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Water is mobile, unpredictable and valuable to a range of competing stakeholders. The National Water Commission has estimated that the value of water entitlements in the Murray-Darling Basin alone is approximately $13 billion. Particularly in a changing climate, the management of water resources requires an understanding of scientific and ecological issues that influence the quantity and quality of supply, coupled with equitable rules for sharing water resources and for resolving disputes.

This edition features articles examining aspects of water management under three different regulatory regimes. Debra Townsend and Odette Adams examine the benefits and challenges of trading water in the Murray Darling Basin scheme, identifying the need for improvements in access, accuracy of meters and compliance activities. In the first in a water law series, Charmian Barton looks at the policy positions set out in the Western Australia Department of Water’s paper, Securing WA’s Water Future, and how those positions are expected to be implemented through ongoing water law reforms. Anthony Spence and Sarah Wilson suggest that recent amendments to Tasmania’s Water Management Act 1999 justify a reconsideration of current restrictions on appeals against dam approvals.

On other topics, Peter Briggs shares his golden rules to help companies dealing with environmental incidents ensure their response is lawful, transparent and appropriate to the likely impact of the event. Paul Lalich, Marcia Doheny and Claire Macdonald summarise key changes proposed by the new Wind Energy Planning Framework in New South Wales, while Brad Wylcko and Mark Etherington outline the implications of the Roe 8 appeal decision for the application of offsets policies in Western Australia.

Finally, we introduce you to another impressive young lawyer, Jessica Carroll, in our series of NELA member profiles.
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- Polly Grace, Kimberley Land Council
- Deborah Hollingworth, EPA Victoria
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- Sue Higginson, EDO NSW
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NELA thanks King & Wood Mallesons for sponsoring the national conference.
Water rights and trading in Australia

Originally published on 3 August 2016
By Debra Townsend¹ and Odette Adams

Water access rights are core assets for many agribusinesses. In the Australian Water Markets Report 2012-2013, the National Water Commission estimated that the value of water entitlements in the Murray-Darling Basin (MDB) is approximately $13 billion. Trading in water has become commonplace, not only for water users but increasingly for speculators or companies whose core business is not water or land related. With more than a decade of trading under our belt, in this article we look at the benefits and challenges of trading water and what we might expect the regulators to do next.

What’s happened so far?

Since 1994, all state governments have reformed their water laws to separate water rights from the land, to implement water allocations and entitlements and to put in place trading rules within the context of water resource management plans.

Water entitlements are rights to an ongoing share of the total amount of water available in a water resource or system. Water allocations are the actual amount of water available under water entitlements in a given season. During the year, water is allocated against entitlements by state governments in response to factors such as changes in rainfall and storage levels. Allocations for the environment are also created to support the health and longevity of rivers and groundwater basins. Both water entitlements and water allocations are tradable, with the number of trades in water allocations in the MDB being around 5 times the number of trades in water entitlements.

For the last decade, water reform in the MDB has been a key priority of the Commonwealth Government. Often referred to as the “food bowl” of Australia, the MDB is jointly managed by the Commonwealth, New South Wales, Queensland and South Australian Governments along with the independent MDB Authority through the Basin Plan 2012. New South Wales, Queensland and South Australia remain responsible for managing water resources within their jurisdictions, but have agreed to implement the Commonwealth MDB Plan, including its new cap, by 1 July 2019.

Progressive reforms in the MDB water trading market have improved its operation and increased trade, making it one of the most sophisticated water markets in the world. Improved trading rules, a central online access point for comparing water products and the development of an MDB compliance strategy have all contributed to its success. With the release of the Government’s White Paper on developing water resources in Northern Australia over the next two decades, we can be sure that there is more reform to come.

Has water trading been beneficial?

With additional water resources being required to serve a growing population, food production must compete with other sectors such as manufacturing and energy generation for water allocation.

The idea behind water trading is that the creation of a price signal encourages the most efficient water use, improving the resilience of the agricultural industry to drought and shifts in commodity supply and demand. A recent survey of participants suggests that the experience of water trading in the MDB has been a largely positive one – with individual farmers and large corporates alike

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believing that the market has allowed people to find the highest value for their water, so that each megalitre produces the most earning capacity for the industry.

Studies have found that the ability to trade water has allowed irrigation industries to maintain income during times of drought. There is evidence of other economic benefits as well, such as allowing farmers to improve their security and commercial certainty and some (although unquantified) environmental benefits (such as flow management and buy-backs of water entitlements for environmental purposes).

What’s the downside?

Despite the success of water trading, there are lingering barriers to its effective operation. One issue is the high administrative cost of participation, made harder by the overlapping rules and regulations of the various states involved.

There is also a perceived lack of confidence among some that water allocations are being effectively enforced. Some people query whether the New South Wales Department of Primary Industry Water (DPI Water), the state water regulator, has the resources needed to stop people illegally extracting water, thus avoiding the need to purchase allocations. DPI Water is aware of these concerns and has concentrated greater effort recently on compliance technology in particular, installing improved metering on licenced water extraction sites.

Another key concern is the accurate measurement of extractions. The age, lack of proper maintenance and installation of many water meters mean they have questionable accuracy, with one study suggesting an average of 2.2% under-reading of volume extracted. If this were confirmed and acted upon by the regulator, DPI Water estimates that it could see up to a $21 million write-down in the value of the water trading market. Perhaps unsurprisingly, increased accuracy of water metering is largely supported by water allocation users.

According to Dr Cameron Holley, other concerns relate to the unequal operation of different water markets across Australia, different levels of investment in water efficiency infrastructure between regions and the uncertain environmental impacts of the regime.

