

“Testing the Waters: Legal Challenges to Water Sharing Plans in NSW”

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Abstract

Over the last 10 years, all States and Territories in Australia have been reviewing their water management regimes in light of the Council of Australian Government’s Water Reform Agenda and now the National Water Initiative. As part of this process, new water legislation has been passed in a number of States including New South Wales and Queensland, whilst other states have seen existing legislation significantly overhauled. The introduction of new legislative regimes gives rise to the potential for legal challenges to test the interpretation and implementation of those new laws. In NSW, the introduction of the *Water Management Act 2000* and the making of water sharing plans under that Act has led to the commencement of a number of legal challenges by both irrigators and conservation groups. This paper will review the role that water management plans play in the water reform process, having regard to the two recent cases which have been decided in the NSW Court of Appeal.

Introduction

Across Australia, freshwater ecosystems are being placed under increasing stress from the demands for water for human consumption. Providing water security for large cities such as Perth and Sydney is one of the most significant challenges faced by the managers of freshwater resources. With high level water restrictions being invoked in cities and rural towns and debates turning to desalination, grey water recycling and new dams or storages to augment dwindling surface and groundwater supplies, it becomes evident that the sustainable management of water resources must be every State government’s priority.

For over 10 years, the Commonwealth government through the National Competition Council (**the Competition Council**) and the Council of Australian Governments (**CoAG**) has been driving a water reform agenda. In 2004 the National Water Initiative (**NWI**) was agreed to as the vehicle by which the Commonwealth and State & Territory Governments (excluding WA and Tasmania) committed themselves to certain actions to facilitate a more coordinated approach to inland river management.

The Council of Australian Governments (COAG) *Communique* of 25 June 2004 identified the following outcomes that the NWI seeks to achieve:

- expansion of permanent trade in water bringing about more profitable use of water and more cost effective and flexible recovery of water to achieve environmental outcomes;
- more confidence for those investing in the water industry due to more secure water access entitlements, better and more compatible registry arrangements, better monitoring, reporting and accounting of water use, and improved public access to information;
- *more sophisticated, transparent and comprehensive water planning that deals with key issues such as the major interception of water, the interaction between surface and groundwater systems, and the provision of water to meet specific environmental outcomes;*
- a commitment to addressing over-allocated systems as quickly as possible, in consultation with affected stakeholders, addressing significant adjustment issues where appropriate; and
- better and more efficient management of water in urban environments, for example through the increased use of recycled water and stormwater.

The third bullet point, water management planning, is the focus of this paper.

Policy Framework for Water Management Planning

The NWI objectives have been elaborated upon in the *Draft Inter-Governmental Agreement on a National Water Initiative 2004* (draft **IGA**). The draft IGA includes provisions relating to water access and entitlements that state that:

“the consumptive use of water will require a water access entitlement, separate from land, to be described as a perpetual or open-ended share of the consumptive pool of a specified water resource, as determined by the relevant water plan¹.

The allocation of water to a water access entitlement will be made consistent with a water plan²⁻³.

¹*Draft Inter-governmental Agreement on a National Water Initiative (“IGA”) cl.28*

² IGA cl.29

³ **IGA cl.31** - water access entitlements will:

i. *specify the essential characteristics of the water product;*

Under the draft IGA, broadly, water planning by States and Territories is required to provide for:

- i. secure ecological outcomes by describing the environmental and other public benefit outcomes for water systems and defining the appropriate water management arrangements to achieve those outcomes; and*
- ii. resource security outcomes by determining the shares in the consumptive pool and the rules to allocate water during the life of the plan⁴.*

There is wide discretion afforded to the States and Territories to determine the area to which a plan will apply⁵. However, in terms of format, States and Territories are required to prepare *water plans* along the lines of the characteristics and components set out at Schedule E to the draft IGA⁶. The matters listed include:

- descriptions of the water source and its current health;
- risks that could affect the size of the water resource;
- the objectives of the policy;
- the knowledge base upon which decisions are being made and how to improve that knowledge base;
- environmental and other public benefit outcomes;
- estimations about system reliability;
- circumstances for extractions and limits upon those extractions; and

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- ii. be exclusive;*
 - iii. be able to be traded, given, bequeathed or leased;*
 - iv. be able to be subdivided or amalgamated;*
 - v. be mortgageable (and in this respect have similar status as freehold land when used as collateral for accessing finance);*
 - vi. be enforceable and enforced; and*
 - vii. be recorded in publicly-accessible reliable water registers that foster public confidence and state unambiguously who owns the entitlement, and the nature of any encumbrances on it*

⁴ IGA cl.37

⁵ IGA cl.38

⁶ IGA cl.39 – Descriptions to include the water source/s covered by the plan, the current health and condition of the system, the risks that could affect the size of the water resource, the uses and users of the water including consideration of indigenous water use and the environmental outcomes proposed; where systems are over-allocated or overused the plan should set out a pathway to correct it; the duration of the plan should be consistent with the level of knowledge and development of the water source; review process for ongoing plans.

