

# **Implementing the National Water Initiative**

A GENERIC SET

of

ARRANGEMENTS

for

MANAGING INTERESTS IN WATER

by

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A generic set of arrangements for managing interests in water

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## PREFACE

For most of the twentieth century Australia's water resources were managed by public sector agencies in accordance with their strategic and operational priorities and perspectives – largely as an element of infrastructure in support of economic development. Much changed during the last decade of the twentieth century. Water was increasingly seen to have been overallocated. Demand was exceeding supply. Water was becoming more polluted. The ecological requirements associated with water systems were either ignored or afforded little priority. Climate change was contributing to unpredictability.

During the 1990s public policy began to respond to these challenges. First, reduction or at least stabilisation of allocations. Second, the conservation of the ecological values of water. Third, the extended use of market mechanisms to achieve the outcomes of water resources management. The implementation of policies such as these required considerable reform of water law. Each State and Territory began this process during the late 1990s and early 2000s.

One of the particular challenges for the legal system was the proposed extension of the regime for trading in water rights – particularly the interjurisdictional trading regime. In this context the Queensland University of Technology Law Faculty and Phillips Fox Lawyers jointly prepared and published in May 2004 a report entitled *Trading in Water Rights – towards a national legal framework*. While the focus of this report was trading in water rights, it necessarily considered this issue in the wider context of water resources management.

Then in June 2004 the Council of Australian Governments published the *Intergovernmental Agreement on a National Water Initiative*. This proposed a nationally-compatible, market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that optimises economic, social and environmental outcomes. While the legislation in each of the States and Territories has gone some way to achieving this, the Agreement is yet to be fully implemented.

Against this background it seemed appropriate as a matter of general interest to formulate a set of arrangements for managing water resources that would achieve or go some way to achieving the outcomes contemplated by the Agreement. Phillips Fox Lawyers supported this project and the outcome is this publication.

This project takes the Agreement as a statement of policy and seeks in generic terms – without reference to any particular State or Territory – to put together a number of ideas and suggestions for the implementation of the Agreement. It does so strictly from a legal point of view. It is not concerned, in other words, with their desirability or effectiveness in technical, hydrological, administrative, economic or even political

terms. It is no more than a generic set of arrangements that might constitute the basis for a statutory model. Ideas but not necessarily practical solutions.

My thanks to Phillips Fox Lawyers for their support and for their agreement to make this publication available generally. Phillips Fox Lawyers are in no way responsible for the contents of this publication. That is my responsibility alone.

D E Fisher

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## Table of Contents

<b>PREFACE</b> .....	<b>iii</b>
<b>Chapter One</b> .....	<b>1</b>
<b>INTRODUCTION</b> .....	<b>1</b>
The Purpose and Focus of this Paper .....	1
The Elements of Tradeability.....	1
A Generic Legal Structure .....	2
<b>Chapter Two</b> .....	<b>3</b>
<b>A RANGE OF CRITICAL ISSUES</b> .....	<b>3</b>
Introduction.....	3
The Tradeability of Water Allocations and Water Use Approvals.....	3
Whether all Water Access Entitlements are tradeable .....	3
Who may hold a Water Access Entitlement .....	4
How are Water Access Entitlements created.....	4
How are Water Access Entitlements granted .....	5
The Allocation Of Water For Environmental Purposes.....	5
The Tradeability of Environmental Water Access Entitlements .....	6
The Interjurisdictional Transferability of Water Management Instruments.....	6
An initial structure.....	6
Urban water management.....	7
<b>Chapter Three</b> .....	<b>8</b>
<b>THE STRUCTURAL FOUNDATIONS OF A MANAGEMENT SYSTEM</b> .....	<b>8</b>
Introduction.....	8
The Objective.....	8
The Principles.....	9
The Creation of a Fundamental Duty .....	10
<b>Chapter Four</b> .....	<b>11</b>
<b>A SET OF INTERLINKED RIGHTS AND DUTIES</b> .....	<b>11</b>
Introduction.....	11
The Prohibition of Controlled Activities.....	12
The Interest created by a Water Access Entitlement.....	14
The Interest created by a Water Allocation.....	15
The Rights granted by a Water Use Approval .....	16
The Interest created by an Urban Water Supply Entitlement .....	16
A General Duty of Care.....	18
<b>Chapter Five</b> .....	<b>19</b>
<b>THE PRINCIPLE OF INFORMATION AVAILABILITY</b> .....	<b>19</b>
Introduction.....	19
Information for Strategic Planning .....	19
Information about individual Water Management Instruments .....	20
Information about Water Use .....	21
A Public Water Accounting System .....	22
Information about Transactions.....	23

<i>Chapter Six</i> .....	<b>25</b>
<b>THE FUNCTIONS OF A WATER PLAN</b> .....	<b>25</b>
Introduction.....	25
How Water Access Entitlements are Structured for Tradeability.....	26
How to determine whether Water Access Entitlements are transferable .....	27
(a) The issues .....	27
(b) Some approaches .....	27
(c) Alternative solutions.....	28
(d) A Recommendation .....	31
The Transferability of Environmental Water Access Entitlements.....	32
What is a Water Allocation .....	33
(a) Introduction .....	33
(b) How Water Allocations are determined .....	33
(c) The Transferability of Water Allocations .....	34
What is a Water Use Approval .....	35
(a) Introduction .....	35
(b) How Water Use Approvals are Granted .....	35
(c) The Transferability of Water Use Approvals .....	35
The Variability of Water Plans .....	36
<i>Chapter Seven</i> .....	<b>38</b>
<b>THE MANAGEMENT OF WATER ACCESS ENTITLEMENTS</b> .....	<b>38</b>
Who may hold a Consumptive Water Access Entitlement .....	38
How a Consumptive Water Access Entitlement is granted .....	39
The Rights associated with a Consumptive Water Access Entitlement.....	40
Environmental Water Access Entitlements .....	40
The Duration and Stability of Water Access Entitlements.....	41
<i>Chapter Eight</i> .....	<b>43</b>
<b>THE MANAGEMENT OF WATER ALLOCATIONS</b> .....	<b>43</b>
Introduction.....	43
Who may hold a Water Allocation .....	43
How a Water Allocation is granted .....	44
The Relationship between Water Allocations and Water Access Entitlements.....	45
The Stability of Water Allocations .....	46
<i>Chapter Nine</i> .....	<b>48</b>
<b>THE MANAGEMENT OF WATER USE APPROVALS</b> .....	<b>48</b>
The Function of Water Use Approvals.....	48
Who may hold a Water Use Approval .....	49
How a Water Use Approval is granted.....	49
The Stability of Water Use Approvals.....	51
<i>Chapter Ten</i> .....	<b>54</b>
<b>URBAN WATER MANAGEMENT ARRANGEMENTS</b> .....	<b>54</b>
Introduction.....	54
Urban Water Plans .....	54
Urban Water Action Programs.....	55
Urban Water Supply Entitlements .....	56
How Urban Water Supply Entitlements Are Granted .....	56
The Assignment of Urban Water Supply Entitlements .....	57

The Management of these Arrangements .....	57
<b>Chapter Eleven .....</b>	<b>58</b>
<b>WATER MANAGEMENT INSTRUMENT TRANSACTIONS .....</b>	<b>58</b>
Introduction .....	58
The Power to engage in Transactions.....	59
The Facilitation of Transactions .....	60
Negotiation.....	60
Completion of the Transaction .....	61
Arrangements for Urban Water Supply Entitlements.....	61
Interjurisdictional Transactions .....	62
<b>Chapter Twelve .....</b>	<b>64</b>
<b>ARRANGEMENTS FOR ENFORCING THE SYSTEM.....</b>	<b>64</b>
Introduction.....	64
The Creation of Duties.....	65
Common Law and Statutory Liabilities.....	65
The Allocation of Risk .....	66
Reviews and Appeals .....	66
Powers of Investigation.....	66
Administrative Sanctions for Non-Compliance.....	67
Criminal Sanctions for Non-Compliance.....	68
Civil Sanctions for Non-Compliance .....	68
Judicial Review of Administrative Decisions.....	69
The Range of Remedies .....	69
Compensation .....	70
Jurisdiction.....	70
Interjurisdictional issues .....	72
<b>A GENERIC STATUTORY STRUCTURE.....</b>	<b>74</b>
<b>PART 1.....</b>	<b>74</b>
<b>FOUNDATIONAL ELEMENTS.....</b>	<b>74</b>
<b>PART 2.....</b>	<b>75</b>
<b>A SYSTEM OF RIGHTS AND DUTIES.....</b>	<b>75</b>
<b>PART 3.....</b>	<b>77</b>
<b>INFORMATION AVAILABILITY.....</b>	<b>77</b>
<b>PART 4.....</b>	<b>78</b>
<b>WATER PLANS.....</b>	<b>78</b>
<b>PART 5.....</b>	<b>80</b>
<b>WATER ACCESS ENTITLEMENTS .....</b>	<b>80</b>
<b>PART 6.....</b>	<b>81</b>
<b>WATER ALLOCATIONS .....</b>	<b>81</b>
<b>PART 7.....</b>	<b>82</b>
<b>WATER USE APPROVALS.....</b>	<b>82</b>

<b>PART 8</b> .....	<b>83</b>
<b>URBAN WATER</b> .....	<b>83</b>
<b>PART 9</b> .....	<b>84</b>
<b>TRANSACTIONS</b> .....	<b>84</b>
<b>PART 10</b> .....	<b>85</b>
<b>ENFORCEMENT</b> .....	<b>85</b>



## Chapter One

### INTRODUCTION

#### **The Purpose and Focus of this Paper**

- 1.1 The purpose of this paper is to formulate a set of generic arrangements whereby the policies and principles set out in the Intergovernmental Agreement on a National Water Initiative (hereafter the Agreement) can be implemented through a legal structure. These arrangements are generic in the sense that they represent a model against which the statutory arrangements in each of the States and Territories can be assessed. While the Agreement deals with issues relating to water resources management in general, the arrangements described in this paper focus upon the creation of a market in water rights and the mechanisms for dealing in water rights. However, wider issues need to be considered in addition to the formulation of structures for a water market. These include in particular the conservation of the ecological values of water, the relationship between the use of water and the use of land, and the protection of the environment.

#### **The Elements of Tradeability**

- 1.2 The incorporation of trading rights in a regime for managing water resources will need to disclose four essential elements of tradeability. These may be described as structural tradeability, hydrological tradeability, transactional tradeability and commercial tradeability. Structural tradeability means that the interest to be traded must be inherently transferable as a matter of law. This characteristic approximates to the characterisation of the interest as a right of property. Hydrological tradeability means that the water itself is capable in a physical sense of being moved or conveyed from one place to another without any or undue technical difficulty. Transactional tradeability means that the interest must be transferred in accordance with a set of prescribed rules of procedure. Commercial tradeability means first that those trading or intending to trade in a market have or have access to as complete knowledge and information as possible about the interest in question and second that they have confidence in these transactional arrangements and in the legal structure out of which these arrangements evolve.
- 1.3 Each of these elements of tradeability is linked to the others. However, they are also linked inextricably to another factor. This is the complex range of public interests in the management of water resources. In many respects these components of the public interest occupy a dominant position in the whole legal structure. These include:
  - the basis upon which water resources are allocated to a range of different uses;

- the protection of the environmental and ecological values of the water; and
- the protection of the land and the environment that are inextricably related to the water.

While the creation of a trading regime involves the recognition and creation of private interests in relation to water as a matter of public policy, these private interests exist side by side with these three essential components of the public interest. The characteristic of structural tradeability must necessarily reflect, if not incorporate, these components of the public interest.

### **A Generic Legal Structure**

- 1.4 The set of legal arrangements described in the paper conforms with the way in which contemporary environmental and resource legislation is structured in Australia and in other jurisdictions. It comprises essentially four elements. The first is a statement of the overall purposes or objectives of the legislation. The second is a statement of the ways and means according to which these objectives are achieved in principle. The third is a regime of regulation based upon an integrated set of rights and obligations. The fourth is a set of enforcement mechanisms. It is into a structure such as this that a regime for trading in water rights has to be incorporated. A trading regime is no more than a means to an end and any legal structure must acknowledge this.

## Chapter Two

### **A RANGE OF CRITICAL ISSUES**

#### **Introduction**

- 2.1 While the Agreement is clear in many respects, there are a number of issues which it does not appear to address. Some of these issues are critical. It makes it clear that the consumptive use of water requires a water access entitlement separate from land. Water is allocated to a water access entitlement consistently with a water plan. In addition, the use of water at a particular site and for a particular purpose requires an approval. The Agreement thus contemplates three instruments for managing water resources: namely, water access entitlements, water allocations and water use approvals (hereafter water management instruments). It is clear from the Agreement that water access entitlements are intended to be as freely tradeable as possible. However, the Agreement does not seem to address directly whether water allocations are tradeable and whether water use approvals are tradeable. The implication is that they are transferable but perhaps not fully tradeable.

#### **The Tradeability of Water Allocations and Water Use Approvals**

- 2.2 In any event the tradeability of water allocations and of water use approvals is an issue that needs to be addressed in any set of arrangements that implement the Agreement. If water allocations and water use approvals are not transferable, at least under certain circumstances, and if not fully tradeable, then the holder of a water access entitlement, particularly after a transfer has taken place, may have no right of access to a particular amount of water or to use it for particular purposes at particular locations. Is it intended, for example, that water access entitlements are able to be held in the absence of water use rights by way of a speculative investment? There is a fundamental distinction between trading and transferring. Although they are linked, trading requires a market but a transfer does not. The outcome to be expected, then, is for water access entitlements to be fully tradeable in a market but for water allocations and water use approvals to be transferable in accordance with prescribed rules or with an approval granted in accordance with prescribed criteria.

#### **Whether all Water Access Entitlements are tradeable**

- 2.3 A second critical issue only indirectly addressed by the Agreement is whether all water access entitlements are open to be transferred and traded. The implication for hydrological reasons is that they are not. If so, some water access entitlements will be able to be traded while others are not. How is this determination made and according to what criteria? Does the legislation state the criteria? Does the water plan state the criteria? The answer is probably a combination of both. The legislation would be expected to state the general criteria applicable in all circumstances while the water plan would deal with the

transferability of water access entitlements in relation to particular water catchments. An alternative is for either the legislation or the water plan to leave it to the relevant public agency to determine in individual cases whether a water access entitlement is transferable or not in accordance with criteria stated in the legislation or in the plan. If this were so, it would create considerable uncertainty about the transferability of a water access entitlement and hence lead to an inherently unstable and unpredictable market regime. As this is undesirable, the first approach is suggested.

- 2.4 The Agreement is in addition largely silent about whether and how water access entitlements are able to be traded beyond catchments within a State or Territory (hereafter intrajurisdictional trading) and beyond State and Territory boundaries hereafter interjurisdictional trading. It is suggested that these are governed by arrangements in water plans for inter-catchment transfers and in inter-State or Territory trading schemes for transfers beyond State and Territory boundaries. Similar issues arise in relation to water allocations and water use approvals and these have not been addressed at all in the Agreement.

### **Who May Hold a Water Access Entitlement**

- 2.5 A third issue largely unresolved by the Agreement is who may hold a water access entitlement. The answer to this reflects very much who are intended to be players in a water market. There are a number of possibilities. The first is that any person or institution may hold a water access entitlement. This would open the system to an unrestricted market susceptible to a range of motives for holding water access entitlements including mere speculation. Secondly, a water access entitlement may be held only by a land owner or a person with lawful occupation of land. Although the interest in the land and the interest in the water access entitlement would be quite separate, there would be at least a cultural and possibly physical relationship between the two. Thirdly, a water access entitlement may be held only by a participant in the water industry. This would include suppliers as well as users. Fourthly, a water access entitlement may be held only by an accredited person or institution. This would enable a public agency to determine in accordance with statutory criteria who may or may not hold water access entitlements in particular sets of circumstances.

### **How are Water Access Entitlements Created**

- 2.6 A fourth issue is how water access entitlements are created. Currently water rights are granted in most circumstances on an ad hoc basis in response to an application. However, a water access entitlement for the purposes of the Agreement is a different kind of concept altogether. It is more an interest or a share in an interest in a water resource rather than a right to do anything in an operational sense. The function of a water plan is to review the water resources of the area in question and then to determine what proportions of the resource are to be devoted to consumptive purposes and to environmental purposes. Once the share of the resource to be devoted to consumptive purposes has been determined and identified, then the expectation is that the plan will create shares in the relevant water resource devoted to consumptive purposes. It is this 'perpetual or open ended share' which constitutes the water access

entitlement. It is expected therefore that the water plan will divide the relevant water resource into an appropriate number of shares and then for these shares to be made available to those who wish to hold the entitlement. For example, if the water resource in question is divided into one million shares, then whoever wishes access to the water will hold the appropriate number of shares which, when linked to the water allocation and the water use approval, will enable the holder of the entitlement to have access and use rights in relation to the water which is the subject of the entitlement. It is important to remember that a water access entitlement does not give any rights to water per se. The entitlement will be complemented by a water allocation which identifies the amount of water actually available during the period in question – probably a year. In addition, the allocation is merely a right of access to the water and this itself has to be complemented by a water use approval.

### **How are Water Access Entitlements Granted**

- 2.7 If this is what is contemplated, then the fifth issue is how water access entitlements created by the water plan are made available. They could be made available to whoever is entitled to hold a water access entitlement – a point already discussed. In this case, such a person may make application for the number of entitlements appropriate to the ultimate use. Alternatively, the entitlements could be available by way of auction, tender, individual sale or whatever other means that may be seen to be appropriate. There are transitional problems. Clearly, an arrangement such as this is not going to be created out of nothing. Each State and Territory has its existing system for creating water rights. Water plans no doubt will have to address this issue by conferring an appropriate number of water access entitlements upon those who already have water rights in relation to the water resource in question. This will be a complicated exercise. But it may be left out of account for our immediate purposes. The important point, however, is that it is the water plan which creates water access entitlements and it is these entitlements that are going to be the assets to be traded in accordance with the rest of the system.

### **The Allocation of Water for Environmental Purposes**

- 2.8 The sixth issue is how water is allocated for environmental purposes. The Agreement is rather equivocal on this. It contemplates that it may be done administratively through the water plan. But it also contemplates the use of environmental water rights. Let us assume that this is the solution to the problem. In theory, it would seem, there is no difficulty in creating water access entitlements whose function is the protection of the ecological values of the water resource in question. The water plan sets aside water access entitlements for consumptive purposes. Whether they are used in that way or not depends on other approvals. The position could be exactly the same in relation to water for environmental purposes. If, for example, 30% of the water resource is deemed appropriate to be set aside for environmental purposes, then only 70% of water access entitlements will be available for consumptive purposes. If an appropriate institution were authorised to hold the water access entitlements set aside for environmental purposes, then, in the absence of anything further, the existence of the entitlement would simply have the effect

that the water could not be used for consumptive purposes to an extent greater than 70% of the totality of the water resource. In other words, this would operate as a form of reservation of rights of use or potential use to the holder of the environmental water access entitlement.

### **The Tradeability of Environmental Water Access Entitlements**

2.9 This raises the seventh question whether environmental water access entitlements should be available for trading or not. In theory, in a market context the answer presumably is that they should be available. In circumstances of low flow and drought, for example, the holder of environmental water access entitlements could purchase water access entitlements that are otherwise available for consumptive use but which will not actually be used for consumptive purposes. Much would depend upon the market and the price. This would determine whether or not at any moment of time environmental values exceed productive values or the other way around. In any event, a solution to the protection of the ecological values of water is to create environmental water access entitlements in exactly the same way as consumptive water access entitlements are created. That is, by the detailed provisions of the water plan.

