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**New Water Management
Legislation in NSW:
A Review**

by

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Briefing Paper No 8/2000

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EXECUTIVE SUMMARY

The Council of Australian Governments and the NSW Government have introduced wide ranging reforms to the administration of water in the State and across the nation. The catalyst for this action has been the widespread degradation of both rivers and their catchments. The Council of Australian Governments outlined a Communique of change in 1994, and this is presented on pages 1 to 3.

In 1995, the NSW Labor Government introduced water reforms almost immediately. These were followed up with further reforms in 1997. In December 1999 the Government released a White Paper foreshadowing legislative reform. Subsequently, the Water Management Bill 2000 was released on 22 June 2000.

This Briefing Paper summarises the White Paper and submissions to the Paper from two major peak non-government organisation groups – the NSW Farmers Association and the NSW Nature Conservation Council. At the conclusion of each section of the White Paper, the relevant section of the Water Management Bill is then discussed.

1.0 INTRODUCTION

Rainfall across New South Wales is highly variable. Coastal areas of the State receive about 75 percent of the State average, but around 80 percent of water extraction and use occurs west of the Great Dividing Range. With variable rainfall, streamflows are also extremely variable, especially in inland areas where a far greater proportion of the total flow occurs in short flood events. Stream flows can range from no flow to flood in the same year, and vary from year to year. To deal with this variable flow, the amount and timing of river flows have been modified to suit the needs of irrigation, town water supplies, industrial purposes and for the watering of stock. Urban communities are the main use of water in coastal areas. Irrigation is the main water use in inland NSW.¹

Regulating river systems has reduced and changed the natural flows that are essential for maintaining aquatic ecosystems. Regulation has a profound effect on ecosystems that have adapted over time to the natural regime of a succession of droughts and floods. There are several thousand dams and weirs on rivers throughout the State.²

In response to deteriorating riverine water quality and flows, the Council of Australian Governments and the NSW Government have introduced water reforms. This paper briefly reviews the history of some of these reforms, and discusses at length the NSW Government's water reform package introduced as a White Paper in December 1999, and the Water Management Bill introduced on 22 June 2000.

2.0 COUNCIL OF AUSTRALIAN GOVERNMENTS WATER REFORMS 1994

Water reforms over the 1990s and the new millennium have been driven by the Council of Australian Governments (COAG), which in February 1994 endorsed a strategic framework for the efficient and sustainable reform of the Australian water industry.³ Attachment A to the COAG February 1994 Communique contained 11 agreed principles, each with many sub-points. Highlights of the Communique applicable for this Briefing Paper are summarised below.

In relation to water resource policy, the Council agreed:

- 1/ that action needs to be taken to arrest widespread natural resource degradation in all jurisdictions occasioned, in part, by water use and that a package of measures is required to address the economic, environmental and social implications of future water reform.

¹ Environment Protection Authority, *New South Wales State of the Environment Report 1997*, 1997 at 216.

² Environment Protection Authority, *New South Wales State of the Environment Report 1997*, 1997 at 217.

³ Council of Australian Governments. *Communique*, Hobart 25 February 1994.

- 4/ in relation to water allocations or entitlements,
- (a) the State Government Members of the Council would implement comprehensive systems of water allocations or entitlements backed by separation of water property rights from land title and clear specification of entitlements in terms of ownership, volume, reliability, transferability and if appropriate, quality.
 - (b) where they have not already done so, States would give priority to formally determining allocations or entitlements to water, including allocations for the environment as a legitimate user of water.
 - ...
 - (d) that the environmental requirements, wherever possible, will be determined on the best scientific information available and have regard to the inter-temporal and inter-spacial water needs required to maintain the health and viability of rivers systems and groundwater basins. In cases where river systems have been over-allocated, or are deemed to be stressed, arrangements will be instituted and substantial progress made by 1998 to provide a better balance in water resource use including appropriate allocations to the environment in order to enhance/restore the health of river systems.
 - (e) where significant future irrigation activity or dam construction is contemplated, appropriate assessments would be undertaken to allow natural resource managers to satisfy themselves that the environmental requirements of the river systems would be adequately met before any harvesting of the water resource occurs.
- 5/ in relation to trading in water allocations or entitlements:-
- (a) that water be used to maximise its contribution to national income and welfare, within the social, physical and ecological constraints of catchments;
 - (b) that trading arrangements in water allocations be instituted once the entitlement arrangements have been settled. This should occur no later than the end of 1998;
 - ...
 - (d) that individual jurisdictions would develop, where they do not already exist, the necessary institutional arrangements, from a natural resource management perspective, to facilitate trade in water, with the proviso that in the Murray Darling Basin the Murray Darling Basin Commission be satisfied as to the sustainability of proposed trading transactions.

6/ in relation to institutional reform:-

...

- (c) as far as possible, the roles of water resource management, standard setting and regulatory enforcement and service provision be separated institutionally, and for this to occur no later than 1998;

3.0 NSW GOVERNMENT WATER REFORMS

The endorsed COAG reforms as listed above provide a framework for change. Since then, the NSW Government has been enacting this change through non-statutory government policy and legislative amendments. In particular, the Government introduced major water policy reforms in 1995 and 1997, and the most recent proposals were released in late 1999.

According to the Government, the 1995 reforms:⁴

- Started to develop interim river flow and water quality objectives for the State's waters;
- Established the Healthy Rivers Commission;
- Provided water to the environment in the Macquarie and Gwydir River systems;
- Introduced water pricing reform, such as full cost recovery, removal of cross subsidies and two part tariffing;
- Established a Water Advisory Council;
- Separated the roles of operator, regulator and manager.

The 1997 reforms:⁵

- Introduced better sharing of available water by: introducing environmental flow rules; establishing environmental objectives for water management and identifying stressed unregulated rivers and groundwater systems;
- Enhanced investment strategies for the rural sector through: improved water access rights; government support for a range of water related activities; ensuring balance in cost sharing arrangements;
- Changed the way water management is delivered by setting up water management committees and making government administration of water more efficient.

⁴ NSW Department of Land and Water Conservation, *A proposal for updated and consolidated water management legislation for New South Wales, A White Paper*, December 1999, at 9.

⁵ NSW Department of Land and Water Conservation, *A proposal for updated and consolidated water management legislation for New South Wales, A White Paper*, December 1999, at 9.

1998 Water Sharing Policy

In 1998 the Government released a policy discussion paper *Water Sharing in New South Wales – Access and Use*, which outlined options for resolving 21 outstanding water policy issues for a new water sharing framework. After community input and meetings, the Government finalised its policy positions, clearing the way for a new legislative framework.

3.1 The 1999 Water Reform Proposals: A Proposal for Updated and Consolidated Water Management in NSW, A White Paper, and the Water Management Bill 2000

The NSW Government released its latest proposals for reform of water management in December 1999. The proposals, contained in a White Paper⁶, were released for public comment. The White Paper provided explanations of the key elements of the Government's proposed legislative framework for water management.

The White Paper is divided into 14 sections, each of which is discussed below. At the conclusion of each section or major subsection, a commentary is provided with viewpoints from, amongst others, two major peak non-government organisations. These groups are the NSW Farmers Association and/or the NSW Irrigators Council, and the NSW Nature Conservation Council. With these two organisations having different agendas, their submissions are longer in respect to some areas than they are in others, and this may be reflected in the commentary sections.

Following a public consultation period after the release of the White Paper, the Minister for Land and Water Conservation the Hon Richard Amery MP introduced into Parliament on 22 June 2000 the *Water Management Bill 2000*. At the conclusion of each section of discussion of the White Paper, the *Water Management Bill* is also discussed.

This Briefing Paper therefore provides a historical overview of what the government proposed for water reform, as contained in the White Paper, community feedback on these proposals, and the final outcome in terms of the *Water Management Bill 2000*.

The White Paper: Section 1 – Introduction

This section of the White Paper noted that the proposed reforms bring together major NSW Government water policy reforms that have been developed since 1995.

Historically, the main focus of water management in the State has been the development of dams and other storages, and to promote water use for the development of agriculture and regional development. The *Water Act 1912* was passed to provide an administrative process for access to water. It vested ownership of water in the Crown.

⁶ NSW Department of Land and Water Conservation, *A proposal for updated and consolidated water management legislation for New South Wales, A White Paper*, December 1999.

Today most water is shared through a licensing system, which was established with the 1912 Water Act. There are now more than 130,000 surface water and groundwater extraction licences. The largest volumes of water are extracted for irrigation.

Water scarcity is driving the need for sustainable water resource management. A water trading mechanism is now the main mechanism for new enterprises to emerge and for water to move from traditional uses to newer, higher value uses such as viticulture.

Commentary

Farrier notes that the *Water Act 1912* is the oldest natural resource management legislation still in operation today. He also notes that traditionally, water resource planning in NSW has been reactive. There are no provisions for making strategic plans, or to set the parameters within which decisions can be made about specific project proposals. Furthermore, in the absence of this planning framework, the current Water Act provides no opportunity for members of the community to participate in advance of debates about specific project proposals.⁷

In response to the White Paper, the NSW Farmers Association acknowledged that an overhaul of current water legislation is required, and that the current legislation is ineffective at managing the water resource equitably and sustainably. The Association commended the Government for taking up the challenge of consolidating the numerous Acts into one piece of legislation.

The Association noted that irrigated agriculture has made significant contributions to regional development in NSW. The Association stated that great care is required in preparing the legislative framework for water management to ensure that irrigated agriculture can contribute significantly to the economy in a way that is sustainable.

The Nature Conservation Council noted that the proposed Act provided an important opportunity to adopt a whole of government approach to water reform, and that it was crucial that this opportunity be used to integrate strong environmental protection into the Act for the benefit of future generations.

The White Paper: Section 2 – Water Management Legislation

The White Paper acknowledged that the *Water Act 1912* lacks contemporary water management objectives and mechanisms for achieving them. The Paper lists the following gaps and problems with current legislation:

- There is no explicit head of power for environmental needs. The *Water Act* does not provide for water to meet identified ecosystem needs;

⁷ Farrier, D. "Integrated management of land and water? Planning and project approvals under the White Paper on NSW water management legislation". In *1st Australian Natural Resources Law and Policy Conference Proceedings*, 27-28 March 2000, Canberra Australia at 152. Professor David Farrier is from the Centre for Natural Resources Law and Policy, University of Wollongong.

