise, are often about flows at particular points.

20 THE COMMISSIONER: May I say, we won't need to spend a lot of time in evidence about that because it can't just be a matter of flow. Right. Definitely pushing an open door there. But equivalent environmental outcomes, being a prerequisite of adjustments originally timed for 2017, will of course have to be considered again in 2024 for the reconciliation. That's because the wording of that
25 requirement is that it depends upon whether something appears to the Authority that there would be a result produced which is different from the original determination.

30 So you would go back to the criteria that governed the original one. Now, that's what led, as I understand your evidence, to the possibility that if it turned out that equivalent environmental outcomes had not been achieved – sorry, that's what I meant about by the shorthand of "environmental disappointment" – falling short of the equivalency.

MR WHAN: Sure.

35

THE COMMISSIONER: Then the reconciliation, had this sort of accounting figure of speech, is that – let's just be arbitrary – instead of 605 it has to be adjusted to 405. 200 gegalitres being given back to the environment so to speak. I would have thought from everything you do for a living and for the way, with great respect, you
40 have put together your submissions, that the NIC would definitely want full transparency from the Authority - - -

MR WHAN: Yes.

45 THE COMMISSIONER: - - - about its proposal - - -

MR WHAN: Absolutely.

THE COMMISSIONER: - - - to take another 200 gicalitres back to the environment because of an assessment they had made in 2024 of equivalent environmental outcomes not having been achieved.

5 MR WHAN: Yes.

THE COMMISSIONER: Right.

10 MR WHAN: And please don't take anything from what I have said here to suggest that things should be able to be done in secret.

MR BEASLEY: That's - - -

15 THE COMMISSIONER: It's just that a couple of your answers you have been, if I may say so – uncharacteristically modest about the fact it is really not for you to say. I would have thought, in your position for the NIC, you do have a strong public view that there needs to be transparency so among other people, NIC, as members of the public – very interested members of the public – can be involved before the Authority makes such an important decision.

20

MR WHAN: Yes. And we have advocated and expect to see ongoing consultation and reports about how things are going.

MR BEASLEY: But you don't want some - - -

25

THE COMMISSIONER: But I want to be - - - - -

MR WHAN: We also do – and we also want to see, as part of that, a – you know, essentially where – how we are tracking? how are we tracking as we go?

30

THE COMMISSIONER: Adaptive management, I think, you've referred to.

MR WHAN: Yes. That – particularly in of the projects' implementation. Those projects need to be able to change if - - -

35

THE COMMISSIONER: Quite so.

MR WHAN: Yes.

40 THE COMMISSIONER: Now, that means you have to have continuing transparency, doesn't it?

MR WHAN: It does. And - - -

45 THE COMMISSIONER: I want to make it clear – I don't want to misrepresent you - - -

MR WHAN: I want to be clear. I am certainly not saying that, you know, you are absolutely right. If a calculation is being made as we go through, we want to know how that is done. But - - -

5 MR BEASLEY: You want to have confidence that you can tell your members that 605 is a reliable figure, don't you?

MR WHAN: Well, I have the 605 essentially – as – we would've – as I said before, we would've liked 650. We would have been very happy if they came back and said they had exceeded it.

MR BEASLEY: You want to know – you want information from the Basin Authority, surely, to be able to say to your members, “Look, 605 looks like it's going to fly because there will be environment equivalents.” So if the Basin Authority, for example, has done analysis of Menindee Lakes – and that's one example of another where they identify, having looked at a business case, that there are alarming environment – potential environmental risks – that's surely information that you would want to see in a timely fashion so you can advise your members about it?

20 MR WHAN: Well, yes. Recognising that these projects – I do suspect to see public consultation, full environmental impact statements and so on, but recognising that not all of those are available when that 605 was done - - -

MR BEASLEY: You see, if you need an environmental impact statement, how have you made – how have you been satisfied about environmental equivalency?

MR WHAN: Well, from the point of view where the National Irrigators Council sits on the 605, we wanted a figure of 605 and, you know, the – we didn't have a choice about the time frames of when that was going to be brought in.

30 MR BEASLEY: No. I understand that.

MR WHAN: So let's – so you know, that's - - -

35 THE COMMISSIONER: If I may say so – neither did the Authority.

MR WHAN: No.

THE COMMISSIONER: Parliament had required it to do something.

40 MR WHAN: Correct. That's right. Now - - -

THE COMMISSIONER: There's nowhere it says, “But, if you can't think about it, have a guess.”

45

MR WHAN: Whether or not – whether or not the time frames set out in the original legislation and Plan have proven to be realistic is something for – is something for debate in a number of areas. And I would say it's not just in the 605.

5 THE COMMISSIONER: Mr Beasley, I note the time.

MR BEASLEY: Yes.

10 THE COMMISSIONER: Nothing is convenient, but can we stop at this point?

MR BEASLEY: We can. And - - -

THE COMMISSIONER: Mr Whan, I'm sorry about having to - - -

15 MR BEASLEY: Yes. You can't get a plane tonight, is that right. We have missed it? We've rescheduled it.

MR WHAN: There is only one to Canberra.

20 MR BEASLEY: No, all right. Okay. All right.

MR WHAN: But I mean, I can, you know, there's other options, but it depends if you want - - -

25 MR BEASLEY: We won't be long.

THE COMMISSIONER: Let me commend the pleasures of Adelaide in the evening. That's what I'm telling myself.

30 MR BEASLEY: Just be careful.

THE COMMISSIONER: And I'm very grateful for your making yourself available again tomorrow. It's very important evidence. I'm really – I really need to fully understand all this. I'm much obliged to you.

35 MR WHAN: No, I'm happy to.

40 MR BEASLEY: Just before Mr Whan goes, can I just inform the – you, Commissioner, that some community members have been appointed by the MDBA to community councils and they include Mr Martinson, the mayor of Renmark.

THE COMMISSIONER: Good, thank you.

45 MR BEASLEY: Tomorrow.

THE COMMISSIONER: Thank you.

MR BEASLEY: What time are we meeting tomorrow?

THE COMMISSIONER: 9, if that's convenient.

5 MR BEASLEY: It is to me.

THE COMMISSIONER: You will be up and about by 9?

10 MR WHAN: Yes. Of course. I might even get a swim in before then.

THE COMMISSIONER: Thank you.

MR BEASLEY: Thank you, Mr Whan.

15 THE COMMISSIONER: We will adjourn till here at 9 o'clock. Thank you.

<THE WITNESS WITHDREW

[4.20 pm]

20

MATTER ADJOURNED at 4.20 pm UNTIL THURSDAY, 19 JULY 2018

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