### **The Interjurisdictional Transferability of Water Management Instruments**

2.10 The Agreement clearly acknowledges the use of interjurisdictional trading as a means of achieving its overall objectives. There is little detail about the mechanisms for doing so. Paragraph 59 talks about compatibility among the systems in each jurisdiction. Paragraph 60(iv) contemplates the removal of existing barriers to interjurisdictional trading. It seems that the same approach is contemplated for interjurisdictional as well as for intrajurisdictional trading. This may well be so in relation to hydrological considerations. But is it true of the legal structures necessary to facilitate and expand interjurisdictional trading? In the absence of a national system enacted by the Commonwealth, compatibility is unlikely to be enough. Indeed the Agreement itself seems to recognise the need for some form of consensual arrangements among jurisdictions. For legal purposes this needs to be formalised. It is therefore suggested that the legislation in each jurisdiction requires the creation of an Interjurisdictional Water Management Instrument Transfer Scheme that constitutes an enforceable set of arrangements for interjurisdictional trading. Based, no doubt, upon the same fundamental principles as the arrangements for interjurisdictional trading.

### **An Initial Structure**

2.11 By way of summary, these issues suggest an initial structure such as this:

- the range of water access entitlements that may be created (consumptive, environmental, transferable, non-transferable);
- who is entitled to hold a water access entitlement – a matter to be determined by the legislation;

- how is a water access entitlement created – a matter to be determined by the legislation;
- the creation of consumptive water access entitlements by the water plan;
- the creation of environmental water access entitlements by the water plan;
- the division by the water plan of consumptive water access entitlements into those that are transferable and those that are not transferable;
- the division by the water plan of environmental water access entitlements into those that are transferable and those that are not transferable;
- the formulation of an Interjurisdictional Water Management Instrument Transfer Scheme.

2.12 It needs to be considered whether this structure depends upon a prescriptive set of rules or a more discretionary set of criteria or a combination of both. On the face of it a market based approach should be based upon as few discretions as possible with the requirements set out in the form of clear rules. The Agreement acknowledges a function for the exercise of discretion in accordance with as clearly stated criteria as possible. It may therefore be that the creation of water access entitlements and their division into consumptive and environmental water access entitlements is left to a public agency with the criteria for making the decision set out either in the legislation or in the plan. But this would not be the preferred option.

### **Urban Water Management**

2.13 The Agreement contemplates changes to the way water in urban communities is managed. This includes the facilitation of trading between and within the urban and rural sectors. But the Agreement is almost totally silent about how this should be done. Can the broad political philosophy driving the Agreement be applied to urban water management? Probably not – given the differences between rural and urban uses and supplies, between the range of different hydrological and technical issues and between the numbers of suppliers and users. It is suggested in later paragraphs that the legislation should provide for:

- urban water plans;
- urban water action programs;
- urban water supply entitlements.

Such arrangements are expected to recognise the distinctive needs of urban water management within a strategic framework of sustainability.

## THE STRUCTURAL FOUNDATIONS OF A MANAGEMENT SYSTEM

### Introduction

- 3.1 Let us turn now to the more detailed structural elements of a statutory regime for managing water resources including the use of market mechanisms. A synoptic framework is attached as the Appendix. It is essentially an integrated set of rights and duties having effect within a strategic framework of clearly stated objectives, principles and instrumental functions. This would be consistent with contemporary approaches to resource management statutory structures in Australia and similar jurisdictions. The initial and in conceptual terms probably the most important part of such a framework is the status of the introductory provisions.

### The Objective

- 3.2 The first is a statement of the objective of the legislation. The word 'objective' in the singular is important. It comprises three elements to be integrated as one objective for simultaneously linked achievement. This statement of objective needs to encapsulate the essential elements of sustainability. It could be framed such as this:

*The objective of the Act is the sustainable development of the water resources of the State (or Territory), the protection of the ecological values inherent in these water resources and the efficient use of these water resources.*

- 3.3 Each of these elements of this composite objective would need to attract something in the nature of an interpretation provision. But it is more than an interpretation provision. It indicates how a particular element of the objective is achieved. While the details of such a provision are not the focus of this paper, an example might help. This example is based upon the Queensland water legislation:

*The sustainable development of the water resources of the State is achieved by:*

- *allocating and using the water resources of the State for the physical, economic and social well being of the people of the State within limits that can be sustained indefinitely;*
- *developing the water resources and other resources of the State in accordance with the principles of ecologically sustainable development;*
- *allocating water to meet the needs of the people of the State in a fair, orderly and efficient matter;*
- *protecting the biological diversity and health of natural ecosystems;*



- *maintaining and improving the quality of the water resources and other resources of the State*
- *protecting the water resources, natural ecosystems and other natural resources from degradation and reversing degradation that has occurred;*
- *creating a market for trading in water access entitlements that has the confidence of those participating in the market.*

Appropriate details could be stated for the protection of ecological values and for the efficient use of water resources.

## **The Principles**

- 3.4 Then there are the principles that are to be embedded in the legislation. Perhaps a good model is the legislation in New South Wales. It sets out a whole series of water management principles relating to water sharing and water use and other matters. Given the focus of this paper upon trading and water rights, the principles in the New South Wales legislation need to be extended and perhaps incorporated in the legislation of other States and Territories. The statement of principles needs to include something like this:

*The principles underpinning an open and competitive market for trading in water access entitlements;*

*The principles according to which water allocations and water use approvals are transferable.*

- 3.5 This could be complemented by reference to more specific principles such as:

- the principle of adaptive management;
- the principle of competitive neutrality;
- the principle of comprehensive availability of information;
- the principle of individual ownership of water access entitlements;
- the principle of enforceability of individual rights and obligations;
- the principle of public participation;
- the principle of public agency accountability.

The incorporation of principles such as these would be something of a novelty in legislation. But if trading is to be taken seriously, then there must be a clear statutory acknowledgement that this is so, that these are the principles driving the system and that the detail of the legislation reflects and even incorporates in instrumental form these principles.

## The Creation of a Fundamental Duty

3.6 This takes us, then, to the instruments for achieving the objective of the legislation. In synoptic form the instruments are, of course, the objective of the legislation itself; the principles underlying it; the rights and duties created by the legislation and by the water plan; the water plan itself; the water access entitlements; the water allocations; the water use approvals; the mechanisms for registering, transferring and trading in these entitlements, allocations and approvals; and the range of enforcement mechanisms. To this there must be added now the analogous range of instruments for urban water management.

3.7 This is not enough. The effectiveness of the legislation is going to depend on the relationship between all of these. It is suggested that this is addressed by the creation of a fundamental duty along these lines:

*It is the duty of all persons and institutions (including the State or the Territory and its administrative, executive and judicial agencies) exercising powers, performing functions or fulfilling obligations under this Act, any plans made under this Act and any water management instruments granted under this Act to achieve the objective of this Act, to observe the principles stated by this Act, to comply with the rules contained in or provided for by this Act, to comply with the plans made under this Act and to comply with the water management instruments granted under this Act or, as the case may be, to ensure the achievement of the objective, the observance of the principles and the compliance with the rules, the plans and the water management instruments.*

This is a very positive statement of duty and its subject matter is very comprehensive. It probably goes beyond what has hitherto been incorporated in legislation of this kind or indeed perhaps of any kind. It is suggested that this duty is enforceable in accordance with the enforcement provisions discussed later.

3.8 This duty incorporates a number of critical concepts that must be defined. The objective is a reference to the stated objective and the principles to the stated principles. The rules are a reference to any prescriptive statement in the legislation and to any regulations or, in the case of an urban institution, any by-laws made under the Act. Plans include water plans, interjurisdictional trading schemes, urban water plans and urban water action programs.

## Chapter Four

### A SET OF INTERLINKED RIGHTS AND DUTIES

#### Introduction

- 4.1 This comprehensive and overarching statement of fundamental duty is of no practical value without a detailed set of rights and duties describing what all participants may or may not do. This includes planners, administrators, suppliers and consumers. So the next part of the structure contemplated by the Agreement is a complex regulatory regime based upon water plans, water access entitlements, water allocations, water use approvals and market based instruments. The Agreement contemplates that the focus of trading in water rights is the relatively large scale use of water for agricultural and some industrial purposes. However, the Agreement also recognises that a trading regime may be appropriate in an urban as well as a rural context. A generic model therefore has to take account of the way water is supplied to and used by domestic consumers in urban areas.
- 4.2 At the moment urban domestic consumers of water have generally neither a contractual relationship with the supplier nor a legally enforceable right to receive water from the supplier. It is at most an expectation that water will be made available to the consumer provided the consumer complies with the conditions of supply including payment of the relevant charges. If trading is to be extended to urban domestic consumers of water, then the legal system must create an interest – likely to be in the form of an enforceable right – which has value, which can be transferred and which can therefore be traded in the full sense of the word. The Agreement does not address this issue in detail. It is suggested that the appropriate instrument whereby such an objective can be achieved is the creation of an urban water supply entitlement in addition to the other instruments contemplated by the Agreement.
- 4.3 The detailed regime of regulation to be created by the legislation will be the most important part of the scheme overall for consumers and in particular for traders and potential traders. Much of it is already in place in existing legislation in one form or another. However, it is suggested that the basis of a regime of regulation comprises these elements:
- a statement comprising a prohibition – a negative duty – on the activities to be regulated or controlled;
  - a statement describing the rights of the holders of the four water management instruments created by the legislation;
  - the first is a water access entitlement;
  - the second is a water allocation;
  - the third is a water use approval;

- the fourth is an urban water supply entitlement;
- the creation of a general duty of care in the exercise of the rights associated with these instruments.

These are discussed in the following paragraphs.

4.4 The creation of these duties and the description of the interests created by these instruments establish only the conceptual basis of a regime of regulation. This must be complemented by a comprehensive set of arrangements by which this regime is put into practice. It comprises these seven sections discussed later:

- the creation of a set of rights and duties in relation to the availability of information;
- the formulation and content of water plans;
- the rights and duties associated with water access entitlements;
- the rights and duties associated with water allocations;
- the rights and duties associated with water use approvals;
- the rights and duties associated with urban water supply entitlements;
- the rights and duties associated with dealings in these four instruments.

### **The Prohibition of Controlled Activities**

4.5 The first element of a regulatory regime is the negative duty that lies at its foundation. This is the duty or obligation not to engage in the activities controlled by the regulatory regime. The Agreement contemplates water access entitlements, water allocations and water use approvals. A water access entitlement is a share of the resource; a water allocation is the nominal amount of water available to the holder of a water access entitlement; and a water use approval enables the undertaking of the activities linked to the exercise of the rights associated with the entitlement and the allocation. It is contemplated that an activity in relation to water cannot be undertaken without these three instruments. While each is directed at a different situation, the holding of a water use approval is of itself of no effect in the absence of a water access entitlement and a water allocation. Similarly, a water access entitlement authorises nothing in the absence of a water use approval.

4.6 Each of these three instruments need not necessarily be held by the same person – especially in a mature market context. For example, the holder of a water use approval may have access to the water as a result of an assignment of an interest in the water allocation by its holder. However, while water use approvals are related to the use of land as well as the use of water, it will be necessary in practice for the holder of a water use approval to have access to the land to which the water relates. This is not governed necessarily by the water legislation. Access to the land may be the result of ownership or lawful

occupation of the land on the part of the holder of the water use approval. Alternatively, access to the land may be the result of statutory rights conferred upon a participant in the water industry – for example a water authority or a water board – by the legislation governing that institution.

4.7 Access to water for domestic and industrial purposes in an urban context raises different issues. The interest of the consumer in this case is not so much an interest or a right to take or use the water. Rather it is an interest or right to receive a supply of water from a participant in the water industry who is otherwise authorised to take and use the water for onward distribution and supply to the consumer. If it is intended – as the Agreement seems to imply – that trading is to be extended to urban consumers, then the urban consumer must have an asset that is tradeable. It has been suggested that this asset should be an urban water supply entitlement. This needs to be built into the regime of regulation.

4.8 Finally, there must be a statutory foundation for dealing in all of these instruments. While a market arrangement requires that the power to transfer these rights should be as unrestricted as possible, there will inevitably be some restrictions – no doubt of a procedural kind – that are relevant. Compliance with such procedures and other restrictions is thus a matter of importance. Hence there needs to be a duty not to engage in dealings except in accordance with the legislation. In particular, it will be suggested that only those accredited to do so should be entitled to apply for and hold a water management instrument or an interest in one.

4.9 Against this background it is suggested that there should be four fundamental prohibitory provisions in the scheme of arrangements. These are expressed passively – that is without a reference to a person – to make it clear that it is the activity that is prohibited rather than any particular person. Hence each instrument can be held by a different person. The first is this:

*An activity or operation relating to, affecting or involving water must not be undertaken unless there is in force a relevant water access entitlement, water allocation and water use approval.*

This requires a definition of the water to which it applies: that is water other than urban water. The second is this:

*Water must not be received or delivered unless there is in force a relevant urban water supply entitlement.*

This requires a definition of the water to which it applies: that is urban water.

The third is this:

*A dealing with a water access entitlement, a water allocation, a water use approval or an urban water supply entitlement must not take place except in accordance with this Act, a water plan made under this Act or a regulation made under this Act.*

This requires an interpretation of dealings. The fourth is this:

*A person who is not an accredited person must not apply for, hold or hold an interest in a water access entitlement, a water allocation or a water use approval.*

This requires an interpretation of accredited person. These duties will be enforced in accordance with the wide range of enforcement mechanisms to be contained in the legislation. These are discussed later.

### **The Interest Created by a Water Access Entitlement**

4.10 The next element of the structural foundations of the scheme is a statement of the rights of the holders of these instruments. The Agreement describes, in relation to the consumptive use of water, a water access entitlement, separate from land, as a perpetual or open ended share of the consumptive pool of a specified water resource as determined by the relevant water plan. This paper has suggested not only consumptive water access entitlements but also environmental water access entitlements. There will therefore need to be several points of reference.

4.11 The first is about water access entitlements. What is such an entitlement? It is suggested that:

*The holder of a water access entitlement is the owner of a share of a water resource created in accordance with the water plan that relates to the water resource.*

The use of the word 'owner' is indicative of the status of this interest. It emphasises in particular its nature as a so-called 'property' right that contributes to a sense of confidence on the part of participants in a market. However, it is a matter for further consideration whether the legislation should be as specific as this or whether it should use a more neutral term in relation to the type of interest created by a water access entitlement.

4.12 There are consumptive water access entitlements and environmental water access entitlements. The difference is the use to which the water may ultimately be put. Thus the holder of a consumptive water access entitlement will be authorised to use the water only for consumptive purposes and similarly the holder of an environmental water access entitlement only for environmental purposes. Consumptive purposes and environmental purposes will need to be carefully defined. Consumptive purposes include agricultural, horticultural, viticultural, pastoral, industrial, commercial and domestic uses. Included in industrial is use for mining and associated purposes. Environmental uses are restricted to the preservation of environmental flows to secure the ecological values of water and the quality of water and the protection of the environment of which the water is a part. A number of these matters will be governed by water plans and by regulations. It will therefore need to be stated that the person or institution exercising the rights associated with a water access entitlement of either kind must comply with any provisions in the water plan or in the regulations. In addition, this person or institution must hold an interest in

a water allocation and a water use approval to enable the right of 'ownership' to be converted into a usufructuary right.

### **The Interest Created by a Water Allocation**

4.13 Then there are water allocations. The Agreement is somewhat unclear about the precise nature of a water allocation. It appears to refer to the water to be made available to the holder of the water access entitlement if water is in fact available. Paragraph 36 of the Agreement links allocations with planning – not unexpectedly. Planning helps to determine 'water management and allocation decisions to meet productive, environmental and social objectives'. So an allocation appears to be the determination of how much of the available share of the water of the water resource will be able to be used for these particular purposes: that is productive, environmental and social. This paragraph of the Agreement has thus subtly switched the terminology from consumptive use. So, while water access entitlements fall into one of two categories – consumptive or environmental – water allocations will reflect the wider objectives of the legislation but no doubt within the framework of this distinction between consumptive and environmental. It is likely that a water allocation will prescribe not only the productive, environmental and social objectives to be achieved by it, but also the quantity of water to be directed to these ends. In any event, it seems inevitable that a water allocation will be very closely linked both in principle and in practice to water access entitlements.

4.14 On this basis it is suggested that this description is appropriate:

*A water allocation associated with a water access entitlement states:*

- a) the water access entitlement which it is associated;*
- b) the quantity of water that comprises the share of the water resource created by the water access entitlement,*
- c) the period of time during which the person or institution exercising the rights associated with the water access entitlement has access to this quantity of water; and*
- d) whether this quantity of water may be used for either consumptive or environmental purposes.*

Such a description must be complemented by a general duty of compliance on the part of the person or institution exercising the rights associated with the water allocation.

4.15 It is unclear from the Agreement whether a water allocation is an integral part of and inseparable from a water access entitlement. On the other hand, it may be that the two are separate instruments and have to be dealt with separately. Currently, the legislation in the States and Territories provides examples of either of these two approaches. But the position needs to be clarified. This is particularly so in the context of transferability of water access entitlements on the one hand and transferability of water allocations on the other hand. It is

also a factor in the context of variation, amendment, and cancellation of either of these two instruments. A water allocation may be variable depending on circumstances but a water access entitlement, while variable in theory, should in practice, if a confident market is to be created, be intrinsically not variable. It is suggested that they should be linked but separate in accordance with the form of words in the preceding paragraph.

### **The Rights Granted by a Water Use Approval**

4.16 We consider now water use approvals. Paragraph 30 of the Agreement states that 'regulatory approvals enabling water use at a particular site for a particular purpose will be specified separately to the water access entitlement consistent with the principles set out in Schedule D.' This is quite clear. The water use approval authorises the activities that are able to be undertaken at a particular location and for a particular purpose. Thus:

*A water use approval associated with a water allocation states:*

- a) the water allocation with which it is associated;*
- b) the location of the infrastructure authorised to be constructed and used by the approval; and*
- c) the purpose for which the quantity of water stated in the water allocation may be used.*

Again, water use approvals will be granted in accordance with the legislation, the relevant water plan and any relevant regulations made under the legislation.

4.17 There is nothing new or unusual about arrangements such as this. The critical questions however are these: the extent to which the decision to grant a water use approval is discretionary; the extent to which the criteria (optional or mandatory) are contained within the legislation; and the extent to which the requirements for the grant of a water use approval are prescribed objectively in regulations or in water plans. The fundamental question is whether the approach should be prescriptive or discretionary. This is a matter that will be worked out in detail in the part of the arrangements that deal specifically with water use approvals and discussed later.

### **The Interest Created by an Urban Water Supply Entitlement**

4.18 Then there are urban water supply entitlements. There is no reference, of course, to these in the Agreement. It is suggested that these entitlements are a reflection of the water industry as a whole and how it is organised as well as a reflection of the implied policy in the Agreement that trading in water rights should be extended to users of water in the urban community. There are many water users in the rural community holding individual rights, either directly from a public agency or through another agency, public or private. Indeed there are probably hundreds of thousands of these across Australia. One of the difficulties in any event is dealing with these large numbers. However, the problem becomes magnified many times if we have to take into account the



number of individual domestic users not only in any one urban community but across larger communities, States or Australia generally. In this context there will be literally millions of holders of urban water supply entitlements in Australia.

