Legal Aspects of Environmental Allocations in Water Management Planning

by Ilona Miller, Principal Solicitor, EDO - a paper presented to the 2003 NELA Annual Conference, Broken Hill, 23-25 October 2003.

Introduction

River flows have been drastically affected by irrigation and consumptive uses over the past 5 decades. In attempts to control water flows to deliver water for agricultural purposes, natural flow patterns have been altered to the extent of reversing seasonal patterns of water delivery to floodplains and wetlands. This has led to significant environmental problems where ecological values of riverine systems, such as riparian and floodplain vegetation and aquatic species are being drastically affected. One example of this is the iconic River Red Gums in the Murray darling basin, populations of which have been declining due to the absence of flood flows. Another example is the decline in species such as the Murray Cod and Silver Perch, which have been identified as threatened species under federal environmental law.

In this paper, I would like to take the opportunity to discuss some of the legal and practical issues arising from the first stage of implementing the Water Management Act 2000 **(WM Act)** in NSW. Chapter 2, Part 3 of the WM Act deals with water management planning and in particular the preparation and making of water management plans **(WMPs)**. The processes that have been undertaken in relation to WMPs have been fraught with contention and are now the subject of a number of legal challenges in the NSW Land and Environment Court **(L&E Court)**. This paper will canvas some of the reasons why the planning process has resulted in such controversy and the background to some of the legal challenges decided, and currently before the Court. My particular interest is in the way in which the WM Act is intended to protect environmental flows and the environmental values of this States' water resources. Accordingly, the focus of this paper is on environmental allocations. However, I will also try to highlight some of the social and economic issues that result from the changes to water management planning.

I will be looking firstly at the framework within which the WM Act provides for environmental allocations through its objectives and principles. Secondly, I will consider the way in which water management committees and the Minister have given effect to those objectives and principles through Water Sharing Plans **(WSPs)**. I will then review some of the legal issues arising from the environmental provisions of the WSPs having regard to the recent *Murrumbidgee Horticulture Council v Minister for Land and Water* case decided on 26 September 2003 and other challenges yet to be heard by the L&E Court. Finally, I will briefly review some of the recent developments in relation to a National Water Action Plan and the suggestions raised by the Wentworth Group of Concerned Scientists (Wentworth Group) to better manage and share water resources.

Impetus for water management reform

In order to place the environmental provisions of the WM Act in context, it is important to remember that the impetus for reform of water management came from the Commonwealth government through the National Competition Council **(NCC)** and the Council of Australian Governments **(CoAG)** reform agenda.

The CoAG Agreement states that governments are to:

> *establish a sustainable balance between the environment and other uses, including formal provisions for the environment for surface and groundwater consistent with the ARMCANZ/ANZECC national principles. Best available scientific evidence should be used and regard should be had to the inter-temporal and inter-spatial needs of river systems and groundwater systems.*[7]

The ARMCANZ National Principles for the Provision of Water for Ecosystems include the following relevant principles:

> Principle 1 – river regulation and/or consumptive use should be recognised as potentially impacting upon ecological values
>
> Principle 3 – environmental water provisions should be legally recognised.

7 clauses 4b – 4f CoAG Agreement

> Principle 4 – in systems where there are existing users, provision of water for ecosystems should go as far as possible to meet the water regime necessary to sustain the ecological values of aquatic ecosystems while recognising the existing rights of other water users.
>
> Principle 9 – all water uses should be managed in a manner which recognises ecological values.
>
> Principle 12 –all relevant environmental, social and economic stakeholders will be involved in water allocation planning and decision making on environmental water provisions.

In addition to allocating water to the environment, the CoAG Water Reform Framework also sought to ensure States implemented legislative changes and institutional reform to deal with issues including:

- establishing certainty of entitlements for water users ('property' rights);
- integrated planning for ecologically sustainable new developments;
- facilitating adaptive management of water resources;
- incorporating environmental costs in water pricing;
- facilitating ecologically sustainable water trading; and
- implementing a National Water Quality Management Strategy.

In order to meet the objectives of the CoAG Water Reform Framework, States have been allocated funding contingent upon meeting targets for implementing institutional and legislative reform.

One of the matters I will be addressing in this paper is the New South Wales Government's performance in establishing a sustainable balance between the environment and other uses of water.