- No explicit mechanisms for broad community involvement;
- No community based planning provisions;
- Licences tie water entitlements to land. Only an owner/occupier of an area of land is able to hold a water licence. It is a requirement of the COAG reforms that water entitlements be separated from the requirement to own land;
- Water access entitlements need definition. Many water users do not adequately understand the level of privileges and limits associated with a water licence. The way in which the Water Act defines a water licence is also restrictive. There is no ability to break the licence entitlements into a number of individual components of supply, meaning that water users cannot effectively mix and match a portfolio of entitlements to best suit their requirements. As well, the longer-term elements of a defined share of a resource are currently confused with short-term debate on specific extraction conditions. For example, under the volumetric allocation schemes for regulated rivers, the licence entitlements are actually used as a basis for sharing the available water each year. However, as the stated volume cannot be extracted in some years, it would be more appropriate if the licensed entitlement could be expressed as an entitlement to a share of the water available to users each year;
- Licences tie water entitlements to works and specified land. The *Water Act* authorises the construction and operation of works. Licences are issued for these works and water entitlements are attached to the licences as conditions. A key problem is that this arrangement does not recognise that the construction of works and the allocation of water resources are separate issues;
- Access to water is not secure. A water licence is an increasingly important and valuable asset for landholders. Problems of ill-defined entitlements, security and tenure detract from the value of the licence and reduce the willingness of financial institutions to finance proposed developments. Although water licences have traditionally been renewed at the end of their five yearly renewal period, they are generally perceived by licence holders as lacking security of tenure;
- Water use approvals need streamlining. Water licence applications need to be assessed for their environmental impact by the DLWC. This takes a great deal of time and tends to limit business flexibility for proposed developments and creates uncertainty;
- Special entitlements are loosely or poorly specified. Over the years some water users have had access to certain 'types' of water. There are no current provisions to clearly specify this access;
- Riparian rights in rural residential development. Riparian landholders have a right to draw water from a watercourse for stock watering, domestic purposes and non-commercial irrigation. No permit or authorisation is required for the works to divert this water. In areas of intense rural subdivision, the total use of riparian water can have a significant impact on the availability of flow for other users;
- It is difficult to integrate water management across the water ecosystem. Currently approvals for various works, such as the construction of levees, are scattered throughout various water statutes;

The White Paper: Section 3 – Preliminary Provisions

The White Paper proposed that the new Water Management Act cover the management of all freshwater surface water, as well as related ecosystems, including: all hydrological and

ecological components, such as dams, lakes, wetlands, floodplains and riverine corridors; aquifers and groundwater in them and dependent ecosystems. It was proposed that the new Act would cover estuarine water, including coastal lakes, lagoons and channels to the sea. It would also cover activities in the beds, banks and shores of rivers and other surface water bodies and in riverine corridors. Currently these provisions are found in the *Water Act 1912* and the *Rivers and Foreshores Improvement Act 1948*.

The proposed Act would also contain a new set of objectives, the over-riding one of which would be to allow for the sustainable and integrated management of water resources in NSW for the benefit of present and future generations.

Commentary

The NCC agreed in principle with the objectives of the proposed Act as outlined in the White Paper, but noted that the objectives should be amended to emphasise the importance of ecological sustainability. The NCC believed that groundwater should be addressed the same as surface water in rivers within the new legislation, rather than just as a 'related ecosystem'. The Act should also comply with other natural resource legislation such as the *Native Vegetation Conservation Act 1977*, *Threatened Species Conservation Act 1995*, *Fisheries Management Act 1994* and the *Environmental Planning and Assessment Act 1979*.

The NSW Farmers Association had no comment on this section of the White Paper.

The Water Management Bill 2000

The *Water Management Bill 2000* is divided into nine chapters. These are:

- Chapter 1 – Preliminary
- Chapter 2 – Water Resource Planning
- Chapter 3 – Water Resource Management
- Chapter 4 – Joint Private Works
- Chapter 5 – Public Works
- Chapter 6 – Public Utilities
- Chapter 7 – Enforcement
- Chapter 8 – Administration
- Chapter 9 – Miscellaneous

Within the Bill, chapters 4,5, and 6 are largely carried over from pre-existing Acts. This Briefing Paper will therefore concentrate its discussion on the other chapters, which is also reflected in the emphasis of the White Paper.

The objectives of the new Act as included in the Bill are fundamentally the same as those outlined in the White Paper. The over-riding objective is to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations.

In terms of its scope the Bill removes any references to ‘related ecosystems’ and defines a water source as follows:

Water source means a river, estuary, lake or aquifer, and includes the coastal waters of the State.

This definition of water source, and in particular the inclusion of the coastal waters of the State, appears to have a wider scope than envisioned in the White Paper, as the State’s coastal waters extend for three nautical miles from the coast. For instance, the White Paper stated that: “the new Act will also cover estuarine water, including coastal lakes, lagoons and channels to the sea.” Including the coastal waters in the definition accepts that defining ‘to the sea’ is problematic. In addition, in his Second Reading Speech, the Minister the Hon Richard Amery MP noted that extending the definition of water source to the coastal waters was the only way of ensuring that all water management activities are able to be considered in a whole of water catchment and in a water cycle basis.

The White Paper: Section 4 – Protection of the Water Environment

Current riverine management is to provide for environmental flows of water. The White Paper proposed that the new Act define three different types of environmental water. These were:

- Environmental health water
- Targeted environmental water
- Market-based environmental water.

Environmental Health Water

This was defined as water reserved to maintain or restore surface and groundwater systems and dependent ecosystems. This water was classed as non-tradeable and could not ever be converted for extractive use.

Where there is a water management committee in place, the White Paper proposed that the quantity of environmental health water was to be determined by the following: the Government will approve environmental objectives; the Minister will set the policy framework; the water management committees will develop draft rules/strategies; the Minister considers these, and with the concurrence of the Minister for the Environment, approves/disapproves the rules/strategies. The subsequent rules and strategies would be embodied in the water management plan.

Where there is no committee or plan in place, the Minister would set the interim rules with the concurrence of the Minister for the Environment.

The White Paper proposed that the legislation not simply allow for a volume of water to be provided to the environment, but require flow rules and groundwater rules to be designed to meet spatial and temporal needs of ecosystems.

Targeted Environmental Water

This was defined as water that can be used for other environmental purposes above fundamental ecosystem health requirements at the discretion of the Minister. Targeted Environmental Water was classed as non-tradeable, but may be converted to extractive use subject to the Minister's approval.

Market-based Environmental Water

This was defined as access entitlement water that could be used for environmental purposes by a private entitlement holder, if so desired. This water is to be protected operationally along the whole system. The White Paper proposed that this water could be traded and treated like any other water entitlement and could be converted back to operational use.

The White Paper proposed that the new Act would include other environmental supporting provisions including the following:

- The Minister will be able to adjust, on the advice of water management committees and at the water management plan review stage, access entitlement conditions to achieve agreed environmental outcomes in systems that are fully or over allocated;
- There will be an ability to reserve unallocated water for the environment in river and groundwater systems that are not already fully allocated;
- The Minister will continue to have the ability to define limits for water extraction, limit certain water uses and put in place embargoes on the issue of further additional entitlements;
- There will be the ability to determine a hierarchy of water use during times of shortage and to reduce access to water during emergencies, such as major algal blooms;
- In considering applications for access entitlements and approvals, the environmental impact, including cumulative impact, will be assessed and the appropriate conditions applied. The requirements of other relevant legislation, such as the *Fisheries Management Act* and the *Threatened Species Conservation Act* must also continue to be applied;

Commentary

The Farmers Association noted that agricultural industries couldn't survive without a supply of water of an adequate quality. Their submission stated that a healthy river environment is essential for delivering quality water and providing a base for agriculture, and that there is no doubt or argument that in developing water management policy, the environment should be adequately catered for. The Association stated that the vexed question is how to manage the environment to get the best result whilst minimising the negative socio-economic impacts on the rest of society, including agriculture.

The Association noted that its members want water set aside for environmental flows to be clearly identified, quantified and managed in a way that is transparent and flexible. Information should be freely available and include the quantity of water released, the purpose for the release and the time of the release.

The NCC commented extensively (six pages) on this section of the White Paper. The NCC was concerned the proposed framework for the provision of environmental water will not achieve the stated aim of the ‘protection and restoration of the water environment’. These concerns arose from a combination of:

- A failure to include an adequate definition of the proposed types of environmental water; and
- A lack of clarity as to how decision making under the proposed Act will implement the goals for the provision of environmental water.

The NCC believed that environmental health water should be defined as the foreseeable environmental flows that are necessary to restore and/or maintain water based ecosystems. Environmental health water should not be restricted to arbitrary numerical limits such as the current 10% limit on the impact on diversions. The NCC put forward the proposal that an Independent Assessment Panel should determine environmental flows. The concept of this Panel will be further discussed in the commentary on the next section.

The NCC stated that targeted environmental water must not be able to be converted for extractive use, and that any release should have the concurrence of the Minister for the Environment.

The NCC would like to see another form of environmental water allocated, called bequest environmental water. This differs from the White Paper’s market based environmental water in that it results in an obligation by the licensee to provide the water to the environment. The NCC also suggested several incentives to encourage this private action.

In response to the White Paper, the NCC argued that the allocation for environmental water should be adequate within itself without the need to resort to the market. A series of sustainability indicators needs to be developed by the Independent Assessment Panel to determine whether environmental flows have been successfully delivered, and have had a beneficial effect on riverine health. The NCC would then like an Independent Auditor to audit the water management plan against the sustainability indicator criteria.

The Water Management Bill 2000

Part 1 of Chapter 2 (Water Management Planning) of the Bill includes provisions that arose out of the above parts of the White Paper. Clause 5 of the Bill defines water sharing principles as follows:

- (a) Firstly, that management of a water source should seek to protect its dependent ecosystems;
- (b) Secondly, that management of a water source should ensure that landholders are able to exercise their basic landholder rights;
- (c) Thirdly, that the extraction of water pursuant to any other authority to extract water from a water source must not be permitted to prejudice the principles set out in paragraphs (a) and (b).

From these principles it is clear that when it comes to allocating water, the protection of the water source ecosystems should be the first priority.

The Bill then defines three categories of environmental water, but with different names to those proposed in the White Paper. The three classes are:

- Environmental health water (ie, water that must be provided for fundamental ecosystem health at all times);
- Supplementary environmental water (ie, water that must be provided for specific environmental purposes at specific times or in specified circumstances but may otherwise be used for other purposes);
- Adaptive environmental water (ie, water that is subject to an access licence but is committed for use for environmental purposes).

In his Second Reading Speech, the Minister stated that environmental health water cannot be traded, and would include all current environmental flow rules on the regulated rivers (ie, Gwydir, Namoi, Lachlan, Murrumbidgee and Hunter rivers), including any existing environmental contingency allowances, and for the unregulated Barwon-Darling river system. Supplementary environmental water is principally allocated for environmental purposes but is subject to triggers for special events, such as bird breeding or fish passage. If the present triggers are not activated, the water may be reallocated to extractive use. The Minister stated that the provision of supplementary environmental water reflected the need for adaptive mechanisms for managing water to allow for natural seasonal variations. Adaptive environmental water is a normal access water entitlement that a licence holder has decided to use for agreed environmental purposes. It is available at their discretion and can be converted back to consumptive use or traded at their discretion. Adaptive environmental water can only be used where it is consistent with the water management plan or Ministerial agreement. Environmental assessment must still take place and management measures must be put in place to ensure that the water can meet the defined purpose.⁸

Clause 6 of the Bill states that it is the intention of Parliament that principles for the identification, establishment and maintenance of each class of environmental water will be established for all water sources in the State, either by means of management plans or a Minister's plan, as soon as practicable (section 6 starting on page 16 explains the process of formulating management plans and Minister's plans, and hence the above classes of environmental water).

