ARTICLES

Fighting Over Water
Litigating Water Rights under the Water Resources Act 1997

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Introduction

The *Water Resources Act 1997* (SA) ("the Act") contains a number of provisions that allow appeals against decisions and enforcement of its terms by litigation. The Act is similar to other South Australian legislation such as the *Development Act 1993* (SA) and the *Environment Protection Act 1993* (SA), which allow civil enforcement of rights and obligations by certain persons. The Act also contains a number of decisions and actions that are subject to judicial review.

As the value of water increases, it is likely that those who possess or seek rights to use water will pursue their interests with increased vigour. Similarly, the community will be concerned to ensure that the Act is properly administered and that the obligations contained within it are complied with. This will almost certainly result in an increase in litigation concerning water.

This paper contains an outline of the rights, obligations and processes that are determined through, enforced by or subjected to litigation.

Enforcement Action – Directions and Restrictions

A number of provisions in the Act empower the Minister or other authority to take action to protect water resources. Some of those actions are subject to a right of appeal.

Section 142(1)(d) confers a right of appeal against a "direction" by a relevant authority. The sections of the Act that allow such direction are outlined below along with other provisions that contain their own appeal rights. Where no right of appeal is conferred judicial review is generally the only opportunity to litigate the issue.

[1] The views expressed in this paper are those of the author and do not necessarily reflect those of the Crown Solicitor. This paper is an overview of the possible sources of litigation under the *Water Resources Act 1997*. It should not be relied on as legal advice on any particular matter.

Breach of licence etc

Where the provisions of section 9, a licence, a section 11 authorisation or a permit has been contravened, a relevant authority may issue a notice under section 13 directing action to rectify the contravention. An appeal may obviously relate to both the existence of any contravention and the action necessary to rectify it.

Under section 43, the Minister may cancel, vary or suspend a licence where the licensee takes more water than they are allocated, breaches a licence condition, uses water for an illegal purpose or commits an offence against section 16. The same action can be taken where the licensee breaches an environment protection order or clean up order under the *Environment Protection Act 1993* and the Minister is satisfied that water quality has been detrimentally affected as a result. The licensee may appeal against such cancellation etc, but only on the ground that the Minister's decision was harsh or unreasonable.

Condition of Watercourses and Wells

A relevant authority may issue a notice under section 14 directing certain action to maintain a watercourse or lake in good condition. This power is similar to powers contained in the now repealed sections of the *Local Government Act 1934*. Appeals against such a direction may well relate to both the condition of the watercourse or lake and the action required to maintain it.

Under section 15, the Minister may issue a notice directing the removal or modification of a dam or other similar obstruction lawfully placed in the watercourse prior to the commencement of the Act. This notice can only be issued on the recommendation of a Catchment Water Management Board and may only relate to dams etc within the catchment area of the Board. Compensation is payable by the Minister under section 146. There does not appear to be any guide in this section to the exercise of this power other than the recommendation of the Board. Both the Minister and the Board must of course comply with the obligations in section 6 of the Act. While those same obligations apply to the Court, it is uncertain the extent to which the provisions of the Catchment Water Management Plan would be considered in any such appeal. It seems that the appeal against the direction cannot address the amount of compensation payable.

Section 17(1) imposes a duty on owners and occupiers of land containing or adjoining watercourses or lakes. The duty requires reasonable steps to prevent damage to the bed and banks and shores of watercourses and lakes and the ecosystems that depend on those resources. This duty may be enforced by civil enforcement action discussed below. The relevant authority may also serve a notice to a person who has failed to carry out the duty directing the person to take specified action to prevent or rectify damage. The directions in the notice may be appealed on the usual grounds, however it is important to note that the term "damage" does not include damage in the normal course of an authorised activity, or minor damage.[2]

Where water is likely to be degraded or wasted because of a defect in a well or the absence of an adequate capping mechanism, the Minister may issue a notice under section 28. The notice may direct that action be taken to remedy the defects. If it is issued to the owner or occupier of the land, there does not appear to be any time restriction. However, the notice may alternatively

[2] See Section 17(4).

be issued to the well driller in certain circumstances, provided it is issued within 6 months after the work was carried out. Both the well driller and the owner have a right of appeal against the notice (depending of course on who is the recipient). The appeal may properly relate to both the issue of waste or degradation of water and the reasonableness of the directions in the notice.