Implementation of the Water Management Act

The WM Act sets out a number of mechanisms relating to water sharing, water use, drainage management, floodplain management and controlled activities[8].

At the outset, it is important to note that, to date, critical aspects of the WM Act have not yet become operative, in particular those parts dealing with access licenses and approvals.[9] Accordingly, water licenses, works approvals and floodplain works approval are still being dealt with under the *Water Act 1912* and permits to develop near water sources are still granted pursuant to Part 3A of the *Rivers and Foreshore Improvement Act 1948.* The parts of the WM Act dealing with access licences and approvals are intended to commence on 1 January 2004 and 1 July 2004 respectively.

There are a number of reasons for the delay in the operation of the WM Act. Firstly, following the NSW State election in March 2003 there were a number of institutional changes within the Departments responsible for the implementation of the WM Act. The Hon Craig Knowles MP was appointed as the Minister for Natural Resources and the Departments of Land and Water Conservation and PlanningNSW were integrated into a new department known as the Department of Infrastructure, Planning and Natural Resources **(DIPNR)**. Upon his appointment, Minister Knowles stated that implementation of the Act would be deferred as he wanted to consider the National Water Plan being developed by the Commonwealth government. The Minister pointed to the need to for *"tight cohesion and co-operation between the States and the Commonwealth"*[10]. As will be seen below, the National Water Plan is intended to be agreed upon by State Governments in November 2003 and the provisions of the plan may lead to further amendments to the WM Act with a view to defining water access licenses in perpetuity[11].

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8 Chapter 3 WM Act

9 Chapter 2 of the WM Act

10 Media Release – Department of Land and Water Conservation 17/06/03 http://www.dlwc.nsw.gov.au/mediarel/mo20030617_2024.html

11 "CoAG deal on $500m national water initiative" *Land and Water News* (September 2003) p.2

Additionally, as will be discussed in more detail below, many of the issues surrounding the preparation of WMPs and the matters dealt with in them, have been highly contentious, leading to prolonged debate and legal challenges. Until the validity of some of the provisions of WMPs are settled by the Court, those provisions, which facilitate the operation of licences and approvals, may not be able to commence.

Environmental Objectives

Turning now to the environmental considerations in the WM Act. Under the Act, water for the fundamental health of the environment is be protected as a priority in the sharing of water resources.

The objectives of the WM Act provide the basis for sustainable water management and water for the environment – these include:

(a) to apply the principles of ecologically sustainable development;

(b) to protect, enhance and restore water sources, and their associated ecosystems, ecological processes and biological diversity and their water quality.

Similarly, the water management principles outlined in section 5 of the WM Act state that:

- water sources, floodplains and dependent ecosystems (including groundwater and wetlands) should be protected and restored and, where possible, land should not be degraded;
- habitats, animals and plants that benefit from water or are potentially affected by managed activities should be protected and (in the case of habitats) restored;
- the water quality of all water sources should be protected and, wherever possible, enhanced;
- the cumulative impacts of water management licenses and approvals and other activities on water sources and their dependent ecosystems should be considered and minimised; and
- sharing of water from a water source must protect the water source and its dependent ecosystems.

It is clear from the objectives and water management principles that the WM Act is concerned with the environmental health of water sources and their dependent ecosystems. However, it is arguable that the implementation of the Act has failed to give effect to many of these objectives.

Water Management Planning

The initial intent of the WM Act was for WMPs to be prepared to deal with a range of issues including (but not limited to) water sharing, water source protection, drainage management and floodplain management.[12] For the purposes of giving effect to the objects of the WM Act,[13] WMPs were intended to be inclusive documents setting the framework for all aspects of water catchment planning. However, this intention has not been effectively implemented, with only discrete water sharing issues being addressed by the preparation of Water Sharing Plans (WSPs) over the past two years. WSPs operate as 10 year statutory plans which define water sharing arrangements between defined categories of water users; including the environment, basic landholders (domestic, stock and native title entitlements), high security, general security and supplementary water users. The DIPNR has expressed the view that the plans have been *'designed to provide for healthier rivers and aquifers and dependent ecosystems and to provide clarity and certainty about water rights'*[14]. However, many stakeholders have questioned the achievement of this goal.