- 4.19 While the nature of these entitlements may be simple enough, there will need to be administrative mechanisms in place able to cope with these large numbers. This, of course, is not unprecedented, even in the context of water. In some jurisdictions, charges for water are simply a part of the administration of local government charges in the form of rates and other payments. So the institutional and administrative machinery for managing a water supply entitlement system already exists. It may need to be modified but that is a less difficult alternative. In any event an urban water supply entitlement is the right of a person to receive or have delivered a quantity of water from or by the person or institution able to exercise the rights associated with a water management instrument. Such arrangements would be in the form of either a contract (if it were a relatively large amount of water, for example, for industrial purposes) or by way of a statutory regime governing the process of supply and use in the case of individuals such as domestic householders (an urban water supply program). The differences compared with the present system would be these: for the consumer of the water to have a right to receive the water rather than a mere expectation; for this right to take the form of an urban water supply entitlement as an asset; and for this entitlement or a portion of it to be made transferable and traded in an appropriate market regime.
- 4.20 In practice, an urban water supply program would be created by the local government. The local government receives its water from a supplier or from a water source directly in terms of a water access entitlement, a water allocation and a water use approval. The urban water supply entitlement is not an open ended and perpetual right. It is a right effective over an appropriate period; probably an annual basis. The program must specify the number of urban supply entitlements able to be held by each participant in the program: namely domestic householders. The amount of water would be determined on a per capita basis or some other basis. The householder would then be credited with a certain number of urban water supply entitlements. If the holder of these entitlements used less water, then the balance could be 'sold' to someone else. Alternatively, if the householder so wished, this person could 'buy' entitlements from someone who had a surplus. And so on. Such a set of arrangements may be no more difficult to administer than the present arrangements about water charging. However, the legislation would need to reflect and incorporate these concepts.
- 4.21 It may be possible for such an arrangement for the supply of water in an urban community to be replicated for a rural community. This might require, however, some kind of rationalisation of the institutional system comprising the water industry. The fundamental distinctions would be between those who take and use water; those who take and supply onwards water to other users; those who receive water from those entitled to take and supply to others. In other words the three functions of abstraction, distribution and use. The relationship between these will depend upon a range of factors including the source of the

water (surface water or underground water); the hydrological relationship between the source and use; the location of use; the quantity of use; the purpose of use; and no doubt other factors. Consideration perhaps needs to be given in the longer term to a reorganisation of the water industry generally along these lines. This is not proposed by the Agreement but would facilitate its implementation.

## **A General Duty of Care**

- 4.22 Water use approvals and urban water supply entitlements involve the use of infrastructure as well as of water. Such activities may cause injury, harm or damage to other members of the community and to the environment. While the common law may protect the interests of the former, it does not directly protect the latter. Since one of the outcomes of the legislation is the protection of the environment, it is appropriate to include within it a general duty of care of the environment. This is not unprecedented in Australia. It should be restricted to a duty of care only and imposed on those involved in activities authorised under the legislation. Thus:

*A person performing functions under a water management instrument granted under this Act must take all reasonable and practicable measures to prevent or minimise any harm to the environment and failure to do so renders the person liable to one or more of the enforcement proceedings provided by this Act.*

## Chapter Five

### THE PRINCIPLE OF INFORMATION AVAILABILITY

#### Introduction

5.1 So much, then, for the structural foundations of rights and duties underlying the system. The next element comprises the rules about the availability of information. The Agreement makes it clear that any trading system depends, among others, on the availability of accurate and up-to-date information about all aspects of water regimes. The duty to provide information and to make information available arises at all stages in the water management process. The formulation of water plans requires a comprehensive and up-to-date set of information about the resource, its availability, its projected uses and its short term and long term reliability of supply. Equally important is information about the use of water on a day-to-day basis. In addition, particularly in a trading context, there needs to be information available about the specific rights and duties of the holders of water access entitlements, water allocations, water use approvals and urban water supply entitlements. While the legislation and the plans are a source of information on these topics, much information relates to the individual right. Hence the clear need for all such information to be available publicly and no doubt in the form of a register. This raises important questions about the consequences of registration and the need for certificates of availability and certificates of compliance.

5.2 Information for these purposes falls broadly into four categories:

- information and data used by strategists and planners in formulating their plans and making their decisions;
- information about individual access entitlements, water allocations, water use approvals and urban water supply entitlements;
- information about the practical operation of the whole system on the basis of actual use;
- information about dealings of all kinds affecting water.

There must, however, be a duty not only to compile and make this information available but also a duty of information currency – that is a duty to ensure that it is totally and comprehensively up-to-date.

#### Information for Strategic Planning

5.3 The first step in managing water resources is the function of strategic planning. This is done by the relevant public agency in consultation with the public. Any planning process requires relevant information. A number of duties therefore need to be placed upon the public agency. These include duties:

- to identify the water resources in each catchment;
- to measure the volume and quality of water in each catchment on an annual basis;
- to identify the past, present and future requirements for water for both consumptive and environmental purposes;
- to analyse and evaluate this information with a view to determining how these water resources should be managed to ensure they are sustainably and efficiently used;
- to make available to the public all of this information, analysis and evaluation;
- in addition to make this information, analysis and evaluation available to the public in a meaningful and accessible summary form;
- to discharge these duties on an annual basis.

5.3 To enable the relevant public agency to discharge these duties requires the cooperation of other agencies, other organisations and institutions, and members of the public. These duties, therefore, need to be complemented by a power given to the relevant public agency to require information from these other bodies and for these other bodies, including members of the public, to provide the information when it is requested.

### **Information about Individual Water Management Instruments**

5.5 Next, there is the need to make available to the public detailed information about the contents of each water management instrument granted under these arrangements. The Agreement contemplates three interests to which this paper has added one more. The three are water access entitlements, water allocations and water use approvals. To which there has been added urban water supply entitlements. The first three need to be looked at together. Certified copies of each water access entitlement, water allocation and water use approval must be kept by the relevant public agency and copies made available on request to any person. It will be useful for this to be supplemented by the creation of lists of these three instruments stating the holder, the location, the quantity, and the use. There must therefore be a duty on the relevant public agency:

- to keep in its records a certified copy of each water access entitlement, water allocation and water use approval;
- to make available a copy to any person on request;
- to prepare and keep current a list of these three including details of holder, location, quantity and use;
- to make this listed information available to the public on request.

5.6 Urban water supply entitlements are somewhat different. There will be potentially a very large number of these. The information will be held in a range of different locations: mainly suppliers of water both wholesale and retail, including a number of water authorities and local governments. These suppliers must therefore come under a duty to keep a record of each urban water supply entitlement, its holder, the place of supply and the amount of water to be supplied. This will be complemented by a duty to keep a list of each entitlement. These records must be available for public inspection and a copy of the entry on the list in relation to any particular water supply entitlement must be made available by the supplier to any person on request.

### **Information about Water Use**

5.7 This information about water access entitlements, water allocations, water use approvals and urban water supply entitlements does no more than indicate who is the holder and what is authorised. Just as important is what actually happens. Information therefore needs to be obtained about how much water is actually used, by whom and for what purposes. This information is obtained from the users and the suppliers. There must therefore be a comprehensive system of measuring quantitatively the amounts of water supplied, the amounts of water received and the amounts of water used. This necessarily involves a comprehensive system of meters recording the amounts of water supplied and used. Every person receiving water must have a meter at the point of reception. This applies to both wholesale and retail buyers and receivers. Records must be kept on an annual basis of the amount of water measured in these meters. The amount recorded in this way must be included in a database held in a central location relevant to the catchment and this information must be available to any person on request. More particularly a copy of the entry in relation to any particular meter must be made available to any person on request. This applies as much to urban water supply entitlements as to any of the others. In addition, a summary of this information must be compiled by the relevant public sector agency in its annual report.

5.8 The implementation of these arrangements about the supply and use of water for consumptive purposes requires the creation of a number of duties. These include duties on the relevant public agency or supplier:

- to require the installation of meters;
- to install meters;
- to read these meters on a regular basis;
- to record the information obtained from the meters;
- to list the entries in relation to each meter;
- to make available to any person the information contained in these lists;
- to make a copy of an entry in the list available to any person on request.

5.9 A range of information must be provided about the use of water for environmental purposes. This is the responsibility of the public agency responsible for planning the development of water resources and implementing water plans. If the environmental values of water are protected by the creation of environmental water access entitlements and water allocations for environmental purposes and water use approvals for environmental purposes, then the responsibility lies with those holding these instruments. In either case there must be a duty imposed upon these institutions to measure, out of the total available water resource, how much is allocated to environmental purposes, how much is used for environmental purposes and whether or not there is a surplus or a deficit. A duty must therefore be imposed upon these institutions to make these measurements, to make this information available to the public, to provide it on request by anyone and to compile an annual report on a catchment basis that summarises these issues and assesses whether the objectives of providing water for environmental purposes have been achieved.

### **A Public Water Accounting System**

5.10 These arrangements should ensure that information is made available to relevant public agencies, to water suppliers, to those receiving water and to the public at large. This includes water used for all consumptive purposes and for all environmental purposes. In other words, it should deal comprehensively with the use of water resources in the relevant catchment and in its wider context. If this information is accurate, up-to-date and comprehensive, it should provide the basis for a public reporting system designed to determine whether or not water resources are being managed in ways which achieve the objective of the legislation. This means a requirement for something in the nature of an accounting system to ensure the public accountability of those responsible for managing and using these water resources. The basis for such a system should be an integrated set of accounts at the catchment level, the regional level and the State level – possibly even at national level. The input of information from the consumer and receiver through the supplier to the institution responsible at these levels for overall management should enable a comprehensive picture to emerge.

5.11 Annual accounts on this basis will reveal at these three levels the amount of water available for consumptive and environmental purposes, the amount of water supplied for these purposes and the amount of water used for these purposes. Information available at the planning stage will have revealed how much water was expected to be available during the year in question. There will therefore be available a series of tables - or statements of account - under these heads:

- estimated amount of water available;
- estimated amount of water available for consumptive purposes
- estimated amount of water available for environmental purposes;
- actual amount of water available;

- actual amount of water available for consumptive purposes;
- actual amount of water available for environmental purposes;
- amount of water supplied for consumptive purposes;
- amount of water supplied for environmental purposes;
- amount of water used for consumptive purposes;
- amount of water used for environmental purposes.

5.12 The information in relation to consumptive purposes would need to be broken down into the use of water for classes of particular purpose of use: such as use for irrigation, use for industrial purposes and use for domestic purposes. Use for irrigation would need to be divided into further categories (for example, use for agricultural or viticultural purposes) and the use for industrial purposes divided into use for mining purposes and use for manufacturing purposes. The particular uses would need to be as specific as possible. When all of this information is put together, it would present something like a balance sheet which discloses overall whether the system is in debit or in credit and whether each level of the system is in debit or in credit. These accounts should then be made available to the public.

5.13 Such a system requires the imposition of a range of duties upon the relevant public agency. These include:

- a duty to collect and collate the information;
- a duty to analyse the information;
- a duty to classify the information;
- a duty to present the information according to acceptable accounting standards;
- a duty to do so in summary form in a way that members of the public can understand.

### **Information about Transactions**

5.14 Finally, there is the need for information about trading in water access entitlements and other transferable instruments. This requires the establishment of an appropriate register or registers. It has already been suggested that the relevant public agency must keep in its records a certified copy of each water access entitlement, water allocation and water use approval and to make a copy available to any person on request. In similar fashion it has been suggested that lists of urban water supply entitlements should be created and a copy of entries in the list available to any person on request. Tradeability, however, requires an additional set of arrangements: not only for the purpose of making information available but also for the purpose of assuring the public of the

validity of the information. Hence the need for an appropriate register or registers.

- 5.15 The Agreement contemplates the establishment of registers in each State and Territory and these registers will contain records of all water access entitlements and dealings in these entitlements. The Agreement does not contemplate inclusion in these registers of water allocations or water use approvals. If these are to be transferable, if not fully tradeable, then consideration needs to be given to the establishment of registers in relation to water allocations and water use approvals. In any event, the critical questions are the information to be included in the register and the status of the register.
- 5.16 The fundamental principle is that a register of water access entitlements must be established and that each water access entitlement is entered in the register. The information in the register should include the water resource which is the subject of the entitlement, the share of the resource owned by the holder, details of the holder of the entitlement, and a note of the allocation and the water use approval linked to the entitlement. Any dealings affecting the entitlement must be recorded in the register. These include any transfers, any assignments of a share of the entitlement, any mortgages of the entitlement or of a share of the entitlement, and the creation or termination of any other interest in the entitlement. In addition, the information in the register should include the amount of the consideration for the transfer and the amount of any loan secured by a mortgage or other security instrument.
- 5.17 The register will require to be supported by a number of other provisions. These include a duty on the registrar:
- to enter in the register all lawful dealings;
  - to certify the entry of the dealing in the register by the issue of a certificate;
  - to enter in the register any dealing at the request of the beneficiary of the interest (for example, a transferee, an assignee, a mortgagee, a trustee or an executor);
  - to determine the order in which entries are to be included in the register in accordance with the rules of priority.
- 5.18 In addition, provision must be made for assuring and protecting the interests of all parties. These include the guarantee given by the state of the accuracy of the certificates provided by the registrar about water access entitlements and dealings with them included in the register. This must be complemented by a duty on the holder of any interests entered in the register to inform the holder of any other interest included in the register of any proposal to deal with the interest in any way at least seven days prior to doing so. During that period the holder of the interest may object to the proposed dealing. The registrar must not register the proposed dealing until the requirements for its valid entry in the register have been satisfied including, for example, the requirement for the consent of the holder of a security interest in relation to a water access entitlement.



## Chapter Six

### THE FUNCTIONS OF A WATER PLAN

#### Introduction

- 6.1 The next element in a structure for the management of water resources is the water plan. There are three essential functions of a plan. These are description, analysis and prescription. The quality of the prescriptive provisions of a plan depends upon the adequacy of the two other elements. The first involves as detailed and as comprehensive a description as possible of the water resources of the area to which the plan applies. This depends upon compliance with the duties in relation to the provision of information already discussed. This information is then analysed against the objective, the principles, and the requirements of the legislation so that an appropriate range of rights and obligations can be formulated and included as prescriptive measures in the plan.
- 6.2 The function of formulating a plan requires a number of duties to be placed upon the relevant public agency which in this case is likely to be the appropriate Minister. These include a duty:
- to divide the State or the Territory into areas – likely to be catchment areas – to which the plan applies;
  - to formulate a plan in accordance with the legislation;
  - to provide for public participation in the formulation of the plan including, for example, the preparation and publication of a report providing the relevant information, an analysis of the information and the range of issues upon which comment is invited;
  - to take into account the responses of the public;
  - to prepare a provisional plan for further public comment;
  - to finalise the plan.
- 6.3 The legislation must state the subject matter of the plan. The plan must:
- describe the water resources to which it applies including surface waters, underground waters and overland flows;
  - describe the quality and quantity of these waters;
  - describe existing uses of these water resources;
  - assess the quality and quantity of these water resources likely to be available over the next 5 years;

- assess the likely demand for these water resources for consumptive purposes over the next 5 years;
  - assess the likely demand for these water resources to satisfy the requirements of the environment;
  - determine how much water should be allocated over the next 5 years to consumptive purposes and environmental purposes.
- 6.4 For the most part these requirements reflect existing planning regimes. However a water plan must incorporate a range of additional provisions to ensure a framework that enables trading in water access entitlements. In doing so, it must address both consumptive and environmental water access entitlements. If water allocations and water use approvals are to be traded as well as transferred, then provision will have to be made for this also in the water plan. Similarly, if it is intended that urban water supply entitlements are to be traded, provision must be made in the range of instruments for this.

### **How Water Access Entitlements are Structured for Tradeability**

- 6.5 In the case of water access entitlements, the water plan must include a number of provisions directed at tradeability. These include:
- the classification of water resources by source: for example, by reservoir, by river, by channel or by underground aquifer;
  - the division of each source so classified into a number of shares;
  - the allocation of an appropriate number of shares to be available for consumptive purposes and for environmental purposes;
  - the creation of an appropriate number of consumptive water access entitlements;
  - the creation of an appropriate number of environmental water access entitlements;
  - the creation of an appropriate number of transferable consumptive water access entitlements;
  - the creation of an appropriate number of non-transferable consumptive water access entitlements;
  - the creation of an appropriate number of transferable environmental water access entitlements;
  - the creation of an appropriate number of non-transferable environmental water access entitlements.
- 6.6 The formulation of a water plan, including in particular the making of these determinations, must comply with the duties to achieve the objective of the legislation and to observe the principles stated in the legislation. In addition, it

is expected that the legislation will state the criteria according to which these decisions are made. The criteria according to which water is distributed between consumptive and environmental purposes are reasonably well established. They include a prediction of the availability of water from the range of sources classified in the plan; a statement of existing water entitlements; the likely demand for water for all non-environmental purposes; and the water flows necessary to support natural ecosystems. All of these predictions must be based upon the best available information and methodology for analysis.

## **How to Determine Whether Water Access Entitlements are Transferable**

### **(a) The Issues**

- 6.7 Much more complex is deciding whether a water access entitlement, consumptive or environmental, is transferable. The Agreement, it has been suggested, appears to make a distinction between transferable and non-transferable water access entitlements without using these words. If this distinction is intended, it creates a number of issues that need to be addressed. While the Agreement talks about trading in water access entitlements, the concept of trading is left somewhat unclear. For present purposes it certainly includes transferability. But it goes further to the extent that transfers take place within the wider framework of a market. In addition, it is unclear whether and to what extent water allocations and water use approvals are able to be transferred and hence potentially traded.
- 6.8 The Agreement is also ambiguous because it talks about water trading rather than transferring, dealing in, or trading in water access entitlements. These comments, of course, are based upon the simple proposition that water – since it is not subject to original private ownership rights - cannot be traded. It is only interests such as water access entitlements that can be traded. On this basis a number of approaches may be adopted. It is not entirely clear which approach has been adopted by the Agreement. Let us therefore begin with first principles.

### **(b) Some Approaches**

- 6.9 It has been suggested that for a market to be effective the transfer of water access entitlements should be either unrestricted or restricted as little as possible. In any event, any restrictions should take the form of clear and enforceable rules of law. One example of this in the current arrangements in Australia is the transfer of a water allocation under the Water Act 2000 (Qld). A water allocation is transferred by the recording of a transfer in the water allocations register. There is nothing more to it. However, the transfer of a water allocation is quite different from a change to a water allocation. A change to a water allocation, such as a change to a location of abstraction, requires approval. Some changes are permissible, while other changes are prohibited. A permissible change, once approved, involves the issue of a certificate which may be recorded in the water allocations register. There is

therefore a clear distinction between the transfer of an entitlement and the power of the transferee to exercise any rights associated with it.

6.10 In any event, the Agreement clearly envisages that water access entitlements may be 'traded' in certain circumstances. These include:

- where water systems are physically shared;
- where hydrologic connections permit;
- where water supply considerations permit.

These criteria are physical and hydrological. This is understandable. However, these criteria are related to operational constraints rather than legal constraints. In addition, the Agreement contemplates that the operational consequences of a transfer of a water access entitlement can be restricted only for certain purposes. For example, once there has been a transfer of a water access entitlement, the use of water by the transferee may be restricted only, for example, to manage environmental impacts or impacts on geographical features. So the expectation but not the requirement is that a transfer should be as unrestricted as circumstances permit. However, it is clearly contemplated that conditions or restrictions can be imposed. The question then becomes what are the criteria for deciding whether to approve a transfer and what conditions to impose upon the transfer. These criteria must be set out either in the legislation or in the water plan.