Where to from here?

Better public access and searchability of water rights registers are areas in need of improvement. Improved compliance measures and a greater focus on the accuracy of meters would also assist the long-term viability of the water trading market. The anticipated commencement of the Commonwealth trading rules in 2019 will bring greater certainty about the future, but for now, the water market is showing signs of good health and presents an interesting, portfolio-diversifying investment opportunity for both land based and non-land based industries.
The Future of WA Water Law

Originally published on 1 August 2016
By Charmian Barton

In June this year, the WA Department of Water released its report ‘Water for Growth: Urban’ on urban water supply and demand. The forecasts contained in the report support the current water reform agenda which is intended to address the pressures of population growth and a drying climate, as well as reduce the level of intervention by government in water allocation.

The legislative framework for water management in WA is spread across six different statutes, which were developed at various times to deal with specific water issues. For this reason, the system is described as fragmented and in need of modernisation. In order to better serve the needs of WA’s water users in the future, drafting of the Water Resources Management Bill began in March 2015. A draft Bill is anticipated later in 2016.

This update is the first in a series on water law that HWL Ebsworth Lawyers will publish to track the progress of the reforms and inform current licence holders about how the proposals will affect their water entitlements.

Background

Following a decade of stakeholder consultation on water resource management, the Water Services Act 2012 (WA) (Water Services Act) became operational in November 2013. The Water Services Act was the first step in the reform agenda and introduced changes affecting the water services sector, including minimum service standards in relation to billing, payment, complaints and service provision.

In October 2013, the WA Department of Water released the position paper 'Securing WA’s Water Future' (Position Paper). Following its publication, widespread public, industry and stakeholder consultation demonstrated strong support for reform and the drafting of new legislation has begun. The Department’s most recent report published in June, 'Water for Growth: Urban' emphasizes the need for legislative reform to address how water is shared and managed in the context of climate change. The Government’s priority is to streamline and consolidate the water allocation and licensing framework across WA in a way that is responsive to the drying climate.

The Outline of key proposals

In the Position Paper, the Government proposes changes to the existing licensing framework, and the introduction of statutory water allocation plans. One of the primary objectives of the reform is to reduce the level of intervention by government in water allocation by enabling the use of market-based mechanisms where appropriate.

Licensing

Currently, a licence is generally required to take groundwater and surface water from a 'proclaimed area' for commercial or industrial use. Allocation limits are not defined by law and a licence is usually granted for 10 years.

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2 Partner, HWL Ebsworth – Perth. Contact Charmian.
The new legislation will introduce criteria to the licence application process to ensure the level of assessment is commensurate with risk. Different criteria will apply to licence renewals, amendments and applications relating to bores. This will see the existing regime simplified in many instances.

To provide greater security of access to water over a water-user’s working life, it is proposed that licences could have 40-year terms. Licence trading would also be simplified, with provision made for ‘low risk’ trades to occur without the full assessment that is currently required.

**Statutory water entitlements**

The Position Paper outlines plans to introduce statutory water access entitlements. An entitlement will be considered a right to take certain units of water, which can be freely traded, mortgaged and bequeathed. Statutory water allocation plans will provide the rules for taking water from the ‘consumptive pool’, that is the aggregate amount of water that can be made available for use from a particular water resource.

A statutory allocation plan is likely to be prepared when:

1. Water resources are approaching or have reached full allocation;
2. The water resource is extensive, both in area and in the volume of water available for consumption;
3. The science of the resource is sufficiently understood;
4. A relatively large number of users are competing for access to the resource; and
5. The benefits of establishing a consumptive pool and the supporting systems (including statutory water allocation plans) clearly outweigh the costs.

The development of allocation plans will be overseen by an independent advisory body and local water resource management committee. Voluntary local advisory groups may also play a role in informing and advising the Department of Water on local water management and allocation issues.

The current fixed annual volume regime will be replaced with a new mechanism for matching water use with water availability on a seasonal basis. These variations will not be compensable because they are seasonal and temporary. The Minister will determine the allocation limit for a water resource following public consultation. The volume of water accessible will be dependent on climate and other factors.

The Position paper indicates that the Gnangara groundwater area is likely to be one of the first areas to have a plan developed.

**Implications**

The licensing regime established under the Rights in Water and Irrigation Act 1914 (WA) will continue to apply until statutory allocation plans are introduced. Once the transition process begins, existing licences may be converted to water access entitlements in areas where allocation plans are introduced.

Building on the changes introduced by the Water Services Act, the proposed reforms will have widespread effects for water users. The Government envisages a better framework for management of the valuable resource. The introduction of trading opportunities for water entitlements will provide greater availability and more options for managing water allocation.

The success of the reforms may depend on the Government’s ability to use appropriate policy and regulation to balance the needs of water users with the protection of environmental water. A comprehensive public notification process will ensure licence holders understand the new system and obtain the correct entitlements.
‘Dam’ it - a review of appeal rights under the Water Management Act 1999

Anthony Spence and Sarah Wilson6

The right to appeal against resource management decisions has always been controversial, particularly where they enable third parties to challenge approvals. The nature of appeal rights under Tasmania’s Water Management Act 1999 has been shaped by the politicised nature of this process. However, recent amendments to the Water Management Act 1999 warrant a reassessment of whether available appeal rights remain fit for purpose.