With the inclusion of this clause, the Government has rejected calls from both the Nature Conservation Council and the NSW Farmers Association for an independent third party to identify environmental water requirements.

The Bill proposes that water sources be classified according to the extent to which they are: at risk; subject to stress; and conservation value. In the preparation of management plans, those water sources that are classified as at high risk, high stress and high conservation

⁸ NSWPD, 22 June 2000, Second Reading Speech for the Water Management Bill, at 7501.

value will have their plans prepared first.

The White Paper: Section 5 – Community Involvement and Responsible Bodies

The White Paper proposed that the new Water Management Act would contain provisions for the Minister to establish water management committees and a peak water advisory body. These bodies have already been created following the 1995 and 1997 water reform announcements but are not provided for specifically in legislation.

The main tasks of the water management committees as identified in the White Paper were:

- Develop draft water management plans to achieve environmental and other objectives and provide a basis for water management;
- Ensure consistency of water management plans with other approved natural resource management plans and government policy;
- Review water management plans;
- Satisfy agreed objectives for water management;
- Develop local targets and priorities;
- Assess socio-economic impacts of changes in water management;
- Undertake local monitoring, reporting and review activities;
- Facilitate broader community input to the water management process;
- Promote public awareness of sustainable water resource management;
- Advise the Minister and the Minister for the Environment on other matters;
- Report as specified by Minister and the Minister for the Environment.

The White Paper noted that water management committees would not be on-going but would be appointed for a set period or task. The Minister would appoint members for specified periods with the following stakeholders represented:

- Water user groups;
- Conservation groups;
- Local government;
- Catchment management boards;
- Local Aboriginal communities;
- Other interests as required;
- Government agencies – DLWC, EPA, NPWS, DUAP, NSW Agriculture, NSW Fisheries.

The White Paper stated that an appointed independent chair would lead and drive the Committee towards consensus outcomes, but not participate in the consensus decision making.

The White Paper noted the new Act would contain provisions for establishing the Water Advisory Council, the peak advisory body to the Minister. In addition, the Minister would be able to establish valley based customer service committees, to provide a forum for water customers representing their local area and give them a voice in the day to day operational

and asset management decisions impacting on their rural bulk water delivery services.

Commentary

The NSW Farmers Association noted that for the Water Management Committees to work efficiently and effectively, their composition and function needed to be closely examined. Whilst the Association generally supported the representation on current River Management Committees, they believed that the new Water Management Committees must be comprised of water users who live in the region and adequately represent the managers of the resource in that region. The Association considered that Departmental officers should be present in an advisory role only, providing the Committee with facts and logical argument on how to improve the management of the riverine ecosystem. The Association would like the role of Water Management Committees to be more clearly defined, and to provide the community with the ability to have a greater input into the management of their rivers.

The Association also supported the consideration of an alternative, as put forward by the NSW Irrigators Council to the proposed Water Management Committee structure. The structure put forward by the Irrigators Council was as follows:⁹

- Water Management Committees should be established based on existing River Management Committees;
- The operating protocol of these Committees must be reviewed to ensure that effective decision making is not hampered and that decisions are truly reflective of community values;
- The Committees should have responsibility for developing objectives and strategies, not just interpreting the objectives put forward by the Minister (see pages 16-24 for a discussion on the roles and responsibilities of Water Management Committees);
- The Irrigators Council advocated plans: that are put together by the community; that meet community and government policy outcomes; that set the operational plans for the river operator; and that include adequate mechanisms for accountability and evaluation;
- Where agreements cannot be reached there will be a role for the Healthy Rivers Commission to mediate or arbitrate.

The NSW Irrigators Council also stated that changes to the proposed Water Advisory Council are required, including:

- A responsibility to undertake more effective communication with key stakeholder groups;
- Provision for more proactive, strategic advice to the Minister as opposed to the current role of commenting on decisions already taken.

The Nature Conservation Council also advocated that the new Water Management Committees should carry-over the membership from the current River Management

⁹ NSW Irrigators Council, *An Industry Proposal for Water Rights in NSW – The Blue Paper*, March 2000, at 12.

Committees and that they should be appointed for a fixed term. The NCC sought a commitment that the new Water Management Committees will contain at least two conservation representatives, as nominated by the NCC. The NCC believed that the new Committees should have an on-going role in the management of water resources.

In regard to the Water Advisory Council, the NCC took the same position as the Irrigators. The NCC stated that the Advisory Council should provide greater communication with its key stakeholder groups, and that it should incorporate strategic policy advice to the Minister rather than commenting on decisions already taken by the Minister.

Clearly, this is a call from stakeholders in the water industry for them to provide a meaningful role in the direction of the industry, rather than simply responding to Government decisions.

The Water Management Bill 2000

Part 2 of Chapter 2 of the Bill (Water Management Planning) includes provisions for the establishment of water management areas and management committees. The Bill states that any area can be defined as a water management area by the Minister by order published in the Gazette.

A management committee is to be established to carry out a specific task in relation to water management, and the Minister may abolish it at any time by order published in the Gazette whether it has completed its task or not (clause 9). A management committee is to be comprised of at least 10, but not more than 20 members, appointed by the Minister. Of this number:

- At least two people are to represent environmental protection groups;
- At least two people are to represent water user groups;
- At least two people are to represent local councils;
- One person to represent catchment management boards and trusts;
- One person to represent Aboriginal persons;
- One member of staff of the Department of Land and Water Conservation;
- An independent chair.

This is a total of ten people. The Minister may also appoint other persons as required, likely to be from other government departments. For instance, the White Paper envisaged roles on a Committee for the Environment Protection Authority, National Parks and Wildlife Service, Department of Urban Affairs and Planning, NSW Agriculture and NSW Fisheries. As management committees can have no more than 20 people, it is quite legitimate for the Minister to appoint another 10 people other than those specified above, including government representatives, onto a management committee. On this basis, the government could have a controlling interest on a management committee (ie, one DLWC staff member in the nominated 10 as per the bill, plus another 10 appointees, totalling 11 out of 20 votes).

The White Paper made extensive reference to water management committees operating on a consensus model, with an independent chair to lead and drive towards consensus outcomes, but the chair itself was not to participate in the consensus decision making. However, the Bill makes no references to this. Schedule 6 states that a decision supported by the majority of the votes cast is a decision of the Committee, and that in the event of an equal number of votes, the presiding member (ie, the Chairperson) has a second or casting vote.

The Bill lists the following functions for a management committee:

- (a) to prepare a draft management plan for the water management area;
- (b) to review a management plan that is in force for the water management area;
- (c) to investigate such matters affecting the management of the water management area and as the Minister refers to it;
- (d) to report to the Minister on such matters affecting the management of the water management area as the Minister refers to it for report;
- (e) to advise the Minister on such matters affecting the management of the water management area as the Minister refers to it for advice.

As indicated above the White Paper made reference to water management committees advising and reporting as specified to both the Minister and the Minister for the Environment. However, the Bill makes no reference to a role for the Minister for the Environment in relation to management committees, and the committees are required to report to only the Minister.

In Chapter 8 (Administration), clause 380 of the Bill establishes the Water Advisory Council, comprised of at least 12, but no more than 20 members of whom:

- (a) at least two to represent the interests of environment protection groups;
- (b) at least two to represent the interests of water user groups;
- (c) at least two to represent the interests of local councils;
- (d) at least one having technical qualifications in connection with environmental protection;
- (e) at least one having qualifications in ecology;
- (f) at least two to represent the interests of catchment management boards and trusts;
- (g) at least one to be an Aboriginal person to represent the interests of Aboriginal people;
- (h) one is to be a person appointed as an independent chairperson for the Council.

In terms of voting, the same procedures as per the management committees as described above apply.

The Bill defines four principal functions of the Water Advisory Council. These are (clause 381):

- to review draft management plans and implementation plans;
- to investigate matters affecting the management of the water sources throughout the State;

- to report on matters affecting the management of the water sources throughout the State;
- to advise the Minister on matters affecting the management of water sources throughout the State.

The White Paper: Section 6 – Water Management Planning

The White Paper noted that a key focus of contemporary water management in NSW is the development of water management plans. The White Paper reinforced the notion that a water management plan provides a logical way of developing and implementing rules and strategies to protect the environment and allow access to water in specific water management units. However, currently there is no statutory provision for the implementation of water management plans.

The White Paper proposed that water management plans would be based on water management units, which may be catchments, aquifers, zones, or a combination or parts of these within those water management units. The Minister would set the boundaries based on bio-physical criteria, and they would not be based around local government areas.

The White Paper noted that the proposed Water Management Act would provide for water management plans and implementation plans to be developed. These plans would be the basis for river and groundwater management in the State. The Government may set environmental objectives that would provide overall targets for the water management plans. The plans will specify:

- River flow objectives;
- Water quality objectives;
- Ecosystem management objectives, such as limits for sand and gravel extraction from river beds and banks.

Where no water management plan is in place, the Minister may set interim water management rules. These interim rules would continue until a water management plan has been developed for that water management unit. Plans would be made in the order of priority starting with the most highly stressed or high conservation rivers and aquifers being those most at risk from over-allocation.

The White Paper noted that the Environment Protection Authority would oversee the development of an auditing program on water management plans to determine whether they meet agreed environmental objectives.

The White Paper proposed that water management plans must have the approval of the Minister and the concurrence of the Minister for the Environment. The plans would operate for a five year period and be reviewed before the end of that period. The Minister and the Minister for the Environment would be able to review the plan at any other time under particular circumstances. Examples of such circumstances provided by the White Paper included where the Department's annual implementation report, or the (EPA's) audit report, identified serious non-compliance with the implementation plan or the water management

plan.

The White Paper proposed that the Department of Land and Water Conservation would then prepare an implementation plan consistent with the management plan and relating to DLWC's statutory functions. The implementation plan would set out detailed river flow and access rules designed to achieve the outcomes specified in the management plan, and would therefore determine many of the conditions of the access conditions. The implementation plans were proposed to be made by way of an order under the new Act.

The White Paper noted that the DLWC implementation plans would also set the transfer rules for water transfers and trading. The operational rules in an implementation plan would be subject to annual review. The Department's Annual Report would include information on whether the implementation plan complied with the standards and rules set by the water management plan and if it meets the performance targets in a water management plan.

The White Paper noted that it is expected that other agencies, such as the EPA, NSW Agriculture, NPWS, NSW Fisheries and State Forests have regard to water management plans in making their decisions about natural resource management.

Finally, this section of the White Paper stated that any environmental assessment prescribed in the *Environmental Planning and Assessment Act 1979* must be adopted both in the administration of approvals under the new Water Management Act but also in any matters determined as part of a water management plan or implementation plan prepared for water management in NSW.

Commentary

Both the NCC and the Farmers Association disagreed with sections of this part of the White Paper, and then agreed with each other on some remedies, although significant differences remained apparent. The NCC was stronger in its condemnation of the proposals and stated that the water management plans as proposed will fail to achieve the protection and restoration of the water environment since they:

- Provide an unnecessarily restrictive role to the Plans;
- Do not provide adequate guidance as to what must be addressed in the Plans;
- Place undue influence on implementation plans which are not developed in a transparent or accountable way.