Restrictions on Use of Water

By notice under section 16(1)(d) published in the Gazette, the Minister may prohibit or restrict the taking of water, whether or not the resource is prescribed under section 8. There is no right of appeal against this notice, other than challenge by way of judicial review.

The Minister may also publish a notice under section 16(1)(e) directing the modification of certain dams. As this constitutes a "direction" it appears that a right of appeal exists under section 142(1)(d). The appeal can probably relate to the nature of the modifications required. It is arguable that it cannot relate to the criteria set out in section 16(1)(a) or (c) which refer to the Minister's opinion, for the same reasons discussed below relating to appeals against decisions under section 29(3)(b). If this argument is not sustainable, it appears that a notice under section 16(1)(e), issued to modify all dams in a particular area, could be effectively undermined by one merit appeal which overturned the "opinion of the Minister" under sub-sections 16(1)(a) and (c).

For water resources that are not prescribed under section 8, the Minister may issue a notice under section 16(5) where he or she forms the opinion that the rate or manner in which water is taken is likely to damage ecosystems that depend on it. The notice may restrict the taking of water or direct certain action to rectify certain problems. Section 142(1)(e) confers a right of appeal against the restriction of use, while section 142(1)(d) confers a right of appeal against any direction. Again, subject to the comments below, it is arguable that the basis for the Minister's opinion can not be challenged on appeal, only the terms of the restriction or direction.

Section 37 empowers the Minister to reduce the allocations of water granted to licence holders. This power can be exercised in a number of circumstances including where it is necessary to prevent a reduction in water quality, to prevent damage to ecosystems, because there is insufficient water to meet demand or where there has been a reduction in the quantity of water available under the *Murray-Darling Basin Act 1993*. The reduction can be proportional or by some other scheme set out in regulations. Despite the fairly significant effect the exercise of this power may have on water rights, there is no right of appeal.

When a resource is prescribed under section 8, it is allocated by the Minister in accordance with section 36. In particular, the Minister must grant existing users of the resource a licence with an allocation endorsed on it. The amount of the allocation to a person is the quantity that in the opinion of the Minister will meet their future needs based on existing use or certain commitments to use.[3] Section 36(6) provides a right of appeal against any decision or determination of the Minister under section 36(2). It seems that the drafting of this right of appeal allows the Minister's decision to be entirely reviewed by the Court.

[3] See section 36(2)

Merit Appeals

Section 142(1)(a) provides a right of appeal against a refusal or conditions, to an applicant for a permit, well driller's licence or water licence. Section 142(1)(b) provides a right of appeal against a refusal, reduction or conditions, to an applicant for consent to transfer a water licence or water allocation.

The appeal must be instituted within six weeks of the relevant decision, although the Court has an express discretion to allow such further time as it considers reasonable in the circumstances (see section 142(4)). The appeal is referred at first instance to a conference under section 16 of the *Environment, Resources and Development Court Act 1993* to enable the parties to explore any opportunities to resolve the dispute. On hearing the matter, the Court has power to affirm, vary or substitute the decision appealed against, to remit the matter back to the Minister or authority for further decision, or to make any ancillary or consequential orders.

The grounds of appeal are not specified in the Act, and it is probable that such grounds are to be limited to the basis for the decision of the relevant authority under the relevant section of the Act. The Court's obligation under section 6(2) (to act consistently with and seek to further the object and to have regard to the matters in section 6(2)(b)) should also be borne in mind when considering the grounds of appeal.

An application for a permit to undertake an activity listed in section 9(3) or (4) of the Act must be assessed against the State Water Plan, any relevant Water Allocation Plan, Catchment Water Management Plan and Local Water Management Plan. Indeed the decision of the relevant authority "must not be inconsistent" with any of those plans (even if all four happen to exist for a particular area) (see section 18(3)). This means the evidence on appeal must address all of the relevant water Plans. Certain conditions for certain activities are prescribed by the Act or may be prescribed by regulation and cannot be appealed (see sub-sections 18(6) and (8)). Other conditions will be subject to the normal common law rules relating to valid conditions (ie consistency with the object of the Act, reasonableness, certainty and finality etc).