12 s.13(1) WM Act

13 including integrated management of water sources (s.3(f) WM Act)

14 Hampsted, M *NSW Legislation and Policy Overview* paper presented at the A-Z of Australian Water Trading Conference September 2003

WSPs were intended to be gazetted by mid 2002 to enable the commencement of the provisions of the WM Act in relation to access and entitlements. This process has been seriously delayed due to the inability of regional water management committees to work effectively to balance environmental, social and economic needs. In the NSW 2001 National Competition Policy Assessment, the National Competition Council stated that:

> *The prime concern the Council has with the New South Wales System, is to ensure that while it is important for bulk access regimes to be established quickly, they must also be done properly including the basis for determination of environmental flows to reflect the 10 year timeframe under the Act. Otherwise, if the bulk access regimes and environmental flow requirements are poorly addressed, the issues for the environment will not be addressed for another 10 years.*[15]

Notwithstanding the CoAG caution about taking time to prepare the plans properly, the 35 plans that have recently been gazetted suffer a number of common deficiencies and arguably contradict many of the environmental objectives of the WM Act[16].

Environmental Water

Section 8 of the WM Act states that a WSP must identify three classes of environmental water. These are:

- environmental health water – *being water committed for fundamental ecosystem health at all times;*
- supplementary environmental water – *being water committed for specified environmental purposes at specified times or in specified circumstances; and*
- *adaptive environmental water* – water that, pursuant to an access licence is committed for specified environmental purposes, either generally or at specified times.

Section 20 of the WM Act further requires a WSP for a water management area to establish environmental water rules, identify the requirements for water use in a water management area, identify requirements for water access licenses and provide for the establishment for the creation of a bulk access regime and access dealing principles and access dealing rules. Access dealings principles are made by order published in the Gazette - known as "the principles order". Access dealing rules must comply with the principles. In addition, WSPs must be consistent with the State Water Management Outcomes Plan **(SWMOP)** and relevant legal policies. Herein lies the crux of the legal challenges before the L&E Court.

Section 20 of the WM Act states:

20 **Core provisions**

(1) The water sharing provisions of a management plan for a water management area or water source must deal with the following matters:

(a) the establishment of environmental water rules for the area or water source in relation to each of the classes of environmental water referred to in section 8 (1),

(b) the identification of requirements for water within the area, or from the water source, to satisfy basic landholder rights,

(c) the identification of requirements for water for extraction under access licences,

(d) the establishment of access licence dealing rules for the area or water source,

(e) the establishment of a bulk access regime for the extraction of water under access licences, having regard to the rules referred to in paragraphs (a) and (d) and the requirements referred to in paragraphs (b) and (c).

15 NSW 2001 NCP Assessment p.94

16 The WSPS are intended to commence operation on 1 January 2004 and apply to over 80% of water extraction in NSW.

(2) The bulk access regime referred to in subsection (1) (e):

(a) must recognise and be consistent with any limits to the availability of water that are set (whether by the relevant management plan or otherwise) in relation to the water sources to which the regime relates, and

(b) must establish rules according to which access licences are to be granted and managed and available water determinations to be made, and

(c) must recognise the effect of climatic variability on the availability of water, and

(d) may establish rules with respect to the priorities according to which water allocations are to be adjusted as a consequence of any reduction in the availability of water, and

(e) may contain provisions with respect to the conditions that must (as mandatory conditions) be imposed on access licences under section 66 (1), including conditions providing for the variation, from time to time, of the share and extraction components of access licences, and

(f) must be consistent with the water management principles.

(3) The rules referred to in subsection (2) (d) must comply with the priorities established under section 58.

(4) The access licence dealing rules established under subsection (1) (d):

(a) must comply with the access licence dealing principles, and

(b) subject to those principles, may regulate or prohibit any dealing under Division 4 of Part 2 of Chapter 3.

The requirement to establish environmental rules and a bulk access regime are mandatory obligations, which leads to the next part of this paper.