- conditions to be applied to entitlements.

Water planning processes are required to include:

- consultation with stakeholders;
- application of best scientific knowledge;
- identification of consumptive use, environmental, cultural and other public benefit issues and consideration of those issues in a transparent manner; and
- references to broader natural resource management planning processes.

In the implementation of *water plans*, the State and Territory governments are required, consistent with the nature and intensity of resource use, to:

- i. monitor the performance of water plan objectives, outcomes and water management arrangements;*
- ii. factor in knowledge improvements as provided for in the plans; and*
- iii. provide regular public reports. The reporting will be designed to help water users and governments to manage risk, and be timed to give early indications of possible changes to the consumptive pool.⁷*

Ensuring that water is provided for environmental purposes is a central component of the NWI and water management plans. In this regard, the draft IGA states that:

“water that is provided by the States and Territories to meet agreed environmental and other public benefit outcomes as defined within relevant water plans is to:

- i. be given statutory recognition and have at least the same degree of security as water access entitlements for consumptive use and be fully accounted for;*
- ii. be defined as the water management arrangements required to meet the outcomes sought, including water provided on a rules basis or held as a water access entitlement; and*
- iii. if held as a water access entitlement, may be made available to be traded (where physically possible) on the temporary market, when not required to meet the environmental and other public benefit outcomes sought and provided such trading is not in conflict with those outcomes.⁸*

⁷ IGA cl.40

⁸ IGA cl.35

In many Australian States there have already been a number of steps taken to meet the CoAG/NWI objectives in relation to water management planning. These steps are reviewed regularly by the Council and competition payments are dependent upon the achievement of certain targets set by the water reform agenda.

Whilst all Australian States and Territories are involved in significant reforms to their water management legislation and policy, New South Wales and Queensland have, over the past 6 years, both introduced wide ranging institutional changes and completely new legislation to advance the CoAG/NWI goals. In New South Wales, the *Water Management Act 2000* and the water management reform process has been described by the Minister for Infrastructure, Planning and Natural Resources as follows:

“We are poised to introduce a new framework for water management which will deliver far reaching benefits for the economy, the environment and regional communities in NSW. This new framework will recognise the importance of sustainable management of our water resources in underpinning vibrant regional communities. It will maintain the environmental health of the State’s water and encourage innovative and efficient use of this scarce resource.”⁹

However, the most recent Competition Council assessment of New South Wales performance against the NWI in relation to water management planning found that the State had failed to demonstrate that its water sharing plans were developed using the best available scientific evidence to enable stressed river systems to be returned to sustainable levels of extraction in the near future¹⁰.

In this paper, I would like to take the opportunity to review the water sharing provisions of the Water Management Act 2000 (NSW) (**WM Act**) and to discuss, having regard to two recent decisions of the NSW Court of Appeal, whether these provisions as drafted and as amended achieve the objectives of the NWI. It is my view that, although the provisions of the WM Act provide an excellent statutory basis to achieve the NWI objectives, the

⁹ “NSW Water Reforms – A secure and sustainable future” Ministerial Statement of Craig Knowles p.2 (www.dipnr.nsw.gov.au/water)

¹⁰ National Competition Council Annual Report 2003-2004 (www.ncc.gov.au/annualreport)

implementation of the water management planning process has fallen short of achieving the environmental, social and economic outcomes of the NWI and the Act itself.

Water Management Act 2000 (NSW)

The WM Act is a voluminous piece of legislation that addresses a wide range of water management issues, most of which are beyond the scope of this paper. However, the structure of the WM Act discloses four underlying premises which are particularly pertinent to water management planning.

First, in determining the priority between the protection of the water source and its dependent ecosystems and extraction rights, priority is to be given to the protection of the water source and its dependent ecosystems¹¹.

Second, the means selected by the WM Act, to achieve its objects in accordance with the priority given by Parliament to the protection of the water source and its dependent ecosystems is the making of management plans, including water sharing plans. These plans are the tools selected by the Act to implement the water management planning principles¹² and the environmental water rules¹³. Water sharing plans are therefore important as they set parameters for the Minister's duties and the functions of other public authorities in relation to water management¹⁴, as well as the rules for the distribution of water and available water determinations¹⁵, the determination of applications for access licences¹⁶, setting mandatory conditions on licences¹⁷, and the determination of applications to transfer, vary, consolidate or assign rights under access licences¹⁸.