Applications for licences to take water and applications to transfer licences (under section 38) may be refused on four grounds set out in section 29(3). It is probable that a refusal under section 29(3)(c) on the basis that the person formerly held a licence that was cancelled under the Act or under section 29(3)(d) on the basis that the person committed an offence against the Act cannot be readily appealed (ie it is a question of fact). It is arguable that there can be no appeal against a refusal under section 29(3)(b) on the basis that in the Minister's opinion, the water is so contaminated that its use would create a risk to the health of humans or animals. The qualification that the Minister form that opinion may protect the decision from a merit appeal under section 142(1) following the reasoning of the Full Court in *Sullivan & Anor v DC Riverton* (1997) 69 SASR.

The most likely reason for refusal will come from section 29(3)(a) that it is not possible to endorse a water allocation on the licence consistently with the relevant Water Allocation Plan. Refusals on this basis will inspire a relatively simple ground of appeal to the contrary, causing the Court to consider the licence application against the terms of the relevant Plan.

The Minister is empowered by section 30 of the Act to vary water licences in certain circumstances. Section 30(1)(b) allows the variation where the licence specifies intervals at which the licence conditions may be varied and a variation is necessary to more effectively regulate the use of water in accordance with the relevant Plan and the Act. Section 30(1)(c) allows the variation where a Plan has been altered and it is necessary to prevent the licence from being inconsistent with the Plan in the quantity of the allocation or the basis of allocation. That same subsection also allows a variation to the conditions on the licence to prevent the conditions from being seriously at variance with the Plan.

Section 30(2) expressly provides a right of appeal against any of these variations. Again, the grounds of appeal are likely to revolve around the need for the variation to effectively regulate water use and the need for the variation to avoid inconsistency or serious variation respectively (subject to the *Sullivan* argument).

The Minister's decision on a water allocation to be endorsed on a licence is governed by sections 33, 34 and 35. Section 33 allows the allocation to be fixed by specifying the volume of water that may be taken, the purpose for which it may be used or in any other manner. The basis of allocation may well be dictated to some extent by the relevant water plan, leaving little practical choice between say volume or purpose of use. It is unclear what right of appeal exists against a decision adopting one form of allocation over another. Arguably the basis of allocation would be determined by a condition on the licence and could therefore be appealed on the same grounds.

The Minister may refuse to allocate water to a person who has committed an offence against the Act (see section 34(7)). There is probably little scope for appeal against a decision on these grounds.

The primary guide to the Minister's decision is found in section 35. The allocation to be endorsed on the licence must be consistent with the relevant Water Allocation Plan while the conditions to be imposed (relating to the allocation but imposed on the licence) must not be seriously at variance with the Plan. The Minister's decision must also be in the public interest and consistent with any requirements prescribed by regulation (there are none prescribed at present). Appeals against refusals or conditions under this section are likely to involve more than simple merit appeals considering the application against the Water Allocation Plan. The requirement for the decision to be in the public interest adds what could conservatively be described as a new dimension to this form of litigation.

The grounds for refusing an application to transfer a licence (with an allocation) or an allocation alone are set out in section 41, except for a refusal where the applicant has committed an offence against the Act[4]. They are largely identical to those applying to a decision to allocate water under section 35 discussed above. The same questions of public interest will therefore arise in the decision and any subsequent appeal. Of note is the slightly different drafting style ("and the Minister's decision under both paragraphs (a) and (b) must" appears in section 35 but not in section 41). Whether this is intended to more vigorously subject the decisions in section 35(1)(a) and (b) to the "public interest" is difficult to determine.

[4] See section 38(5)

Section 140(9) allows a Catchment Water Management Plan or the regulations to specify certain water usage or land management practices that may form the basis of a refund of any levy imposed under the Act. A person may apply to the Board or the Minister for the refund and may appeal to the Environment, Resources and Development Court against the decision. The Act does not specify the grounds of appeal. It seems that the appeal could relate to the amount of money (if any) refunded as well as an assessment of the application against the criteria specified in the Plan or the regulations.