Legal Issues with Environmental Water in Water Sharing Plans

To date, the NSW L&E Court has determined one challenge to the validity of a WSP and has made interim rulings on another WSP challenge. There are a further 12 plans progressing through the Court system. All of these challenges have been brought in the Court's Class 4 jurisdiction, which enables the Court to review, on administrative law grounds, the legality of the provisions of the plan and the validity of the Minister for Natural Resources' decision to make the plans. There is no avenue for challenges to be brought against the merits of the plans – hence, for the most part, the proceedings are extremely legalistic. Section 336(1) of the WM Act enables "any person" to bring proceedings to remedy or restrain a breach of the Act. This provides the standing of third parties to challenge the validity of the plans within 3 months of their gazettal[17].

1. Compliance with Legislation

It is submitted that the purported rules for environmental water do not, in the majority of WSPs, provide environmental flow rules for each class of environmental water in accordance with section 20(1)(a) and section 8 of the WM Act. This is one of the matters being raised on behalf of conservation interests in the only environmental challenge to a water sharing plan[18].

It is important to recall that environmental health water is required to be committed for fundamental ecosystem health at all times. However, many WSPs do not provide environmental health water 'at all times' or where it is provided for, it is linked to flows for consumptive uses.

Additionally, in a number of the plans the dependent ecosystems of the water source or area are not identified, nor are their needs (specific or even general) set out. Nor are terms such as "fundamental ecosystem health" defined. The basis for providing environmental flows is to protect, enhance and restore water sources, their associated ecosystems, ecological processes and biodiversity and their water quality.[19]

17 S.47 WMA

18 Nature Conservation Council Inc v Minister administering the Water Management Act 2000 LEC 40573/03

19 s.3(b) WM Act

Many of the ARMCANZ Principles adopted by CoAG have been developed with this general objective in mind. However, these issues have not taken prominence in the consideration of environmental requirements. For example, whilst a number of the draft WSPs contained provisions which identified local threatened species or key environmental concerns, such provisions are absent from the final plans.

In the majority of WSPs the approach of water management committees has consistently been to determine what the existing consumptive requirements of a water source are (i.e. current licence allocations) and set a long term annual extraction limit and then work backwards from that amount of water to provide for environmental flows. This is fundamentally contrary to the objects of the WM Act and also the CoAG principles.

The same criticism is applicable to many of the rules for supplementary environmental water where events that require supplementary health water, such a bird breeding events, are not expressly identified. Additionally, crediting water to supplementary environmental purposes is often contingent upon the Minister making an available water determination for general security access licences. This has the effect, similarly to the provision of environmental health water, of linking environmental flows to consumptive purposes, rather than giving it the priority it requires under the Act.

It would appear that the conservationists are not the only ones concerned about the failure to comply with the requirements of section 20 of the WM Act to establish bulk access dealing rules. The converse argument to the failure to adequately provide for environmental flows is that too much water is being set aside for environmental purposes and that this is contrary to the requirement that the rules identify the requirements for water for extraction under access licences and be consistent with priorities set out in section 58 of the WM Act between high, general and supplementary entitlements.

2. Performance Indicators

Another example of a possible failure to comply with the terms of the WM Act relates to performance indicators. Section 35(1) of the WM Act requires a water management plan to include the following components:

(a) a vision statement;

(b) objectives consistent with the vision statement;

(c) strategies for reaching those objectives; and

(d) performance indicators to measure the success of those strategies.

Section 35(1)(d) imposes an obligation to measure the success of strategies to achieve the objectives consistent with the vision statement. The use of the word 'measure' requires the performance indicator to be capable of some form of objective assessment.

Many of the WSPs that I have reviewed contain 'performance indicators' which are incapable of any form of measurement. Concepts such as 'change' are frequently referred to without specification of the magnitude or nature of the change which could then be used to indicate a measurement of success or otherwise.[20] The failure to set out performance indicators in WSPs is arguably a breach of section 35 of the WM Act and could potentially lead to the invalidity of that plan.

3. Priority for the Environment and Consistency with the State Water Management Outcomes Plan

Section 9 of the WM Act provides that:

(1) It is the duty of all persons exercising functions under this Act:

  (a) to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of this Act, and

  (b) as between the principles for water sharing set out in section 5 (3), to give priority to those principles in the order in which they are set out in that subsection.

20 See for example Clause 13 Water Sharing Plan for the Gwydir Regulated River Source 2002

(2) It is the duty of all persons involved in the administration of this Act to exercise their functions under this Act in a manner that gives effect to the State Water Management Outcomes Plan.

