

Our ref: TLC/219144

13 December 2019

Ms Madeleine Houghton
Australian Competition & Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

By email only: adjudication@accc.gov.au

Dear Ms Houghton

CB10000471 - Virginia Irrigation Association Incorporated - responding submissions

I refer to the collective bargaining notification by the Virginia irrigation Association Incorporated (**VIA**) submitted on 22 October 2019 (**Notification**) and the letter from the South Australian Crown Solicitor's Office on behalf of SA Water dated 20 November 2019 (**SAWC Submissions**).

I am instructed by the VIA to respond to the SAWC Submission about the Notification.

Summary of the VIA's position

In summary, VIA's position in response to the SAWC Submission is:-

1. VIA strongly maintains that:-
 - 1.1 there will be a substantial benefit for the public and for competition arising from the VIA is proposed collective bargaining conduct;
 - 1.2 Conversely, there will be a substantial detriment to competition and on the public interest if the VIA's collective bargaining notification cannot proceed;
2. VIA strongly refutes SA Water's assertion that the VIA's existing members are "likely to be a small minority of producers who receive irrigation by way of the Virginia Pipeline Scheme (**VPS**)."
The VIA estimates that:
 - 2.1 even the 63 VIA members presently referred to in the Notification are likely to use approximately 60% of the total annual volume of water sold annually by SA Water to irrigators under the VPS (which itself is estimated to be approximately 20 GL per annum);

- 2.2 The VIA is confident of gaining express instructions to represent additional of its member irrigators who use at least 75% of the scheme in total, who would ultimately form part of the bargaining group.
3. The VIA agrees that it was a party to very detailed arrangements with SA Water pursuant to the Renewal Deed¹ as to the price of water to be supplied by SA Water to customers of the VPS, and further says:-
 - 3.1 SA Water's contention that SA Water validly terminated the Renewal Deed on 25 June 2019 is emphatically rejected;
 - 3.2 The VIA validly referred the dispute to arbitration pursuant to clauses 5.4, 5.5.2 and 8.1 of the Renewal Deed by letter from its President, Mr Rocco Musolino to SA Water dated 3 May 2019 (See **Annexure 1**);
 - 3.3 On 23 May 2019, SA Water's Chief Executive Officer wrote to the VIA asserting that its 3 May 2019 letter did not constitute a valid referral to arbitration under the Renewal Deed and inviting the VIA to refer the dispute to arbitration by 25 June 2019 and stating that:

██
██
██
- 3.4 Accordingly, by letter dated 24 June 2019 enclosing a Notice of Referral to Arbitration, the VIA's solicitors:
 - 3.4.1 repeated the VIA's previous longstanding contention that SA Water had not negotiated in good faith with the VIA, as required by the Renewal Deed;
 - 3.4.2 duly referred the matter again to arbitration, pursuant to the Renewal Deed; and
 - 3.4.3 expressed its intention participate in an arbitration (or a similar process) to resolve the water pricing dispute between the parties.
- (See **Annexure 3**)
- 3.5 Accordingly, SA Water has not terminated the Renewal Deed and the VIA has validly referred the dispute with SA Water to arbitration in accordance with the Renewal Deed.
4. The VIA says that the Notification is valid, in that the sum of the prices for supply of water with SA Water for all relevant Customer Contracts for the VPS will not exceed the statutory limit of \$5,000,000 per annum prescribed by the *Competition and Consumer Law 2010 (ACL)*.²
5. The Notification is of fundamental importance and utility to the VIA and its member users who are also customers of SA Water and wish to negotiate new Customer Contracts pursuant to the VPS.

¹ Being the "Renewal Deed" as described in paragraph 1.3.1 of the Notification.

² Section 93AB(4) and regulation 71D of the *Competition and Consumer Regulations 2010*.

We respond further below by adopting the paragraphs of the Notification referred to therein the SA Water Submission.