Both the NCC, the Farmers Association and NSW Irrigators suggested that an independent third party has a role to play in the review of water management plans.

The NCC recommended the establishment of an Independent Assessment Panel, such as the Healthy Rivers Commission.¹⁰ The role of the Panel as recommended by the NCC was:

¹⁰ As part of the NSW Government's 1995 water reforms, the Healthy Rivers Commission was established to conduct detailed inquiries into priority rivers. The fundamental principles of

- Establishment of the terms of reference for an independent resource assessment;
- Determination of environmental health water requirements, including environmental flows and the sustainability indicators for ecosystem health;
- Determinations on off-allocation;
- A technical advisory role to the Water Management Committees, especially in relation to the water management plans.

Under the NCC system, the Independent Assessment Panel had a strong role to play in the review of water management plans. Briefly, the NCC identified the following three scenarios:

1/ The Water Management Committee has completed their water management plan. The plan will be passed directly to the Independent Assessment Panel. After reviewing the plan, the Panel determines whether the plan should be passed on to the Minister for endorsement or whether it should be referred back to the Committee for revision;

2/ The Committee has reached consensus in a number of areas but is unable to reach agreement on all aspects of the plan formulation. The Panel will then intercede and make recommendations to the Committee on all key areas. The Committee will then be required to consider the recommendations and identify ways that they can be incorporated into the plan.

3/ The Committee is unable to reach consensus on environmental health water and or sustainable access limits. The Panel will intercede and act as arbitrator. The Panel makes a determination, with recommendations referred to the Committee for deliberation. The Committee considers the recommendations and revises the Plan. The Plan must then be directed back to the Panel for further review before final endorsement by the Minister. In instances where agreement cannot be reached between the Panel and the Committee, both parties will prepare a report for final determination by the Minister.

The NCC also considered that water management plans should address certain issues so that a degree of consistency, certainty and minimum environmental standards are achieved throughout the State. The NCC then outlined 20 items that they consider should be included in a plan. Furthermore, the implementation plan should be part of the water management plan.

The NCC considered that the new Act should attempt to provide a more integrated approach to natural resource management. The NCC proposed that water management plans should become the primary plan for managing water resources. Other water resource plans, such as estuary management plans, should be made consistent with water management plans. Water management plans must be required to be consistent with:

independence, objectivity and community involvement guide the Commission in its formulation of recommendations for river health objectives and mechanisms for achieving them.

See: Healthy Rivers Commission of New South Wales, *Independent Inquiry into the Hawkesbury Nepean River System, Final Report* August 1998 at 1.

- The objectives of the Act;
- Any relevant government policy or environmental planning instruments that have been published in the Government Gazette;
- Any requirements set out in the regulations;
- Requirements of any relevant inter-government agreements that have been published in the Gazette;
- Relevant regional vegetation management plans under the *Native Vegetation Conservation Act 1997*;
- Requirements of recovery plans under the *Threatened Species Conservation Act 1995*.

The NCC proposed that an independent auditor be appointed and that an annual audit of water planning, management and the implementation process be undertaken. The auditor should be commissioned by the Premier's Department, and that given the role of the Environment Protection Authority as a regulator, it was not considered appropriate for the Authority to be considered an independent auditor as proposed in the White Paper.

The NCC supported the review of water management plans but suggested a review be held every three years rather than five years.

The timing of a review of water management plans is always going to be a contentious issue. The NSW Farmers Association stated that having reviews at five year intervals will undermine the security of water users, and that a review period of 15-20 years is more appropriate. In addition, the Association stated that ecosystems also do not operate on five year cycles. Herein lies the problem - reconciling ecosystem requirements that do not operate in human defined years, and the requirements of water users to water security.

In regard to the formulation of water management plans, the NSW Irrigators Council also suggested a role for independent advice to the Minister, and suggested the Healthy Rivers Commission. The Irrigators Council then suggested a similar role for the Commission as outlined in the section above as recommended by the Nature Conservation Council.

The NSW Farmers Association did not agree with the White Paper proposals for the Department of Land and Water Conservation to develop, implement and audit implementation plans. The Association stated that implementation plans should be incorporated into the water management plans, and that these plans should be audited by an independent third party.

The Association also stated that Government bodies should be constrained by the same water management requirements as individuals or other industries. The White Paper phrase that Government bodies are "to have regard to water management plans" is unacceptable to the Association, and in their opinion would perpetuate the inequality that exists between government departments and private landholders with different regulatory standards.

Farrier also identified the dichotomy of the water management plan and the implementation plan, and noted that resolving the precise division between the two is important for two reasons. Firstly, members of the community beyond the water management committee will be able to comment on draft proposals in water management plans, but not implementation

plans. Farrier concluded that if members of the community can only comment on draft water management plans which are restricted to setting broad objectives and strategies, then many people are likely to conclude that participation at that level of generality is not worth the effort.¹¹

Farrier's second concern was the question of enforceability. He noted that the White Paper proposed to make it an offence to take water otherwise than in accordance with an approved water management plan, but, by inference, not an implementation plan. Alternatively, any person may bring civil proceedings to remedy a breach or threatened breach of the proposed legislation, including judicial review of breaches by the Minister or the Department. If the detailed rules are to be found in implementation plans rather than water management plans, it then becomes crucial that breaches of implementation plans are treated as breaches of the legislation. However, Farrier notes that the implication is that accountability in relation to implementation plans is to be secured through annual reports to the Minister, rather than the threat of enforcement proceedings.¹²

Farrier also raised the issue of consistency of water management plans with other natural resource management plans, particularly local environmental plans and other environmental planning instruments made under the *Environmental Planning and Assessment Act*. Farrier provided a scenario where a local environmental plan allows a local council to give development consent for clay mining in an upper catchment swamp, which acts as a sponge releasing water during low flow periods. If the water management committee concludes that mining of the swamp must not be allowed under any circumstances, Farrier asked what would be the process for resolving this conflict. Further, what will be the 'pecking order' if agreement cannot be reached between the local council and the Minister for Urban Affairs and Planning on the one hand, and the water management committee and the Minister for Land and Water Development on the other?¹³

The Healthy Rivers Commission has also made some generic comments about community based 'river management committees'. In one of its recent reports, the Commission strongly supported community involvement in decision making at the local level. It considered that the basis of a partnership approach must be an agreed set of strategies to overcome river health problems. That agreement must be reached through processes that the community sees as objective and independent, and the strategies themselves must be

¹¹ Farrier, D. "Integrated management of land and water? Planning and project approvals under the White Paper on NSW water management legislation". In *1st Australian Natural Resources Law and Policy Conference Proceedings, 27-28 March 2000, Canberra Australia* at 153.

¹² Farrier, D. "Integrated management of land and water? Planning and project approvals under the White Paper on NSW water management legislation". In *1st Australian Natural Resources Law and Policy Conference Proceedings, 27-28 March 2000, Canberra Australia* at 153.

¹³ Farrier, D. "Integrated management of land and water? Planning and project approvals under the White Paper on NSW water management legislation". In *1st Australian Natural Resources Law and Policy Conference Proceedings, 27-28 March 2000, Canberra Australia* at 157.

viewed by the community as fair and equitable. There must be mechanisms for establishing accountability for actions, and for clarifying community responsibilities and those of Government.¹⁴

The Commission noted that in river systems that have been subject to a Commission Inquiry, river management committees will be guided by the Commission's findings and recommendations. There will, however, be a continuing need to ensure that the State agencies and local councils implement the responsibilities assigned to them. In those catchments not subject to a Commission Inquiry, the Commission noted that the community based committees will have a more difficult task. The Commission considered the committees' responsibility of establishing river flow and water quality objectives to be particularly onerous, especially in the absence of a public inquiry. The Commission noted that committees will need to convince the wider community that the solutions they propose for long standing problems are likely to be effective, and that those solutions will share the burdens equitably.¹⁵

The Water Management Bill 2000

Part 3 of Chapter 2 (Water management planning) of the Bill includes provisions for management plans. Clause 12 states that the Minister may order a management committee to prepare a draft management plan, and review any related implementation program, on any aspect of water management, including, but not limited to:

- (i) water sharing;
- (ii) water source protection;
- (iii) drainage management;
- (iv) floodplain management.

The Bill then contains further provisions for each of the above areas. For instance, clause 17 includes five core provisions that a management plan must have to the extent to which it deals with water sharing. They include such factors as: establishing environmental water principles; identifying basic landholder rights for water; requirements for extraction licences; and perhaps most importantly, provisions that establish a bulk water access regime, recognising the effect of climatic variability, and the regime may establish rules with respect to the priorities according to which access licences are to be adjusted as a consequence of any reduction in the availability of water. Transfer rules, which must comply with the Minister's transfer rules, are also to be included in this section.

Clauses 19 and 20 deal with water source protection zones. A management plan may contain provisions identifying zones, called water source protection zones. Within such

¹⁴ Healthy Rivers Commission of New South Wales, *Independent Inquiry into the Shoalhaven River System. Final Report*, July 1999, at 97.

¹⁵ Healthy Rivers Commission of New South Wales, *Independent Inquiry into the Shoalhaven River System. Final Report*, July 1999, at 97.

zones, controlled activities¹⁶ must be regulated ‘in order to discourage unacceptable effects on the water sources of the area’. In addition, the management plan may contain provisions that may limit the exercise of basic landholder rights within a water source protection zone.

The management plan may, but need not, contain a provision declaring that the plan is to have the same effect as a regional environmental plan under the *Environmental Planning and Assessment Act 1979*. If this provision is enacted, clause 20(3) states that the section is taken to be a (deemed) regional environmental plan, and prevails over any other environmental planning instrument other than a State environmental planning policy to the extent of any inconsistency. The Minister is taken to be the consent authority under the EPAA in respect of all development to which the plan relates.

Similarly, the Bill outlines principles for drainage management and floodplain management that must be followed in relation to any management plan that deals with these areas.

A management plan must include the following components (clause 29):

- (a) a vision statement;
- (b) objectives consistent with the vision statement;
- (c) strategies for reaching those objectives;
- (d) performance indicators to measure the success of those strategies.

The management committee must notify any local councils, catchment management committees or trusts, each holder of an access licence or approval and any others as determined by the Minister that a draft management plan is being prepared. These parties have 28 days to make a written submission to the Minister. Once prepared, a draft management plan is to be submitted to the Minister. Once the Minister is satisfied that the draft complies with this part of the Act, the plan must be exhibited for at least 40 days and submissions invited.

The Management Committee must then consider any submissions received, and then resubmit the draft back to the Minister. The Minister may then: make a management plan in accordance with the draft, or with alterations as the Minister sees fit; or cause the draft management plan to be re-exhibited and re-submitted; or may decide not to proceed with the draft management plan. Before the making of the plan, the Minister must obtain the concurrence of the Minister for the Environment.

Clause 37 states that management plans have effect for five years, and within the fifth year the Minister, in consultation with the Minister for the Environment, is to ‘review each management plan for the purpose of ascertaining whether its provisions remain adequate and appropriate.’ There is no requirement for the Minister to have the concurrence of the Minister for the Environment. If satisfied, the Minister may extend the management plan for another five years. This power to extend the plan may only be exercised once.