6.11 An example of this approach comes from New South Wales. The arrangements in New South Wales include a set of access licence dealing principles. The principles relate, among others, to impacts on water sources; impacts on indigenous, cultural, heritage or spiritual matters; and impacts on water users. An example of the first is that dealings should not adversely affect environmental water and water dependent ecosystems as identified in any relevant management plan. An example of the last is that dealings should have no more than minimal effect on the ability of a person to take water using an existing approved water supply work and any associated access licences. This, it is stated, should be addressed by constraints on dealings established in access licence dealing rules in relevant management plans. What is significant is that each of these two examples contemplates that water plans must address these issues. The pattern is reasonably clear. The legislation states the criteria and the water plan applies these criteria to the area to which the plan applies.

### **(c) Alternative Solutions**

6.12 Where does this relatively confused set of circumstances leave us? The Agreement contemplates that the transfer of a water access entitlement requires approval or at the very least that it complies with a set of transfer rules. In this context there are probably three possible approaches. Namely:

- the need for an approval;
- compliance with enforceable rules;

- classification in the plan.

Let us consider each in turn.

- 6.13 The first is for a transfer of a water access entitlement to require the approval of the relevant Minister, Chief Executive Officer or identifiable administrative officer. An approval will be in response to an application made on an ad hoc basis. The decision could be left entirely to the discretion of the decision - maker or in accordance with a set of stated criteria. In this case, the applicant for approval – either the transferor or the transferee or probably both – will not know in advance whether the transfer will be effective or not.
- 6.14 The second approach is for the legislation, or more likely the water plan, to create a set of water access entitlement transfer rules according to which a water access entitlement may be transferred. The formulation of such rules is likely to be a complicated exercise. The rules will need to acknowledge the subject matter of the water access entitlement and the physical and hydrological difficulties, if any, associated with the exercise of the rights associated with the entitlement by a potential transferee. These difficulties are acknowledged, for example, in the Queensland system which distinguishes between an unrestricted transferable water allocation and a restricted change to a water allocation linked to operational activities.
- 6.15 A water plan, it will be recalled, deals comprehensively with all sources of water: water in watercourses, underground water and surface water. A water access entitlement will identify the share of the resource in question: a share of the water abstracted from a watercourse or a volume of water abstracted from an underground aquifer. It may be inappropriate for physical and hydrological reasons for the transferee of a water access entitlement associated with a volume of water from an underground aquifer to have access to that source and to use it for all the purposes desired by the transferee. These difficulties can be overcome in a legal sense by creating a prohibition, as already suggested, on engaging in any activities or operations relating to, affecting or involving water in the absence not only of a water access entitlement and a water allocation but also a water use approval. In this way, a water access entitlement can be transferred without the need to comply with any water access entitlements transfer rules. But any activities or operations cannot be undertaken with a water use approval. While in this way entitlement and use are distinct, they are nevertheless for these practical reasons linked to each other. In this sense, the legal context of this approach to transfers may perhaps more appropriately be described not so much as a set of transfer rules as a set of use rules. However, the focus of these rules remains the physical conveyance of the water as distinct from the transfer of the water access entitlement.
- 6.16 What form might these rules take? The Agreement to some extent contemplates this. It refers to water trading zones. It is interesting that the reference is to water trading and not water access entitlement trading. However the position is reasonably clear. Paragraph 8 of Schedule G to the Agreement states that 'water trading zones, including groundwater trading zones, should be defined in terms of the ability to change the point of extraction of the water from one place to another, and protection of the environment.' A regime like

this is included in some of the plans formulated under the Water Act 2000 (Qld). However, the context is not so much water trading zones but water allocation change rules. This is understandable given the difference in the Queensland legislation between unrestricted transfer of water allocations and restricted changes to water allocations. It is therefore possible but no doubt difficult to create zones based on geographical criteria within which water access entitlements and no doubt also water allocations and water use approvals can be transferred provided the transfer complies with the rules formulated for these zones.

6.17 Compliance with these rules may be certified by the appropriate public agency and the certificate recorded in the register. This would help to assure the transferee of the rights associated with the transferred water access entitlement. Otherwise it is simply a matter for the transferee to be satisfied in whatever way appropriate that the water may be lawfully used as the transferee wishes once the water access entitlement has been transferred. In this case, the risk lies with the transferee. On the other hand, if a certificate has been recorded in the register, depending on how the certificate is assured, the risk may lie with the certifying agency.

6.18 The third approach is quite different. It has already been suggested that one of the functions of a water plan is to create water access entitlements, whether consumptive or environmental, in accordance with the legislation. These water access entitlements could further be divided into transferable water access entitlements and non-transferable water access entitlements. The criteria according to which a water access entitlement is transferable or non-transferable would be stated in the legislation. Rather like the access licence dealing principles formulated for the purposes of the water legislation in New South Wales. The application of these principles or criteria would determine whether each and every water access entitlement is transferable or non-transferable. The decision, in other words, is made in the plan rather than in exercise of a discretionary decision or by way of compliance with a set of rules. The advantage of this approach is absolute certainty as to whether a water access entitlement is or is not transferable. The holder of the water access entitlement, a person interested in acquiring it or indeed any person at all will know in advance whether or not it is transferable. This is the simplest approach and in addition it leads to outcomes that are clear beyond doubt.

6.19 Each of these three approaches relies to some extent upon a clear statement of criteria according to which decisions, rules or plans are made. There are no doubt many factors to be taken into consideration in deciding whether a water access entitlement should or should not be transferred or be able to be transferred. These include for example:

- physical constraints;
- hydrological constraints;
- conveyance and delivery constraints;
- the availability and reliability of the source of water;

- other entitlements, allocations and use approvals;
- ecological considerations;
- environmental considerations;
- cultural considerations.

**(d) A Recommendation**

6.20 In any event, whatever the criteria, it is necessary to identify which approach is most likely to achieve the outcomes contemplated by the Agreement. By way of summary the approaches are:

- a discretionary approach based upon ad hoc approvals;
- transferability according to enforceable rules;
- the classification in the plan of water access entitlements as transferable or non-transferable.

In each case it is assumed that the legislation states that the criteria for either granting approval, formulating the rules or classifying the entitlements. It has already been suggested there are four essential elements of tradeability: structural, hydrological, transactional and commercial. The third approach creates the greatest degree of security in the context of these four elements and the first approach the least degree of security. It is for consideration which of these approaches should be adopted. The first and third are relatively straightforward. The second is more complicated.

6.21 In the case of the second, the water plan must include a number of relevant requirements:

- to create zones within the area to which the plan applies within which water access entitlements are able to be transferred;
- to state the water access entitlements or the category of water access entitlements able to be transferred within each zone;
- to state the rules that comprise the conditions according to which a transfer may take place within each zone;
- to provide for the issue of a certificate of compliance with these rules if the parties to a transfer or a potential transfer so request.

6.22 In the case of the third approach the plan must contain two requirements:

- to state which water access entitlements within the area to which the plan applies are transferable;
- to state which water access entitlements within the area to which the plan applies are not transferable.

In this way it will be clear whether a water access entitlement is or is not transferable. There should be no need for further requirements.

### **The Transferability of Environmental Water Access Entitlements**

- 6.23 It is suggested that a function of the water plan is to determine which water access entitlements are transferable and which are non-transferable. Water access entitlements are also divided into those that are consumptive and those that are environmental. Should the same approach be adopted in relation to the transferability of environmental as well as consumptive water access entitlements? The forgoing paragraphs have discussed the approaches in relation to consumptive water access entitlements. On the face of it, the criteria are the same and the range of approaches is the same. It is by no means clear from the Agreement that environmental water access entitlements, assuming that there are going to be such, are intended to be fully tradeable. If so, is there any need for a different approach?
- 6.24 Environmental and ecological considerations have been stated to be relevant to making decisions about the transferability of consumptive water access entitlements. Clearly they are equally relevant to environmental water access entitlements. However, the whole purpose of creating environmental water access entitlements is to conserve the ecological values of water and to protect the environment of water. Perhaps, therefore, priority should be afforded in one form or another to these considerations in the context of the transferability of environmental water access entitlements. If so, should the priority be relative or absolute?
- 6.25 If it is relative, then the legislation governing the formulation of water plans must state that these considerations have priority. For example:

*In determining whether or not an environmental water access entitlement is transferable or non-transferable, the conservation of the ecological values of the water resource and the protection of the environment of the water resource are to be given paramount consideration.*

On the other hand, if these considerations are to have absolute priority, then a different form of words is appropriate:

*An environmental water access entitlement is transferable only if the exercise of the rights associated with the environmental water access entitlement after the transfer has taken place has no adverse impact upon the ecological values of the water resource and upon the environment of the water resource.*

The second approach is, of course, much more restrictive than the first. It is a matter of policy which is preferred. The second approach will be more difficult to implement. But this approach is more likely to be effective in the longer term in protecting environmental values.



## **What is a Water Allocation**

### **(a) Introduction**

- 6.26 The Agreement contemplates that it is a function of a water plan to determine the water allocation linked to a water access entitlement. The Agreement is not at all clear about precisely what a water allocation is. It is assumed that a water allocation is the amount of water determined on an annual basis available to the holder of a water access entitlement. It is further assumed that during this period of one year the holder of the water allocation is entitled to receive the amount of water so identified. However, it is further expected that the legislation will contain a general power to vary or suspend the amount of water able to be delivered for reasons of emergency.

### **(b) How Water Allocations are Determined**

- 6.27 It is thus the function of a water plan to determine what this amount of water should be. There are two ways in which this can be done. The first is to give to the relevant public agency power to determine the water allocation linked to a water access entitlement in accordance with a set of criteria. These criteria must be stated in the legislation and a duty placed upon the public agency to apply these criteria in making individual determinations. The criteria would include such matters as the amount of water expected to be available over the period of a year, the expected demand for water over this period, the share of the water resource which is the subject matter of the water access entitlement and the potential requirements of other holders of water access entitlements. This set of arrangements gives to the public agency a degree of discretion but limited by these criteria. Once the determination is made, the water allocation then constitutes a legally enforceable right of access to the amount of water so identified subject only to the exercise of the emergency power.
- 6.28 A second approach is for the water plan to state in detail the rules according to which a water allocation is determined. These rules would be made in accordance with the criteria already identified. However, the rules would state in detail how a water allocation is determined. This would no doubt be a highly complicated technical exercise based upon physical, hydrological and meteorological circumstances. Once such rules have been formulated, the advantage is that the holder of a water access entitlement, or any person for that matter, would be able to predict the amount of water available to the holder of the water allocation. The determination of the water allocation would be made by the relevant public agency in any event. However, the agency must make a decision in compliance with the rules. Hence the holder of the water allocation should be able to predict with a reasonable degree of accuracy the amount of water to be made available in this way. Since these are rules, they would fall within the enforceability provisions of the legislation. The credibility of a such a system would depend upon the availability of information supporting the determination of the water allocation. Hence the need for the range of duties already identified in relation to the provision of information.

### **(c) The Transferability of Water Allocations**

- 6.29 Then there arises the issue of the transferability of a water allocation. The Agreement is silent on this issue. The Agreement is also relatively silent on the relationship between a water access entitlement and a water allocation. The Agreement contemplates the tradeability as distinct from the mere transferability of water access entitlements. There is no suggestion that water allocations are tradeable. However, this does not prevent them from being transferable. Indeed, they must be transferable if the holder of a transferred water access entitlement wishes to exercise any of the functional or operational rights associated with it. It has already been suggested that water must not be used in the absence of a relevant water access entitlement, a water allocation and water use approval. However this does not necessarily mean that these instruments must be held by the same person. In most cases, nevertheless, this is likely to be the situation.
- 6.30 If a water allocation is transferable, then how must this be done? The options are much the same as for a water access entitlement. In other words, a discretionary approach based upon ad hoc approvals; transferability according to enforceable rules; and the classification in the water plan of water allocations as transferable or non-transferable. In the case of water allocations, however, the expectation is that none would be non-transferable. If so, then the choice would be between a discretionary system or a rule based system. In view of the linkages between water allocations and water access entitlements, the preferred option would be a set of enforceable rules. These, like the rules governing the determination of a water allocation, are likely to be complicated and dependent upon a range of physical, hydrological and geomorphological considerations. Once such rules have been formulated, they are enforceable. The holder of a water allocation would know in advance what these rules are and therefore would be able to predict with a reasonable degree of certainty whether the water allocation is transferable.
- 6.31 It is likely that the involvement of a public agency would be required in one way or another. Again there are two approaches. The first is for the holder of the water allocation and the potential transferee of the water allocation to apply to the agency for approval. The legislation must in this situation place a duty on the agency to approve the application if the transfer is in accordance with the rules. In other words there is no discretion given to the agency. The alternative is for the holder of the water allocation and the potential transferee to apply to the public agency for a certificate certifying compliance with the rules. In either event the approval or the certification would be recorded in the register. The alternative, of course, is for the application for approval to be determined on an ad hoc basis by the public agency in the exercise of a discretion limited only by the requirement to apply the relevant criteria. But this is not the best option in a market context.

## **What is a Water Use Approval**

### **(a) Introduction**

- 6.32 Then there are water use approvals. Paragraph 31 of the Agreement states relatively clearly that regulatory approvals enabling water use at a particular site for a particular purpose will be specified separately to the water access entitlement consistent with the principles set out in Schedule D. The Agreement thus contemplates that water must not be used for a particular purpose at a particular location without an approval. It seems implicit in the Agreement that the water plan will address this issue. The use of water has clear ramifications for the ecological and environmental values protected by the legislation. It is consequently one of the functions of a water plan to achieve these objectives in relation to the area to which the water plan applies. The use of water in a particular location and for a particular purpose must be necessarily be dependent upon the particular circumstances relating to the water in question, the location and the purpose of the use. It is therefore use specific and site specific.

### **(b) How Water Use Approvals are Granted**

- 6.33 Again there are a number of approaches to this issue. It may be possible – but no doubt very difficult – to identify in advance the precise circumstances in which the water may be used and at what location and for what particular purpose. If so, then these requirements may be able to be incorporated in a set of enforceable rules. This may well be unlikely in practice. In this event, the approach would be for the legislation to state the strategic criteria according to which water use approvals are determined and for the water plan to apply these criteria to the circumstances of the catchment in question. In other words, increasing specificity of criteria as the level of application moves from the jurisdiction at large, through the catchment to the area relevant to the water use approval. In this event, the determination whether to approve a water use would be made on an ad hoc basis in accordance with the criteria stated in the legislation and more particularly in the water plan. This is likely to be the scenario emerging from the Agreement.

### **(c) The Transferability of Water Use Approvals**

- 6.34 Then there is the transferability of water use approvals. Again the Agreement is silent on this issue. But clearly water use approvals should in principle be transferable for exactly the same reasons as water allocations should be transferable. Similar considerations apply and similar approaches may be adopted. That is, the determination of an application in the exercise of a discretion limited by a set of stated criteria; transferability according to a set of enforceable rules; or classification in the water plan of water use approvals as transferable or non-transferable. Unlike water allocations, it may be possible to identify much more clearly whether water use approvals should be transferable or non-transferable. For example, a change of use or change in location may produce unacceptable environmental consequences. But again it is a matter for individual site specific circumstances. The Agreement appears to imply that applications for a water use approval will be determined in accordance with

stated criteria in the exercise of a discretion and also that applications for transfers will be determined in the same way. However this is not absolutely clear from the Agreement and the other options need to be considered. The fundamental issues, already discussed, are the relationship between water access entitlements, water allocations and water use approvals and whether it is the same person who may or must hold one or all of these instruments. It is suggested that the water plan should classify water use approvals as transferable or non-transferable. This would give certainty to these arrangements.

### **The Variability of Water Plans**

6.35 The principle of adaptive management is one of the most important principles that guide the achievement of the sustainable development of water resources. This principle requires to be complemented by a number of specific duties. These include the duty:

- to ensure that the information available to those preparing water plans is up to date;
- to engage in a continuous monitoring of how water resources are managed;
- to review regularly the content of water plans in response to new information, new understanding of how water resources are managed, and new techniques for managing water resources;
- to review water plans in the light of these factors;
- to vary water plans so as to ensure that they continue to achieve the objective of the legislation.

6.36 Compliance with these duties requires the incorporation in the legislation of a number of additional specific duties. These include:

- a duty on the relevant public agency to prepare a synoptic report each year on how the water plan is achieving the objective of the legislation;
- a duty on the relevant public agency every three years to prepare a detailed report with full supporting information and analysis of how the water plan is achieving the objective of the legislation;
- a duty on the relevant public agency to include in the three yearly report an assessment of whether the water plan needs to be varied or replaced to achieve the objective of the legislation;
- a duty on the relevant public agency to amend the water plan or replace it with a new water plan to ensure that the water plan achieves the objective of the legislation.

It is a requirement for these reports to be made available to the public and for the public to have an opportunity to comment on them. If there is a proposal to

vary a water plan or to prepare a new water plan, then the procedures for doing so must be the same as the procedures for preparing a water plan in the first instance.

- 6.37 It is an essential feature of these arrangements that a water plan achieves the objective of the legislation and that water access entitlements are granted and transferred in accordance with the water plan. Any variations to a water plan therefore impact directly upon the holders of water access entitlements. Perhaps to their disadvantage. This raises the question of whether any variations to a water plan as well as any variations to a water access entitlement should be compensable if the holder of the water access entitlement has suffered some disadvantage. This is an issue of general relevance and it will be discussed in later paragraphs.

## THE MANAGEMENT OF WATER ACCESS ENTITLEMENTS

### Who May Hold a Consumptive Water Access Entitlement

- 7.1 It has already been suggested that water access entitlements should be either consumptive or environmental entitlements with appropriate definitions of consumptive and environmental purposes. There are a number of issues for determination. The first question is who may hold a consumptive water access entitlement. It has already been suggested that holders may include any person, a landowner or land occupier, a participant in the water industry or an accredited person. While the Agreement implies that any person may hold a water access entitlement, this is by no means clear. The issue needs to be determined in policy terms. If the preferred option is for any person to hold such an entitlement, then this would promote most effectively the idea of an open market.
- 7.2 We need to bear in mind that, for a consumptive water access entitlement to become effective in functional and operational terms, its holder must also have an interest in a water allocation and a water use approval. This requirement may be sufficient to limit trading in the wide sense to those who are actually involved in the use of water resources. On the other hand, is this sufficient to keep 'speculators' out of the market? The use of this word in some commentaries is misleading. The issue perhaps is not speculation but investment. Despite the fact that the two may well be linked. Is it desirable for a person to hold a consumptive water access entitlement for a period of time without ever intending to use it in a functional and operational sense? Such a possibility is an element of an open market. Is it intended that the market should be as open as this? Again a matter of policy but reflective of the legal structure.
- 7.3 The most likely scenario is for a consumptive water access entitlement to be held by any person or institution or by an accredited person. The other two options are possible but less likely. If such an entitlement is able to be held only by an accredited person, this adds an additional administrative layer but it does give to the relevant public agency the power to control this aspect of these arrangements. Once a person is accredited, then this person is entitled to hold, transfer and deal with an entitlement in whatever way is permitted. It is suggested that an accreditation system would provide certainty in a regulated context.
- 7.4 This raises two issues. What are the criteria for accreditation and in what circumstances may accreditation be withdrawn. Presumably any person may apply to be accredited. It is again for discussion whether the determination to accredit or not is made in accordance with a set of criteria in the legislation or on compliance with a set of rules stated in the legislation. In either case the matters for consideration are likely to be much the same. These would include:

- the status of the applicant – for example, an individual person or a corporation or a statutory participant in the water industry;
- the activities in which the applicant proposes to engage;
- the capacity of the applicant to engage in these activities in technical, operational, financial and commercial terms;
- the record of the applicant of compliance or non-compliance with the requirements of the water legislation;
- possibly even the public interest.