6. **SAWC's Response to Paragraph 1.3 of the Notification:**

- 6.1 The 63 current "contracting" VIA members are those persons who have expressly responded in writing to an invitation by the VIA's Committee to participate in the Notification. Even those 63 entities have previously contracted to use a volume of water that accounts for in the order of 60 % of the total water sold by SA Water to customers of the VPS. Those 63 contracting members are on my instructions all valid members of the VIA.
- 6.2 The VIA is confident that it has the support of and will obtain express instructions to represent further member irrigators who use at least 75 % of the total volume sold by SA Water via the VPS annually;³
- 6.3 The Act does not require the initial contract⁴ to be expressly identified in the Notification. While the initial contract was identified in the Notification, for the avoidance of doubt, we confirm the initial contract includes, without limitation:
 - 6.3.1 the subscription of its members to the VIA's Rules for the purposes of negotiating new customer contracts with SA Water for the supply of recycled water reticulated via the VPS (**Customer Contracts**); and
 - 6.3.2 all such other proposed contracts, arrangements and/or understandings that the VIA's members may make as to the collective negotiation of new Customer Contracts with SA Water, including the collective participation via the VIA in arbitration or similar processes.
- 6.4 The VIA's members specified in the list in Annexure 4 of the Notification are current members of the VIA in accordance with the VIA Rules in Annexure 2.
- 6.5 As stated in the Notification, while many of these additional VIA members in Annexure 4 have not yet expressly authorised the VIA to negotiate new Customer Contracts with SA Water on their behalf in response to the VIA's recent "mail out", many have indicated a desire to do so.
- 6.6 The VIA is an Incorporated Association with limited financial and administrative resources generally, and particularly relative to SA Water. However, as already stated in the Notification,⁵ the VIA is continuing to contact its other members listed in Annexure 4 for express instructions to act on their behalf in the VIA's proposed negotiations with SA Water. In some cases has had difficulty making contact.
- 6.7 The VIA strongly refutes SA Water's assertion that the Renewal Deed has been terminated, for reasons already given and as demonstrated in Annexures 1 - 3 hereto.

³ Which persons would form part of the collective bargaining group in the future.

⁴ For the purposes of section 93AB(2).

⁵ See page 18.

- 6.8 It is also clear that the VIA and SA Water have negotiated and correspondence at some length about water price for the VPS and the mechanisms to resolve the parties' dispute on same. In particular, SA Water has previously expressed willingness to participate in arbitration and the VIA has responded indicating its willingness to do so.⁶
- 6.9 It is therefore, with respect, disingenuous and incorrect for SA Water to suggest that "[t]he VIA is not currently to SA Water's knowledge "in the process of negotiating renewed customer contracts for its members.""⁷
- 6.10 Naturally, the VIA and its members require this collective bargaining notification process to finalise, prior to engaging further with SA Water and its legal representatives as to arbitration, which has been offered to resolve the dispute of water price by SA Water's own solicitors.

7. SAWC's Response to Paragraph 3 of the Notification

- 7.1 The VIA strongly refutes SA Water's assertions at paragraph 8 of the SA Water Submission:
- 7.1.1 The Renewal Deed, to which SA Water is a party, expressly requires that "water price [for supply of water pursuant to the VPS] is presently targeted to be less in real terms than prices during the BOOT Period"⁸ (my underlining);
- 7.1.2 Based on and recollections of members of the VIA's Committee who were present during the negotiations of the Renewal Deed with SA Water, the Renewal Deed was agreed in recognition that the treatment and sale of water to VPS customers was intended to offset to SA Water's environmental compliance costs.
- 7.1.3 With due respect, to the best of the VIA's knowledge, none of the representatives employed at SA Water at the time the Renewal Deed was negotiated remain at that organisation, whereas my client's Committee members were personally involved in the negotiation of the Renewal Deed and can recall the basis on which it was negotiated.
- 7.2 SA Water's assertion that it was not intending legal representation between itself and producers is somewhat disingenuous, given that:
- 7.2.1 SA Water has already engaged with the VIA's solicitors via its solicitors including as to an arbitration process under the Renewal Deed.
- 7.2.2 VIA repeats its contentions at paragraphs 5(c)(ii) and 3.3 of the Notification as to the benefits of negotiations via solicitors;
- 7.2.3 The VIA repeats its concerns in the Notification about SA Water's publicly-stated intention to "go behind" the VIA (as a representative body of the majority of VPS users) and negotiate individual customer contracts with under-resourced and often

⁶ See Annexures 2 and 3.

⁷ SA Water Submission, page 2.

⁸ Clause 4.1.

unsophisticated irrigators, where SA Water has a substantially greater bargaining power compared to those irrigators.