Introduction

The Tasmanian Resource Management and Planning System (RMPS) comprises a suite of legislation establishing an integrated development assessment framework, with common sustainability objectives and rights of appeal to the Resource Management and Planning Appeal Tribunal (Tribunal). In most of the RMPS legislation, key planning and environmental decisions are subject to merits review.7

The Water Management Act 1999 provides a number of opportunities for merits review of decisions relating to water management. However, the Act contains an anomaly in relation to dam permits. Appeals against the granting or refusal of a dam works permit are not full merits based appeals: grounds of appeal cannot challenge scientific or economic evidence presented in support of the dam proposal.8 This restriction was introduced in 2007 and is in contrast to the broad de novo review rights under the majority of other RMPS legislation. Consideration of how the legislation developed provides some insight into the politicised nature of dam permit assessment in Tasmania.

On 1 January 2016 the Water Management (Dam Works) Amendment Act 2015 commenced, introducing a risk-based dam works approval process and abolishing the Assessment Committee for Dam Construction (ACDC). Despite these amendments, no changes have been made to the restricted nature of appeals against dam permits.

Given the reduction in the number of permits that can be appealed and changes to the assessment process, it is time to consider whether the dam permit appeal rights should be expanded to bring them into conformity with other RMPS legislation.

Recent amendments

There have been a series of amendments to Part 8 of the Water Management Act 1999, notably in 2007, which have aimed to make the dam works approval process “simpler and more effective”.9 Whilst the current dam works approval process has been streamlined over time, it was thought that

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7 Section 16(1)(e) Resource Management and Planning Appeal Tribunal Act 1993. For example, merits review is available for planning appeals (s.62(3), Land Use Planning and Approvals Act 1993), appeals against the issuing of Environment Protection Notices or the issuing of a contaminated sites notice (ss.44 and 74O, Environmental Management and Pollution Control Act 1994).
8 Section 278(3) Water Management Act 1999, application of RMPAT Act is restricted by s276(4).
the process was “still too complex and prevented further dam development”. Consequently, the Water Management (Dam Works) Amendment Act 2015 was passed late last year.

The key features of the amendments include:

- Abolition of the Assessment Committee for Dam Construction;
- The creation of two categories of dam permits, Division 3 permits (high risk) and Division 4 permits (self-assessable); and
- The introduction of “Dam Operating Notices” to allow operational restrictions to apply after construction of the dam is completed.

As a result of these recent amendments, Division 4 permits, applying to lower risk dams, are deemed to be granted as long as the dam is constructed and operated in accordance with the Division 4 Permit Dam Works Code 2015. Division 4 permit applicants must notify the Minister, but no formal assessment is required and no rights of appeal exist in respect of the deemed grant of a Division 4 permit.

Division 3 permits are required for those dams considered to pose a higher risk and, therefore, requiring impact assessment. Following the abolition of the ACDC, the Minister now assesses and makes a decision in relation to Division 3 dam permits. Notice of an application for a Division 3 permit must be published in a local newspaper and provided to any adjoining landholders that the Minister considers may be affected by the dam, and any other person the Minister thinks it is in the public interest to notify. Any person may make a representation in respect of proposed dam works within 14 days.

Despite reducing the range of dam permits that may be appealed and removing the ACDC from the assessment process, the amendments did not alter the narrow scope for grounds of appeal.

Assessment of dam permits

In considering how the restricted appeal rights for dam permits have developed, the former ACDC provides a helpful starting point. An application for a permit for dam works, prior to the recent amendments, was assessed by the ACDC. Asoutlined above, the ACDC has now been abolished.

In making its decision, the ACDC was to have regard to the objectives of the Water Management Act 1999 (including the RMPS objectives), the provisions of the relevant water management plan, matters raised in representations and the nature of the material to be stored in the dam. It consisted of six members appointed by the Minister including representatives from the Tasmanian Farmers and Graziers Association, the Tasmanian Chamber of Commerce and Industry and the Local

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10 Ibid
11 Ibid
12 A development permit under the LUPAA is not required for dam works for which a dam permit has been obtained under the Water Management Act 1999. This exemption applies to both Division 3 and 4 permits.
13 Prior to the amendments, the Water Management Act 1999 provided for a number of exemptions. This section has now been repealed. However, guidelines provided on the department’s website seem to indicate that those exemptions still apply. See Department of Primary Industries, Parks, Water and Environment, Will I need a permit to construct, modify, repair or remove a dam? (2016) http://dpipwe.tas.gov.au/Documents/Guideline_Will%20I%20need%20a%20permit%20to%20construct%2c%20modify%2c%20repair%2c%20or%20remove%20a%20dam.pdf (accessed on 14 August 2016).
14 Division 4 permits (ss159-162 Water Management Act 1999) are not an appealable decision pursuant to s275 Water Management Act 1999.
15 Section 145 Water Management Act 1999
16 Sections 145(2)(d)(i) and 146 Water Management Act 1999
The aim of the Committee was to bring together in one body a range of expertise in the management of water resources, the use and economic development of water resources, engineering and safety matters relating to dams, integrated natural resource management, and best practice environmental management. The limited appeal rights have been rationalised on the basis of the unique nature and expert composition of the ACDC. The second reading speech accompanying the 2007 amendments stated:

...the substantial time and cost burden involved in the current appeals mechanism whereby RMPAT reviews the decisions of the assessment committee from scratch can no longer be justified.

Arguably, the ACDC did provide for consideration of a diverse range of concerns and views in assessing the application, both in relation to expertise (scientific and safety) and community concern. However, while the expert composition of the ACDC provided some justification for the restriction of appeal rights, that justification no longer exists.

The reversion of the assessment responsibility to the Minister through the recent amendments necessitates consideration of the current narrow appeal rights and whether there is scope for broadening those rights to a full merits review.