Third, the WM Act has number of significant accountability provisions. These include requiring cumulative impacts to be considered and minimized¹⁹, to apply principles of

¹¹ This is as a consequence of the operation of s.9(1)(b) of the Act read with s.5(3) in the context of the objects established in s.3

¹² s.5 WM Act

¹³ s.8 WM Act

¹⁴ ss.48 & 49 WM Act

¹⁵ s.60 WM Act

¹⁶ s.63(2)(a) WM Act

¹⁷ s.61(1), (2) and 67(2A) WM Act

¹⁸ s.71Y(1)© WM Act

¹⁹ s.5(2)(d) WM Act

adaptive management²⁰, requiring the State Water Management Outcomes Plan to set overarching policy²¹, classification of water sources²², regular reviews of performance under the Act²³, public involvement in the preparation of management plans²⁴, maintenance of public registers for security interests in licences²⁵ and available water determinations²⁶ and extensive enforcement provisions in Chapter 7 of the Act, including open standing provisions for civil enforcement²⁷.

Fourth, water management principles of the WM Act control the performance of all functions under the Act, including the making of management plans²⁸. The requirement to adhere to these principles operates throughout the course of management planning²⁹ and they are the touchstone for the review of any management plan made under the Act to determine whether the provisions of the plan are achieving their objects³⁰.

When the WM Act was passed in December 2000, it represented a sophisticated approach to water management which gave clear priority to the environmental needs of inland river systems. On its face, the legislation addressed a number of key issues related to reversing over allocation and promoting sustainability, as identified in the CoAG water reform agenda and more recently the NWI. However, a number of hurdles have been placed between the objectives of the Act and their implementation. These hurdles include amendments to the WM Act in 2002 and 2004 which had the effect of diluting some of the important plan making and accountability provisions³¹. Also, throughout the process of developing water sharing plans, the first step to putting in place the new water management system, there has

²⁰ s.5(2)(h) WM Act

²¹ s.6(2) WM Act

²² s.7 WM Act

²³ s.10(1), s.43-44 and s.404 WM Act

²⁴ s.36-39 WM Act

²⁵ ss.83 & 83A WM act

²⁶ s.84 WM Act

²⁷ s.336(1) WM Act

²⁸ s.9 of the WM Act imposes a duty on all persons exercising functions under the Act to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of the Act and, between the principles of water sharing set out in s.5(3), to give priority to those principles in the order in which they are set out in that subsection.

²⁹ See for example: s.20(2)(f), 21(e), 24(g), 27(e), 30() and 33(e) WM Act

³⁰ s.43 & 43A WM Act – although now as a result of amendments to the WM Act in 2004 the natural resource targets and standards set by the Natural Resources Commission will dictate performance of water sharing plans

³¹ For a review of the amendments – see Millar, I “Water Management Amendment Bill 2004 – Discussion paper” www.edo.org.au/nsw/publications

been ongoing tension between irrigators and those people representing consumptive uses of water and pastoralists and environmentalist who are seeking to re-establish healthy river systems. The conflict between interest groups has seen, on a number of occasions, the Government making compromises about measures to achieve environmental health outcomes when pressed by irrigators claiming those protective measures would adversely effect the economic viability of their industries.

Plan making in NSW

The key provisions in relation to water management planning are found in Chapter 2 of the WM Act which deals with the making of water management plans. Whilst Chapter 2 provides for the establishment of committees and the making of plans that deal with water sharing, water use, drainage management, floodplain management, controlled activities and environmental protection, to date, only water management plans that deal with water sharing have been made.

The main components of water sharing plans are set out in ss.20 and 21 of the WM Act which require plans to deal with the establishment of environmental water rules³², identification of water for basic landholder rights, identification of water requirements for extraction under access licences, establishment of access licence dealing rules and the establishment of a bulk access regime³³ for the extraction of water. Water sharing plans may also deal with the circumstances in which water may be extracted, the kinds of water supply works that can be constructed in a water management area, operation of water accounts and measures for the protection and rehabilitation of water sources.

In late 2002 and early 2003 the Minister for Land and Water Conservation (as he then was – now the Minister for Infrastructure, Planning and Natural Resources) gazetted 36 water sharing plans for regulated river, unregulated river and groundwater water sources across the State. As noted above, Part 3 of Chapter 2 of the WM Act contains the statutory process

³² Being rules for the identification, establishment and maintenance of water for each class of environmental water (s.8 WM Act)

³³ The bulk access regime is required to be consistent with limits on the availability of water set for the water source, must establish rules according to which access licences are to be granted and managed, recognize effects of climatic variability, establish rules relating to priorities for the adjustment of water allocations and may contain provisions with respect to mandatory conditions to be imposed on access licences.

for the establishment of management committees and the making of water management plans in accordance with a publicly accountable process. Notwithstanding these provisions, all but one of the water sharing plans made in 2002/2003 were Minister's plans made pursuant to Part 4 (s.50) of Chapter 2 of the WM Act.