The WM Act establishes a system of priorities between environmental and consumptive water uses. Environmental water is intended to have priority over all other types of water except in times of drought, when landholders basic rights take priority.[21] In order to reflect these priorities, it is submitted that in determining the structure of bulk access regimes, the first step should be to determine the environmental water needs of the water source and its dependent ecosystems, having regard to the stresses and constraints of the water source. To this end, classes of environmental water are required to be identified and provided for.

One of the main criticisms conservationists have made in respect of WSPs is that they do not provide priority for the environment. For almost all water management committees, there was significant tension between conflicting interests of consumptive water users and conservation groups during the WSP drafting process. Where there was disagreement amongst committee members as to the environmental water needs of a water source (which has been the case in all water management areas) there was no opportunity for disputes to be resolved through independent processes by a suitably qualified person. Rather, there was a bargaining process in an attempt to achieve an acceptable allocation by consensus which often resulted in 'the absolute minimum' amount of environmental water to be allocated to the environment.

Other Priorities

Further issues relating to priorities between categories of consumptive water users were raised in the recent case of *Murrumbidgee Horticulture Council v Minister for Land and Water* (2003 NSWLEC 213). The WM Act identifies categories of licences in section 57 and then allocates priorities between them in section 58. This case is discussed below in detail for a number of reasons. Firstly, it is the first case to interpret the WM Act. Secondly, it highlights the contentious nature of the debate between water users. Thirdly, it illustrates the complexity of the provisions of the Act and subordinate instruments and their interaction. Fourthly, it canvasses important issues that will shape the future of other challenges before the Court.

In the Murrumbidgee case, the Council represented approximately 1000 'high security' water users (irrigators with permanent plantings) along the Murrumbidgee River in a challenge to the validity of the *Water Sharing Plan for the Murrumbidgee Regulated River Water Source* **(MWSP)**. In relation to the issue of priority between water users, the following grounds of review were raised:

1. That cl 49 of the MWSP, which provides for priority of access during periods of supply constraints was inconsistent with s58 of the Act which sets the water access priorities of different licences[22]. This was predicated on the basis that only persons who had ordered water would receive it.

2. That cl 53(8) of the WM Act, which prohibits a dealing in water allocations from a high security access licence water allocation account if the application is received after 1 September in any water year, is invalid and beyond the power of the Minister because:

   (a) the time limits in cl 53(8) are in breach of the priorities between licence holders in s 58(1) of the Act; and

   (b) it does not comply with Target 16a of the SWMOP which provides that improved and extended water markets should be established by making all share components of access licences transferable.

21 s 9 & 5 WM Act

22 Cl 49 provides that

"Where extraction components of an access licence do not specify the rate as a share of supply capacity or a volume per unit of time, then whenever supply capability is insufficient to satisfy all orders for water in any section of this water source at any time then:

(a) water will be supplied to domestic and stock access licences, local water utility access licences and regulated river (high security) access licences that have placed orders for water, and

(b) then any remaining supply capability will be shared between regulated river (general security) access licences that placed an order for water, in proportion to the share components specified on the access licence."

In relation to the first ground of priorities - After reading and hearing the written and oral submissions of both parties, Pain J concluded that the parties had agreed on the appropriate interpretation of cl 49 and that it was unnecessary to consider the making of a declaration with regards to its validity. For the sake of completeness cl 49 was constructed to mean that:

> *"priority is made at the time of delivery of the water when orders have been received. At the time water is released priority is given to orders from the class of access licence holders in par (a)."*

In relation to the second ground of appeal, the Council argued that the time limit of two months from the start of the water year for the making of water dealings is a breach that impinges on the priorities between licence holders under s 58(1) which gives priority to high security licence holders. It argued that placing limits on the priority system was a subversion of the scheme itself and the Act. The issue here was if water was required for environmental purposes, then that water should, at first instance, come from lower security access licenses, rather than high security licenses.

The Minister argued firstly that water could only be used if it had been ordered and then that cl 53(8) was not inconsistent with the Act (in particular s 71G, which requires the Minister to consent to transfers to other access holders). It was also argued that there is no unfettered right to assign water allocations to other access holders.