¹⁶ The Bill defines a ‘controlled activity’ as: the erection of a building or; the carrying out of a work or; the removal of extractive material from land or; the carrying out of landfill operations.

Several things are worthy of comment. The peak non-government organisation groups suggested a role for an independent party to help determine environmental water flows and such like. However, the Government has not provided for such a facility in the Bill. The comments of the Healthy Rivers Commission are particularly pertinent under the proposed arrangements. In regard to renewing management plans, there is no provision for public input or consultation on the decision to extend a plan for another five years. This lack of public input, and no criteria in the bill to guide the Minister as to his or her decision, is likely to attract criticism from sectors of the community. As noted above, clause 29 of the Bill stated that a management plan must include performance indicators to measure the success of the proposed strategies. The Bill does not make any direct reference to the use of these performance indicators, when reviewing a management plan after five years, to guide the Minister's decision making whether to extend the plan or not. However, in his Second Reading Speech, the Minister stated: "The plans will normally be for five years. I, as Minister, may extend the plan for a further five years but only if set performance indicators are being met."¹⁷

Clause 39 provides for appeals to the Land and Environment Court against the validity of a management plan, action of which must commence within three months after the date of publication in the Gazette.

In response to the White Paper, there was considerable opposition from the Nature Conservation Council and the NSW Farmers Association in relation to the Department preparing implementation programs. The Government has maintained this role for the Department and clause 43 of the Bill provides for the establishment of implementation programs by order of the Minister. The Minister must first consult the relevant management committee before establishing the first implementation program for a management plan. However, no other consultation is required. Clause 43(3) states that an implementation program must set out the means by which the Minister intends that the objectives of the relevant management plan or Minister's plan are to be achieved. In his Second Reading Speech, the Minister stated that the implementation plans will be the source of conditions placed on licences and approvals in the management area.¹⁸ The implementation program is to be reviewed each year for the purpose of determining whether it is effective in implementing the management plan or Minister's Plan. The results of the review are to be included in the Annual Report for the Department.

Part 4 of the Bill contains provisions for the Minister to make water management plans, called a Minister's plan, for any part of the State: not within a water management area; or for a water management area for which a plan is not in force; or where a plan is in force but only to deal with matters not dealt with by the management plan. The White Paper referred to the Minister making 'interim flow rules' in areas that are not covered by a water management plan. However, the Bill does not use this terminology, and instead simply refers to them as Minister's Plans, which does sound, at least, more final than an 'interim

¹⁷ NSWPD, 22 June 2000, Second Reading Speech for the Water Management Bill, at 7502.

¹⁸ NSWPD, 22 June 2000, Second Reading Speech for the Water Management Bill, at 7503.

There are no provisions for public submissions, consultation or review of draft Minister's plans. Before making a plan that establishes environmental water principles, the Minister must obtain the concurrence of the Minister for the Environment. However, a Minister's plan may not be made for the purpose of establishing water source protection zones. Finally, the Minister must review each Minister's plan at intervals of not more than five years. There is no requirement for a review to be published or to release details if a Minister's plan is successful in reaching its objectives.

The issue here is one of review. There are in essence two programs that need reviewing. These are the management plan, which may last for up to five years, and the annual implementation program. As stated, the implementation program must be reviewed every year to determine whether it is effective in implementing the management plan or Minister's Plan. It may be determined that the implementation program is very effective in implementing the management plan, but that the management plan falls short.

The White Paper stated that the Environment Protection Authority should oversee the development of an auditing program of water management plans to determine whether they meet agreed environmental objectives. The Bill contains no provisions for this to occur. Whilst a management plan must include performance indicators to measure its success, there are no 'third party' independent reviews to measure the success of a management plan.

The White Paper stated that water management plans would be reviewable by both Ministers at any time under particular circumstances, and gave the following example: "...a review should take place where the DLWC annual implementation plan report, or the [EPA] audit report, identifies serious non-compliance with the implementation plan or the water management plan itself."¹⁹

However, with no EPA or third party auditing now provided for, there is less opportunity for the Ministers to identify when a plan needs review. Clause 36 of the Bill provides for amendment and repeal of management plans. A management plan may be amended by a subsequent management plan made in accordance with the Act. Alternatively, a management plan may be amended by the Minister, but only in such circumstances, and in relation to such matters and to such extent as provided for in the plan. However, clause 38 states that the Minister may vary the bulk access regime (ie, the total amount of water for allocation) established by a management plan if satisfied that it is in the public interest to do so. There is no provision in the Bill for the Minister for the Environment to take an interest in a review of a management plan under particular circumstances as outlined above.

In response to the White Paper, considerable discussion was held in regard to public authorities and whether they must take management plans into account in their own planning and carrying out of works. Clause 41 of the Bill states that public authorities must have regard to the provisions of any management plan. The clause continues that this

¹⁹ NSW Department of Land and Water Conservation, *A proposal for updated and consolidated water management legislation for New South Wales, A White Paper*, December 1999, at 26.

section of the Act neither restricts a public authority's statutory discretions nor authorises a public authority to do anything inconsistent with its statutory or other legal obligations.

With these sections in the Act, clearly public authorities are not bound by any provisions in a management plan. Indeed, when exercising functions under this Act, the Minister need only take all reasonable steps to give effect to the provisions of any management plan (clause 40).

The White Paper: Section 7 – Access to Water

The White Paper proposed that the new Water Management Act enable the definition of sustainable access limits. This means that in each defined water management unit, and for each category of access entitlement, there would be a specific limit on the total amount of water available for a specified period. The Minister would set these limits, based on technical and scientific analysis and the advice of the relevant water management committee. The access limit would be reviewed and adjusted if necessary for each event, year or resource secure period.

Adjustments to the over-allocation of water would be mainly achieved through setting access limits taking into account impacts on:

- Local communities;
- Regional and state economic development;
- Appropriate time-scales;
- Compliance and administration costs;
- Severity of the environmental consequences of not adjusting.

The White Paper proposed two types of consumptive water rights and entitlements. These were:

- Basic rights as defined in the new Act and which do not require approvals;
- A privileged entitlement to access water, which will be subject to approval and will specify how much water can be accessed, and the conditions governing where, when and how it can be extracted.

Basic Rights

In the current Water Act there is a provision for a riparian right for landowners/occupiers with a property that adjoins a river or lake. There have been long-standing exemptions from licensing for small pumps and small in-river dams for stock and domestic water supply and limited cultivation. In the 1970s the right was further amended to allow a maximum pump capacity of 50 litres/second and a maximum in-river dam capacity of seven megalitres. This right is therefore the equivalent of a maximum of four megalitres a day, enough water to supply a town with a population of 2,000 to 3,000.

The White Paper noted that there is a need to review these conditions of riparian water use and proposes that the new Act would re-define the riparian right as a domestic and stock right. There should also be provisions for the Minister to implement special management

arrangements for declared sensitive areas, which may allow for:

A fixed megalitre entitlement based on location (up to two megalitres per year) for household domestic consumption and garden use regardless of land size;

- A stock watering entitlement based on land area and geographical location;
- A right to take these entitlements from a river or lake abutting the property.

The White Paper also discussed harvestable rights. The NSW Government's Farm Dams Policy permits, without requiring a licence, the harvesting of a minimum of 10 percent of the rainwater runoff from a landholder's land. Any amount above this minimum is subject to the Minister's approval. The dams must only be located on hillsides, gullies or minor, non-permanent watercourses. The runoff water can be used for any purpose and is in addition to any other entitlement. The White Paper proposed that this right be carried over into the proposed Water Management Act.

Commentary

The NSW Farmers Association noted that riparian rights for stock and domestic purposes have contributed significantly to the value of properties with river frontage. Many landholders have paid a premium to obtain land with this right and as a result, the Association believes that any existing riparian rights must remain unaltered. However, the Association does accept the problems of subdivision and supported the proposals to declare sensitive areas and require a subdivision of the riparian right.

In contrast, in their submission to the White Paper the NCC did not support any additional harvesting of water that is separate from the licensing regime, and believes that all extractions should be subject to application for an access licence, including riparian rights and domestic and stock rights.

The Water Management Bill 2000

Part 1 of Chapter 3 (Water Management Implementation) of the Bill provides for basic landholder rights, including domestic and stock rights and harvestable rights. Clause 44 states that a landholder is entitled, without the need for any licences or approvals, to take water from any river, estuary or lake to which the land has frontage or from any aquifer underlying the land for the purposes of domestic consumption and stock watering only. However, a landholder will still be required to obtain a water supply work approval to construct a dam or water bore. Whilst the Bill makes no mention of the Minister being able to declare sensitive areas and subdivide the riparian right, this section is subject to any deemed regional environmental plan, as made under a water source protection zone as part of a management plan. In this case, the deemed regional environmental plan may include those provisions.

Clauses 45 and 46 of the Bill include provisions for harvestable rights, as indicated in the White Paper. Harvestable rights are also subject to any deemed regional environmental plan as noted above for the domestic and stock holder water rights.

Clause 394 (in Chapter 9 – Miscellaneous) abolishes any right that an owner of riparian land would have had at common law in regard to the flow or taking of water (ie, this right is to be replaced by the above basic and harvestable rights).

The White Paper: Access Entitlements

The White Paper proposed that the new Water Management Act would define categories of water access entitlements that would reflect their priority, which would be given effect in the setting of sustainable access limits for each category. It would be possible to hold entitlements in a number of categories. The White Paper noted that the following are possible water access entitlement categories, as shown in Table 1 below.

Table 1: Access Entitlement Categories

Entitlement Category	Purpose	Water Source	Term of Extraction Entitlement*	Review**
1a	Local water utilities	All	20 years	5 years
1b	Major water utilities	All	Variable	5 years
2	High security	Regulated surface water	5 years***	5 years
3	Low flow – (A class)	Unregulated surface water	5 years	5 years
4	General security	Regulated surface water/groundwater	5 years***	5 years
5	Medium flow (B class)	Unregulated surface water	5 years	5 years
6	High flow (C class)	Unregulated surface water	5 years	5 years

Notes

* Extraction entitlement only. Share entitlements are of no fixed term.

** Linked to review of water management plans (where in operation).

*** 15 years for irrigation corporations.

The above entitlements are explained in the following section:

Category 1 – Local and Major Urban Water Utilities

Local water utilities include single local councils, water supply authorities and county councils. At this stage the major urban water utilities are Sydney Water Corporation and Hunter Water Corporation.

This category has the highest level of security. Entitlements would be for fixed volumes and renewable on a 20 year basis. The entitlement would be volumetric and would not vary

annually between resource secure periods. The access entitlement would require demand forecasting and management as a condition. Initial entitlement volumes would be based on current entitlements for the town with a small growth factor. Growth in additional usage, beyond that allowed for within initial entitlements, would have to be accommodated through demand management, by returning high quality treated water for access credits or by purchasing entitlements. Trade in effluent credits (ie, water returned to a water source after use) would be permitted by the legislation. However, this was not expected to be available until after 2002 to enable details to be developed.

The White Paper noted that for major urban water utilities the current provisions of Part 9 of the Water Act should be carried forward to the new Act.