Section 50 of the WM Act, as originally enacted in 2000 required Minister's plans to deal with the same matters as a plan made under Part 3, in particular the form of a management plan (vision statement, objectives, strategies and performance indicators)³⁴ and the establishment of rules for the sharing of water between environmental and consumptive uses³⁵. However, in 2002 (shortly before the gazettal of the first round of management plans) s.50 of the WM Act was amended to require the Minister to deal with these matters only "in general terms". Further, in 2004, s.50 was further amended to exempt Minister's plans from complying with certain requirements relating to public consultation about the making of such plans³⁶.

The making of Minister's plans represented one of the first controversies of the implementation of the NSW system. Many members of advisory committees (called water management committees)³⁷ who were involved in the initial drafting of water sharing plans in their water management area felt that the Minister had either misled them as to their role in the plan making process³⁸ or alternatively had exercised his power for an extraneous purpose to achieve outcomes that were unfair to stakeholders. This second point will be discussed below in relation to the *Murrumbidgee Groundwater Preservation Association* case³⁹.

A number of other aspects of the water sharing plans have been the subject of criticism and legal challenge by both conservation groups and irrigators. From a conservation perspective

³⁴ s.35 WM Act

³⁵ s.20 WM Act

³⁶ Specifically ss.36-41 of the WM Act no longer need to be complied with.

³⁷ Established under s.381 as opposed to s.12 of the WM Act

³⁸ In this respect some irrigator groups have argued in pleadings filed in the NSW Land and Environment Court that they were denied natural justice insofar as they had a legitimate expectation that the plan making process in Part 3 of Chapter 2 would be followed and the failure to adhere to that process meant that their views and recommendations (particularly in relation to socio-economic implications of the plans) were not followed resulting in unfairness to their interests.

³⁹ *Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources* (2004) NSWLEC & on appeal [2005] NSWCA 10 (**MGPA case**)

some of the critical failings in the water sharing plans for regulated rivers, were the failure to provide meaningful performance indicators and the failure to provide environmental water rules that provided for the identification, establishment and maintenance of water for the fundamental ecosystem health of the dependent ecosystems of the water sources⁴⁰. In addition to concerns about the process by which the plans were made, from the irrigator's point of view, the water sharing plans for both river and groundwater sources were objectionable insofar as they over-allocated water for environmental purposes, reduced existing entitlements in areas where water supply was at or below sustainable levels of extraction, failed to provide adequate security to high security water users and failed to take into account socio-economic considerations – in particular the impacts identified by modeling commissioned by irrigator groups.

Within three months of the water sharing plans being made, legal challenges to the validity of many of those plans⁴¹ were commenced in the NSW Land and Environment Court. One case, the *Murrumbidgee Horticulture Council v Minister for Land and Water Conservation* was heard and determined on its facts in September 2003. However, due to the large number of cases which canvassed many similar issues, in October 2003 the new Chief Judge of the Land and Environment Court instigated a system of case management for the water sharing plan challenges which resulted in two “test cases” being put forward.

The first (*Nature Conservation Council of NSW Inc v Minister administering the Water Management Act 2000*) challenged the Water Sharing Plan for the Gwydir Regulated River Water Source. The second (*Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources*) challenged the Water Sharing Plan for the Murrumbidgee Groundwater Water Source. Due to the fact that the Minister has made the three types of water sharing plans using a similar formula, the challenge to a regulated river plan and a groundwater plan were thought to provide an indication of the likely outcomes for cases relating to other plans made using the same formula. Both of these cases, which dealt with vastly different legal issues, were heard by judges of the Land and Environment Court in November/December 2003 and were dismissed in early 2004. Appeals were made against those decisions in the NSW Court of

⁴⁰ *Nature Conservation Council of NSW Inc v Minister administering the Water Management Act 2000* (2004) NSWLEC 33 & on appeal [2005] NSWCA 9 (the NCC case)

Appeal which heard the appeals consecutively in November 2004. The Court of Appeal decisions, dismissing both appeals are discussed in detail below.

***Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources* [2005] NSWCA 10**

The MGPA case dealt with a challenge to the *Water Sharing Plan for the Lower Murrumbidgee Groundwater Sources 2003 (GWSP)*. The plan covered an area of over 33,000 square kilometres and involved three aquifers known as the Shepparton formation, the Calivil formation and the Renmark group. The applicant in the proceedings was an association of primary producers who relied upon water from the Lower Murrumbidgee aquifers.