**Appeal rights under the Water Management Act 1999**

The Water Management Act 1999 creates a dual system for challenging decisions: firstly, internal review by the Minister, and subsequent appeal to the Tribunal. Generally speaking, the Water Management Act 1999 outlines the decisions that are appealable (reviewable decisions), who can appeal which decisions (interested person) and on what basis such decisions can be appealed.

An "interested person" for the purposes of an internal review or an appeal before the Tribunal is defined by reference to various decision-making powers. This definition includes:

- the applicant for, or holder of a water licence or water allocation;
- a person with a financial interest in a water allocation;
- persons to whom notices and directions are given; and
- a person who is entitled to make a representation in relation to a water licence and dam permit.

In addition, the Tribunal has discretion to grant leave to any person to join the appeal, as long as their joinder would not result in an abuse of process, prevent the matter from being properly determined or not be in the public interest.

For water management appeals, the Tribunal, which normally consists of three members, must include at least one member with “wide practical knowledge of, and experience in, the use or management of water resources.” This requirement is unique in the RMPS suite of legislation.

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19 Ibid
20 Although noting that there was no dedicated environmental representative.
21 Tasmania, Parliamentary Debates, House of Assembly, Wednesday 18 April 2007, 3 (Doug Parkinson)
22 Gardiner, A ‘Appeals against administrative decisions affecting water resources’ (2000) 17 Environmental and Planning Law Journal 341
23 Part 14 Water Management Act 1999
24 Section 270 Water Management Act 1999; Gardiner, A ‘Appeals against administrative decisions affecting water resources’ (2000) 17 Environmental and Planning Law Journal 341
25 Section 270 (b) and (lg) Water Management Act 1999
26 Section 274(1)(g) and (2) Water Management Act 1999
27 Section 227(1) Water Management Act 1999
Significantly, while decisions in relation to water licences and water allocations are subject to full merits review28, appeals in relation to Division 3 dam permits may only be made on grounds relating to procedural fairness and natural justice.29 Such appeals cannot be made on the grounds that any technical information taken into account in making the decision, or that any technical finding made in reaching the decision, was incorrect as a matter of fact.30 “Technical” includes economic, engineering or scientific matters.31

Interestingly, the bases upon which proceedings can be commenced under the Judicial Review Act 2000 are arguably broader than the current grounds for review available under the Water Management Act 1999 for Division 3 dam permits. The grounds upon which a judicial review can be sought largely relate to consideration of the rules of natural justice and lack of procedural fairness but with the addition of whether the relevant statutory provisions were correctly applied.32 Arguably, an appeal against a Division 3 permit could not challenge whether statutory provisions regarding, for example, dam safety, had been met, as any challenge to the technical safety reports would be prevented.

Why has the legislation developed this way? Why is the Water Management Act 1999 different to other RMPS legislation in its restrictive approach to merits review?

**Appeals against dam projects**

A number of prominent appeals against dam permits provide insight into how the appeal rights under the Water Management Act 1999 developed in such a way.

On 18 September 2003, the Minister for Environment and Heritage gave approval for the construction and operation of the Meander Dam, a significant dam project in the Meander Valley. The approval was subject to conditions relating to the management of impacts on the Spotted-tailed Quoll and the threatened south Esk heath (*Epacris exserta*). The Tasmanian Conservation Trust (TCT), assisted by the Humane Society International, appealed against the decision on grounds alleging that the dam would have serious environmental impacts on threatened species and the Meander river system.33

The Tribunal found in favour of the TCT and overturned the ACDC’s approval of the dam permit. The Tribunal held:34

> Upon the present state of the evidence the Tribunal is satisfied that the certain and further likely environmental harm arising from construction of and the existence of the dam, clearly outweigh the less certain benefits. The Tribunal is satisfied that the proper decision is to refuse a permit for the dam.

Following this decision, the Meander Dam Project Act 2003 to allow the project to proceed was passed with bipartisan parliamentary support. The Act reinstated the dam permit which had been overturned by the Tribunal decision.

The politicisation of this decision created a push for a narrowing of the scope of appeal rights against dam permits under the Water Management Act 1999. This is most clearly evidenced by the second

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28 Section 275(b) & (c) Water Management Act 1999, water licence is an appealable decision; section 275(f) a reduction of a water allocation is an appealable decision to RMPAT.
29 Section 276(4) Water Management Act 1999
30 Section 276(4) Water Management Act 1999
31 Section 276(5) Water Management Act 1999
32 Section 17(e) Judicial Review Act 2000
34 Ibid at [49]
reading speech of the *Meander Dam Project Act 2003* which, quite unusually, criticised the handling of the appeal before the Tribunal:35

*Much has been said about the handling by the Government or its agencies of those hearings and the lack of cross-examination of various witnesses. Probably in hindsight one could suggest that that was a mistake or incompetence or there may well have been another agenda.*

The subsequent case of *Tasmanian Conservation Trust v Assessment Committee for Dam Construction & Glamorgan Spring Bay Council*36 compounded concerns about third party appeals against dam permits and the costs applicants can incur in defending them. This case involved an unsuccessful appeal against the grant of dam permits associated with the construction of boutique visitor accommodation at Freycinet on Tasmania’s east coast.

Arguably, it was these decisions that led to the introduction of a series of legislative amendments which would impact the scope of appeal rights under the *Water Management Act 1999.*

**History of legislative amendments**

The *Dam Works Legislation (Miscellaneous Amendments) Bill 2007* sought to amend the nature of the appeal process from “one of checking technical assessment to one of checking due process.”37 This amendment introduced the restriction on the grounds upon which an appeal against a dam permit could be brought.