- 7.2.4 The VIA maintains that SA Water has not negotiated in good faith with the VIA and its member irrigators as required by the Renewal Deed. The lack of good faith displayed to date by SA Water in the negotiations emphasises the need for a consolidated, single point of contact for future negotiations.
- 7.3 The VIA intends to negotiate the terms and conditions specified in paragraph 3.1(i) - (iv) with SA Water's solicitors once the outcome of its Notification is known.
- 7.4 As to paragraph 12 of the SA Water Submission, the VIA repeats its contention in paragraph 3, above. The VIA further says that it and its members intend to arbitrate with SA Water in terms of the Renewal Deed (or other similar process as may be agreed), including on the question of good faith negotiation.
- 7.5 The VIA again strongly refutes the assertion at paragraph 12 of the SA Water Submission and says that the VIA represents the interests of over 400 member irrigators, most or all of which may conceivably become expressly part of the collective bargaining group.
- 7.6 The VIA strongly refutes the submission at paragraph 13 of the SA Water Submission:
- 7.6.1 The VIA repeats its contentions at paragraph 3.3 of the Notification that SA Water continues to exploit its excessive bargaining power with the VIA's under-resourced irrigator members.
- 7.6.2 VIA repeats its contentions in the Notification and at paragraph 3 above as to the Renewal Deed.
8. The VIA refutes the assertions at paragraphs 14 and 15 of the SA Water Submission and repeats its contentions at pp 9 - 10 of the Notification as to the impacts of SA Water's proposed water price.
9. **SAWC's Response to paragraph 5 of the Notification**
- 9.1 The VIA refers to paragraph 19 of SA Water's letter and says that homeowners are not effectively "*subsidising favourable water prices of the producers under the VPS*".
- 9.2 The sale of recycled water from Bolivar Wastewater treatment plant to VPS customers provide substantial benefits and cost savings for SA Water by assisting it with its environmental compliance obligations.
- 9.3 The VIA repeats its submissions at paragraph 5 of the Notification.
10. **SAWC's Response to paragraph 9 of the Notification**
- 10.1 The VIA repeats its previous submissions in response to paragraphs 12, 4, 5 and 11 of the SA Water Submissions.
11. **SAWC's Response to paragraph 10 of the Notification**

- 11.1 The VIA says that it is a notorious fact that SA Water's use of its bargaining position to negotiate with member irrigators is having a detrimental effect on competition and the well-being of horticultural and primary production businesses in the Northern Adelaide region.
 - 11.2 Further, the VIA has and can provide further documentary evidence of the likely effects of SA Water's bargaining position on competition, local employment and the ability of irrigators to continue to purchase water upon request, consistent with the media articles it has produced.
 - 11.3 SA Water's assertion that prices of the VPS over a 15 year period are "significantly below compatible schemes and below the cost of production" are entirely unsupported by evidence, and contrary to the VIA's own experience of other recycled water's supply networks in South Australia and interstate.
12. Indeed, the VIA understands that the District Council of Mount Barker operates a recycled water supply system which, like many other local government entities, has emerging issues to do with compliance with its environmental compliance obligations. My client also refers to the Shoalhaven Reclaimed Water Management Scheme (REMS) in NSW, where were supplied water for an initial 15 year period at no charge, to support re-use and minimise marine discharge.⁹
13. **SAWC's Response to paragraph 11 of the Notification**
- 13.1 The VIA repeats its contentions at paragraph 5 of the Notification and above at paragraph 9.
14. **SAWC's Response to paragraph 16 of the Notification**
- 14.1 The VIA denies that prescribed amount will be exceeded, as asserted at paragraph 25 of the SA Water Submission, having regard to the relevant requirements as under section 93AB of the Act and the corporations listed in the current and proposed future bargaining group.
 - 14.2 Indeed, I am instructed that the \$5 million in any 12 month period limit is not likely to be exceeded, even if, notionally, all 400 (or thereabouts) customer contracts were renewed on the prices sought by SA Water.
 - 14.3 The bare assertions at paragraphs 25-26 of SA Water's letter are without foundation and should not be relied upon by the ACCC.
15. **Term of protection afforded by Notification**
- 15.1 Finally, if the ACCC decides to permit the VIA's Notification, then the VIA respectfully seeks that the protection afforded by the Notification be granted for the maximum period, up to ten years, which will permit the VIA to collectively re-negotiate Customer Contracts with SA Water again in the future if necessary, pending the outcome of present negotiations and the terms of current customer contracts.