The public interest would be relevant only in the context of a discretionary rather than a rule based system. The policy question thus is whether and at what point access to consumptive water access entitlements is to be controlled.

### **How a Consumptive Water Access Entitlement is Granted**

- 7.5 The next question is how a consumptive water access entitlement is granted. Since the right to control water in Australia is in all cases conferred upon the Crown or the state by legislation, it must obviously be an agency of the state which is responsible for granting water access entitlements of any kind. Is it a function of the relevant Minister or the Chief Executive Officer of the relevant public agency? While the formulation of water plans is no doubt a function of the Minister, it is likely to be a function of the Chief Executive Officer to grant water access entitlements. The water plan, it has been suggested, creates shares of a water resource as a water access entitlement. It is the function of the Chief Executive Officer to grant these shares or entitlements to applicants.
- 7.6 How are these decisions made? Is it the function of the law to state the substantive criteria, the procedures, or both? The need for substantive requirements takes us back to the question of eligibility: whether any person may apply or whether only an accredited person may apply. It has been suggested that only accredited persons may hold these entitlements. In any event the Chief Executive Officer will have to approve an application on the basis of either an open ended discretion or stated criteria. The creation of criteria would inevitably be discriminatory to some extent. These criteria might be, for example, a citizen or a resident of Australia, a resident in the area of the water plan, the owner or occupier of land in the area of the water plan, or the capacity to engage in activities linked to the use of a water associated with the entitlement. Criteria such as these may be somewhat controversial. Accreditation is sufficient.
- 7.7 If the objective is as open a market as possible, then it is likely that the only legal constraints will be procedural. It has already been suggested that these procedures may be by way of auction, tender or individual sale. The price to be paid for the grant of an original consumptive water access entitlement may be set either by the relevant public agency or by the market. For example, the public agency might offer for sale all or a number of consumptive water access entitlements created by the water plan. The price would be set by the agency

and it would be for the applicant to determine in light of all the other factors for consideration whether this is a reasonable price or not from the applicant's point of view. The factors for consideration would no doubt be the available information about the water catchment, the number of consumptive water access entitlements provided for in the water plan, the number of consumptive water access entitlements available for purchase, the water allocation related to the entitlement, and the relevant water use approval.

- 7.8 An applicant in such circumstances may be either any accredited person who wishes to apply or who wishes to respond to an invitation to make a tender. Alternatively, consumptive water access entitlements may be made available for purchase by way of auction and the highest bidder, subject perhaps to a minimum acceptable offer, would be successful. In any event the processes by which consumptive water access entitlements are made available must be public and transparent. Once a consumptive water access entitlement has been granted, it must be recorded in the register.

### **The Rights Associated with a Consumptive Water Access Entitlement**

- 7.9 Then there are the rights and duties associated with a consumptive water access entitlement. It has already been suggested that the holder of water access entitlement is the owner of a share of a water resource. This is a purely formal entitlement without any usufructuary rights associated with it. This is clear from the structural foundations of the system already discussed. Thus the only rights which the holder or owner has are to transfer it and more generally to deal with it so far as the legislation, the water plan and the rules permit. Thus it should be provided:

*The holder of a consumptive water access entitlement as the owner of a share of a water resource created in accordance with the water plan that relates to the water resource may transfer and deal with it as the holder thinks fit provided any transfer or dealing complies with this Act, any rules or regulations under this Act and the provisions of the water plan made under this Act so far as they relate to the consumptive water access entitlement. It is expressly declared that the holder of a consumptive water access entitlement is not authorised as the holder of such an entitlement to do anything else or engage in any other activities.*

### **Environmental Water Access Entitlements**

- 7.10 Next we discuss environmental water access entitlements. Are they different in any of these respects? The holder of such an entitlement cannot use the water to which the entitlement is linked for any purpose other than environmental purposes. Environmental purposes thus need to be defined. This restriction is a restriction imposed in the public interest. This necessarily impacts upon who may hold an environmental water access entitlement and how it is granted. If the public interest is to be protected, then it is unlikely that an environmental water access entitlement should be able to be held by any person.



- 7.11 If so, then there are probably two options. The first is to restrict the holding of such an entitlement to a person, an organisation or an institution identified as such in the legislation. Alternatively, an environmental water access entitlement may be held by an accredited person or institution. In this case the legislation will state the requirements for accreditation. These are likely to be not so much a person but rather an organisation or institution whose sole object is the protection of the environment. This in the normal course of events is likely to be difficult to substantiate. If so, then the only solution may be for the legislation itself to set up such an institution. There is no reason why such an institution could not hold and perhaps transfer consumptive water access entitlements as well as environmental water access entitlements.
- 7.12 Equally important is how an environmental water access entitlement is granted. We need to bear in mind again that environmental water access entitlements are created by the water plan. Since these entitlements are held in the public interest, then it is unlikely – probably impossible – for them to be granted by way of auction, tender or sale. More likely they are the subject of a unilateral grant by the Chief Executive Officer of the relevant public agency. The only criterion relevant to the grant of such an entitlement is the capacity of the applicant or grantee to protect the environment in accordance with the requirements of the legislation. Except in the case of a statutory institution set up specifically for this purpose, this is unlikely to be satisfied. But it may be that a non-government organisation concerned only with the protection of the environment might be eligible. In any event, once granted, an environmental water access entitlement must be recorded in the register. Thus, the holder of an environmental water access entitlement has only a formal entitlement – as in the case of a consumptive water access entitlement – subject to a duty to exercise any other powers, for example, through a water use approval, for the purpose only of protecting the environment.

### **The Duration and Stability of Water Access Entitlements**

- 7.13 Once water access entitlements of either kind have been granted, they are of unlimited duration. In other words perpetual. It is always possible for the legislation to be revoked or amended and for the relevant water plan to be amended in accordance with the legislation. Either may have an impact upon a water access entitlement – certainly to the disadvantage of its holder. Under what circumstances, if any, can these entitlements be varied or cancelled.
- 7.14 We have already noted that the legislation will continue to include within its powers of intervention in the case of emergencies. How otherwise may a public agency interfere with water access entitlements? Paragraph 32 of the Agreement contemplates two situations:
- these entitlements will only be able to be cancelled at ministerial and agency discretion where the responsibilities and obligations of the entitlement holder have clearly been breached;

- these entitlements will be able to be varied, for example, to change extraction conditions where mutually agreed between the government and the entitlement holder.

Cancellation is thus discretionary but only where the holder has breached a relevant obligation. But are there any obligations placed on the holder of an entitlement? This is not clear. The holder of an environmental water access entitlement is restricted to protection of the environment. The holder of a consumptive water access entitlement has no duties as such except in relation to transfers and dealings. Any substantive duties that might arise are imposed upon the holder of an interest in a water access entitlement not as such but as the holder or assignee of an interest in a water allocation or a water use approval. If this is so, then there is in effect no power to cancel a water access entitlement. This would be consistent with its tradeability in a free market.

7.15 The position in relation to variation is quite different. There must be agreement. And the example is a change of an extraction condition. On the face of it, extraction relates to use and not entitlement. So the relevance of a power to vary, with or without agreement, is questionable. If a water access entitlement were cancelled or varied in the ways contemplated by the Agreement, the entitlement would continue to exist - even in the case of cancellation - because it has been created by the water plan. It is suggested therefore that the nature of water access entitlements makes them not susceptible to cancellation or variation. Perhaps the legislation may include a power to acquire compulsorily a water access entitlement – no doubt subject to compensation - but that is another matter.

## Chapter Eight

### THE MANAGEMENT OF WATER ALLOCATIONS

#### Introduction

- 8.1 The Agreement says little about water allocations except to provide a definition. A water allocation is thus 'the specified volume of water allocated to water access entitlements [sic] in a given season defined according to rules established in the relevant water plans'.

Perhaps more specifically:

*A water allocation is the maximum quantity of water expressed in volumetric terms, stated to be available to the holder of the water access entitlement to which it is related or to a person with an interest in it and authorised to be taken by the holder or the person over the period of time stated in it.*

Clearly one of the functions of a water plan is to state rules for the allocation of water and this has already been discussed. Obviously there is a very close relationship between a water access entitlement and a water allocation. A water access entitlement is no more than a formal title to a share of a water resource. An entitlement does not in any way define how much water is associated with it. This is the function of the water allocation and it is done on a seasonal basis. Not only that, it is done in accordance with rules in the water plan.

- 8.2 The formulation of these rules is likely to be not only an important but also a complex exercise. The use of the word 'rules' is instructive. It clearly contemplates a set of prescriptions rather than the conferment of a discretion. While there is always an element of discretion in the application of rules, it is a discretion controlled by the rules themselves rather than by the application of criteria. Once again three of the critical questions are:

- who may hold a water allocation;
- who may grant a water allocation;
- how is a water allocation granted.

#### Who May Hold a Water Allocation

- 8.3 The difficult question is who may hold a water allocation. What are the alternatives? These include:

- any person;
- the holder of a water access entitlement;

- the holder of a water use approval;
- a member of the water industry;
- an accredited person.

These issues seem not to have been discussed in the Agreement. Nevertheless they are critical questions of policy. On the face of it, given the close linkages between water access entitlements and water allocations, the answer perhaps is the holder of the water access entitlement to which it is related. But we need to bear in mind that a water access entitlement may be transferred to someone else and also dealt with in a range of other ways by its holder.

8.4 One of the ways in which it may be dealt with is by way of assignment rather than transfer. What is the difference? In this context the transferee is substituted for the transferor who thus loses forever all rights and interests in the water access entitlement. Unless, of course, the transferor buys back the entitlement and becomes a subsequent transferee. An assignment, on the other hand, only confers a limited interest upon the assignee so that the assignor remains the holder of the entitlement but subject to the assignment. The assignment may be in the form of a lease or the grant of some similar lesser interest. In this case the assignee may wish to have the benefit of the water allocation for the duration of the assignment.

8.5 Is it desirable as a matter of policy for the holders of water allocations to be unrestricted or limited in some form? If, for example, it is finally determined that only an accredited person may hold a water access entitlement, then it would follow in principle that only an accredited person should hold a water allocation. But the holders of the two instruments may be different persons. If so, are the criteria the same? Probably yes. The simplest solution, it is suggested, is, as in the case of water access entitlements, for a water allocation to be held only by an accredited person. This separates out the relevant issues so as to give a degree of control to the relevant public agency over who may hold a water access entitlement and a water allocation at the accreditation stage while leaving uncontrolled those accredited persons who may otherwise wish to hold a water access entitlement or a water allocation.

### **How a Water Allocation is Granted**

8.6 Having determined who is entitled to hold a water allocation, the next questions are who authorises the grant of water allocations and what are the procedures for doing so. If, as seems likely, it is the Chief Executive Officer of the relevant public agency responsible for the administration of water resources who has the power to grant water access entitlements, it seems logical that the same person should grant water allocations. This seems appropriate for the additional reason that the function of granting water allocations – as it is with water access entitlements – is an exercise in the application of the criteria and the rules in the legislation and in the water plan. There will be a very limited opportunity, if any, for the exercise of a discretion. It is suggested therefore that water allocations should be granted by the Chief Executive Officer of the relevant public agency.

8.7 What are the procedures, then, for granting water allocations? The options are much the same for a water access entitlement:

- an application by whoever is entitled to hold a water allocation: that is, an accredited person;
- an application by such a person in response to an invitation by the relevant public agency;
- a process by way of tender organised by the relevant public agency;
- a process by way of auction organised by the relevant public agency.

One possibility is to leave it to the public agency in question to determine how water allocations are to be granted by selecting one of these procedures. Alternatively it may be possible to select the procedure that most accords with an open and free market. In this case the preferred option would be an application by any person or – depending on circumstances – an application by an accredited person. The procedure selected will therefore depend on the degree to which the public agency wishes to control the arrangements. It is suggested that the procedure most consistent with a market is for an application for a water allocation to be made to the Chief Executive Officer of the relevant public agency by an accredited person. The public agency will determine the application in accordance with the criteria and the rules in the legislation and in the water plan. In this way discretion is reduced to a minimum and predictability and certainty increased to the greatest extent possible. A water allocation, once granted, will be recorded in the register in just the same way as a water access entitlement.

### **The Relationship between Water Allocations and Water Access Entitlements**

8.8 Then there is the relationship between water allocations and water access entitlements. The Agreement clearly contemplates a very close relationship. But the nature of this relationship is not clear. It has already been suggested that any activity or operation in relation to water must not be undertaken without a water access entitlement, a water allocation and a water use approval. This does not mean that each of these instruments must necessarily be held at the same time by the same person. While a person may not use water in the absence of a water use approval, such a person is not necessarily the holder or 'owner' of the water access entitlement. The same on the face of it would apply to a water allocation. The holder of the water use approval may thus use the water in accordance with the approval but also in accordance with the water access entitlement and the water allocation to the extent that the rights associated with these two instruments have been assigned to or otherwise conferred upon the holder of the water use approval. In other words, a market necessarily requires the capacity for these interests to be fragmented on the one hand but also linked together on the other hand.

8.9 What is the solution in relation to water allocations and their relationship with water access entitlements? The implication of the Agreement is that a water allocation is at least to some extent a part of a water access entitlement. If so,

then the rules about who may hold each of these instruments, who grants them and the procedures for granting them should be the same. This is the basis for the suggestions in earlier paragraphs. If not, then separate sets of rules will need to be devised for each of the two instruments. The possibilities have already been canvassed. In any event, if it is the intention of the legislation to create a credible framework for an open market, then it seems necessary to ensure that water access entitlements and water allocations can be held formally by different persons and that different persons can have different interests in each of them. This fragmentation of interests renders the arrangements much more complex, but this is likely to be inevitable in the context of a market regime. Fragmentation of interests in these instruments is picked up later in the context of dealings with them.

### **The Stability of Water Allocations**

8.10 There is nothing specific in the Agreement about the cancellation, suspension or variation of water allocations. If they are regarded as inextricably linked to water access entitlements, then presumably the approach of the Agreement to the cancellation, suspension and variation of water access entitlements applies as much to water allocations. This has already been discussed. If not, however, consideration needs to be given to the cancellation, suspension and variation of water allocations. A water allocation is, of course, a specific volume of water allocated to a water access entitlement for a stated period. Two sets of circumstances arise.

8.11 First, if the amount of water taken during the season in question exceeds the volume specified in the allocation, should the allocation be cancelled or suspended for non-compliance? The answer to this is presumably positive given the need to ensure that the amount of water taken does not exceed the permitted level. In this case the power to cancel or suspend the water allocation should be specifically prescribed. For example:

*If the holder of a water allocation takes water during the period for which the water allocation is in force in excess of the maximum quantity of water stated to be available by the water allocation, the Chief Executive Officer of [the relevant public agency] must suspend the water allocation and the water allocation has no effect for the remaining period during which the water allocation is in force.*

8.12 Secondly, should there be a power to vary a water allocation? There are two approaches to this question. The rules in the water plan may provide that the water allocation depends upon the existence of circumstances as they are from time to time. In the event that these circumstances change, then the volume of water specified in the water allocation itself changes in response to these other circumstantial changes. This can be prescribed as a matter of rules. In this event it should be possible to determine the specific volume of water provided for in a water allocation at any moment of time. Alternatively, a water allocation may be varied in the exercise of an open or a limited discretion conferred upon the public agency in question. In this event the criteria justifying the variation will need to be stated. These no doubt include:

- a change able to be justified on the available information about the volume of water predicted to be available from the water resource in question during the period in question;
- a change able to be justified on the available information about meteorological circumstances;
- a change able to be justified on the available information about the volume of water predicted to be required for environmental purposes;
- the existence of exceptional circumstances arising out of an emergency incident.

Criteria such as these may involve an amendment to a water allocation leading to an increase in the volume of water, a reduction in the volume of water to a lesser volume and a reduction in the volume of water to nil. In the two latter cases consideration needs to be given to the issue of compensation which is addressed later.

## Chapter Nine

### THE MANAGEMENT OF WATER USE APPROVALS

#### The Function of Water Use Approvals

9.1 We turn now to water use approvals. The Agreement makes it clear from paragraph 30 that 'regulatory approvals enabling water use at a particular site for a particular purpose will be specified separately to the water access entitlement'. There is no doubt therefore that, whatever the relationship between water access entitlements and water allocations, water use approvals are quite separate. Water use approvals must be seen in context. Water access entitlements and water allocations are concerned with where the water comes from – its source – and the volume of water that may be taken from that source. Water use approvals, on the other hand, are not concerned with source or volume but with site specific activities involving the use of the water. Hence the relevance of the impact of the use of the water on wider and more extensive values such as environmental values.

9.2 What is use for this purpose? Paragraph 30 of the Agreement talks about use. Paragraph 1 of Schedule D to the Agreement also talks about use. Paragraph 2(2) and the heading to Schedule D refer to a works licence and approvals for works. For this purpose, works may be taken to include the infrastructure to be built at or near the location of use. The implication then is clear. A water use approval includes authorisation not only to use the water at a particular site and for a particular purpose but also to construct and operate the infrastructure for doing so. This needs to be clarified. If the use of infrastructure is not included, then it may well be that some kind of development approval for the construction of the infrastructure would in addition be required. Perhaps two sets of approvals may be necessary.

9.3 Let us however assume that this is not the case. If so, then the powers conferred by a water use approval must be stated clearly in the legislation. Thus:

*A water use approval enables the holder, first, to construct the infrastructural facilities at the location stated in the approval and necessary to take advantage of the interests in the water access entitlement and the water allocation held by the holder of the approval and, second, to enable the quantity of water stated by the water allocation to be used at the location, for the purpose and on the conditions stated in the approval.*

9.4 Bearing in mind that water may be used for environmental as well as consumptive purposes and that water plans provide for environmental water access entitlements as well as consumptive water access entitlements, then the legislation must recognise not only consumptive water use approvals but also environmental water use approval. Once environmental water access entitlements and environmental water allocations have been determined by the



water plan, then on the face of it there should be no need for the legislation to distinguish between environmental water use approvals and consumptive water use approvals. Clearly there will be differences in the terms of the approval but not the criteria according to which the approval is granted. The only practical difference is this. The overriding use of water authorised by a consumptive water use approval is a use for consumptive purposes which may include a range of quite different purposes. In the case of an environmental water use approval, then the only purpose is an environmental purpose. But there may in practical terms be a series of different environmental purposes.