Third Party Appeals

The Act does not of itself confer any third party rights of appeal (ie appeals against a decision by a person who is not the applicant or the decision-maker) but empowers Water Allocation Plans and Catchment Water Management Plans to confer those rights. Section 19 applies to applications for permits to undertake activities set out in section 9(3) and (4) if the relevant Plan specifies that it applies. Similarly, a Plan can declare that section 40 applies to applications to transfer licences and allocations.

Sections 19 and 40 are in similar terms and essentially provide that notice of the applications specified in the Plan must be given to the public in accordance with Regulation 14 and section 157. Any person who writes a representation in accordance with Regulation 15 must be given notice of the relevant authority's decision and may appeal against that decision within 15 business days of receiving the notice. The decision of the relevant authority is suspended until the appeal is determined or withdrawn etc.

Civil Enforcement Action

Orders

Section 141 of the Act allows applications to be made to the Environment, Resources and Development Court for orders in four general circumstances –

(a) to restrain a breach of the Act;

(b) to require a person to take action required by the Act;

(c) to require payment of compensation for injury, loss or damage from a breach of the Act; and

(d) exemplary damages.

Proceedings must be commenced within three years of the date of the alleged contravention unless the Attorney General allows otherwise.

The Court's powers to issue orders to restrain certain conduct or to require certain action are enlarged by sub-sections 141(2) and (3) respectively. The Court may make the orders whether or not the person is likely to continue with the breach (or inaction), provided the person has engaged in conduct in breach of the Act (or has refused to take the action). Conversely, the Court may make the orders even though there has not yet been any breach of the Act (or any

refusal to act) and even though the breach (or refusal to act) may not result in any substantial harm or damage.

When considering the amount of exemplary damages the Court is required to have regard to the factors in sub-section 141(4). These factors include any damage to the environment or detriment to the public interest from the breach and any financial saving or other benefit enjoyed by the respondent for any loss or damage caused by the application (ie in addition to costs). Orders for security of costs and undertakings for the payment of compensation may be made against the applicant.

Process

Proceedings are commenced by filing an application in the Court for leave to serve a summons on the respondent. The application may be heard in the absence of the respondent, and will be granted if the Court is satisfied that the respondent has a case to answer (generally on affidavit evidence). If leave is granted, the respondent is required to enter an appearance in answer to the summons and the matter is set down for a conference under section 16 of the Environment, Resources and Development Court Act 1993. If no resolution is achieved at the conference, the matter is generally set down for directions or hearing.

Standing

Sub-section 141(6) provides that applications may be made by the Minister, a Catchment Water Management Board or a Water Resources Planning Committee. Local councils and controlling authorities appear to be given standing as well (see sections 3(1) and 141(6)(a)) although it is possible that they may only take action where they have Local Water Management Plans or some other express authority.[5]

Standing is also granted to any person whose interests are affected and any other person with leave of the Court. In granting leave, the Court is required to be satisfied that the proceedings would not be an abuse of process, that there is some likelihood of the requirements for making the order being met and that it is in the public interest that the proceedings be brought. The Minister must be served with a copy of any proceedings and has a right to be joined as a party.

Riparian type rights

Section 7(9) expressly abolishes the common law rights to take water. However the Act provides a modified version of those rights to some extent by sub-sections 7(1), (2), (4) and (5).

Sub-sections 7(1) and (2) are fairly simple. They essentially grant the right to take water from watercourses, lakes, wells and surface water to a person who is an occupier of land containing the resource or has lawful access to it. It appears however that these rights cannot be protected by action under section 141(1)(a) unless a person engaging in some breach of the Act infringes them. Subject to sub-section 7(4) discussed below, action under the general law of trespass or nuisance may be required to protect these rights from infringement.

Sub-section 7(4) prohibits the taking of water from resources that are not prescribed. The prohibition exists where the taking would detrimentally affect the ability of another person to

[5] For example where they are a "relevant authority" under sections 10, 13, 14 or 17.

exercise a right to take water (ie under section 7(1) or (2)).[6] It also operates where the taking would detrimentally affect the enjoyment of the amenity of water in the watercourse or lake enjoyed by adjoining owners and occupiers.[7] Section 141 can clearly be used to take action to enforce these prohibitions. A person who takes water from a resource that is not prescribed contrary to those prohibitions is clearly "engaging in conduct in contravention of (the) Act".