During the 1980s, officers of the Department of Land and Water Conservation had adopted a policy and developed rules that encouraged farmers to extract water from aquifers in order to address problems relating to salinity. These rules often had little regard to the impact of the extraction on the sustainable yield and recharge rates of the aquifer. By 1998, the Lower Murrumbidgee ground water management area had been identified as a high risk ground water system and the risks identified included over-allocation of extraction, local draw-down and interference between bores and invasion of aquifers by saline ground water.

The intent of the GWSP was to address the significant over-allocation of entitlements to extract ground water promulgated under the old *Water Act 1912* regime. In order to do this, the plan proposed reducing actual groundwater use over a ten year period to a level that equated to the annual average recharge less a specific quantity of water reserved for the environment. The GWSP contained two mechanisms for dealing with the impact of the reduction in entitlements on water users. First the creation of a market in access licences, with associated access licence dealing rules. Second, the issue, for a number of years, of supplementary water access licences to those users who had, in the past, taken a high percentage of their entitlements to extract water. The plan also involved an across-the-board cut in entitlements. In both the Land and Environment Court and Court of Appeal the Association argued that, in the absence of interconnectivity between the various ground

⁴¹ s.47 WMA

water systems, the cuts in entitlements were perverse as they did not serve the objective of limiting extractions to sustainable yield.

The applicants raised six main challenges in the Court of Appeal proceedings. They were:

First, that the power to make the plan had been exercised for an extraneous purpose, namely to avoid the statutory scheme for the promulgation of a plan by a management committee. The Association argued that this occurred either due to a deliberate policy to avoid the statutory procedures or because the Minister wished to reserve the power to make such plans himself.

Second, in relation to supplementary water licences, the Association argued that the provisions in the plan which allow for the grant of supplementary water access licences to holders who had historically used a significant portion of their entitlement under pre-existing licensing regimes was attempting to create an entitlement to supplementary water access without statutory authority as only the Minister could grant supplementary licences.

Third, that the formula in the plan which provided for the reservation of water for environmental purposes contained a mathematical impossibility.

Fourth, that the difficulty arising from the commencement date of the plan, being by reference to a period commencing from the date of proclamation of that part of the plan making provisions of the Act relating to access licences, was a factor which could lead to a conclusion of invalidity.

Fifth, the provisions of the Act which require water sharing provisions of the management plan to deal with the identification of requirements for water for extraction under access licences, should be understood to mean requirements in the sense of needs as distinct from entitlements – particularly in some aquifers where actual usage was significantly less than water theoretically available.

Sixth, the formula in the plan to reduce entitlement was irrational. In this respect, the appellant claimed that due to the limited interconnectivity within the aquifers, constituting the ground water source, the across the board pro-rata cut in pre-existing entitlements was perverse and did not serve the objective of limiting extractions to sustainable usage. The applicant submitted that in this context the imposition of uniform reductions was illogical to the point of irrationality and involved a considerable level of unfairness.

It is the first and sixth point of appeal that are of most interest to broader water management issues. As noted above, Chapter 2, Part 2 of the WM Act provides for management committees, which may be established by the Minister to carry out a specific task in relation to water management in a particular area. The tasks for which the committee is appointed include the preparation of a draft management plan or a water management area. Chapter 2, Part 3 covers the process of preparation, and content, of management plans. The procedures for making management plans are outlined in Division 8 of Part 3 of Chapter 2, including public exhibition and concurrence requirements before the Minister can make a management plan. Minister's plans are regulated by Part 4 of Chapter 2, and may be made for any water management area for which a management plan is not already in force.

The GSWP was a plan made by the Minister as distinct from a plan made by a management committee. However, the management committee albeit an advisory committee, had been established by the Minister pursuant to Section 281 of the Act. The management committee carried out all the tasks and functions of a management committee that could have been established under Part 3 of Chapter 2, however, the management committee did not have the final say in relation to the content of the draft GWSP.

The Association submitted that the structure of the WM Act, including the objects of the Act, required the "*involvement of the community as a partner with government in resolving issues relating to water management*", and "*to encourage the sharing of responsibility for the sustainable and efficient use of water between the government and water users*". The Association therefore claimed that the failure to establish management committees constituted a deliberate policy to either avoid the statutory procedures which those committees were required to follow or because the

Minister wished to preserve for himself the power to make all relevant plans with the broader discretion afforded under Section 50.

The Court of Appeal rejected these claims and held that there was nothing in the legislative scheme to suggest that a Ministerial plan was in any way a secondary or subordinate form of making a plan or that the power to make such plan was only to be exercised as a matter of last resort⁴². The Court noted that the Minister's power to establish a management committee under Section 12 of the Act was discretionary and that whilst public consultation was useful, public input into the plan could be obtained by other means – as had occurred in that instance.