### **Who May Hold a Water Use Approval**

- 9.5 The next question is who may hold a water use approval. Again one answer is that any person can hold a water use approval. However in the absence of a water access entitlement and a water allocation, it is worth nothing in practice. But in the context of a free market, that is the choice of those participating. Once again the issue is the degree to which the relevant public agency should be empowered to control the extent to which water use approvals are available. The options are much the same as in the case of water access entitlements and water allocations. For the reasons already discussed, perhaps the most appropriate solution is for only accredited persons to be eligible to hold water use approvals.
- 9.6 While the criteria for accreditation to hold a water use approval may be the same as for accreditation to hold a water access entitlement and a water allocation, the criteria for determining an application for a water use approval may be different. The reason is because those holding water use approvals engage in activities related to the use of the water and impacting upon the environment. Indeed paragraph 1(iii) of Schedule D to the Agreement clearly contemplates the relevance of environmental, social and economic impacts of use including on downstream users. Not only that, paragraph 1(vi) contemplates a different level of assessment reflective of the level of potential impact. Overall, therefore, water use approvals have a critical function to perform in the overall system.

### **How a Water Use Approval is Granted**

- 9.7 Next, who may grant water use approvals and how are they granted? For the reasons already mentioned in relation to water access entitlements and water allocations, it seems appropriate for water use approvals to be granted by the Chief Executive Officer of the relevant public agency in response to an application by an accredited person. There are however a number of options indicating how they may be granted. The first is for the Chief Executive Officer to determine the application in accordance with stated criteria. The second is for the Chief Executive Officer to determine the application by applying a set of prescriptive rules. Because water use approvals are specific to a particular location and for a particular purpose, it would be difficult – perhaps impossible - to create a set of rules precise enough to cover a very wide range of circumstances. In this respect, water use approvals are different from water access entitlements and water allocations. Simply because the latter are

concerned with source while the former is concerned with destination. It is probably inevitable in these circumstances that an application for a water use approval is determined in accordance with a set of stated criteria.

- 9.8 These criteria can take a number of forms. For example, a statement of the objectives of this part of the legislation. These include not only the efficient use of the water at the location in question but also the protection of the environmental values of the location and its wider environment. Another objective may be the protection of the rights of other holders of water management instruments. The criteria, secondly, may state not so much the objectives but rather the matters to be taken into consideration in achieving these objectives. Since the purpose of the use is one of the prescriptive outcomes of a water use approval, this will necessarily involve a fairly wide ranging inquiry into the economic aspects of a particular use: for example, use for irrigation for agricultural or pastoral purposes, use for irrigation for growing rice or cotton or sugarcane, or use for mining or other commercial purposes. This approach does not inhibit use for any particular purpose but it does require careful investigation into whether a use for one purpose is more advantageous economically than a use for another purpose. Similarly, there must be a requirement to take into consideration not only the social but also the environmental impacts of a particular use. It is these decisions that are likely to be the most significant in practice in the context of a free market since it is these permitted uses that are going to add value to the water management instruments held for this purpose. It may well be that the water plan itself places restrictions upon the use of water at particular locations or for particular purposes. If so, a water use approval must comply with any such restrictions. But the applicant for a water use approval would be aware of these restrictions in advance of an application being made.
- 9.9 It has already been noted that paragraph 1(iv) of Schedule D to the Agreement talks about different levels of potential impact and for an application to be assessed accordingly. This seems to contemplate some form of environmental impact assessment. There is, of course, a very clear distinction between a duty to take into account environmental impacts and a duty to take into account significant environmental impacts disclosed by an environmental impact assessment. The legislation or the water plan may distinguish between high level impacts which require impact assessment and low level impacts which are simply required to be taken into consideration. It may be possible to formulate definitions of high impact and low impact activities so that it may be predictable from the definitions into which category a particular activity and its impact falls. Otherwise it may be left to the applicant to determine whether there is a likely significant impact involving the requirement for an environmental impact assessment. In this case the risk of non-compliance lies with the applicant. In this event, much depends on the enforcement provisions of the legislation which are discussed later.
- 9.10 What emerges from this scenario is a fairly complicated set of arrangements involving the imposition on the Chief Executive Officer of the relevant public agency of a number of duties. These include:

- a duty to achieve or at least to take into account the objectives of this part of the legislation providing for water use approvals;
- a duty to determine whether the impact of the proposed use is a high level impact or a low level impact;
- a duty to require an environmental impact assessment involving public participation in the case of a high level impact;
- a duty to take into account in all cases the beneficial and the adverse environmental impacts of the proposed use;
- A duty to take into account the social and economic impacts of the proposed use;
- a duty to take into account the impact of the proposed use on all existing uses of the water resource;
- a duty to take into account the impact of the proposed use on the cultural, spiritual and other values of the water held by the indigenous community.

9.11 These requirements are designed to protect components of the public interest in determining whether and on what conditions to grant water use approvals. It is appropriate therefore that the process is a public process involving public notification of applications, the right of the public to object or make representations, the duty for these objections and representations to be considered in the process of determining the application, and ultimately public participation in ensuring compliance with all of these requirements. These rights of public participation are in addition to any requirements for public involvement through the environmental impact assessment process in the case of high level impact applications. These requirements apply as much to applications for consumptive water use approvals as to applications for environmental water use approvals. This would be consistent with the requirement in paragraph 1(vii) of Schedule D to the Agreement for 'transparent and contestable processes in place to establish whether a proposed activity is to be approved'. Once a water use approval has been granted, then the approval and its conditions should be made available to the public. It should also be recorded in the register with an annotation as to where a full copy of the approval including its conditions may be obtained.

### **The Stability of Water Use Approvals**

9.12 Then there is the question of cancellation, suspension, or variation of water use approvals. This is clearly contemplated by paragraph 1(iv) of Schedule D to the Agreement. The existence of a power to cancel or vary water use approvals raises the ancillary question of the duration of water use approvals. Water access entitlements exist in perpetuity. Water allocations are in force for a particular period which is assumed to be a year. Water use approvals are of no value unless there is available a quantity of water in accordance with an existing water allocation. For these reasons, there is no need for there to be a

limit on the duration of a water use approval. It is suggested therefore that there should be no time limit upon water use approvals.

9.13 Cancellation, suspension and variation are different issues. Failure to comply with the terms and conditions of a water use approval clearly carries with it the implication that the holder of the water use approval should no longer be entitled to the benefits of it. This, however, does not mean that the water use approval is itself intrinsically invalid. It is suggested therefore that a failure to comply with a water use approval enables the rights of the current holder to be suspended. This would enable the holder of the approval either to comply with the conditions or to transfer the approval to some person who will be able to comply with the conditions. This raises the question of transfer which will be discussed later. In any event, however, for present purposes the water use approval remains valid. If it is transferred to another person, then the other person holds it free from the vice associated with non-compliance on the part of the transferor.

9.14 Water use approvals are granted for the use of water at particular sites and for particular purposes. The principle of adaptive management built into the legislation implies that uses of water may be acceptable in accordance with the criteria at particular locations and for particular purposes at some times but not at other times. In other words the water resource itself may change and the impacts of its use may change. Hence the need for water use approvals to be variable. In view of the principle of adaptive management this probably requires a duty to be placed upon the Chief Executive Office of the relevant public agency to review the circumstances of water use approvals on an ongoing basis. Possibly even every three years or perhaps an even lesser period. The purpose of these reviews is to ensure that there is no change to the circumstances justifying a review and a possible variation of a water use approval. This will be coupled with a power to amend or vary a water use approval where the ongoing review and monitoring process suggests that this is the proper course of action. Indeed the legislation should contain not only a power but a duty to do so. The procedures for variation of a water use approval should be the same as for the granting of a water use approval. Similarly the criteria according to which the determination to make a variation is made should be the same.

9.15 In effect, therefore, the process of variation involves a number of duties placed upon the Chief Executive Officer of the relevant public agency. These include:

- a duty to monitor the way in which water use approvals are implemented;
- a duty to review on an ongoing basis whether water use approvals are achieving the objectives of this part of the legislation;
- a duty to vary a water use approval if a variation is necessary to achieve the objectives of this part of the legislation;
- a duty to take into account in varying a water use approval all of the criteria required to be taken into account in determining an application for a water use approval;

- a duty to achieve the objectives of this part of the legislation in performing all of these functions.

A variation of a water use approval in these circumstances is likely to affect the interests of the holder of the water use approval to their disadvantage. This may raise issues of compensation which are considered later.

## Chapter Ten

### URBAN WATER MANAGEMENT ARRANGEMENTS

#### Introduction

10.1 The Agreement contemplates urban water reform but says very little about it. It has already been suggested that one of the foundations of the system – in the context of urban water – is the creation of what has been described as urban water supply entitlements. Urban water reform however needs to go further than this so as to ensure that these entitlements are created and managed within a wider planning and programmatic framework. It is suggested that the management of urban water resources should reflect a threefold structure:

- the formulation of urban water plans;
- the creation of urban water action programs;
- the creation of urban water supply entitlements.

#### Urban Water Plans

10.2 The context arises from paragraph 90 of the Agreement. It contemplates among others the provision of healthy, safe and reliable water supplies; increased water use efficiency in domestic and commercial settings; and the facilitation of water trading between and within the urban water sectors. Urban water arrangements need to address these issues. The function of urban water plans is to achieve the objectives of the legislation in general and to ensure compliance with water plans formulated for the catchment or the area of which the relevant urban community is a part. In this sense, urban water plans implement for the urban community the catchment wide objectives of water plans.

10.3 One of functions of the water plan is to determine how much water from which source will be available for domestic and commercial use in the urban communities within the area of the water plan. In most cases it is likely that the water for urban use will be available to the local government or whatever other institution is responsible for the supply of water to consumers in the urban area. The interest of this institution is likely either a contract with a supplier or a water access entitlement, a water allocation and a water use approval or an interest in one or all of these instruments. In this way this institution will know how much water will be available from what source and over what period. These rights will be as secure for this institution as for any other person or institution with an interest in them.

10.4 It is for the purpose of performing these functions that the urban water plan will be formulated. It is once again important that the urban water plan is formulated on the basis of the most comprehensive and the most up to date

information available. This includes information not only about the source of the water but also about the likely demand for water from the range of consumers. These consumers will be domestic households, commercial organisations, industrial organisations, and perhaps agricultural organisations which have their enterprise in close proximity to urban areas. Such an urban water plan must reflect a wide range of considerations including those that are demographic, economic, social, cultural as well as hydrological and environmental. Urban water plans must therefore be consistent with any relevant land use plans or planning schemes for the urban area in question. These plans provide the strategic framework within which operational activities are conducted and water supplied to and used by the consumers.

### **Urban Water Action Programs**

10.5 The second element is the formulation of urban water action programs. These programs are essentially agendas for action stating in some detail how water is to be supplied to consumers through arrangements for use, reuse, recycling and whatever other innovative means are going to be used for this purpose. These programs will no doubt incorporate or be related to similar programs involving the management of stormwater, sewage and other forms of wastewater. The institution responsible for preparing urban water plans must therefore be under a duty to prepare urban water action programs along these lines. The expectation is that these programs will be comprehensive and detailed. It is unlikely that they will contain enforceable rights and duties. These programs, however, in conjunction with urban water plans are the basis upon which urban water supply entitlements are granted. Unlike current arrangements, these urban water supply entitlements will confer enforceable rights upon their holders. This is essential if there is to be, as the Agreement contemplates, a market for trading in these entitlements.

10.6 Urban water plans and urban water action programs are – just like any other plans and programs - ambulatory in nature. In other words, the principle of adaptive management applies to them. This means in practice that there will be a number of duties placed upon those responsible for these plans and programs. These duties include:

- a duty to ensure the currency of information, knowledge and understanding that supports these plans and programs;
- a duty to keep these plans and programs under continuous review;
- a duty to amend or replace these plans and programs to ensure that they are achieving the objectives of the water plans and the legislation;
- a duty to make these plans and programs available to members of the community on request.

The formulation of these plans and programs is a public process requiring public notification, an opportunity for public comment, consideration of any comments and representations and approval by the relevant minister.

## **Urban Water Supply Entitlements**

- 10.7 It is within this framework of urban water plans and urban water action programs that urban water supply entitlements are granted to all consumers of water within the area in question. This may well comprise a very large number of consumers. Most of these consumers will be domestic householders and a smaller number likely to be agricultural, commercial and industrial consumers. This diversity of consumers will be reflected, of course, in the urban water plans and the urban water action programs. There needs therefore to be a variety of arrangements according to which the water is supplied. As in the case of other supplies, the basis may be either a contractual arrangement or an entitlement to receive a volume of water. Any contractual arrangement will necessarily contain all the details for the supply including volume, rate, duration, price and no doubt other elements of an ongoing relationship. Any such contractual arrangements must be subject to the provisions of the urban water plan and the urban water action program including the consequences of any variation of or amendments to these plans or programs.
- 10.8 Different arrangements are appropriate for the domestic consumption of water by a large number of householders. Hitherto such consumers have had little more than an expectation that water will continue to be supplied provided the relevant charges are paid. If urban water is to be traded, this must necessarily change. Each domestic consumer must have an asset able to be traded in a market. It does not necessarily have to be an absolute right to a certain quantity of water. No system is capable of providing such a right. What is contemplated? Something like this:
- the grant of an entitlement to have delivered a maximum volume over a defined period;
  - a right to use that water over that period for domestic purposes;
  - an appropriate definition of domestic purposes;
  - a duty to pay for the amount of water used for domestic purposes at the price and on the terms set out in the urban water action program;
  - a right to assign this entitlement to another consumer within the area.

## **How Urban Water Supply Entitlements are Granted**

- 10.9 So much for the rights and duties associated with an urban water supply entitlement. Who may hold such an entitlement; who is able to grant it; and how is it granted? If the arrangement is contractual, then it should be open to any person within the area to approach the supplier with a view to negotiating and completing these contractual arrangements. If the arrangement is not contractual, then the urban water program will contain details of the arrangements. Each holder of an interest in land will be granted an entitlement in accordance with the rules set out in the urban water action program. These are likely to be based upon the number of facilities in the household using water and the size of the premises comprising the household. This is the kind



of information that should be available to the local government in any event in accordance with its arrangements for imposing rates and other charges upon householders. For this purpose there would have to be a definition of householder and this is likely to be the occupier of the premises with a legal interest in them; for example, the registered proprietor, or the holder of a lease or other form of licence to occupy. In some cases water facilities may be used by a number of occupiers in common with each other. In this case the occupier would be the body corporate or whatever other institution is responsible for this aspect of the resource.

### **The Assignment of Urban Water Supply Entitlements**

10.10 The Agreement contemplates the development of a market in these urban water supply entitlements. We need to bear in mind that these entitlements are of limited duration given their intrinsic nature. Probably on an annual basis. There are in the context of a market, therefore, two possibilities. The transfer of an entitlement or part of an entitlement to another person who is a householder within the area on a permanent basis. This is probably unlikely as a normal scenario. Alternatively the urban water supply entitlement or a part of it may be assigned to another householder within the area. If, for example, one householder expects to use only half of the entitlement over the period of a year, then the other half may be assigned to another householder. This requires an arrangement between the two householders and a notification to the local government or other institution responsible for the program.

### **The Management of These Arrangements**

10.11 In view of the very large number of householders potentially involved in arrangements such as these, the program would need to provide for the facilitation of such assignments. For example, a householder may wish to assign half of the entitlement to someone else. The local government or whoever is responsible for the program will create and manage a list of those interested in purchasing an entitlement or part of an entitlement and arrange the appropriate assignment. Simplicity in such arrangements is important. But there is no reason why it cannot be a relatively straightforward process.

10.12 It is for reasons such as these that an urban water supply entitlement must of necessity be of limited duration. In addition, these entitlements must be as free as possible from any restrictions. The only restrictions should be the requirement to pay the charges for the use of the water and to use the water only for domestic purposes. If there is a failure to comply with either of these two obligations, then the entitlement will be suspended but not terminated. Hence the need for an up-to-date and comprehensive list of entitlements, their holders, the volume of water, and any assignees. This information must be available at least to the holder of the entitlement and any assignee of an interest. There is otherwise no justification for cancellation or variation of an urban water supply entitlement.

## WATER MANAGEMENT INSTRUMENT TRANSACTIONS

### Introduction

11.1 So far our discussions have focussed upon how the legislation, the water plans and the instruments for managing water need to be structured so as to create a credible framework within which commercial transactions involving water may be conducted. Once that structure has been established, the next step is to determine the arrangements for facilitating and securing these transactions. We have identified four water management instruments:

- water access entitlements;
- water allocations;
- water use approvals;
- urban water supply entitlements.

The first two are concerned with the source; water use approvals are concerned with use at a specific location; the last is concerned with consumption in urban areas. The Agreement contemplates that water access entitlements and by implication water allocations are to be as freely tradeable as possible. The Agreement is for the most part silent in relation to the transferability of water use approvals and completely silent about the tradeability of urban water supply entitlements simply because they were not contemplated by the Agreement. However, it has already been suggested that the legal regime for managing water resources cannot ignore the last two elements. Assuming, therefore, that an appropriate, credible and enforceable regime for trading in a market context has been created, what arrangements need to be put in place to validate these transactions?

11.2 A number of issues need to be addressed:

- the power to engage in transactions;
- the facilitation of transactions;
- the creation of contractual relationships;
- the formalities of transfers, assignments and other transactions;
- registration;
- certification.

These arrangements need to be considered in the context of transactions within the area of a water plan or a catchment, transactions across these areas but

within a state or territory, and transactions across state and territory boundaries. Let us deal first of all with water access entitlements, water allocations and water use approvals. Urban water supply entitlements are rather different and will be dealt with separately.

### **The Power to engage in Transactions**

- 11.3 The legislation should include within it a statement of the objective of this part:

*The objective of this Part is to facilitate and secure transactions affecting water management instruments.*

We need to bear in mind the suggestion that only accredited persons should be eligible to hold water management instruments. Then there should follow a general provision enabling these transactions. For example:

*An accredited person who is the holder of a water management instrument may make arrangements either unilaterally or with any other person about its transfer, assignment or any other transaction with it provided that any such arrangements comply with this Act, any rules under this Act, any water plan and any other rule of law that applies to it.*

This requires a definition of accredited person and water management instrument.

- 11.4 The expression transaction is critical for this purpose. It includes first of all the transfer to another person of the instrument in question so that the transferee is in all respects substituted for the transferor. Next, the interest of the holder of the instrument may be divided up and distributed among one or more other persons: a kind of fragmentation process. For example, an assignment of the instrument for a period of time while the assignor retains the original entitlement; the transfer or assignment of part of the interest in the entitlement; the creation of a mortgage over the instrument; the creation of some other charge over the instrument; the creation of a covenant in respect of the instrument; the creation of a caveat in respect of the instrument; and no doubt other ways of creating or acknowledging the interests of other persons.
- 11.5 Are all of these transactions appropriate for all of the instruments under consideration? The Agreement contemplates trading should be as free as possible in water access entitlements and probably also in water allocations. They are essentially assets in the commercial sense. It is thus entirely appropriate for a water access entitlement – a share of a water resource – to be dealt with in any of these ways. This is probably also true of a water allocation. The reason quite simply is that neither of these two instruments carries with it usufructuary rights. This is not to say that usufructuary rights – probably in this case water use approvals – have no commercial value. Indeed they do. To this extent they are also assets but the capacity to engage in transactions involving them is heavily restricted and controlled. This makes it that much more difficult to place a value upon them for purposes of investment, use or indeed any other purpose. It is suggested therefore that the expression transaction for the purposes of this part includes all of these elements in relation to water

access entitlements, probably all of these elements in relation to water allocations; but restricted to transfers and possibly assignments for a limited period in relation to water use approvals.

