

RECENT DEVELOPMENTS

Western Australia

Water Law Reform

The *Rights in Water and Irrigation Amendment Bill 1999* (WA)¹ was tabled in the State Parliament at the end of June. The principal purposes of the Bill are to implement the Water Reform Framework agreed to by the Council of Australian Governments in 1994 by amending the already heavily amended *Rights in Water and Irrigation Act 1914* (WA).² The most significant reforms proposed relate to:

- a statement of objectives for the management of water resources,
- a restatement of the basic rights of the Crown and of individuals in relation to surface and underground water resources, especially basic rights of use,
- the administrative powers of the Water and Rivers Commission (“the Commission”) to regulate the exercise of the basic individual rights in relation to water resources,
- the establishment of local water resources committees and the making of local rules governing the exercise of rights to water resources,
- the making and implementation of plans of management for water resources, and
- the grant, registration and trading of water entitlements under statutory licences.

The creation of a statutory water resources planning system with express allocation of environmental water provisions is seen as an essential prerequisite of the institution of tradeable water rights. The Water and Rivers Commission and its predecessor, the Water Authority, have been developing the procedures of water resources planning, including for environmental allocations, over the last two decades. In recent years, it has begun to implement the ARMCANZ / ANZECC ‘National Principles for the Provision of Water for Ecosystems’.³ Nevertheless, the current planning system has no effective legislative support and some doubt has been expressed about the legal capacity of the Commission to consider ecological and environmental protection factors in the performance of its statutory functions.⁴ The proposed Division 3D of Part III should address the basic legislative deficiencies surrounding water resources planning.

It is proposed that there be three levels of water allocation management plans: regional, sub-regional and local, with the sub-regional and local plans “not to be inconsistent” with the higher levels of plan. The purpose of a regional management plan is to guide the general management “by the Commission” of water resources in the region in relation to:⁵

- (a) the definition of water resources values, including environmental values, and protection of those values;
- (b) the use of water resources; and
- (c) the integration of water resources planning and management with land use planning and management.”

The purposes of sub-regional management plans are to guide the management by the Commission of water resources in the sub-region, including⁶

- (b) how rights in respect of water are to be allocated to meet various needs, including the needs of the environment;

The purposes of local management plans are to guide the management by the Commission of water resources in the area(s) to which it applies, including

- (a) how rights in respect of water are to be allocated, and water may be taken and used, to meet various needs including the needs of the environment;

The proposed legislation gives no greater definition of how the Commission will determine the environmental allocations of water. This has been described in a “Draft Environmental Water Provisions Policy for Western Australia” released in February 1999 (“the Draft EWP Policy”).⁷ The Draft EWP Policy describes current practice in environmental water allocations and proposes 18 principles as the foundation of an improved process for future environmental water allocations. Those 18 principles include procedures for:

- identifying environmental objectives and ecological values of defined water resources,
- determining the ecological water requirements (“EWRs”) to maintain those ecological values,
- determining the environmental water provisions (“EWPs”) to meet the EWRs (which, for economic and social reasons may not fully meet the EWRs),
- allocation planning and licensing processes for regular review of EWPs and allocations, and
- regular monitoring and applied research to ensure that EWPs are meeting their objectives, and the consequent review of EWPs.

In essence, the Draft EWP Policy adopts the technique proposed by the National Water Quality Management Strategy (“NWQMS”)⁸ of an environmental management system to define the process of determining environmental water allocations.

It is worth noting that the Water and Rivers Commission is currently co-ordinating an inter-agency committee that is working on the preparation of a State Water Quality Strategy to implement the NWQMS in fulfillment of the COAG Water Reform Framework commitment.⁹ The final draft of the Strategy is currently (September 1999) being prepared for signature by the Chief Executive Officers of the relevant government agencies¹⁰ and submission for the approval of

State Cabinet.¹¹ The draft Strategy states the objective for water quality management in WA, some guiding principles, and an implementation framework consisting of:¹²

- an action plan to ensure an integrated, consultative and coordinated approach to water quality management under the SWQMS; and
- an outline of government and community roles and State agency processes that will address water quality management.

The draft Strategy further states that:¹³

Water quality will not be managed by any one agency, but many agencies working together in partnership with the community and industry. There are many complementary processes that have evolved in a number of agencies to address various aspects of water quality management.

It is clear from these statements that the draft Strategy is still as much concerned with processes of integrating the actions of governmental agencies and community participation as elaborating the NWQMS process of identifying and protecting environmental values and applying related substantive principles like the precautionary approach and polluter pays.

¹The text of the Bill can be found at <<http://www.parliament.wa.gov.au:8080/parliament/homepage.nsf>>

²See also a discussion of the water reform proposals before they were incorporated into the draft amending Bill: A Gardner, "Water Resources Law Reform" (1998) 15(6) *Environmental and Planning Law Journal* 377-400.

³Sustainable Land and Water Resources Management Committee, Subcommittee on Water Resources, Occasional Paper SWR No 3, July 1996. Also, see Advice to the Minister for Environment from the Environmental Protection Authority of WA on *Water Allocation and Perth's Water Future Strategy* (EPA Bulletin 903, August 1998) and on *Harvey Basin Surface Water Allocation Plan* (EPA Bulletin 910, November 1998).

⁴A Gardner, "Planning for Integrated Natural Resources Management", (1996) 26(2) *UWA L Rev* 427, reprinted in R Bartlett, A Gardner & S Mascher, *Water Law in Western Australia: Comparative Studies and Options for Reform*, Centre for Commercial and Resources Law, UWA Law School, 1997, 208 @ 226.

⁵*Rights in Water and Irrigation Amendment Bill* 1999 (WA) cl.26GW(2).

⁶*Ibid*, cl.26GX(2).

⁷The Draft Policy is subtitled 'A Draft Policy Statement to Support the Implementation of the COAG Water Reform Framework Agreement (1994)' and can be found at the Water and Rivers Commission's website on Water Law Reform <<http://www.wrc.wa.gov.au/about/reform.html>>

⁸Information about the NWQMS is available at the website <<http://www.affa.gov.au/nwqms/>>.

⁹The May 1999 draft of the Strategy is available on the Water and Rivers Commission website at: <<http://www.wrc.wa.gov.au/protect/nwqms.htm>>

¹⁰Those agencies are: the Water and Rivers Commission, the Department of Environmental Protection, the Ministry for Planning, Agriculture WA, the Department of Minerals and Energy, the Office of Water Regulation, the Department of Conservation and Land Management and the Health Department of WA: *ibid*, p.7 of the Draft Strategy.

¹¹Personal communication from Mr David Boyd, Water and Rivers Commission of WA, 3 September 1999. The final version contains some significant amendments from the May 1999 draft.

¹²May 1999 Draft State Water Quality Management Strategy, p.4.

¹³May 1999 Draft State Water Quality Management Strategy, p.7.