Category 2 – High Security Regulated River Entitlements

High security water licences are currently issued on regulated systems to water users who perceive their business viability would be threatened by reduced water availability. Normally two years supply is reserved in dams to meet the needs of the years demand of all high security users. The balance is allocated to the general security users.

High security licences were created to provide virtually guaranteed access to water for permanent crops such as vines and fruit trees. With the introduction of the Murray Darling Basin cap on water diversions and provisions for environmental flows, there is concern that whilst general security users have seen their overall diversion levels reduced, high security users continue to receive their full entitlements which they are also able to trade. The White Paper noted that whilst the intention is to continue to issue high security entitlements, provision would be made to enable review of the entitlement for high security holders so that they can be required to meet a reduction in water similar to that met by general security users. High security entitlement holders would not be allowed to purchase or receive 'off-allocation' water (explained below).

Category 3 – Low Flow Unregulated River Entitlements

The low flow component would provide the highest security in unregulated rivers. The river level at which pumping can commence is lower for this category than for others (ie, medium and high flow for unregulated rivers). The level at which pumping can commence will be set by the Minister. There may be annual access limits and maximum daily pumping limits applied to this category.

Category 4 – General Security Regulated River and Groundwater Entitlements

This category included the current general security irrigation licences and groundwater licences.

Category 5 – Medium Flow Unregulated River Entitlements

These entitlements provide for access to water from unregulated rivers when the river flow exceeds a specified percentile level or other trigger levels, as may be set by the Minister.

Category 6 – High Flow Unregulated River Entitlements

These entitlements will provide for access to water only when flows exceed a specified percentile flow level or other trigger levels as may be set by the Minister.

Other

The White Paper noted that there would be times when it would be agreed that certain water, after other agreed entitlements are met, can be made available for extraction. Water users in regulated systems currently have periodic access to what is commonly called ‘off-allocation’ water. This occurs on an opportunistic basis as announced by the DLWC. The proposed Act would provide for the Minister to provide access to opportunistic water in a water management unit where the approved water management plan has set clear objectives and strategies for the management of any growth in water use.

The White Paper: Access Entitlement Components

In terms of access to water, users will need to know two things. These are: the overall amount of water available to them, known as the share entitlement; and when and where they can get access to that quantity, known as the extraction entitlement. The proposed Water Management Act would give the Minister the capability to convert some of the components of access entitlements into percentage shares. The White Paper noted that this approach has the following advantages:

- It makes it clear that a user has entitlement to a share and not a fixed volume;
- Shares can be readily held as long term entitlements because resource management adjustments do not affect the share;
- Percentage shares are a clear reminder that a resource has been fully allocated and further allocation is not possible;
- Certainty of right in the form of percentage share and clarity of process for determining the size of the sustainable access limit, will give improved security and information to water users.

In unregulated rivers, the proposed Act would also provide for access entitlements to be a combination of annual access limits (ie, a share entitlement) and daily flow limits (ie, an extraction entitlement).

The White Paper proposed that any person or legal entity be able to hold an access entitlement, and that it not be necessary to own or occupy land.

Commentary

One of the major concerns of the NSW Farmers Association arising from the White Paper was the issue of entitlement security. The Association stated that reliability is crucial to the entitlement as it provides the basis for any long-term planning. In addition, water shares should be defined in a similar manner to property (as under the *Real Property Act*) and registration of entitlements should reside with the Land Titles Office.

The Association also believed that should the de-coupling of title in land and water proceed, the tenure of entitlement for water users should be in perpetuity. On this basis, this would allow farmers to make sensible, long-term investment in water use efficiency. The Association stated that tenure of five years simply does not allow for this to occur. Instead, with the knowledge that the tenure will be reviewed in five years, with no

compensation payable for reduction in entitlements, pressure from financial institutions will force water users to gain returns on their investment more quickly than is ecologically and economically sustainable.

Andrew Boxall from the law firm Allen Allen and Hemsley stated that the effect of five year terms for water rights may well be to limit the availability of loan funding to a term well inside the term of water rights, for example three years, or to increase the loan pricing to water dependent industries. He noted that this may well affect the bankability of large projects whose operations are dependent on guaranteed supplies of water, and whose payback period is longer than the term of the water rights.²⁰

The Farmers Association noted the White Paper proposals that non-farm industry and irrigation corporations should obtain a water access entitlement with a 15 year tenure, reviewed every five years, on the basis of the level of investment and legislative obligations. The Association stated that this is merely a perceived difference compared to the 'ordinary farmer', and in reality on an individual property basis, the level of investment is similar. On this basis, the Association sought that all water entitlements should be issued in perpetuity with a review period of 15 to 20 years.

The Association also noted the proposals that credits be available to local government authorities that return water of a suitable quality to the river system. The Association sought the same arrangements for all water users.

The Association noted that off-allocation of water was not recognised in the White Paper as an entitlement, and considered that this needs to be corrected. The Association stated that access to off-allocation water should be determined in individual river valleys, and not by the Minister. The Association stated that off-allocation water should be treated like other access entitlements and users provided with a right that states ownership, reliability etc, and that rights to this water can then be permanently traded.

The Association was of the opinion that the Government must develop a structural adjustment package that can be used to help water users adjust to the new legislation. The package should include a range of measures including a buy back of licences and financial assistance to assist water users increase water efficiency. Where over-allocation of water entitlements has occurred, the Association stated that the Government should buy back entitlements, and noted that industry may be prepared to contribute a portion of the funds if the Government demonstrated a clear commitment to this process.

The Nature Conservation Council noted that a new water sharing system should allow trading of water access rights amongst all those who wish to enter the market. However, to achieve greater environmental protection, the Council proposed that water access entitlement approvals should be subject to:

²⁰ Boxall,A. "Security Issues for Financiers." In *1st Australian Natural Resources Law and Policy Conference Proceedings*, 27-28 March 2000, Canberra Australia, at 7.

- Part 5 of the *Environmental Planning and Assessment Act 1979*, as well as comprehensive assessment from the various responsible agencies;
- Public notification and submission period;
- A five yearly licence with conditions that approved sustainability indicators are being met;
- Trading rules which are clearly defined in the water management plans; and
- Full third party appeal rights, except for applications rejected due to an embargo.

In regard to share and extraction entitlements, the NCC supported a share management regime that is based on a variable extraction volume allocation. Extraction entitlements should be subject to environmental flows that have been allocated by the Independent Assessment Panel.

Whilst the NCC is supportive of the priority of human consumption over industrial use, they believe that at some future date (eg 2010), town water supplies should be capped at agreed levels of projected demand. After this, excess water demand should be met through the acquisition of access rights from third parties on the market.

Finally, the NCC stated that it is imperative that provision is made for environmental needs prior to any distribution of water, which is over and above defined entitlements, including the distribution of off-allocation water. The NCC is of the opinion that off-allocation water should not be tradeable.

The Water Management Bill 2000

Part 2 of Chapter 3 of the Bill provides for access licences. Clause 47 states that an access licence entitles its holder:

- (a) to specified shares in the available water within a specified water management area or from a specified water source (known as the share component);
- (b) to take that share of water at specified times, at specified rates, in specified circumstances or in specified zones or locations, or in any combination of these (known as the extraction component).

Clause 48 of the Bill also defines the following categories of access licences:

- (a) local water utility access licences;
- (b) major utility access licences;
- (c) regulated river (high security) access licences;
- (d) regulated river (general security) access licences;
- (e) regulated river (opportunistic water) access licences;
- (f) unregulated river access licences;
- (g) aquifer access licences;
- (h) estuarine water access licences;
- (i) coastal water access licences;
- (j) such other categories of access licences as may be prescribed by the regulations.

The categories are slightly different as to those proposed in the White Paper, and introduce the opportunistic water access licence, as well as the aquifer, estuarine and coastal water licences.

In terms of priority, local water and major utility access licences have priority over all others, whilst regulated river (high security) licences have priority over regulated river (general security). The latter two have priority over regulated river (opportunistic water) access licences.

Clause 50 states that the Minister may, from time to time, determine the amount of water that is available in a specified water management area or water source. However, such a determination must be consistent with any relevant management plan or Minister's plan and any relevant implementation plan. This provision allows for adaptive management of the water resource, where the amount of water available for use may vary from year to year.

Any person may apply for the granting of an access licence. If the application is for an area that is not in a water management area, or if it is in an area where there is no water sharing management plan in force, the Minister must advertise the application. Any person may object to the granting of the access licence. Before making a decision on the application, the Minister must endeavour to resolve the issues raised by the objection by means of consultation with the applicant and the objector, with a view to reaching agreement. For this purpose the Minister may also propose that the matters be dealt with by way of independent mediation or neutral evaluation involving an independent mediator or neutral evaluator selected by agreement between the applicant, objector and the Minister. The Bill makes no mention of who should pay for this mediation process.

The introduction of mediation or neutral evaluation dispute resolution alternatives is an innovative feature of this legislation, one not currently featured in other natural resource management legislation.

An access licence may have a duration up to: 20 years for a local or major water utility access licence; 2 years in the case of a regulated river (opportunistic water) licence; and 15 years in any other case. This is a significant extension of time compared to the five year period as proposed in the White Paper. In his Second Reading speech, the Minister stated that the term and review of access licences were the subject of many submissions in response to the White Paper, and that it was decided that a reasonable planning period for business investment was 15 years.²¹

The White Paper: Section 8 – Water Trading and Transfers

The White Paper noted that water markets should provide existing users with flexibility on how their water needs are met, provide an incentive for water use efficiency, and facilitate access to water for new developments. Trading is now the dominant vehicle for reallocating increasingly scarce and valuable water between competing demands. In

²¹ NSWPD, 22 June 2000, Second Reading Speech for the Water Management Bill, at 7504.

1997/98, 863,000 megalitres (10 percent of the total entitlement for consumptive water users) was traded.

The White Paper used and defined the following terms:

- Trade – a market transaction between two parties which involves the sale or lease of water entitlements;
- Transfer – a change in the registered ownership or control of water entitlements from one person to another and/or a physical transfer;
- Physical transfer – a change in the physical location of a water entitlement, which may or may not involve a market transaction.

The White Paper proposed that new legislation would provide for the development of statewide transfer principles and rules by the Minister. Domestic, stock and harvestable rights are tied to land and therefore should not be allowed to be traded, except as a consequence of the sale or lease of land. The White Paper proposed that legislation would allow for water transfers of access entitlements (or possible components of access entitlements) to occur with the Minister's approval and subject to any conditions that may be applied. Transfers can be permanent or temporary, and can be for the whole or part of an entitlement.

For regulated and unregulated surface water and groundwater, the main tradeable components were proposed to be the share entitlement (ie, how much of the water resource) and the extraction entitlement (ie, specific location and under specified conditions). For groundwater share entitlement, the share of the sustainable yield may be traded and physical volumes accumulated can also be traded.

The White Paper proposed that the Government would be allowed to buy or sell entitlements on the market. Environmental health water, reserved for environmental flows, should not be part of the water market and will not be available for trades. However, it will be possible for individuals or groups to purchase entitlements on the market and 'use' the water as market based environmental water by leaving it in the river or aquifer.