### **The Facilitation of Transactions**

11.6 What arrangements should be put in place to enable facilitation of transactions? Is it appropriate or necessary to have institutional arrangements in place to enable facilitation or is it simply a matter of leaving participants in a market – potential buyers, sellers, assignors, assignees, mortgagees, and others – to get together in any way they choose? If the intention is to expand an existing market and have an ordered market in which trading is going to take place easily, then probably some form of institutional arrangements may be desirable. If so, what form may they take? Perhaps these forms:

- the public agency responsible for managing water resources in general;
- a public agency established specifically for the purpose such as a Water Assets Trading Office;
- an extended function of the registrar of water management instruments;
- the establishment of independent agents or brokers by the private sector as a response to an expanding market.

The choice thus is either a public agency set up for the purpose or a private agency developing of its own initiative. If the former, then perhaps the better model is an independent statutory water assets trading office. This would be particularly useful if it were to operate at a national level since it would in these circumstances be well placed to engage in other functions such as monitoring trading in the market, assessing the effectiveness of the market and generally overseeing how the market operates.

### **Negotiation**

11.7 The next function to consider is negotiating and entering into contractual arrangements. This may well involve independent agents or brokers in the private sector but unlikely to involve any statutory water assets trading office. Depending on the circumstances, it may be desirable for potential participants in the market to seek the advice not only of agents or brokers expert in the water market but also of lawyers with commercial expertise preferably in the area of water management. Clearly negotiations and contracts are entered into in particular sets of circumstances. However there are likely to be a number of issues arising in relation to the formation of contracts for buying and selling water access entitlements and securing interests in other water management instruments. Particularly if the intention is to facilitate a national market, it might be desirable for the legislation to incorporate a set of model negotiating and contractual arrangements. This would not be obligatory but, if well structured and recognised as authoritative, they would facilitate the formulation

of contractual arrangements particularly at a national level in the case of interjurisdictional trading.

### **Completion of the Transaction**

- 11.8 The next step, once the contract has been signed, is the implementation of the contract through the completion of transfers, assignments or whatever other transactions are permitted. Once again, this should be as simple a process as possible. And again, particularly in the context of a national market, it would be useful if the same or similar forms or documents were used in each jurisdiction. It would in any event be desirable to provide in the legislation for model forms of transfer, assignment, mortgage and other transactions.
- 11.9 The process is complete when the executed form of transfer or other transaction is recorded in the register. The creation of a register has been considered already in the context of the provision of information. The legislation must provide that the documents formalising all transactions involving or affecting water management instruments must be recorded in the register. The registrar is under a duty to include in the register an entry about these documents. The entry must contain sufficient detail to enable members of the public to become aware simply by looking at the register of the nature and effect of the transaction. If requested a copy of the document should be made available to whoever seeks a copy of it.
- 11.10 Entry in the register performs the function not only of public notification but also of certification. It still appears to be uncertain whether the accuracy of entries in the register is to be guaranteed by the state. In principle water access entitlements and water allocations are in this respect no different from titles to land. It is the title that is guaranteed and not the operational or functional rights that the holder of the title might otherwise have. In this respect water access entitlements and water allocations are quite different from water use approvals and urban water supply entitlements. Certification of title by the state would give to water access entitlements and water allocations the security and protection necessary for an effective market. This is particularly significant in the context of a national water market and interjurisdictional transactions.

### **Arrangements for Urban Water Supply Entitlements**

- 11.11 Transactional arrangements for urban water supply entitlements must necessarily be not only different but simpler. It is one of the functions of an urban water supply program to provide for the transfer of urban water supply entitlements. The expectation is that the arrangements will be either contractual in relation to relatively large amounts of water but based upon household entitlements in relation to the much smaller quantities of water involved in individual domestic consumption. In either case there is probably no need for any complicated set of arrangements to facilitate trading. All that is necessary is for the local government or whoever is responsible for the delivery of water to keep a list of all urban water supply entitlements in its area and to make this list available to anyone who wishes access to it.

- 11.12 Any transactions in relation to urban water supply entitlements must necessarily be of limited duration for the reasons already discussed. All that needs to be done, therefore, is for those interested in buying or selling an entitlement or part of an entitlement to notify the local government or whoever is responsible for this and for the local government to make a note to that effect on the relevant entry. So, anyone wishing to buy or sell simply needs access to the lists and these annotations and then decides what to do. Once a transaction has been arranged and completed, then it will be sufficient for this to be notified to the local government or whoever is responsible for annotation on the list. It is one of the functions of the urban water supply program to include the details of these arrangements appropriate to the area in question.

### **Interjurisdictional Transactions**

- 11.13 We have already noted that the Agreement places considerable emphasis upon the facilitation of trading across the boundaries of States and Territories. There is little detail about how this is to be done. One option is the creation of a set of arrangements by the Commonwealth in exercise of its inter-State trade and commerce power. However, the Agreement makes no mention of this possibility. It is suggested therefore that each State and Territory with an interest in this should be under a duty to negotiate and conclude with other interested States and Territories a set of arrangements which can be enforced within each jurisdiction. Such a set of arrangements will be given effect within each jurisdiction by an Interjurisdictional Water Management Instrument Trading Scheme.
- 11.14 The hydrological and technical issues associated with conveying or moving water across areas within catchments and across catchments are no doubt the same as they are for movements across jurisdictions. It is however the law that is the major obstacle for the purposes of the Agreement. The Agreement clearly wishes to facilitate the interjurisdictional transfer of water access entitlements. It probably also contemplates the transfer of water allocations. The position in relation to water use approvals is much less clear. Water use approvals are very much a matter of site specific and location specific issues. In any event, however, the existence of water access entitlements and water allocations has no practical consequence in the absence of a water use approval. On the face of it, therefore, the same arguments and the same consequences apply to interjurisdictional transfers as they do to intrajurisdictional transfers. The issue for the law in each jurisdiction is to validate the arrangements in the other jurisdiction so as to ensure compliance within the jurisdiction where the activities are going to take place. Although the expected outcome of the Agreement is conformity of arrangements in each of the jurisdictions, this does not necessarily mean identical or even reasonably similar sets of arrangements in each of the jurisdictions. For example, water management instruments are structured differently; the procedures for granting these instruments are different; perhaps even the legal rights associated with them are different; and last, but by no means least, the terminology is different.
- 11.15 If this is an appropriate way of proceeding, what should such a scheme contain? On the assumption such a scheme is expected to reflect the arrangements for

transfers within a jurisdiction, then the scheme must incorporate the following elements:

- the classification of water access entitlements, whether for consumptive or environmental purposes, into those that are transferable and those that are non-transferable;
- the classification of water allocations into those that are transferable and those that are non-transferable;
- the classification of water use approvals into those that are transferable and those that are non-transferable;
- the creation of a set of deeming provisions that state that a water management instrument in one jurisdiction is the equivalent of a water management instrument in the other jurisdiction;
- the creation of a set of deeming provisions that state that the effect of recording a water management instrument in a register in one jurisdiction is the same as in the other jurisdiction;
- a set of provisions that give effect reciprocally to the arrangements for enforcement in each of the jurisdictions.

The legislation in each State and Territory will need to include a provision requiring effect to be given to such a scheme not only within the State or Territory in question but also stating that it be recognised and given effect within the other jurisdictions. In other words, these arrangements must be reciprocally enforceable. In this respect, such a model goes far beyond those created for the Murray Darling Basin and the Lake Eyre Basin.

## Chapter Twelve

### ARRANGEMENTS FOR ENFORCING THE SYSTEM

#### Introduction

- 12.1 Enforcement is an essential part of any legal system. However, it is particularly important in the context of a trading regime. If participants in a market do not have the confidence that the arrangements supporting the market are going to be recognised and enforced and in particular that their interests will be protected by the legal system, then the system is unlikely to be successful. Enforcement raises a number of issues. One of the most important in the present context – to be considered later – is the question of jurisdiction. If trading in water access entitlements and other water management instruments is to take place on an interjurisdictional basis, then difficulties of jurisdiction are likely to arise.
- 12.2 In any event, an enforcement regime is likely to incorporate a number of elements:
- a statement or perhaps a restatement of the duties imposed upon all those performing functions under the system;
  - the creation of a set of liabilities for failure to comply with these duties including, in effect, the attribution or allocation of risk associated with performing functions;
  - the creation of a system of reviews and appeals in relation to decisions of public agencies creating water management instruments;
  - the conferment of powers of investigation and inspection upon the relevant public agencies with a view to identifying potential failures to comply;
  - the conferment of administrative powers of enforcement on public agencies for the purpose of ensuring compliance on the part of those on whom duties are imposed;
  - the creation of criminal liability for failure to comply with the duties imposed by the system;
  - the conferment upon any person of power to seek a civil remedy for failure to comply with the duties imposed by the system;
  - the application of procedures for judicial review of administrative decisions without any restriction on the power to seek a remedy for the purpose of ensuring compliance with the duties imposed by the system upon public agencies.



## **The Creation of Duties**

- 12.3 Let us consider first the range of duties necessary to ensure an overall effective system. It has already been suggested that the legislation should contain a fundamental duty imposed upon all persons involved with and affected by the legislation. This duty is related to the achievement of objectives, the observance of principles and compliance with rules and water plans. Despite the relative novelty of such a suggestion, it is critical if overall compliance is to be attained. The range of parties affected includes not only those with rights but also those sustaining duties and liabilities. This extends to the public sector as well as the private sector and indeed everyone. It is probably not appropriate for all compliance mechanisms to apply to this fundamental duty. However it is important that the capacity to enforce this overriding duty is made available to everyone. So the power available to any person to go to a court to seek a remedy for non-compliance should apply to an alleged failure to comply with this fundamental duty.
- 12.4 The legislation is expected to contain a range of duties in relation to prescribed activities along the lines already suggested. In particular a person must not engage in any activities or operations relating to, affecting or involving water without a water access entitlement, a water allocation and a water use approval. There should similarly be an obligation in relation to the receipt of water and engaging in any dealings with water management instruments. These duties relate quite clearly to operational activities. These may well be undertaken by the public sector as well as by the private sector. For example, water conservation or water supply by a Ministerial corporation, a government department, a statutory corporation, a government-owned corporation, a local council or a local council owned corporation. It is important that these duties apply to these operators as well as to any private sector operators. Although the normal rules of interpretation of legislation would be expected to produce this result in any event, it is suggested that the legislation should make it absolutely clear that it applies to these entities.

## **Common Law and Statutory Liabilities**

- 12.5 The undertaking of activities in relation to water and the impact of these activities on other persons and on the environment at large are governed by other elements of the legal system apart from the water legislation. For example, there are the rules of the common law about trespass, nuisance and negligence. And there is the whole range of legislation that seeks to conserve elements of the environment and to protect the environment at large. It may be that in particular sets of circumstances the rights and interests of a person affected by the operations of those responsible for managing water may appropriately be recognised and protected by these other rules. The legislation needs to make it clear that any remedies available under the water legislation do not prejudice in any way the range of remedies that might otherwise be available under the common law or under other legislation. In other words the water legislation must directly preserve remedies available in any other way.

## **The Allocation of Risk**

12.6 One of the functions of the common law and indeed of statutory arrangements is the allocation or attribution of risk. This is a matter addressed by the Agreement. Risk can only be quantified by way of an analysis of legal rights, legal duties and legal liabilities. The Agreement did not address risk in this way. It addressed risk in the context of a political rather than a legal analysis. It is, of course, not always possible to be able to predict with clarity and certainty what are the relevant rights, duties and liabilities of any person in any particular set of circumstances. The task of doing so is much easier if the arrangements are based on rules that are as clear as possible rather than upon the exercise of discretions according to criteria that are less than clear. While the Agreement wishes to make it as clear as possible where risks lie, particularly in relation to imposing reductions upon water allocations already granted, the degree of risk in any particular set of circumstances cannot really be identified or predicted otherwise than by an application of the statutory regime in its totality to these circumstances. This is the skill of the legal adviser and it is unlikely that any statutory set of arrangements will provide the absolute clarity that the Agreement wishes. Hence the importance of compensation to be discussed later.

## **Reviews and Appeals**

12.7 Water management instruments are granted by a public agency in exercise of its statutory powers and in accordance with the legislation. While such decisions may in certain circumstances be subject to judicial review, it is common for legislation about resources and the environment to confer on applicants for such grants a power to have the decision reviewed on its merits and for an appeal to a court on a matter of law. The response to an application may well constitute the grant of a water management instrument, the grant of it on conditions or a refusal. Persons other than the applicant may well have an interest in the outcome particularly if the process involves public participation – which is likely to be the case. So reviews on the merits and appeals on a matter of law are likely to involve not only the applicant but also objectors. In any event the legislation must include procedures for a review of the decision on its merits by an entity other than the entity that made the decision in the first place and for an appeal against the decision on a matter of law.

## **Powers of Investigation**

12.8 Ensuring compliance with the law through enforcement procedures is one of the primary responsibilities of the public sector. Before a public agency can seek to enforce the law, the public agency must be endowed with relevant powers of inspection and investigation. In view of the multiplicity of functions of the public sector in the management of water resources – creative, regulatory, operational as well as enforcement – care must be taken to ensure that there is a separation of function so that the function of granting water management instruments is not confused with the function of ensuring compliance with them. In any event the legislation must confer upon the

relevant public agency the range of powers of inspection and investigation appropriate to ensuring compliance with this system.

12.9 The existence of these powers must be complemented by a range of duties placed upon those whose activities are subject to inspection and investigation. This can include, of course, public sector water managers as well as private water managers. The duties should include the duty to:

- co-operate with the public agency;
- provide information and records to the public agency;
- undertake further investigations if required to do so by the public agency;
- generally comply with all requests reasonably made by the public agency for the purpose of investigating any activities that may constitute a breach of the legislation.

The range of such powers and duties is well preceded in legislation dealing with resources and the environment.

### **Administrative Sanctions for Non-Compliance**

12.10 So much for the power to investigate the activities of water managers and water users. If investigation has indicated a breach of a duty, then the legislation provides for a range of powers to ensure compliance. For this purpose a failure to comply or a breach relates not only to the legislation itself but also to rules and regulations made under the legislation, water plans and the terms and conditions of water management instruments. These powers apply, it must be emphasised, not to the decisions and determinations of public agencies but rather to the whole range of operations and activities undertaken by water managers and water users whether they are private sector or public sector entities.

12.11 Who should be invested with these powers of enforcement? In most instances it is usually the Chief Executive Officer of the relevant public agency. This is likely to be so in this case. These powers of enforcement are administrative in nature. The legislation must therefore state the conditions to be satisfied for the exercise of these powers. For example, a breach of the Act or a breach of a condition of a water use approval. If the Chief Executive Officer is satisfied that a breach has occurred, then an enforcement order may be made. What is the procedure for doing this? Often it involves:

- the service of a provisional enforcement order on the offender;
- public notification of the making of the provisional order together with an invitation to the public to comment;
- an opportunity for the recipient of the provisional order to respond to it;

- a duty on the Chief Executive Officer to take into account any responses made by the alleged offender or any other person;
- a decision on the part of the Chief Executive Officer whether to confirm or not and whether in the same or a modified form the provisional enforcement order;
- service of the final enforcement order on the offender.

12.12 That might the terms of an enforcement order be? It must be specific by identifying the facts and circumstances comprising the breach and by identifying exactly what the offender must do to remedy the breach. This may include what must be done, how it must be done, what must not be done. The need for specificity is important because the failure to comply with an enforcement order is itself subject to the range of sanctions created by the legislation.

### **Criminal Sanctions for Non-Compliance**

12.13 One of the sanctions supporting a statutory system is criminal liability. It has already been suggested that breach of the fundamental duty would not be appropriately supported by criminal sanctions. However, on the face of it, breach of all other provisions of the legislation, all rules and regulations made under the legislation, all water plans, and all water management instruments should appropriately be subject to criminal liability. The nature of the liability and the nature of the penalty will differ depending upon the nature of the offence in question. It has already been suggested that breach of an enforcement order is itself a criminal offence.

12.14 Next there is the question of criminal liability of corporations and the responsibility of the executive officers of corporations. Given public sector involvement in the management and use of water, there is the question whether criminal liability should attach and, if so, how to public sector water managers and users. In principle there is no reason why public sector agencies should not bear precisely the same risks as private sector agencies in this context. This is well precedented in the case, for example, of government-owned corporations but less so in the case of statutory corporations and government departments. But are they in any way different? It is suggested that they are not. This is particularly true in the case of criminal offences underpinning trading arrangements in a market context. If, for example, a water allocation or a water use approval is held by a government department and if there is a breach of the allocation or of a condition attached to the water use approval, then why should this entity be treated any differently from any entity in the private sector?

### **Civil Sanctions for Non-Compliance**

12.15 It is common today for legislation about the environment to include powers enabling any person or at least any person with a relevant interest in the environment able to be substantiated to apply to a court for a remedy for a breach of the legislation and its associated plans and instruments. These are

civil and not criminal proceedings and the remedy make take the form of a declaration, an injunction or an order of various kinds. It is less common to find provisions of this kind in legislation about resources. However, it is suggested that in the case of management of water resources there is a sufficient range of public interest components to justify such a power. But not only that: the existence of a credible market requires not only compliance with the relevant rules but also procedures to ensure compliance. There are, therefore, at least two reasons why the legislation should include a power for anyone to seek a civil remedy of this kind. First the need to protect the public interest components of the legislation and, second, the need for compliance by the private sector of its responsibilities in the context of a credible market.

### **Judicial Review of Administrative Decisions**

12.16 Enforcement orders, criminal prosecutions and applications for civil remedies all seek to ensure compliance with operational responsibilities. The function of judicial review, on the other hand, is to ensure compliance by administrative decision-makers with their statutory responsibilities. Water plans are made by public agencies; water management instruments are granted by public agencies; and public agencies have responsibilities in the context of formulating rules and regulations. Many but not necessarily all of these decisions are likely to be regarded as administrative for the purposes of judicial review. In any event, the common law, apart from legislation, ensures that public agencies comply with their statutory responsibilities. It is therefore essential that the legislation provides for judicial review in the normal way. It has already been suggested that it is appropriate for any person to make an application for a civil remedy for non-compliance and for the same reasons it is suggested that any person should be able to make an application for the judicial review of an administrative decision of the kinds under discussion.

### **The Range of Remedies**

12.17 What should be the subject matter of remedies able to be granted for breach of any of the elements of the system. A number have been mentioned during the discussion in the previous paragraphs. Some sanctions are imposed by a public agency acting administratively and most are imposed by a court acting judicially. Administrative sanctions include:

- the suspension of water management instruments;
- the termination of water management instruments;
- enforcement orders including the regulation, prohibition or requirement of specific actions and activities.

Judicial sanctions include:

- the imposition of civil penalties;
- the imposition of criminal penalties including fines and imprisonment;

- declarations;
- injunctions;
- orders regulating, prohibiting or requiring actions or activities;
- restoration;
- damages;
- compensation.

For the most part sanctions such as these are well precedented. The issue of compensation, however, is both sensitive and complex.