Although introduced some years after the Meander Dam decisions, it is likely that those decisions provided impetus for the amendments. Little other evidence was presented that appeals were common or causing unnecessary delays or burden. In fact, prior to these 2007 amendments, the Tribunal had heard only 14 appeals against the granting of a dam permit, and upheld only one – the Meander Dam appeal.38

The commentary in *Barr v. Assessment Committee for Dam Construction and DF and DF Fish*39, one of the few appeals against a dam permit heard by the Tribunal since the 2007 amendments, highlights the change in approach:

> It will be seen that the basis upon which an appeal may be brought, heard and determined, in respect of a decision under Part 8, such as the impugned permit here, is significantly limited. That was not always the case: prior to the insertion of subsections (3) and (4) by the *Water Management (Amendment) Act 2007* no such limitation existed. Now the scope of the Tribunal’s enquiry on this type of appeal is expressly limited to considering whether the Committee’s decision was “procedurally incorrect or unfair having regard to the requirements of [the] Act and natural justice …[and]… not on the grounds that any technical information taking into account in making the decision … was incorrect as a matter of fact”. *No broader enquiry and certainly no consideration of the merits of the decision is authorised by statute.* [emphasis added]

It remains unclear whether there was any rationale for the legislative provisions beyond the political nature of the Meander Dam project.40 There was undoubtedly concern from the farming and

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35 Tasmania, Parliamentary Debates, House of Assembly, Wednesday 16 April 2003, 15 (Geoffrey Squibb)
36 [2004] TASRMPAT 251
37 Tasmania, Parliamentary Debates, House of Assembly, Wednesday 18 April 2007, 3 (Doug Parkinson); also worth noting that this Bill removed the need for a threatened species permit or FPP where a dam permit had been issued.
38 Tasmania, Parliamentary Debates, House of Assembly, Wednesday 18 April 2007, 3 (Doug Parkinson)
39 [2009] TASRMPAT 93
40 Tasmania, Parliamentary Debates, House of Assembly, Wednesday 18 April 2007, 13 (Sue Smith):

> “...it seems to me that it does clarify in the most appropriate way some of the issues surrounding the Meander Dam and that went through the tribunal process and then we had to have special legislation in this place, when it is much more appropriate to see it coming through in a raft of amendments through the appropriate legislation process. I think it is two years on from that particular concept that we now see that problem solved, that I think was to some degree created by the Meander Dam but did forewarn us, courtesy of that proposal and of course the comments of Mr Woodfield, that down the track we could continue to see more and more problems.”
agriculture industry regarding the costs of appeal. However, given the lack of evidence that appeals were regularly commenced against dam permits, this concern appears largely directed to the risk of costs, rather than costs actually borne.

The experience in other Australian jurisdictions is that water management decisions are rarely the subject of public interest litigation. This strengthens the view that there is little evidence that appeals delay or otherwise hinder dam development in most cases. Limited evidence of risk, the recent streamlining of the assessment process, and the abolition of the expert decision making body, the ACDC, all call into question the need for current restrictions on appeal rights.

Is it time to broaden the scope of appeal rights for the limited number of dams permit decisions that remain appealable?

**Conclusion**

Tasmania has broad standing rights of appeal under the *Water Management Act 1999* which is particularly evidenced by the power to allow other persons who may be affected by an appeal decision to be joined as parties. However, the narrow basis upon which an appeal against dam permit can be based has significantly curtailed the opportunity of review.

In light of the recent amendments to the *Water Management Act 1999*, there are now two ways by which appeal rights in relation to dam permits have been restricted. Firstly, the narrow scope upon which an appeal can be commenced and with the introduction of a self assessable dam permits, the number of dams which can be appealed has been reduced.

Consideration of why these appeal rights have been restricted have their foundation in past public interest litigation. With the abolition of the ACDC and the narrowing of the type of permits that can be appealed, it is time to review the scope of the appeal rights under the *Water Management Act 1999* to align with other RMPS legislation.

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41 Tasmania, Parliamentary Debates, House of Assembly, Wednesday 18 April 2007, 13 (Gregory Raymond Hall)
42 Lindsay, B ‘Public Participation, litigation and adjudicative procedure in water resources management’ (2016) 33 *Environmental and Planning Law Journal* 325 at [333].
44 A development permit under the LUPAA is not required for dam works for which a dam permit has been obtained under the *Water Management Act 1999*. This exemption applies to both Division 3 and 4 permits.
Golden rules for managing an environmental crisis

Originally published on 11 July 2016
By Peter Briggs

Environmental incidents are unexpected and unpredictable. A small event can quickly morph into a crisis. With it come clean-ups and remediation, litigation and criminal proceedings, depression of share price and economic sanctions, reputational damage and loss of customer and shareholder trust.

Though a crisis might originate in a far-flung corner of the world, its ramifications may be felt globally. Multiple audiences, including affected communities, industry regulators, customers, employees, shareholders and the media want answers quickly. Different priorities will vie for attention.

Get the fundamentals right

In the heat of crisis, level-headed thinking will ensure the organisation acts legally, transparently and competently. The first 24 hours are critical. Herbert Smith Freehills' golden rules can help:

(1) Be prepared

The mercurial nature of crises means you cannot plan for every eventuality. But do not risk compiling your response as a situation unfolds.

Preparatory work will help moderate a crisis. A response plan should include a broad framework for who does what and when. It will prioritise and sequence activities. It will identify skills, facilities and technical resources. Checklists will keep the response on track yet sufficiently fluid to flex with evolving events. Priority actions for the first 24 hours of the crisis, as well as first-week obligations, can mitigate damage and assuage negative publicity.

Training and simulated responses to catastrophes might prepare staff for the real thing. A well-rehearsed response team could even prevent an incident from becoming a full-blown environmental calamity.