The case in relation to the question of irrationality was based upon the factual foundation that there was limited interconnectivity within the aquifer, the subject of the plan. This evidence suggested that it could take up to 100,000 years for a molecule of water to move from one part of the Calivil and Renmark aquifer to the other. Complex hydrogeological evidence in relation to the interconnectivity of the aquifer and the appropriate regime for managing extractions from the aquifer, was put before the Land and Environment Court. Having regard to that evidence, his Honour McClellan CJ expressed the view that

“Although the evidence discloses that over a great many years the aquifer may function as a single body of water which would justify a uniform reduction in entitlements, there are obvious anomalies in basing the Plan on these principles. I am also satisfied that by imposing a uniform reduction on all irrigators, irrespective of their capacity to use the water theoretically available under the licence, the Plan will operate unfairly on some irrigators in a manner that could have been avoided.”⁴³

Notwithstanding the clear evidence that the result of the operation of the policy would be unfair, both the Land and Environment Court and the Court of Appeal found that the underlining policy adopted by the government could be justified. The Court reviewed that policy and noted that it contained a clear recognition of the differential impact of the proposed system. The GSWP imposed a proportionate reduction of all existing

⁴² MGPA Case CA - Spigelman CJ at para 35

⁴³ MGPA Case LEC - McClellan CJ at para 179-184

entitlements, alleviated in the short-term by the supplementary water licence system. In the longer-term the Court accepted that the transfer system would provide a mechanism for bringing licence extractions in particular areas closer to the annual recharge in those areas and in doing so, would ensure that water was used for its highest value economic use.

As Spigelman CJ noted *“inevitably, when significant changes are made to established regulatory regimes, there will be winners and losers. Considerations of equity are quintessentially matters for political decision making.. I am not satisfied that anything in the nature, scope and purpose of the Act prevents the Minister from implementing a scheme which operates to the detriment of some persons and to the advantage of others, in a manner not determined by availability of water but by broader considerations of what the Minister regards as equitable.”*⁴⁴

It is interesting to note that in light of the criticisms made about the application of the policy by McClellan CJ, the Minister deferred the commencement of five critical groundwater plans in NSW in July 2004 pending a review of the equity of the policy under consideration. Most recently the Federal and NSW Government announced a package to provide funding to landholders in certain high stressed ground water areas to alleviate some of the financial difficulties associated with the impacts of the reductions in entitlements under the groundwater plans.

Nature Conservation Council of NSW v Minister administering the Water Management Act 2000 [2005] NSWCA 9

The Gwydir River commences near Armidale in the New England Tablelands and flows in a north westerly direction for about 300 kilometres, past the town of Moree and into the Barwon River upstream of Collarenebri. The “regulated” rivers that make up the majority of the water system lying between Copeton Dam and the junction of the Gwydir River and its effluent streams with the Barwon River make up the Gwydir Regulated River Water Source (GRRWS). Importantly, the Gwydir River and its effluent streams provide water to four wetlands which comprise the internationally significant Ramsar listed Gwydir wetlands.

In May 2003 the Nature Conservation Council of NSW Inc (**the NCC**), the peak State environmental group challenged the validity of the Water Sharing Plan for the GRRWS (**the Gwydir WSP**). Unlike the majority of challenges made to other WSPs – based upon socio-economic implications, the NCC’s challenge was focused upon the environmental performance of the plan.

At first instance, the NCC argued that the plan should be found invalid for the following reasons:

First, the statutory scheme established by the WM Act provided that a management plan must include the following components; a vision statement, objectives consistent with the vision statement, strategies for reaching those objectives and performance indicators to measure the success of those strategies. The NCC argued that the Gwydir WSP purported to include performance indicators to measure the success of its objectives (not strategies) in terms which were incapable of indicating any measure of success. Therefore, the plan did not include a mandatory component.

Second, the plan was required to deal with the establishment of environmental water rules for the water source in relation to each of the classes of environmental water⁴⁵. One of those classes in respect of which a rule was required, recognised for the purposes of the Act, was water committed for fundamental ecosystem health, at all times, which may not be taken or used for other purposes. The NCC claimed that the purported rule for “environmental health water” in clause 14 of the Gwydir WSP was not rule as mandated by the relevant provision of the WM Act as it dealt with notional water – constructed by reference to long term averages, instead of actual water to be set aside for clearly defined purposes.