Intervalley transfers occur where a water entitlement that has been issued in one valley, is transferred for use into another. The proposed legislation should allow intervalley transfers on regulated rivers, where the valleys are hydrologically connected, or connected indirectly by infrastructure. Inter-aquifer transfers can occur where a single aquifer is arbitrarily divided into two or more management units, and similarly for an unregulated river where it is divided into several management units. The Minister may also approve physical transfers between NSW and interstate.

Commentary

The Nature Conservation Council noted that there is a serious lack of knowledge regarding the effect water markets and water trading may have on ecological and/or social systems within NSW. The Council considered that water trading amongst extractive users has the potential to:

- Further degrade wetland systems and negatively affect environmental flow rules;
- Move water already suffering from high water table levels and associated salinity problems;
- Move water consumption upriver and decrease flow in the lower parts of the river;
- Move water consumption into areas where the salinity levels of groundwater are significantly higher and increase the flow of highly saline groundwater into the river;
- Increase the concentration of water use in a smaller area and potentially have adverse effects on groundwater levels and water quality; and
- Move water onto soils and landscapes that are not suitable for irrigation.

For these and other reasons, the Council stated that water trade in NSW should be restricted by a broad suite of constraints, firmly based in the precautionary principle, to prevent a trading market that encourages traders to privatise benefits but socialise costs.

Farrier has also noted that water transfer provisions were first introduced in NSW in 1986 with limited debate. Farrier concludes that imbedding the provisions in legislation has meant that the issue of whether water trading represents good policy is no longer contentious. The result is that the principles are now taken for granted, and the White Paper is about how they might be implemented.²²

The NCC stated that transfer rules should be devised on both a state-wide basis through transfer principles, as well as on a sub-catchment basis by clearly defining the criteria for transfer in the water management plan. The NCC strongly disagreed with the proposals that transfer criteria should be developed in the implementation plans.

In regard to groundwater trading, NCC opposed the transfer of extraction licences from one aquifer to another where the transfer will cause added stress on the receiving aquifer, and opposed groundwater to surface water trades and vice versa.

The NSW Farmers Association was supportive of the process of liberating trade in water entitlements as long as it is limited to where it is possible for the water to be physically transferred. The Association did not agree that water should be traded between groundwater systems where water does not readily move between extraction points.

The Association also noted that the costs of infrastructure remain consistent in irrigation areas regardless of how many irrigators contribute to their maintenance. Reports commissioned by the Department of Land and Water Conservation have suggested that when water is permanently traded out of a community, there should be a requirement for the seller to contribute to that community cost via an 'exit fee'. The Association was generally supportive of that concept and was disappointed that the White Paper did not explore this further.

²² Farrier, D. "Integrated management of land and water? Planning and project approvals under the White Paper on NSW water management legislation". In *1st Australian Natural Resources Law and Policy Conference Proceedings*, 27-28 March 2000, Canberra Australia at 152.

The Association believed that water trading rules for each water management unit must be made by the Water Management Committee, and their development should be made a priority.

The Association did not oppose provisions for the Minister to trade in water, but submitted that rules controlling the behaviour of the Minister with regard to the market should be written into the legislation.

The Water Management Bill 2000

Clauses 60 to 63 of the Bill regulate access licence transfers. Key points include the following:

- the Minister may establish transfer principles;
- applications to the Minister for consent to transfer may apply to the whole of the licence or parts thereof;
- the maximum period for which a local or major water utility licence be transferred is one year;
- a regulated river (opportunistic water) access licence may not be transferred unless permitted by the relevant management plan or Minister's plan;
- water allocations conferred by an access licence may be transferred; and
- the Minister may enter into agreements with other States for interstate transfers.

Clauses 64 and 65 provide for the return of water flows and for used water allocations to be recredited to the licence. The White Paper envisaged only water utilities having this option but the Bill proposes that it be available for all access licences.

The Minister may suspend or cancel an access licence on several grounds, such as failing to comply with directions or not paying any fees or charges. However, the Minister may also compulsorily acquire an access licence if the Minister is of the opinion that, in the special circumstances of the case, the public interest requires the acquisition. In this case, the licence holder is entitled to compensation from the State for the market value of the licence, as determined by the Minister and the person entitled to compensation. If no agreement can be reached, the Valuer-General is to determine the amount. A person dissatisfied with the amount of compensation offered is also entitled to appeal to the Land and Environment Court.

Clauses 69 to 71 provide for embargoes on applications for access licences to take effect.

Clause 72 provides for a publicly available register of access licences, including every access licence that is granted, renewed, transferred, surrendered, suspended or cancelled under the Act.

As discussed in the commentary section above, the issue of compensation for licence holders who have been adversely affected by a reduction in water allocation has been fairly contentious. However, for the first time the Bill provides a potential source of compensation to those access licence holders (other than opportunistic water) whose water

allocations have been adversely affected during a prescribed period as a consequence of the a variation in the bulk access regime. The Minister, with the concurrence of the Treasurer, may determine whether or not compensation should be paid, and if so, the amount. No appeal is provided against the Minister's decision. A prescribed period means, if a management plan is in force, for the period during which the plan is in force, or, in any other case, any of the successive periods of five years commencing on the date on which this section of the Act commences.

The White Paper: Section 9 – Water Use Approvals

The White Paper proposed that irrigators, mining companies, irrigation corporations, water utilities, power generation companies and other concerns obtain a water use approval from the Minister before being able to make use of water. The approval would set limits on volume of water that can be used and the conditions of use.

Therefore a water user would require an extraction entitlement (with share entitlement and extraction entitlement components) and a water use approval in order to operate.

The White Paper proposed that water use approvals would be issued for a ten year period for standard irrigation licences. The Minister may issue approvals for longer periods of 15 to 20 years for irrigation corporations, local water utilities, major utilities, power generation, mining and industry. Conditions of water use approvals would be reviewed every five years. However, the White Paper stated that conditions would only be changed if required because of a:

- Change to a resource management plan;
- Significant change to local environmental conditions (eg, increased salinity);
- Request of the licence holder which is accepted by the Minister.

In addition, a particular environmental or water supply crisis may require changes to conditions at relatively short notice, and it was proposed the Water Management Act allow the Minister to do this under exceptional circumstances.

The White Paper also proposed that the new water legislation:

- Explicitly state the environmental factors that the Minister must take into account when considering applications for water use approvals;
- Require the Minister to take account of the relevant resource management plan and cumulative impacts in assessing approvals for water use;
- Provide for the Minister to require, where appropriate, industry best management practices relevant to the development.

Commentary

The NSW Farmers Association had concerns about the ambiguity of the section outlining the water use approval process. Its main concern was that a water user irrigating pasture (once every five years) will be required to develop a property plan to the same level of detail as a water user who is annually irrigating intensively. The Association proposed a

mechanism where the extent and cost of the application for a water use approval is determined by the nature and size of the proposed development.

The Association noted that when determining a water use application, the matters to be taken into account as proposed in the White Paper are similar to those in the Native Vegetation Conservation Act. The Association said that this Act had caused significant difficulties in regional NSW.

The Association sought water use approvals for a 20 year tenure, and that the approval process should be free from any requirements to consider other legislation.

The Nature Conservation Council supported the separation of access and use licenses, as this allows for more effective site specific environmental constraints to be applied. The NCC would like to see water use approvals incorporate the following conditions:

- Restriction of licence period to no longer than five years;
- A comprehensive assessment regime with active input from responsible agencies and the public;
- Public notification and a 28 day period in which any person may make a submission;
- Full third party appeal rights in the Land and Environment Court;
- Licences should be in compliance with other legislation, such as the Threatened Species Conservation Act;
- A set of criteria to which the Minister must adhere in considering any variations to conditions on licences during the term of the licence.

Section 10 – Water Ecosystem Activities

The White Paper noted that as well as water extraction and use, there are a number of other activities that impact upon the environmental health of surface water and groundwater ecosystems. These activities included: river bed and bank excavation; construction of weirs, pumps and bores; and drainage and floodwater diversion. Currently the Acts that regulate these activities are found in the *Water Act 1912*, the *Drainage Act 1939*, and the *Rivers and Foreshores Improvement Act 1948*. It was proposed in the White Paper that the new Water Management Act would repeal these Acts and bring the activities they regulate under a common management regime.

The White Paper proposed that any person or organisation would require an approval from the Minister for the activities listed below:

- Excavation on, in or under ‘protected land’;
- Removal of material from ‘protected land’, such as sand or gravel;
- Anything that obstructs, or detrimentally affects, the flow of ‘protected waters’, or which is likely to do so;
- Building river crossings, such as bridges, culverts and fords;
- Floodwater diversion or obstructions;
- Drainage;

- Bore drilling, modification or removal;
- Channel and bank protection and restoration measures in rivers, lakes and other freshwater and estuarine surface bodies, including restoration activities under the Rivercare program;
- Dams and weirs.

‘Protected land’ was defined as the bed, bank or shore of protected waters or land within 40 metres from the top of the bank or shore of ‘protected waters’. ‘Protected waters’ were defined as: rivers; lakes that have rivers flowing into or out of them; coastal lakes and lagoons including the channel to the sea. This included both freshwater and water in estuaries.

An approval would also be required for constructing and operating any works associated with the above activities, such as pumps, bores, weirs, flow diversion or obstruction works whether the work is associated with water extraction or not. The approval will be vested in the person or organisation conducting the activity for a term of up to five years, which is renewable.

Commentary

Neither the NSW Farmers Association nor the NSW Irrigators Council made comments about this section of the White Paper.

The NCC opposed the continuation of the current system whereby landowners or occupiers may undertake bore drilling activities on their property without a licence if the proposed works will have a minor environmental impact. The NCC proposed that the new legislation and the water management plans should include definitions and criteria for determining what constitutes minor environmental impact. The NCC also proposed that new legislation should include:

- The requirement that all existing weirs should be licensed;
- A public register of all weirs updated as new ones are built;
- A strategy to urgently deal with structures across floodplains.

Farrier has also noted that throughout the White Paper, there was an underlying tension when it comes to defining the precise jurisdiction of the implementing agency, the Department of Land and Water Conservation. The White Paper noted that water management plans will cover both water and catchment issues, but as Farrier noted, the further the plans go from the river bank, the greater the risk that they will trespass on territory claimed by others, such as local councils. Hence for this reason the White Paper takes the definition of protected land (40 metres distance from the river bank) from the *Rivers and Foreshores Improvement Act*, an arbitrary line developed in 1948. Farrier concluded that it was not clear why the proposed legislation will maintain these blanket project control provisions, rather than relying on the water management planing process to craft detailed regulations covering specific situations.²³

²³ Farrier, D. “Integrated management of land and water? Planning and project approvals

The Water Management Bill 2000

As noted, Part 3 of Chapter 3 (Water Management Implementation) of the Bill combines the procedures for three types of approvals. These are:

- water use approvals, which confers a right on its holder to use water for a particular purpose at a particular location (clause 80);
- water management work approvals, of which there are three kinds - water supply work approvals, drainage work approvals and flood work approvals (clause 81); and
- activity approvals, which include controlled activity approvals and an aquifer interference approval. A controlled activity approval confers a right to carry out a specified controlled activity in waterfront land²⁴ (clause 82).