(2) Do no harm

The damage has been done, but steps can be taken to limit further harm.

In your desire to resolve the crisis, hasty actions might exacerbate risks. A clean-up operation, for instance, must safeguard the safety of people first and the environment second. Get it wrong and the crisis will suddenly become much graver.

Take care not to further harm your corporate reputation. Communications, particularly over social media, need to be prompt and transparent, but do not mislead or give unsubstantiated information in your rush to respond.

(3) Cooperate with regulators

An organisation that engages proactively and positively with regulators in advance of an environmental catastrophe might anticipate more mature engagement in the thick of a crisis.

45 Partner, Herbert Smith Freehills – Sydney
Knowing your regulators is an imperative. There may be many of them, each going over different or the same areas of corporate responsibility. Each must be managed appropriately so that you respond compliantly to requests for information.

In understanding your legal rights and responsibilities to inform, know too the limits of your regulators’ powers.

(4) Assemble a team and assign responsibilities

A crisis demands multiple sources of expertise, both from within and outside the organisation, to mitigate damage to health, the environment and the business. Resources must be marshalled, teams assembled and responsibilities allocated within the first 24 hours.

Communication responsibilities must be clearly assigned to manage the flow of information. Spokespeople should observe the fundamental rule of ‘do no harm’ and be mindful of future litigation. Do not assume that the chief executive should be the public face of the crisis if there is a better communicator with more detailed understanding. The wrong signal or the wrong words from the wrong spokesperson can make a bad situation even worse.

Bringing down the shutters and making ‘no comment’ can be just as damaging. Clear communication with an affected community is critical, but balance transparency with the need to maintain legal privilege and protect confidentiality.

Reputational damage can be disproportionate to the level of environmental risk incurred. The share price may take an immediate and sharp hit. Expert PR and legal support might be needed to manage communications with the financial markets and to address potential shareholder class actions for diminution in the value of the business.

(5) Document protocol

Aside from corporate sanctions, today’s directors can be held personally liable for actions that trigger environmental crises.

A document management system will evidence due diligence in relation to corporate decision-making and provide defence from prosecution.

Once you come through the other side of the crisis and corporate life begins to settle down, debrief and consider how you might have done things differently. Make tweaks or wholesale changes to systems and protocols that might prevent the next crisis from materialising.
New Draft Wind Energy Planning Framework

Originally published 8 August 2016

By Paul Lalich 46, Marcia Doheny 47 and Claire Macdonald

The New South Wales Government has released its new Wind Energy Planning Framework, with the aim of establishing a more efficient and consistent assessment and approval regime for wind energy projects and also addressing the concerns raised by stakeholders to the 2011 draft Guidelines. The 'buffer zone' focus under the 2011 draft Guidelines has been set aside in favour of a merits-based analysis, which focuses on key issues of noise and visual impact. This article briefly considers the new Framework and its implications.

Key Points

Investment in the wind energy sector in NSW has to date been limited relative to other states, due largely to the absence of legislative support and a number of wind farm proposals being the subject of well publicised adverse decisions by the NSW Land & Environment Court.

The NSW Government has released the new Framework in order to address the issue. The Framework contains initiatives intended to shift the focus from mandatory buffer zones to impact assessment and mitigation, and achieve greater efficiency of process.

The Framework removes the 2-kilometre buffer zone criteria, preferring a merit-based approach which focuses on the key issues of noise and visual impact.

While the Framework will not apply retrospectively, the VIA (Visual Impact Assessment) Bulletin and Noise Bulletin will apply to applications which have been submitted but not yet determined as at the date of the Bulletins' publication. The Bulletins will also apply to certain modification applications submitted subsequent to publication.

Community engagement is to occur earlier in the process via an applicant sponsored Community Consultative Committee process.

A new methodology for visual impact and noise assessment is mandated, with revised noise assessment methodologies proposed based on the South Australian noise guidelines. New preliminary screening tools and visual performance objectives for visual impact assessment are also proposed.

Background: Wind Farm Assessment in New South Wales

In August 2016, NSW has followed Queensland 48 in announcing changes to the State wind energy planning laws.

The NSW Department of Planning and Infrastructure released the Draft NSW Planning Guidelines for Wind Farms (the Guidelines) in late 2011. 49 The NSW Government has replaced these with the release of a new Wind Energy Planning Framework policy (the Framework). The key draft documents being exhibited are:

- Draft Wind Energy: Assessment Policy (the Assessment Policy)

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46 Partner, contact Paul
47 Planning Special Counsel, contact Marcia
48 See Client Update: New wind farm planning code and guideline for Queensland
49 See Focus: Every wind farm needs good neighbours: NSW unveils ’toughest’ wind farm guidelines
The Assessment Policy and associated documents replace the draft Guidelines, which will be revoked after the Framework is finalised. Applications submitted after 3 August 2016 will therefore be required to comply with the Framework, particularly the contents of the Noise and VIA Bulletins.

Under the Guidelines, the development process for a wind farm proposal in NSW was based on three categories of capital investment value, which class developments as 'local developments' (less than $5 million), 'regional developments' ($5-30 million), or 'State Significant Developments' ($30 million or more, or $10 million in an environmentally sensitive area). The new Assessment Policy subdivides each of these categories based on the electrical power output of the proposal, being either less than or more than 30MW, with slightly different planning assessment pathways for each.

The new Framework applies to State Significant Development (SSD) wind energy proposals and certain related modification applications. As such, it does not apply to the local or regional development classes established under the Guidelines, which will be dealt with by the Infrastructure SEPP. In reality, however, the majority of wind energy development in NSW is SSD.