⁹ C Mooney and N Stenekes, "An analysis of the social aspects of establishing agricultural recycled water schemes - social perspectives on water", Australian Government Bureau of Rural Sciences, 2008, p 30.

16. Summary

- 16.1 The VIA is strongly maintains that its collective bargaining notification will result in substantial public benefit.
- 16.2 On the contrary, should the notification not proceed, then the VIA is it extremely concerned that this SA Water will continue to fail to negotiate in good faith with its irrigator users, who are under-resourced, often unsophisticated and have a far weaker bargaining power compared to SA Water, which holds close to a monopoly position on water supply in South Australia.
- 16.3 VIA says that the weight of public interest points in favour of allowing the proposed collective bargaining conduct, for all the reasons set out in the Notification and so that both parties can continue productive negotiations, if necessary towards an arbitration on the question of water price, as SA Water has itself conceded it is prepared to do.

The VIA awaits the ACCC's response to its Notification in due course.

Yours faithfully



Tom Crompton
Senior Associate
BOTTEN LEVINSON
Email: tlc@bllawyers.com.au

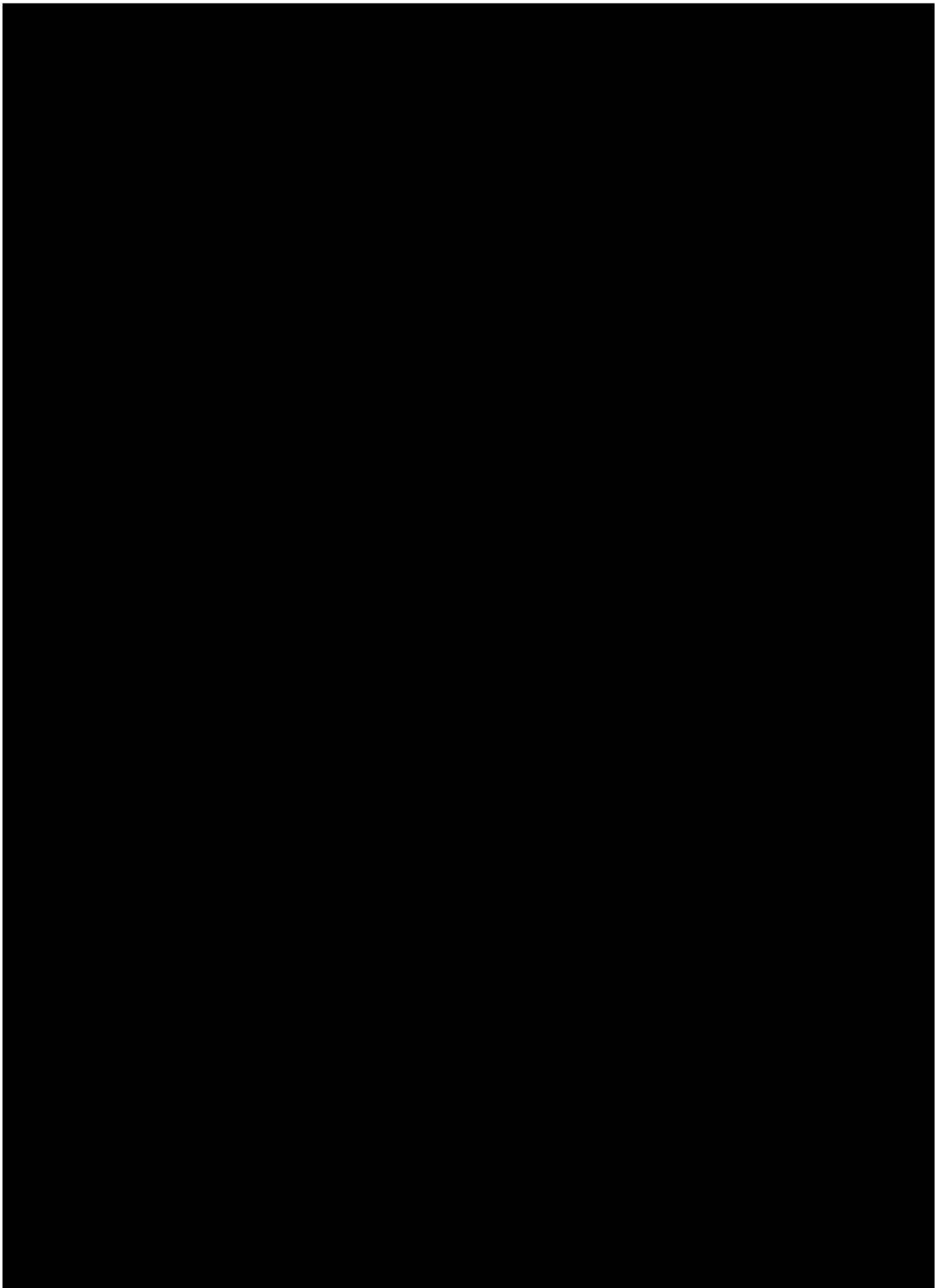
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ANNEXURE 1