Pain J agreed with the Minister and held that there was no recognition in the Act of an unfettered right to deal in the share component of a licence and thus no inconsistency between cl 53(8) and s 71G. She held that while it may be government policy to encourage dealings in the share components of licences once allocated, there is no right to unrestricted dealings. Her Honour noted that section 71G provides that the Minister 'may', not 'must' consent to the transfer of water and that whether the Minister consents or not is a matter for the Minister himself. If access holders wish that the Minister consider the transfer of water from one access holder to another, they can only be made in the first two months of the water year.

In relation to the question of consistency with the SWMOP - Pain J held that the WMP must "be consistent" in general terms with the whole of the SWMOP. She held that even if the WMP was not consistent with Target 16a specifically, it cannot be said that the plan was in general terms inconsistent with the whole of the SWMOP because other targets in the SWMOP are met by the WMP. She went on to say that:

> *"The drafting of the SWMOP does not suggest that the targets have a binding rule-like quality such that a breach would give rise to invalidity."*

A critical issue in the Murrumbidgee case was as to the meaning of the words "in general terms" in section 50(2) of the WM Act. This issue is surfacing in all of the cases currently before the Court and is important as it determines how far the Minister can deviate from strict compliance with section 20 of the Act when making a Minister's Plan. It is interesting to note that these words were only incorporated into section 50(2) of the WM Act in late December 2002, just weeks before some Water Sharing Plans were gazetted.

Additionally in the Murrumbidgee case, the Council raised the questions of whether cl 53(8) of the WSP, which prohibits a dealing in water allocations from a high security access licence water allocation account if the application is received after 1 September in any water year, is invalid and beyond the power of the Minister on the basis that:

(c) Cl 53(8) is fails to comply with s20(4) of the Act because it does not comply with the cl 10 of the Principles Order, which provides that the objective of access licence dealings is to help facilitate the maximisation of "social and economic benefits to the community of access licences".

Pain J held that a Minster's WMP should comply, in general terms, with cl 10 of the Principles Order. She held that s 71L(a) and (b) of the Act implied that the Principles Order should be given priority over the licence access dealing rules in any WPM. This construction is confirmed by s 20(4)(a) and (b) which makes the power to regulate dealings in a management plan subject to access licence dealing principles. However,

clause 10 of the Order was also found to be subject to the other principles set out in the Order, in particular clause 7 (impact on water sources) and therefore justified cl 58 of the WSP. Her Honour found that the Minister's ability to restrict dealings for environmental purposes, in this case for maintaining the 'water cap' in the Murray–Darling basin, was broad, stating that;

> *"the overall aim of achieving the "water cap" to which the Plan is directed is to reduce water extraction in the Murray-Darling Basin in order to achieve better water quality, increase environmental flows and habitat protection. I consider this strategy as implemented by cl 53(8) of the Plan satisfies cl 7(1) and (2)."*

This point is of interest as it suggests that the Judge was taking into consideration the overarching priorities set by the Act, insofar as environmental water requirements may be put before consumptive needs if the system is exceeding the Cap.

4. Socio-economic Considerations

As noted above, there have been a number of legal challenges made to WSPs, primarily by irrigators dissatisfied with the planning process and the resultant plans gazetted by the Minister. Whilst the Murrumbidgee case is the only one to have been finally determined by the Court to date, at least another 6 irrigator challenges are being processed by the Court and to are expected be heard in early 2004. These cases are currently being case managed by the chief Judge of the L&E Court.

One of the central themes in these cases is that the water management committees have failed to have due regard to social and economic impacts of providing certain environmental contingency allowances **(ECA)** when preparing the plans. In this respect, modelling was done by DIPNR on behalf of all the water management committees to determine what effect certain allocations for environmental and consumptive water would have, in particular on the productivity and profitability of irrigated agriculture in the relevant area. Many irrigators have taken the view that the modelling and subsequent studies commissioned to interpret the socio-economic effects have been inadequate. In addition, some irrigators are arguing that their own consultants' reports were not taken into consideration in the preparation of the plans and that this represents either a failure to accord those groups procedural fairness or a failure to take into account a relevant consideration.

5. Procedural Fairness

As noted above, related to the issue of failure to consider social and economic considerations is the purported failure of the Minister to accord procedural fairness to participants in the planning process.