Under the 2011 Guidelines, applicants were required either to obtain the written consent of all existing residences within 2 kilometres of a proposed wind farm site, or apply for a Site Compatibility Certificate. Under the 2016 Framework, negotiated agreements between applicants and landowners are the 'preferred mechanism' for managing assessment criteria, intended to allow applicants more flexibility in negotiating private agreements.

The Guidelines established some of the most stringent approval requirements in Australia, including the establishment of a Community Consultation Committee, Decommissioning and Rehabilitation Plans and compliance monitoring and auditing. The new Framework retains these, and permissible noise levels are still the lowest in Australia and among the toughest in the world. Significantly, however, the arbitrary 2-kilometre buffer zone requirement in the Guidelines has been abandoned in favour of a more general consideration of the project and its impacts, and the public exhibition period has been reduced from 60 to 30 days (the statutory minimum).

**Key Provisions of the Draft 2016 Framework**

**Proximity of turbines to existing dwellings**

- Perhaps most significantly, there are no set buffer zones for turbine distances based on turbine height. Rather, each wind energy development is to be assessed on its own circumstances.

- Instead, the key issues under the Framework policies are visual impact and noise impact, which is reflected in the documents dealing with each topic individually.

**Visual impact**

- The VIA Bulletin requires a Visual Baseline Study to be undertaken as part of the Environmental Impact Statement (EIS) establishing 'visual influence zones', and requires the use of 'visual performance objectives'. The Bulletin divides the VIA process into two main phases, being:
  - the Preliminary Environmental Assessment phase; and
  - the Assessment and Determination phase.

- Preliminary screening tools of 'visual magnitude' and 'cumulative impact' for visual impact assessment are intended to drive better design and site selection, as well as early community consultation.
Noise impacts

- The Noise Bulletin proposes the adoption of the assessment methodology in the 2009 South Australian Wind Farms – Environmental Noise Guidelines, with some variations, for the NSW context, including a stricter base noise criteria and guidance on certain noise characteristics such as tonality and low frequency noise.
- The noise requirements do not apply where there is a noise agreement with the landowner (associated property).
- The general approach to noise issues largely remains the same as under the Guidelines. The Noise Bulletin retains the existing noise limits of 35dB or background noise plus 5dB, whichever is greater.
- Noise and health: the NSW Government is informed by the scientific findings of the National Health and Medical Research Council and NSW Health, in that 'there is currently no consistent evidence that wind farms cause adverse health effects in humans'.
- Noise monitoring requirements are maintained as a condition of consent.

Consultation requirements

- The Framework retains the stringent consultation requirements proffered in the Guidelines, requiring the establishment of a Community Consultative Committee to engage in a consultation process addressing:
  - Landscape values;
  - Land access and occupation arrangements, including negotiated agreements;
  - Landowner consent for land on which the development is to be located; and
  - Benefit sharing and negotiated agreements.
- The Framework introduces the concepts of 'associated properties' (land on which a turbine or related facility will be situated, either by agreement or negotiated agreement) and 'non-associated properties' (land required for access during construction and/or maintenance, or that have not reached a financial or in-kind agreement).
- The standard Secretary's Environmental Assessment Requirements outline the minimum consultation requirements, however the Assessment Policy highlights the value in engaging with stakeholders prior to SEARs being requested.

Other considerations

- Refurbishment and decommissioning: the Framework maintains the position in the Guidelines, whereby the wind energy project owner or operator is responsible for decommissioning and rehabilitation, which must be addressed in the EIS.
- The SEARs are on exhibition as part of the Framework, and will allow for the assessment of remaining key issues in wind farms.
## Comparison Between 2011 & 2016 Requirements

<table>
<thead>
<tr>
<th>Under the 2011 Draft Guidelines</th>
<th>Under the 2016 Draft Framework</th>
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<tbody>
<tr>
<td>A 2-kilometre buffer zone between turbine and dwellings – written consent from all existing landowners within 2 kilometres required or a Site Compatibility Certificate necessary</td>
<td>Buffer zone scrapped in favour of a merits-based assessment approach – introduction of concepts of 'associated properties' and 'non-associated properties'</td>
</tr>
<tr>
<td>Noise limit of 35dB or background noise plus 5dB, whichever is greater</td>
<td>Adoption of the 2009 SA Wind Farms Noise Guidelines, with a stricter base noise criteria (same as the Guidelines) and additional guidance on tonality, low frequency noise etc.</td>
</tr>
<tr>
<td>Three project classes based on capital investment value</td>
<td>Six project categories based on the same capital investment value amounts, with the addition of electrical power output considerations</td>
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<tr>
<td>Applies to all wind energy projects</td>
<td>Applies to SSD project proposals; local and regional developments addressed in Infrastructure SEPP and other relevant controls</td>
</tr>
<tr>
<td>Proximity of turbines, community consultation, visual amenity, noise, health, decommissioning, auditing and compliance are all key issues</td>
<td>Key issues are noise and visual impact. Publication of Noise Bulletin and Visual Impact Assessment Bulletin to guide planning assessment</td>
</tr>
<tr>
<td>Applicants must establish a Community Consultation Committee; extensive community consultation requirements</td>
<td>Largely the same – Community Consultative Committee to engage in a consultation process</td>
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<tr>
<td>Exhibition period of 60 days</td>
<td>Exhibition period of 30 days (statutory minimum)</td>
</tr>
<tr>
<td>Refurbishment and decommissioning the responsibility of the wind energy project owner or operator rather than the landowner</td>
<td>Guidelines position maintained</td>
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Offsets policy: now you need it, now you don't

Originally published on 4 August 2016

By Brad Wylynko and Mark Etherington

The dramatic decision by the West Australian Supreme Court in December 2015 that the WA EPA was legally obliged (and failed) to take into account specific offsets policies in assessing the Roe 8 Highway Extension – and that consequently the Environment Minister’s approval of the proposal was invalid – has been overturned. On 15 July 2016 the WA Court of Appeal unanimously and decisively rejected the Supreme Court’s reasoning, and thereby reinstated the Minister’s approval.