Letter from VIA President, Mr Rocco Musolino to SA Water dated 3 May 2019

The Virginia Irrigation Association

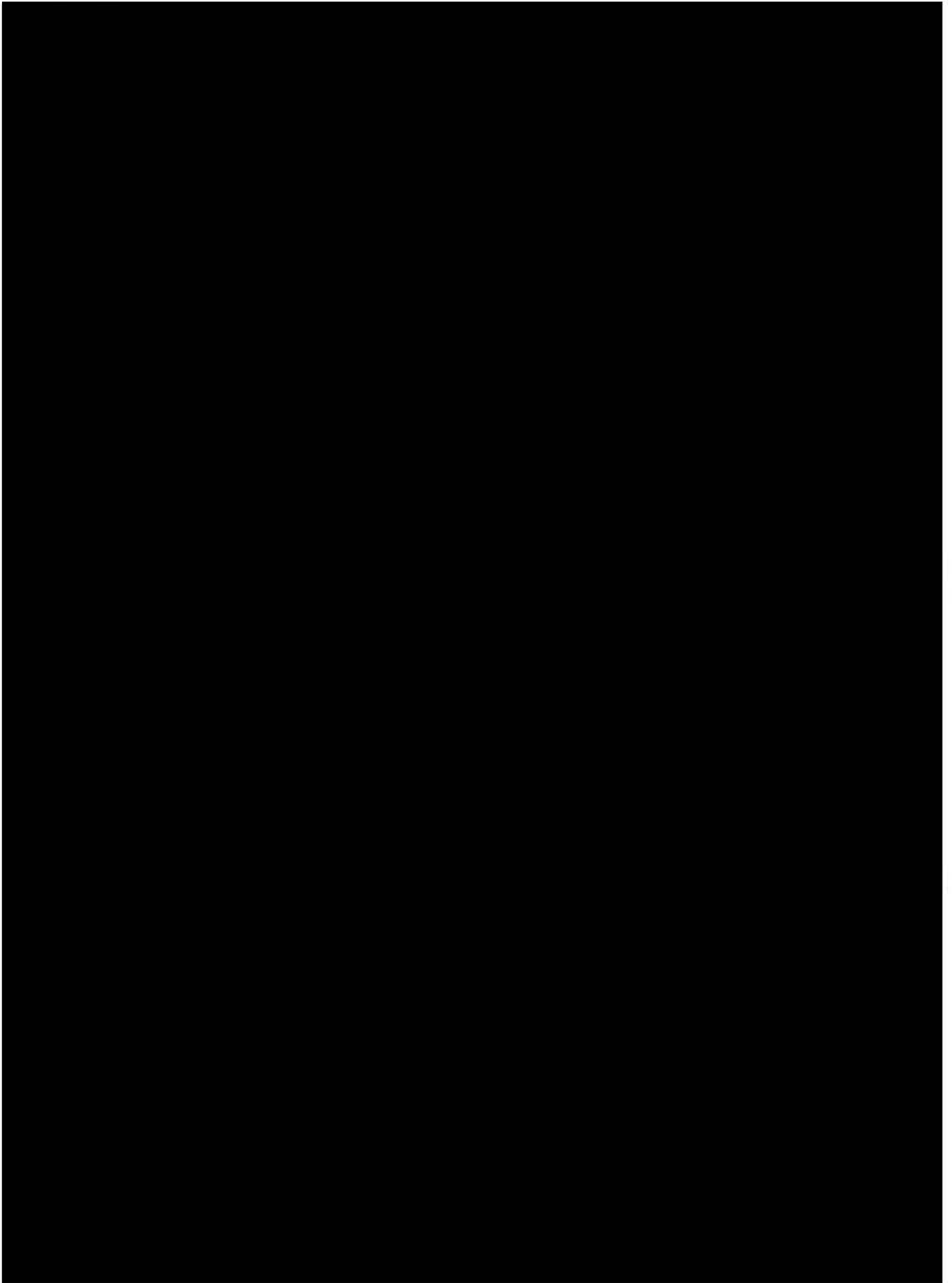
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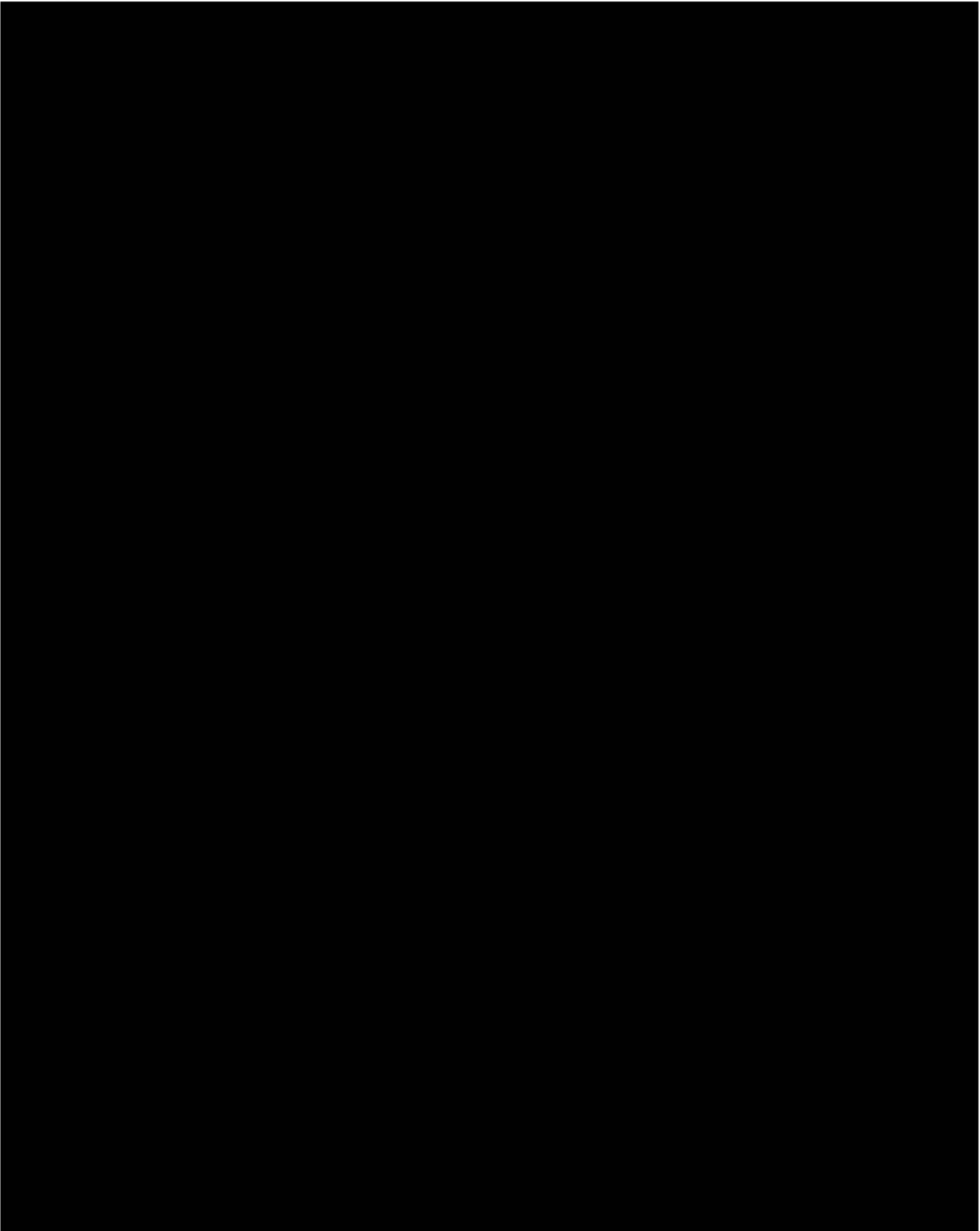