The question of whether this ground of judicial review could be considered by the Court was raised in interlocutory proceedings before the L&E Court in the case of *Upper Namoi Water Users Association Inc v Minister for Natural Resources* [2003] NSWLEC 175. In that case the Minister for Natural Resources asked that the Court determine as a preliminary point whether the doctrine of legitimate expectation and procedural fairness applied to the Minister's decision to make a water sharing plan under section 50 of the WM Act. The proceedings were brought at an interim stage on the basis that a finding in favour of the Minister would substantially limit the grounds of review in the case (deleting some 14 of 80+ grounds of appeal). The Court was not prepared to rule on the question of whether the rules of procedural fairness had been excluded, on the basis that such a decision was contingent on a detailed review of the WSP and the whole of the facts in the case. Accordingly, this question will be explored in detail when that case goes to hearing.

One of the primary concerns in relation to the procedural fairness argument appears to be whether water management committees were misled by the Minister insofar as they assumed that they, not the Minister, would be making water sharing plans[23]. It is my understanding that this issue is also the subject of legal challenge on the basis that committees acted under the assumption that the plans they were preparing would be adopted as WSPs, rather than be advisory to the Minister only.

23 Management committee constituted under Part 2 Chapter 2 WMA contrasted with advisory committees under s. 388 WMA

National Action Plan

On 29 August 2003, CoAG agreed to develop a National Water Initiative to:

- improve the security of water access entitlements, including clear assignment of risks of reductions in future water availability and by returning over-allocated systems to sustainable allocation levels;
- ensure ecosystem health by implementing regimes to protect environmental assets at a whole-of-basin, aquifer or catchment scale;
- ensure water is put to best use by encouraging the expansion of water markets and trading across and between districts and States (where water systems are physically shared), involving clear rules for trading, robust water accounting arrangements and pricing based on full cost recovery principles; and
- encourage water conservation in cities, including better use of stormwater and recycled water.

Details are to be specified in an intergovernmental agreement for consideration at the first COAG meeting in 2004. The agreement will indicate specific actions in each jurisdiction. The 2003 meeting also approved a new $500 million State and Commonwealth funding plan to increase flows in the Murray River.

The WM Act is likely to be further amended in light of the National Water Initiative to provide mechanisms at State level for water markets and trading across States. With many of the licensing and approvals mechanisms in the Act due to come into force in early 2004, the intention of the NSW Government to work in concert with the national plan is likely to further delay the full implementation of WM Act.

Wentworth Blueprint for a National Water Plan

The Wentworth Group have made the following key recommendations to CoAG in their Blueprint for a National Water Plan release in August 2003. National water reform should:

- protect river health and the rights of all Australians to clean, usable water by:
- ensuring that the environmental needs of our river systems have first call on the water required to keep them healthy, protecting both their environmental values and the ability to meet human needs in the future
- establishing a new, nationally consistent water entitlement and trading system that provides security to both water users and the environment by:
- defining water entitlements as a perpetual share of the available water resource;
- clearly articulating the way water can be used in each catchment to protect both the environment and other uses
- engaging local communities to ensure a fair transition by:
- supporting community based catchment and estuary management;
- establishing water trusts to provide active and accountable environmental management;
- reducing freshwater use in towns and cities.

Concluding Remarks

The New South Wales Government's commitment to integrated catchment management and the objectives of the WM Act are being eroded through political processes and arguably by the flaws in the plan making process. At present, environmental allocations are being subordinated to other consumptive and economic uses. If whole catchments are not managed in an integrated fashion then beneficial environmental outcomes will not be achieved, nor will entitlement security for consumptive users.

The initiatives being discussed by COAG and the Wentworth Goup offer some indication that Governments and other stakeholders wish to sort this issue out as a priority. However, if agreement can only be reached about key iconic environmental locations and not whole river systems[24], the process may not achieve much at all. Further, the current reform process is likely to lead to further amendments to the WM Act and other instruments which leaves stakeholders in limbo until COAG meet in April 2004.

24 see recent media reports 13 and 14 November 2003 Sydney Morning Herald stating that the current proposal before the Government is that environmental water will only go to 5 key sites in the Murray Darling Basin