This means the Government can award contracts to begin constructing the highway extension before the upcoming March 2017 State election.

A controversial project

Despite being generally identified in plans for decades, the Roe 8 project, an extension of a major freight link (the Roe Highway) of approximately 5 km from the Kwinana Freeway to Stock Road, has been highly controversial because of the project’s impact on a conservation significant wetland and residential neighbourhoods.

The EPA had earlier given advice to the Environment Minister questioning whether any extension could be environmentally acceptable. However, in 2013 the EPA recommended that the Environment Minister approve the project subject to the provision of environmental offsets. The project was approved.

Round one

The conservation group, Save Beeliar Wetlands Inc, successfully challenged the EPA’s assessment with the Chief Justice Wayne Martin finding that the EPA was legally obliged (and failed) to take into account specific offsets policies.

This decision was a fundamental reinterpretation of the Environmental Protection Act 1986, with the potential to undermine a range of previous assessments on technical procedural grounds. It also had potential wider application to statutory assessments by various Government boards and tribunals. Amongst other things, it triggered an independent review of the EPA and its policy framework.

Round two

On 15 July 2016, the Court of Appeal unanimously overturned the decision of the Chief Justice, concluding that there was no legal obligation on the EPA to consider the offsets policies.

The Court, led by soon departing President, Justice McLure, reasoned that it could not be implied from the express provisions of the EP Act that the Policies were “mandatory” relevant considerations, rather they were "permissive" relevant considerations.

The Respondent, Save Beeliar Wetlands, sought to uphold the decision of the Chief Justice alternatively on grounds that the EPA’s assessment process was unreasonable. Specifically that the policies had not been considered at all and the proposal was so environmentally unacceptable that

50 Partner, Clayton Utz – Perth. Contact Brad.
51 Senior Associate, Clayton Utz – Perth. Contact Mark.
no environmental offset could be recommended. These arguments turned on a technical interpretation of the policies and the presumption against approving impacts to critical environmental assets.

The Court rejected each of these arguments. The Court held that not only were the policies not mandatory considerations, there was evidence that the policies were considered in the wider assessment process and that the presumption was not absolute (and permitted the use of environmental offsets). Ultimately, the Court reasoned that the EPA did not fall into error when it assessed the significant residual adverse impacts of the project on critical assets (and recommended approval subject to the provision of environmental offsets).

Round three?

The conservation group has foreshadowed a possible High Court challenge. We wait to see if the High Court will grant leave.

In the meanwhile, despite the Court of Appeal decision, it is likely the EPA’s policy review will continue and a completely new policy framework will be enacted. Even without the new policies being available, the independent review, and a fine-tooth comb approach to existing policies, has had a dramatic effect in slowing down assessments that are currently before the EPA.

Implications

The Court of Appeal’s decision does not negate the need to consider Government policies when applying for environmental approval in WA. Policies remain relevant, and often involve complex questions relating to interpretation and application (including just how relevant they are to the proposal being assessed).

This means that proponents still must carefully and thoroughly prepare their assessment documents. They also need to ensure an adequate lead-time for the assessment process. Our Planning and Environment team can assist with any questions on the EPA’s environmental impact assessment policies and the assessment process.

Editor’s note: On 12 August 2016, Save the Beeliar Wetlands filed an application for special leave to the High Court. The application is yet to be determined.
Member profile: Jessica Carroll

Jessica Carroll is a lawyer practising in commercial litigation at Thynne + Macartney Lawyers in Brisbane, and the most recent addition to the NELA Executive.

Jessica has a keen interest in environmental and resources litigation, having previously acted for mining companies in a variety of land court proceedings and, most recently, represented the Department of Environment and Heritage Protection in the New Acland objections hearing.

What do you enjoy about your job?

There are numerous reasons I love being a commercial litigator. The stand out would have to be working with clients to achieve their desired outcomes, whether that involves early dispute resolution or running a matter through the court system. Being competent at court procedure is one thing, understanding your clients’ needs and goals and being able to align those goals with an outcome is another.

The variety of matters that come my way as a commercial litigator also keeps the work interesting. I am constantly learning, which is both challenging and rewarding.

What do you think will be the key environmental law issues over the coming decade?

I am confident concern and awareness of environmental issues will continue to grow over the coming decade/s. Climate change is certainly at the forefront of our minds – in Queensland, particularly, the impact on our marine environment through coral bleaching is a stark reminder of the damage that can be caused. I think that there will be continued pressure for policy, innovation and adoption of renewable resources.

What do you do to unwind?

As any commercial litigator would appreciate, knowing how to unwind is essential. My relaxation methods can include a solid cardio session at the gym after a long day at work, or a glass of rosé and a good book at home.

What do you enjoy about being on the NELA executive committee?

Having just recently been appointed as the Queensland representative, I am excited about what being a NELA Board member will entail. I am looking forward to being involved with many wonderful events and programmes, and getting to meet people working across the country on environmental law matters. I feel that it is important to educate and promote discussion and debate on environmental issues, both national and State, which NELA does a fantastic job with. I am also excited for the prospect of increasing NELA’s presence in Queensland.

Want to find out more about NELA membership? Go to www.nela.org.au