Litigation to enforce the prohibition in sub-section 7(4)(a) will most probably involve evidence establishing the nature and extent of the right enjoyed by the applicant and evidence of the detrimental effects on that right caused by the respondent's taking of water. Proceedings to enforce the prohibition in sub-section 7(4)(b) will be very interesting. Evidence will be required on the effect of taking water on the enjoyment of amenity. Just how this will be proved remains to be seen.

It is important to note the fact that this prohibition is limited to resources that are not prescribed. Its effect is that holders of water licences (who by definition will be using prescribed resources) cannot litigate against each other unless some other breach of the Act is involved. Once a licence (and allocation) is granted it effectively authorises the taking of water no matter what the consequences on the rights of others. This places a lot of faith in the process of developing appropriate allocation and transfer policies and in the exercise by the Minister of powers under sections 16 and 37 in particular.

There may also be arguments available about the extent to which section 7(9) has effected the tort of nuisance as it relates to water.

Other breaches

Section 9(2) provides that a person must not take water from a water resource that is not prescribed "in contravention of" a water plan. Similarly, section 9(4) prohibits the undertaking of an activity (listed in section 9(4)) that affects water, "contrary to" a water plan. Action under section 141 could be taken where a person takes water or undertakes an activity contrary to a water plan in contravention of these sections. The great difficulty will be determining whether the action was "in contravention of" or "contrary to" the relevant plan. As water plans are likely to be focussed on water policies and not setting out clear rights or prohibitions, this task will be difficult for the Court to undertake. It will also be interesting to note the approach the Court takes when making orders in the nature of civil enforcement for a breach of a water management policy.

Judicial Review

There are a number of provisions of the Act that empower the Minister to take action that may significantly effect water rights. In particular, restrictions on the use of water under section 16(1)(d) and the reduction of allocations under section 37. It is quite possible that the exercise of these powers will inspire a reasonable amount of judicial review action.

Other sections of the Act contain detailed processes for the creation of policies or the making of

[6] See sub-section 7(4)(a).

[7] See sub-section 7(4)(b).

decisions. Of particular note are sections 92 and 101, which deal with the contents of Catchment Water Management Plans and Water Allocation Plans respectively. These sections contain an extensive list of assessments to be undertaken and factors to be taken into account. They also require the Plans to achieve certain standards. For example, section 101(4)(c) requires Water Allocation Plans to provide for the allocation of water so that "...an equitable balance is achieved between social, economic and environmental needs for the water; and ....the rate of use of the water is sustainable..." It is possible that attempts will be made to test notions of sustainability through judicial review proceedings, despite the fact that Courts have traditionally avoided delving into such technical questions. This possibility presents a challenge to the authors of these plans and their legal advisers.

Other States

Many of the water resources of South Australia are dependent on or influenced by water in other states. This fact is recognised by the Act in a number of ways.

The relationship with the groundwater of Victoria in particular is recognised by section 5 and section 142(3) and (5). The Victorian Government is expressly granted a right of appeal against a decision to approve a licence or permit that is contrary to the Border Groundwater Agreement under the *Groundwater (Border Agreement) Act 1985.*

Section 37 of the Act, which empowers the Minister to reduce allocations, expressly refers to reductions in the amount of water available under both the *Groundwater (Border Agreement) Act* 1985 and the *Murray-Darling Basin Act 1993.* However, this section does not confer any right to take action to or against any other State.

It is also worth considering the effect of section 7(9) on South Australia's ability to take action against say a Queensland cotton grower who takes excessive amounts of water from Cooper Creek. Nice questions arise about whether South Australia has effectively waived its rights to take action to protect its riparian rights or whether such action could be taken under the law of Queensland.

Conclusion

The Act provides a variety of opportunities for litigation. Many of them are similar to the opportunities provided by other legislation and contain few surprises. However, there are a number of provisions that involve complex issues that have not traditionally been litigated in South Australian Courts. In particular the scope for judicial review is somewhat uncertain. As the Act be 2 See section 17(4).