Third, the purported rule for “supplementary environmental water” contained in clause 15 of the Gwydir WSP was contingent upon the allocation of 100% the share component of available water to high security access licences. The NCC argued that this had the effect of subordinating environmental water in circumstances where there was an obligation upon

⁴⁴ MGPA case per Spigelman CJ para 144

⁴⁵ S.20(1)(a) WM Act

persons exercising functions under the Act to give priority to the principle that the sharing of water from a water source must protect the water source and its dependent ecosystems before providing water for basic landholder or consumptive uses.

Talbot J in the Land and Environment Court dismissed the NCC's appeal at first instance. On appeal, his Honour's findings in relation to the first two issues referred to above were challenged.

In relation to the performance indicator point, the NCC submitted that a performance indicator would not satisfy the statutory requirement of the WM Act unless it contained some component against which the success of each strategy may be measured (in the sense that it was referable to a quantity or quality that had been fixed). Specifically, any performance indicator must indicate the direction of any change which indicates success and also provide an indication as to the magnitude of any change which may indicate success or lack of success.

The Court of Appeal dismissed the NCC's claim on this point and held that the legislative scheme in the Act does not require a performance indicator to be expressed in the form of a "target" or "standard"⁴⁶. In the Court's opinion, the indicators identified in the Gwydir WSP pointed to the direction of any change or movement which would indicate success rather than failure. Furthermore, although neither Notes nor Appendices to the plan formed part of the plan, Appendix 4 to the Gwydir WSP did identify matters capable of quantitative assessment and matters requiring qualitative assessment. In other words, it was sufficient for a plan to state indicators in general terms, with more detailed modes of assessment provided for in an appendix.

The Court of Appeal also noted that, as a result of the 2002 amendments to s.50 of the WM Act, a Minister's plan needed to deal with matters required in a management plan but only in "general terms". Even without reference to the Appendix, the Plan contains performance indicators that satisfied this requirement.

In relation to the second ground of appeal, the Court of Appeal rejected the submission of the Minister that it was sufficient for the Plan to deal with “an abstract concept” of water, rather than actual water⁴⁷. Instead the Court formed the view that:

“what is required by the Act is water that is constantly provided for and which, absent acute drought conditions, will in fact be available to protect fundamental ecosystem health. A rule expressed in terms of an amount in excess of an “extraction limit” was not a rule for the “identification, establishment and maintenance of water” within the meaning of the Act.”

The formula contained in clause 14 of the Gwydir WSP (and other regulated river plans) allocated water that was “in excess of the long term average annual extraction limit” to fundamental ecosystem health. The NCC argued that this formula inverted the statutory requirements of the WM Act.

Spigelman CJ made the following observations about the requirements under the WM Act:

“66 What is required is water that is constantly provided for and which, absent acute drought conditions, will in fact be available to protect “fundamental ecosystem health”. To the extent water is present at all, priority is to be given to fundamental ecosystem health.

67 In my opinion, cl 14(a) and cl 14(b) do not “identify, establish and maintain” any water for “fundamental ecosystem health” in a way that can be described as a “commitment” “at all times” of water that “may not be taken or used for any other purpose”. Clause 14(a) and cl 14(b) rely upon cl 32 to ensure that water in excess of the long term extraction limit is not being taken. That provision, however, does not “identify, establish and maintain” any water that may not be taken. It assumes that water is taken.

68 In this regard, cl 14(a) and cl 14(b) invert the statutory requirement. A “bulk access regime” under cl 20(1)(e), including the recognition of limits to the availability of water under s20(2)(a), for which cl 30 and cl 32 of the Plan provide, must be established “having regard to” the environmental

⁴⁶ *Seaton v Mosman Municipal Council* (1996) 93 LGERA 1 distinguished.

⁴⁷ NCC case per Spigelman CJ para 64-65

water rules established under s20(1)(a). However, cl 14(a) and cl 14(b) are environmental water rules established “having regard to” the bulk access regime. The statute requires the opposite to be done.”

The Court of Appeal unequivocally held that the Minister had failed to make an environmental health water rule in accordance with the statutory requirements of the WM Act. However, surprisingly, the Court was not prepared to exercise its discretion and declare the Gwydir WSP invalid.

The law in relation to the Court’s discretion to make a finding that a particular action or formulation is invalid is fairly well settle as a result of the decision of the High Court in the case of *Project Blue Sky Inc v Australian Broadcasting Association*⁴⁸. What is required is that, before determining that a failure to observe the requirements of a legislative scheme has the consequence that the exercise of a statutory power has failed and that the result of the purported exercise is invalid, it is necessary to ask whether there is a legislative purpose to invalidate the exercise of the statutory power by reason of the alleged failure. *Project Blue Sky Inc* required the Court to closely consider the text of the statute in question and the substance of the matter under consideration. In the present case Spigelman CJ stated that:

“ 93 On balance these textual indications would support a conclusion of invalidity. It is, however, my opinion that the factual context of the water source, rather than the textual context of the legislative scheme, is determinative in the present case”⁴⁹.