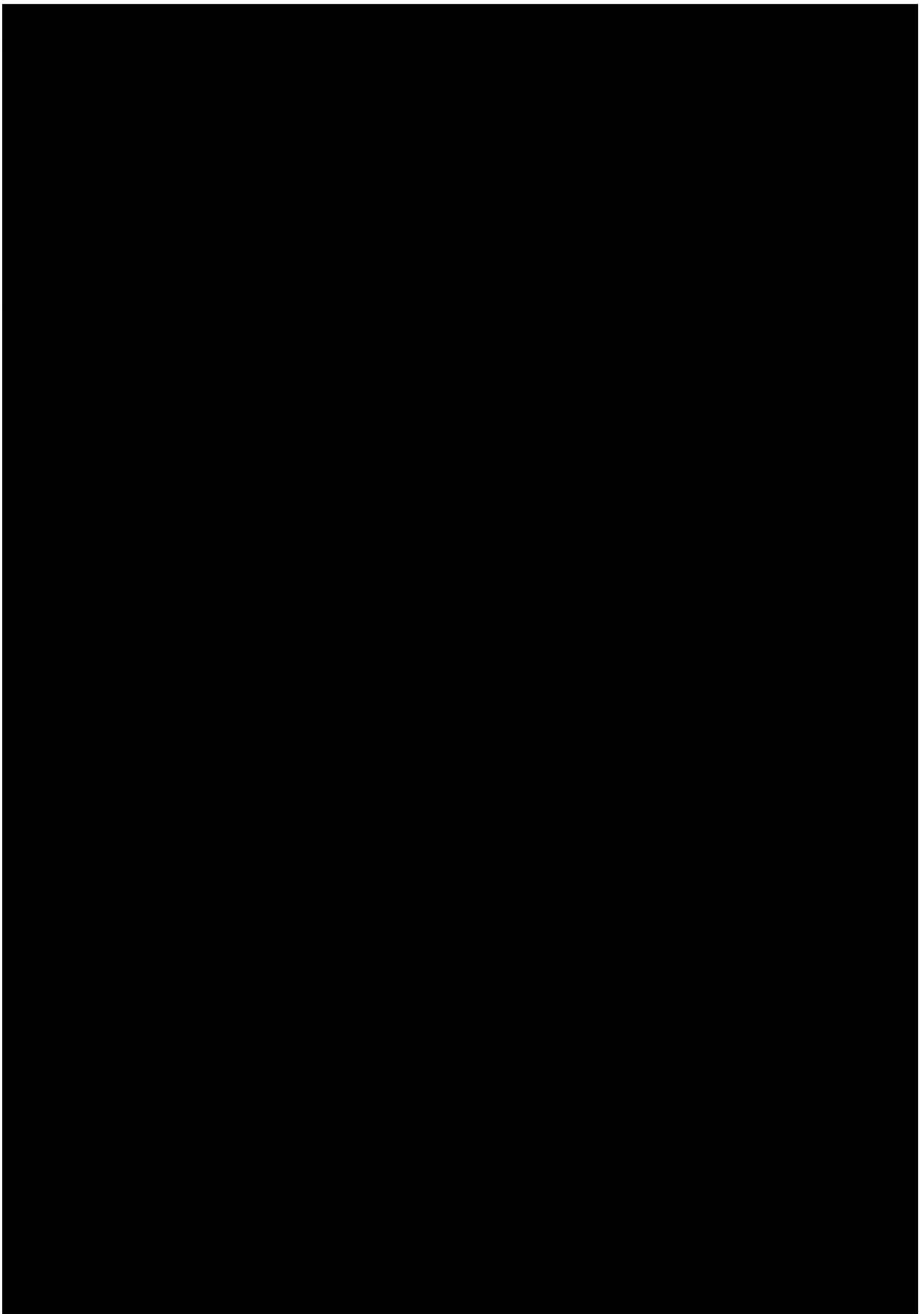
ANNEXURE 2

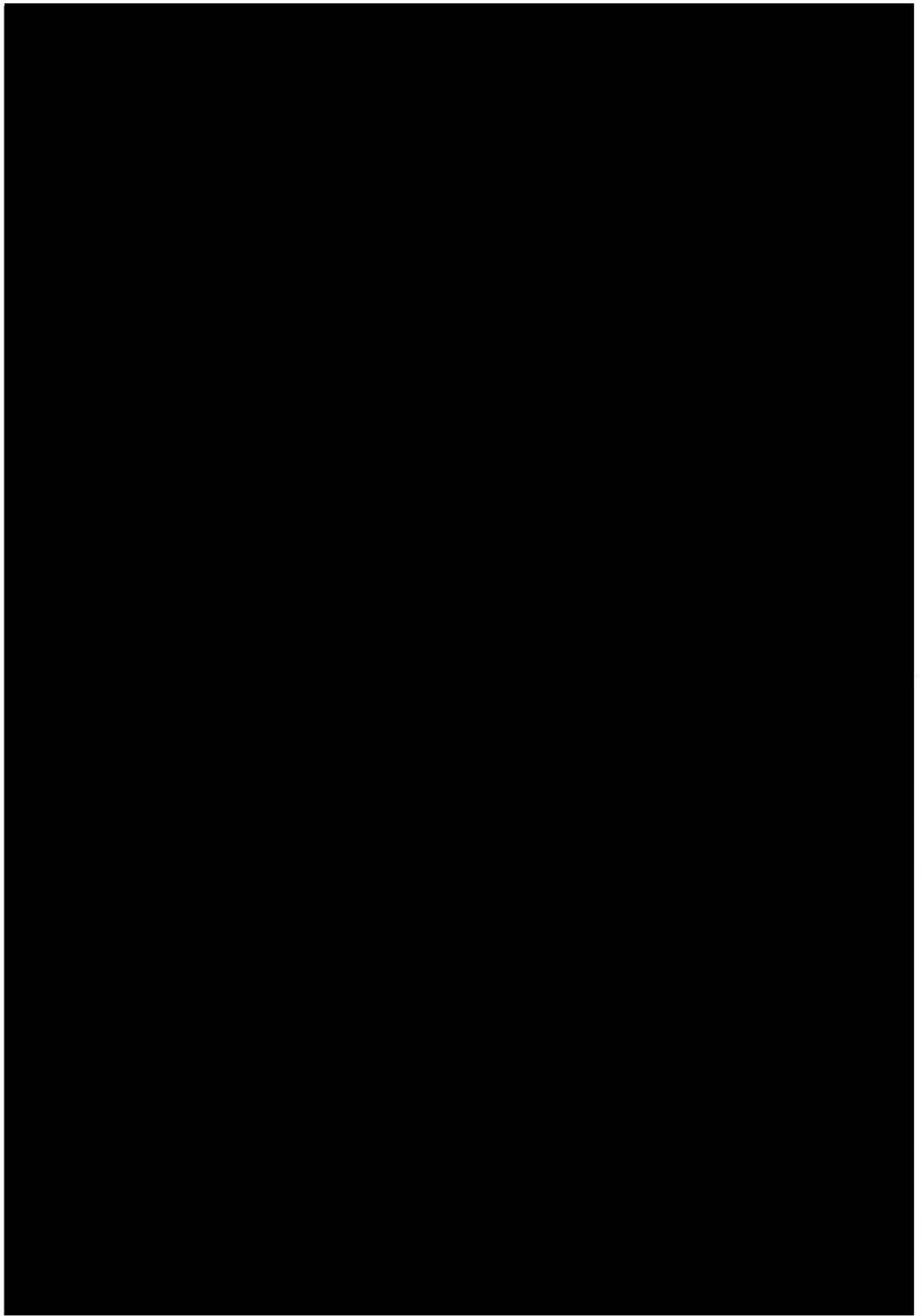
Letter dated 23 May 2019 from SA Water to the VIA

23 May 2019









ANNEXURE 3

**Letter dated 24 June 2019 from Botten Levinson to Crown Solicitors Office (SA) and
the enclosed Notice of Referral to Arbitration**

Our ref: TLC/219144

24 June 2019

**BOTTEN
LEVINSON**
Lawyers