### **Compensation**

- 12.18 The law has always in general been able to provide compensation for a loss sustained by an individual or a corporation brought about by the intentional or negligent activities of another person. However, damage to the environment as such, rather than to an interest in the environment held by an individual or corporation, has generally not been compensable. Nor has loss or damage sustained by an individual or a corporation as a result of decisions made by public agencies except in very exceptional circumstances. While the acquisition of property by the Commonwealth must be on just terms, there is no such constitutional or legal requirement imposed upon the States. In any event an interference with rights rather than the acquisition of rights has generally not been compensable. This remains the fundamental position adopted by the Agreement.
- 12.19 While it is the function of the common law to compensate for a loss arising out of a liability, this generally is not the way in which risk is allocated by legislation. On the face of it, as we have already noted, it is simply for the individual person or corporation to identify the risks associated with the various liabilities created by the legislation and for them to make decisions and engage in activities accordingly. If these risks are well managed, there will be no liability. But a liability may arise as a result of the exercise of a power by a public agency. This may be unpredictable because it depends upon how the legislation is structured. So, if a public agency exercises a statutory power in conformity with the legislation and the effect is an impact upon or an interference with the existing rights and duties of a particular individual or organisation, then normally the risk lies where it falls. Unless the legislation otherwise provides. Should the legislation provide otherwise? This is essentially a political question. If compensation is to be provided in such circumstances, then the legislation must state the conditions of eligibility for compensation very clearly and precisely.

### **Jurisdiction**

- 12.20 The matter of jurisdiction is particularly significant in relation to the question of compensation. There are two reasons for this. The first is that payment of

compensation is mandatory only in the case of a Commonwealth acquisition of property. The second is the relevance of this requirement if the Commonwealth creates a national system either for trading in water management instruments or managing water resources generally. In either of these cases jurisdiction would lie with the courts of the Commonwealth. Otherwise it is the courts of the states and territories that exercise jurisdiction.

12.21 There is no doubt about this where the activities in question – including trading – take place within the boundaries of a state or a territory. One question is which court is the most appropriate judicial institution to determine disputes arising under the legislation. In the first instance, the answer is the court – or other judicial institution in the state or territory – which has jurisdiction in matters relating to resources and the environment. For example, the Land and Environment Court in New South Wales, the Planning and Environment Court in Queensland or the Environment Resources and Development Court in South Australia. If there is no such specialised court, then consideration needs to be given to the establishment of such an institution. In any event, the nature of the jurisdiction of such a court requires consideration of its procedures. Given that such a court is ultimately concerned with the sustainable development of the water resources of the jurisdiction in question, it is the nature of this function that should dictate how the court addresses the issues that come before it.

12.22 A statutory regime for the management of water resources creates a number of institutions whose objective is the sustainable development of water resources. First of all, this objective comprises a prediction of likely future outcomes of a decision-making process. In this sense it is a planning or a resource development type function. It involves decisions about the future and includes processes for review of initial decisions on their merits. In the case of the three specialised courts mentioned, it is part of their jurisdiction to deal with issues on their merits as well as matters of law. It is therefore suggested that it needs to be recognised that the jurisdiction of these judicial institutions is at least to some extent inquisitorial in nature. Such a court should be given appropriate powers of investigation and inquiry where it thinks it appropriate. Clearly this involves the use of resources other than those immediately available to members of the court. Partly for this reason the court should comprise or at least have access to experts other than in law. Further, the way in which expert analysis and information are provided to the court should be governed by appropriate rules for this purpose rather than the more traditional rules of evidence about such matters. Recent reforms to the procedures of the Land and Environment Court in New South Wales might present a good model.

12.23 In any event, the legislation should address this issue by providing for these matters;

- the establishment of a specialised court or tribunal:
- the provision of appropriate resources, including professional expertise, for such a court:
- the conferment on such a court of powers of investigation and inquiry:

- a positive requirement for the court in making its decision to achieve the objective of the legislation along the lines already suggested:
- the adoption of procedures that reflect the nature of the jurisdiction rather than the more traditional adversarial approach.

## **Interjurisdictional Issues**

- 12.24 These comments apply as much to interjurisdictional matters as they do to intrajurisdictional matters. But in the case of interjurisdictional matters there are a number of other issues to consider. In the absence of a legally enforceable national regime for trading in water management instruments, then it is likely that each state and territory will retain its existing system modified no doubt to reflect the requirements of the Agreement but nevertheless constructed in accordance with its own system of objectives, rights, duties, liabilities, procedures, processes and terminology. While such arrangements may well be consistent, they will not be the same. In any event, a court in one jurisdiction may interpret and apply the legislation and its accompanying plans, regulations, rules and instruments differently. If so, is a participant in a market likely to be comfortable with these arrangements in the context of interstate and interterritory transactions?
- 12.25 There is probably no clear answer to this question. Any issues that are likely to arise on an interjurisdictional basis will include questions about contracts, transfers, the creation of interests in water management instruments, and perhaps even the validity of water plans and water management instruments themselves. If so, what system of law applies? Rules of private international law or the conflicts of law may well provide a solution to these issues. Often these are unclear and difficult to apply. In a case of a contract, it may of course be possible for the contract itself to state which set of laws applies to the contract. But this may not be possible in relation to other elements of the transactions or other elements bearing upon the transaction.
- 12.26 It is suggested that in these circumstances the solution is for the legislation to state either the jurisdiction that applies or how the jurisdiction to be applied is to be determined. Perhaps the easiest solution is for the Commonwealth, if it were so minded, to accept conferment by the states and territories upon the Federal Court of jurisdiction in relation to interjurisdictional disputes. But this might not solve the problem simply because no Federal Court has the kind of jurisdiction discussed in the previous paragraphs. It may, therefore, be appropriate for the Commonwealth to establish a specialised court or tribunal to which disputes arising within the states and territories could be referred. This would solve the problem of jurisdiction but not the issue of which legal system to apply.
- 12.27 Interjurisdictional transfers of water management instruments could be regulated by either a bilateral agreement between the states or territory in question or a multilateral agreement between all of the relevant states and territories. Such an agreement would be supported in each jurisdiction by an Interjurisdictional Water Management Instrument Transfer Scheme. This



scheme would be given the force of law in each of the relevant jurisdictions and would therefore comprise the set of rules that govern any interjurisdictional transfer of water management instruments. If this were so, then there would be a scheme for interjurisdictional transfers in each jurisdiction and one tribunal to deal with all issues arising from it. It is suggested therefore that the legislation should include provision for:

- An Interjurisdictional Water Management Instrument Transfer Scheme;
- Such a scheme to recognise and confer jurisdiction upon a national tribunal established by the Commonwealth for the purpose.

**APPENDIX**  
*A GENERIC STATUTORY STRUCTURE*

**PART 1**  
**FOUNDATIONAL ELEMENTS**

- 1** A statement of objective (para 3.2).
- 2** How to achieve the objective (para 3.3):
  - a) Sustainable development of water resources.
  - b) Protection of ecological values.
  - c) Efficient use of water resources.
- 3** A statement of principles (paras 3.4 and 3.5).
- 4** A statement of the fundamental duty (para 3.7).
- 5** A definition of fundamental concepts (para 3.8):
  - a) Objectives.
  - b) Principles.
  - c) Rules.
  - d) Plans to include water plans, urban water plans and urban water action programs.
  - e) Water management instruments to include water access entitlements, water allocations, water use approvals and urban water supply entitlements.

PART 2  
**A SYSTEM OF RIGHTS AND DUTIES**

- 6 A negative duty prohibiting activities involving rural water (para 4.9).
- 7 A definition of rural water (para 4.9).
- 8 A negative duty prohibiting receipt or delivery of urban water (para 4.9).
- 9 A definition of urban water (para 4.9).
- 10 A negative duty prohibiting dealings in water management instruments (para 4.9).
- 11 A negative duty restricting holders of water management instruments to accredited persons (para 4.9).
- 12 A definition of a an accredited person (para 4.9).
- 13 A definition of dealings (para 4.9).
- 14 A description of a water access entitlement (para 4.11).
- 15 A definition of consumptive purposes and of environmental purposes (para 4.12).
- 16 A general duty of compliance (para 4.12).
- 17 A description of a water allocation (para 4.14).
- 18 A general duty of compliance (para 4.14).
- 19 A description of a water use approval (para 4.16).
- 20 A general duty of compliance (para 4.16).
- 21 A description of an urban water supply entitlement (para 4.19).
- 22 A definition of a water management instrument to include a water access entitlement, a water allocation, a water use approval and an urban water supply entitlement (para 4.19).
- 23 A statement of how water is supplied in accordance either with a contractual arrangement or with an urban water action program (para 4.19).
- 24 A duty imposed on a local government to create an urban water supply program (para 4.20).
- 25 A statement of contents of an urban water supply program to include:

- (a) The creation of entitlements.
  - (b) Crediting holders with entitlements.
  - (c) Enabling transfer of entitlements (para 4.20).
- 26** A general duty of compliance with an urban water supply program (para 4.20).
- 27** A general duty of care created (para 4.22).
- 28** A definition of functions to include the exercise of powers and the compliance with obligations (para 4.22).
- 29** A definition of harm to the environment (para 4.22).

PART 3  
**INFORMATION AVAILABILITY**

- 30** A range of duties on relevant public agencies to obtain and make available information for strategic planning (para 5.3)..
- 31** A power conferred on the relevant public agency to require information (para 5.4).
- 32** A duty on the public to provide the information required by the public agency (para 5.4).
- 33** A range of duties on the relevant public agency to keep records and lists of water access entitlements, water allocations and water use approvals and make them available to the public (para 5.5).
- 34** A range of duties on local government to keep records and lists of urban water supply entitlements and to make them available to the public (para 5.6).
- 35** A range of duties on the relevant public agency to require the installation of meters, to record and list metered information about the use of consumptive water and to make it available to the public (para 5.8)..
- 36** A range of duties on the relevant public agency to obtain, make available to the public and report annually on the use of environmental water (para 5.9).
- 37** A duty on the relevant public agency to prepare a set of integrated water accounts (para 5.10).
- 38** The contents of a set of integrated water accounts (para 5.11).
- 39** A duty on the relevant public agency to make water accounts available to the public (para 5.12).
- 40** A range of duties on the relevant public agency in support of the preparation of water accounts (para 5.13).
- 41** A duty on the relevant public agency to establish a register or registers of water management instruments (para 5.14 and 5.15).
- 42** The contents of a register of water management instruments (para 5.16).
- 43** A range of duties on the registrar including certification (para 5.17).
- 44** A range of duties on those with interests in registered water access entitlements (para 5.18).

PART 4  
**WATER PLANS**

- 45** A range of duties on the Minister about the making of a water plan (para 6.2).
- 46** The contents of a water plan (para 6.3).
- 47** A range of duties on the Minister to ensure the structural tradeability of water access entitlements (para 6.5).
- 48** A duty on the Minister to comply with the legislation in creating water access entitlements including the criteria according to which they are created (para 6.6).
- 49** A duty for the water plan to create trading zones (para 6.21).
- 50** A duty for the water plan to state which water access entitlements are transferable (para 6.22).
- 51** A duty for the water plan to give priority to ecological and environmental values in classifying an environmental water access entitlement as transferable (para 6.25).
- 52** A description of a water allocation (para 6.26).
- 53** A duty for the water plan to determine a water allocation (para 6.27).
- 54** A statement of the criteria for determining a water allocation (para 6.27).
- 55** A statement that a water allocation constitutes a right of access to the quantity of water so allocated (para 6.27).
- 56** A duty for the water plan to create a set of rules in determining a water allocation (para 6.28).
- 57** A statement of the transferability of water allocations (para 6.29).
- 58** A duty for the water plan to create a set of rules according to which water allocations are transferable (para 6.30).
- 59** A duty on the relevant public agency to approve or certify a compliant transfer of a water allocation (para 6.31).
- 60** A statement of the criteria for granting a water use approval (para 6.33).
- 61** A duty for the water plan to apply these criteria stated in the rules for determining an application for a water use approval (para 6.33).

- 62** A duty for the water plan to classify water use approvals as transferable or non-transferable (para 6.34).
- 63** A range of duties on the Minister about monitoring, reviewing and varying water plans (para 6.35 and 6.36).
- 64** A general duty of compliance (para 6.37).

## PART 5

### WATER ACCESS ENTITLEMENTS

- 65** The conferment of a power for any person or institution to apply for accreditation to hold a consumptive water access entitlement (para 7.3).
- 66** A statement of the criteria for determining an application for accreditation or creating a set of rules for accreditation (para 7.4).
- 67** A power to withdraw accreditation for failure to comply with the criteria (para 7.4).
- 68** A power for any accredited person or institution to apply for a consumptive water access entitlement (para 7.6).
- 69** A power for the relevant public agency to make available to accredited applicants consumptive water access entitlements by way of individual sale, tender or auction (para 7.7 and 7.8)
- 70** A duty to record a consumptive water access entitlement in the register (para 7.8).
- 71** A statement of the rights of the holder of a consumptive water access entitlement (para 7.9).
- 72** A statement restricting the holding of an environmental water access entitlement to an institution established by the legislation or an accredited institution for the purpose (para 7.11).
- 73** A statement of the criteria for accreditation (para 7.11).
- 74** A statement of a criteria for granting an environmental water access entitlement (para 7.12).
- 75** A duty on the holder of an environmental water access entitlement to exercise any powers or perform any functions in relation to the share of the water resource described in the entitlement only for the purpose of protecting the ecological values of the water or the environment (para 7.12).
- 76** A duty to record an environmental water access entitlement in the register (para 7.12).
- 77** A conferment of a power to acquire compulsorily a water access entitlement on payment of compensation (para 7.15).



PART 6  
**WATER ALLOCATIONS**

- 78** A description of a water allocation (para 8.1).
- 79** The conferment of a power for any person or institution to apply for accreditation to hold a water allocation (para 8.5).
- 80** A statement of the criteria for determining an application for accreditation (para 8.5).
- 81** A power to withdraw accreditation for failure to comply with the criteria (para 8.5).
- 82** A power for an accredited person or institution to apply for a water allocation (para 8.7)
- 83** The conferment of a power for the relevant public agency to make available water allocations to accredited applicants (para 8.7).
- 84** A duty to record a water allocation in the register (para 8.7).
- 85** The conferment of a power to suspend a water allocation for failure to comply with it (para 8.11).
- 86** The conferment of a power to vary a water allocation if prescribed conditions are satisfied (para 8.12).

PART 7  
**WATER USE APPROVALS**

- 87** A statement of the rights of the holder of a water use approval (para 9.3).
- 88** The conferment of a power for any person or institution to apply for accreditation to hold a water allocation (para 9.5).
- 89** The power of an accredited person or institution to apply for a water use approval (para 9.7).
- 90** A statement for the criteria for determining an application for a water use approval (para 9.8).
- 91** A statement of the objective of this part of the legislation to include environmental protection (para 9.10).
- 92** A range of duties on the relevant public agency to ensure environmental protection including provision for environmental impact assessment (para 9.10).
- 93** A range of duties on the relevant public agency to ensure public participation in determining applications for water use approvals (para 9.11).
- 94** A duty to record a water use approval in the register (para 9.11).
- 95** A statement that a water use approval remains in force unless suspended or varied (para 9.12).
- 96** A power of the relevant public agency to suspend a water use approval for non-compliance with it (para 9.13).
- 97** A range of duties on the relevant public agency about monitoring, reviewing and varying water use approvals (para 9.15).

PART 8  
**URBAN WATER**

- 98** A statement of the objective of this part of the legislation (para 10.2).
- 99** A duty on the local government to formulate urban water plans (para 10.2).
- 100** A statement about the contents of urban water plans (para 10.4).
- 101** A duty on the local government to formulate urban water action programs (para 10.5).
- 102** A statement about the contents of urban water action programs (para 10.5).
- 103** A range of duties on the local government to ensure the currency of these plans and programs, to vary them to achieve their objectives and to ensure public participation (para 10.6).
- 104** A description of urban water access entitlements as either contractual or a right to receive (para 10.7).
- 105** A statement of the rights and duties of domestic holders of urban water supply entitlements (para 10.8).
- 106** A definition of domestic purposes (para 10.8).
- 107** A power conferred on any person within the urban area to apply for an urban water supply entitlement (para 10.9).
- 108** A power of the local government to grant an entitlement either by way of contract or in accordance with the action program (para 10.9).
- 109** A definition of householder (para 10.9).
- 110** A power conferred on the holder of an urban water supply entitlement to assign it to another person in the urban area (para 10.10).
- 111** A duty on the local government to include in the urban water action program arrangements to facilitate and manage the assignment of urban water supply entitlements (para 10.11).
- 112** A duty on the holder of an entitlement to pay for the use of the water and to use it only for domestic purposes (para 10.12).
- 113** A power to suspend the entitlement for failure to comply (para 10.12).
- 114** A duty on the local government to keep up to date records and lists of entitlements (para 10.12).

PART 9  
**TRANSACTIONS**

- 115** A statement of the objective of this part (para 11.3).
- 116** A power of an accredited person who is the holder of a water management instrument to deal with it (para 11.3).
- 117** Definitions of accredited person and water management instrument (para 11.3).
- 118** A definition of transaction (para 11.4).
- 119** A statement limiting the power to transact with water use approvals to transfers and assignments for a limited period (para 11.5).
- 120** The establishment of a water assets trading office (para 11.6).
- 121** The formulation and publication of model contracts relating to water management instrument transactions (para 11.7).
- 122** The formulation and publication of model forms of transfer and other transactions (para 11.8).
- 123** The establishment of a register of water management instruments (para 11.9).
- 124** A duty to record all transactions in the register (para 11.9).
- 125** A duty on the state to guarantee entries in the register (para 11.10).
- 126** A duty on the local government to keep a list of urban water supply entitlements and to make it available to the public (para 11.11).
- 127** A duty on the local government to note the interests of potential sellers and buyers on the listed entry (para 11.12).
- 128** A duty to notify the local government of a transaction and for the local government to annotate the listed entry accordingly (para 11.12).
- 129** A duty on the local government to include these detailed arrangements in their urban water action programs (para 11.12).
- 130** A duty on each relevant state and territory to enter into an agreement about interjurisdictional transactions (para 11.13).
- 131** A duty to include in the legislation a requirement for an Interjurisdictional Water Management Instrument Transfer Scheme (para 11.13).
- 132** A description of the contents of an Interjurisdictional Water Management Instrument Transfer Scheme (para 11.14 and 11.15).

PART 10  
**ENFORCEMENT**

- 133** The creation of a fundamental duty (para 12.3).
- 134** A power for any person to ensure compliance with the fundamental duty (para 12.3).
- 135** The creation of duties proscribing unauthorised operational activities (para 12.4).
- 136** A statement ensuring that these duties apply to public agencies and agencies performing public functions (para 12.4).
- 137** A statement recognising and preserving all other common law and statutory remedies (para 12.5).
- 138** The conferment of a power to have a decision reviewed and appealed on application by interested parties (para 12.7).
- 139** The conferment of powers of inspection and investigation (para 12.8).
- 140** The creation of duties in support of powers of inspection and investigation (para 12.9).
- 141** The procedures for making an administrative enforcement order (para 12.11).
- 142** The contents of an administrative enforcement order (para 12.12).
- 143** The creation of criminal sanctions (para 12.13).
- 144** The application of criminal liability to corporations, executive officers of corporations and to public agencies (para 12.14).
- 145** The conferment of a power on any person to seek a judicial remedy for non-compliance (para 12.15).
- 146** The conferment of a power on any person to seek judicial review of an administrative decision (para 12.16).
- 147** The creation of a specialised court or tribunal to supervise and enforce the water resources management regime (para 12.22).
- 148** The creation of powers and procedures appropriate to such a court or tribunal (para 12.23).
- 149** The creation by the Commonwealth of a court or tribunal to settle interjurisdictional disputes (para 12.26).

**150** The power of such a court or tribunal to enforce an Interjurisdictional Water Management Instrument Transfer Scheme (para 12.27).