94 As the Notes to cls 14(a), 14(b) and 30(1) indicate, the long term extraction of 388,000 mega litres is only 56 percent of the estimated long term average annual flow of 875,400 megalitres. As a practical matter, if not in form, a substantial flow of water is in fact committed to fundamental

⁴⁸ (1998) 194 CLR 355 at 391

⁴⁹ Textual indicators suggesting invalidity included:

- The objects of the Act specified in s3(a) and s3(b).
- The water management principles identified in s5(2)(a) and s5(2)(b).
- The priority given to protecting the water source and dependent ecosystems in relation to water sharing by s5(3) and s9(1)(b).
- The mandatory terms of s8(2) (“rules ... are to be established”) and of s20(1)(a) (“water sharing provisions ... must deal with ... the establishment or environmental water rules”).

ecosystem health. In my opinion, the application of the Project Blue Sky test does not, in the circumstances, lead to a conclusion that the Plan is invalid.

95 The objects of the Act set out in s3(a) and s3(b), the water management principles set out in s5(2)(a)–(d) and 5(3)(a), together with the priority established by s9(1)(b) strongly suggest that the Parliament was concerned with matters of substance rather than form when it required the establishment of environmental water rules. On the face of the Plan, together with the analysis in the SWMOP set out in [29] above, and in the absence of any other relevant evidence, the Plan does, as matter of substance, contain rules which identify, establish and maintain water that is committed for fundamental ecosystem health at all times and which may not be used for any other purpose.”

As a result of this application of the test in *Project Blue Sky Inc*, notwithstanding the failure of the Gwydir WSP to provide environmental health water rules, the WSP remains valid. The rationale adopted by the Chief Justice in the paragraphs cited above is not, in my view persuasive. With all due respect, it is my view that his Honour misapplied the test in *Project Blue Sky inc* by focusing upon the factual circumstances of the plan, rather than the legislative intent as demonstrated by the words of the WM Act. This error is compounded by the fact that no evidence was led before the Land and Environment Court or the Court of Appeal (nor could it have been in judicial review proceedings) that addressed whether the amount of water “reserved” for the environment was in any way adequate or based upon best available scientific evidence. The NCC has sought special leave to appeal against this decision in the High Court, and that application will be heard in early September 2005.

Conclusion

In times where drought and the impacts of climate change are being felt across Australia, access to secure water resources is critical to rural and city populations. The tension between different interest groups is demonstrated by the willingness of those groups to mount complex legal challenges to new schemes for water management. The cases outlined about provide an insight into the different issues that are significant to groundwater users, surface water users, irrigators and environmentalists.

· The specification of an obligation to enforce the environmental water rules by s48.

Although any legal challenge will vary depending upon the precise terms of the legislation involved and the facts and circumstances associated with a particular water source and its users, common themes may be derived from these cases – consistent with general principles of administrative law – any may be use as a touchstone when considering challenges to new regimes in other States.

First, standing to challenge decisions is a critical starting point, under the NSW system, the WM Act specifically allows third parties to challenge the validity of management plans. However, in other States which do not have open standing provisions, then it may be necessary for environmental groups to establish common law standing. Second, a decision maker, such as the Minister will always be confined by the powers and functions conferred upon him or her by the specific terms of the legislation, its objects and purposes. This may set the framework within which environmental outcomes can be prioritised. Third, notwithstanding perverse outcomes as a result of policy decisions, if those decisions can be justified, then it may be difficult to mount a challenge that attacks the merits or reasonableness of a management regime. Similarly, even if clear errors are found in the application of legislation, Courts continue to have a discretion in relation to the remedy that is handed down.

In summary, ensuring the best outcomes for the environmental health of river and groundwater systems involves a concerted effort to ensure that good policies and good laws are put in place. The NWI framework an the draft IGA contain statements of principle and intent which support the advancement of sustainable water systems. However, those outcomes need to be balanced with the overwhelming majority of provisions focussed on efficiency and market based solutions. Legislation, such as the WM Act is a good, but not perfect or uniformly applicable model for water management regimes. In particular, the objects and water management principles and the priority purportedly given to the environment should be closely reviewed by other States when reviewing their own laws. The failing in the NSW system (from an environmentalist's perspective) is not, in my opinion, in the original WM Act legislation. Rather, it is in the implementation of the Act and the changes made to both the Act and water management policy as a result of concerted lobbying by consumptive water users. However, as the cases demonstrate, decision makers

do not always act within the terms of their legislation and this may result in both perverse and adverse effects for all interest groups.