Applications for approvals must be made to the Minister, and may be required to be accompanied by a management program for the land to which it relates.

The three approvals as listed above are included in section 91 of the *Environmental Planning and Assessment Act 1979*. This means that development that requires an approval is considered integrated development. Integrated development is development (not being complying development) that, in order for it to be carried out, requires development consent and an approval from another government agency. For example, a local council may be the consent authority for a development, and assess the application in accordance with the requirements of the *Environmental Planning and Assessment Act*. The consent authority must then obtain the general terms of any approval proposed to be issued by another government agency, before granting development consent. If the application is for a local development, and the relevant approval authority (say the Minister for Land and Water Conservation) refuses approval, the consent authority must refuse development consent.

In his Second Reading Speech the Minister stated the following: “Assuming there is no embargo in place, an application for an access licence or for a water use or works approval can be lodged. In areas where there is no water management plan, it will need to be advertised. Objections can then be lodged and there are mediation and other processes for resolving these objections.”²⁵

However, the Bill does not appear to reflect these comments by the Minister, specifically the advertising of water use approvals as distinct from works approval, and indeed activity approvals. For instance, as per the Minister’s comments, in regard to an application for the

under the White Paper on NSW water management legislation”. In *1st Australian Natural Resources Law and Policy Conference Proceedings, 27-28 March 2000, Canberra Australia* at 158.

²⁴ Waterfront land is defined as comprising: a river, estuary or lake, or if the regulations provide, the coastal waters of the State, and land within 40 metres inland of the high bank of any river or lake, or the mean high water mark along the waterfront of any estuary or coastal waters.

²⁵ NSWPD, 22 June 2000, Second Reading Speech for the Water Management Bill, at 7505.

granting of an access licence, clause 51 of the Bill states that the application must be advertised if it deals with water not in a water management area or for where there is not a water sharing management plan in force. There are no similar provisions included in the Bill for applications for a water use or works approval.²⁶

Clause 84(6) states that in the case of an application for a water use approval (ie, water management works and activity approvals not included), the Minister must cause the application to be advertised in accordance with the regulations.

Any person may object to the granting of a water use approval. If so, the process is the same as that discussed for objections to the granting of an access licence, ie, if no agreement can be reached between the applicant and the objector, the Minister may deal with the matters raised by way of an independent mediator. In this case, the Bill states that any costs associated with any mediation or neutral evaluation are to be paid for by the Minister (clause 85(7)). The Bill does not provide any opportunity to object to the granting of a water management works approval or an activity approval.

Clause 89 provides for grounds of refusal for not granting certain approvals, and these are generally based on the wording that ‘the Minister must be satisfied that adequate arrangements are in force to ensure that minimal harm will be done to any water source or its dependent ecosystems...’.

An approval has effect for a maximum of:

- 3 years for a controlled activity approval;
- 10 years for a water use or aquifer interference approval;
- 20 years for a water management work approval.

The Bill also includes provisions for: cancelling or surrendering approvals; temporary and permanent embargoes on approvals; a register of every application for an approval and those approvals granted, renewed, transferred, surrendered or cancelled; and determinations for recoverable costs and charges for administering the Act.

The White Paper: Section 11 – Administration System

Under the currently system, several different types of licences, approvals, authorities and permits are administered under a variety of Acts. Each of these Acts have different processes associated with making an application and with decision making. The White Paper noted that the rationalisation of these processes into the one system is long overdue.

The White Paper proposed that all water access, use and other activities that affect water resources, apart from harvestable rights and basic domestic and stock rights, require an approval. This means that an approval would be required for:

²⁶ Upon inquiry the Department of Conservation and Land Management advised that the Government is likely to introduce amendments to the approvals section of the Bill.

- An access entitlement;
- Sale of all or part of an entitlement;
- Water use;
- Other activities that affect ecosystems, such as pumps, bores and weirs.

The White Paper noted that the first step to seeking such an approval is to lodge an application. The Act would contain provisions for placing embargoes on any new applications for a water licence. This applies to regulated and unregulated surface water and groundwater where entitlements have been fully or over-allocated. Currently, embargoes are in place on all Murray – Darling Basin and North Coast surface water systems and several groundwater systems. Embargoes are made by the Minister and published in the Government Gazette. Where an embargo is in place, the Minister may accept an application for a water transfer.

The White Paper proposed that the Minister, when deciding an application for any type of approval, must consider the environmental impact assessment requirements of Parts 4 and 5 of the *Environmental Planning and Assessment Act 1979*, as well as the requirements of other Acts such as the *Threatened Species Conservation Act 1995* and the *Fisheries Management Act 1994*. Under the proposed Act the Minister would also be required to take into account a number of other factors that more specifically relate to water.

The White Paper proposed that if the Minister grants an application, usually with conditions, an applicant who is not satisfied with the conditions can appeal to the Land and Environment Court. Likewise, any person who lodged an objection to the Minister about the application who is not satisfied with the granting of approval or conditions would have the right to appeal to the Land and Environment Court.

The Minister would have the discretion to vary the conditions of approval during its currency under the following conditions:

- If provided by an approved water management plan;
- On transfer;
- At any time with the approval holder's consent;
- If a significant adverse effect on the aquatic environment, human health, property of public safety, including a dam safety event or algal bloom has occurred or is likely to occur;
- To amalgamate approvals that are owned by a single holder into a single approval.

There are existing provisions in the Water Act to suspend or cancel a water licence, and it is proposed that the new Act will include these provisions where:

- there is non-performance of, or serious breach of any condition of an approval;
- in circumstances where the Minister thinks fit, in order to protect or restore the environment;
- there is a conviction of an offence under the proposed Water Management Act.

The Minister will not be liable to pay compensation if an approval is varied, suspended, cancelled or not renewed.

Commentary

The NCC supported many of the proposals for the administration system which have been proposed in the White Paper. However, the NCC would have liked to see the following included:

- circumstances for which approvals of further entitlements or transfers will be prohibited, including the applicant not being a ‘fit and proper’ person;
- a specific power to impose conditions should be inserted into the legislation, such as requiring monitoring and reporting to be undertaken;
- the cancellation of a licence where it was granted as a result of false or misleading information.

The NCC applauded the provision of a public register for licence details, including both permanent and temporary transfers.

The NSW Farmers Association did not comment on this section. The NSW Irrigators Council noted that under any administrative system, water shares should be defined in the same manner as real property, and that the Land Titles Office should be responsible for administering the register for permanent transfers. The Irrigators Council considered that it is not necessary to provide for a public register of temporary transfers.

The White Paper: Section 12 – Appeals and Objections

The White Paper noted that under the Water Act, appeals and objection rights are not consistent with the approach used in planning and other natural resource management legislation. Under the proposed Act, appeal and objection rights would be available from decisions taken by the Minister that have implications for environmental protection, conservation and management of water resources, water users and other interests.

The White Paper proposed that an applicant for an approval or entitlement may make a merit appeal to the Land and Environment Court if the Minister refuses the application, other than under an embargo. The applicant would also be entitled to appeal against the conditions imposed with the approval. Under a merit appeal, the Land and Environment Court rehears the application to determine the merits of the proposal, and may then substitute its decision for that of the Minister.

The White Paper also proposed that a third party be entitled to object to an application and be able to appeal the decision to the Land and Environment Court except where there is a water management plan and implementation plan in place.

The White Paper also proposed that when a party wishes to purchase an access entitlement from another party, the approval of the Minister would be required. The applicant will have the right of a merit appeal to the Land and Environment Court against any refusal by the

Minister, or any conditions imposed. However, where a water management plan and implementation plan are in place, an applicant for a transfer would only have a right of appeal if one of the conditions of the approval has been varied to achieve consistency with the plans or where the change is harsh or unreasonable. The White Paper proposed that there be no right of appeal against a refusal of a transfer in an area where a water management or implementation plan is in place, if the application, in the Minister's opinion, is inconsistent with those plans. Whilst transfer applications would be advertised, the White Paper proposed that there be no objector rights or third party merit appeals where there is a water management or implementation plan in place.

Finally, the White Paper proposed that any person should have a general right to challenge the procedure used in making the decision (ie, judicial review) under the proposed Act, as is currently the case in administrative law.

Commentary

The NSW Farmers Association did not support rights for third party appeals on water use approvals. The Association believed that the process and list of considerations established in the proposed Act should ensure that the use of water at particular locations is not to the detriment of the environment and/or neighbours.

The Association opposed the proposal to remove the Land Board as the first avenue of appeal in relation to Departmental determinations. The Association believed that appellants should have the ability to utilise a cost effective arbitration tribunal before being required to file their case in the Land and Environment Court, which is an expensive process.

The NCC agreed with:

- proposals that there should be open standing to require compliance with the Act;
- supports the position of the White Paper that there should be no merits appeals in relation to the approval of water management plans.

However, the NCC was extremely concerned about proposals to restrict the merits review processes in the Water Management Act to circumstances where there is no applicable water management plan. The NCC believed that merit reviews should be determined by the potential impact of a particular decision, ie, where an activity has potentially a significant impact on the environment or other water users, merit appeals to the Land and Environment Court should be made available.

The NCC also recommended that third party appeal rights should arise in other circumstances, such as the granting, variation or transfer of entitlements, particularly where there is not a water management plan in place, or where sustainability indicators set out in a water management plan are not being achieved.

The White Paper: Section 13 – Compliance

The White Paper noted that the change in focus in the proposed Water Management Act would allow for more secure rights for water users. These rights must be accompanied by

a compliance system to protect other water users and the environment. Currently the Water Act takes a traditional approach to compliance and enforcement but lacks flexibility and a range of mechanisms. The proposed Water Management Act would provide a statutory framework for the monitoring and enforcement of compliance of the Act.

The White Paper proposed that holders of entitlements and approvals, landowners, occupiers, contractors, whether individuals or corporations would be responsible for complying with the proposed Act. The Minister would have a range of remedial powers to prevent or restrain a breach of the Act. DLWC officers would have delegated authority to enter premises to investigate relevant matters. The proposed delegated powers included stop work orders or restraining a person from taking water, and any of the following: seize equipment; turn off pumps or meters; take notes and record conversations on tape; serve notices and orders; issue on the spot fines.

The Minister may issue a notice to an occupier or contractor on the property where non-compliance with the Act is suspected. The notice will contain a provision explaining that if the recipient does not comply with the notice, such as to stop work immediately, the Minister may take action as outlined above. The notice may also provide that the Minister may obtain a stop work order or injunction in the Land and Environment Court at the expense of the occupier or contractor.

Alternatively, a notice may state that a remedial works order will be issued. Where the recipient fails to comply with a remedial works order, the Minister would be able to undertake the necessary works at the expense of the recipient. Breaches of notices and orders would constitute an offence under the proposed Act.

The White Paper proposed that the Minister would be able to prosecute persons for breaches of the proposed Act, and outlined 13 areas where a prosecution may be launched. These included:

- taking water without approval;
- taking water otherwise than in accordance with an approved management plan;
- carrying out an activity without entitlement/approval;
- failing to comply with an order or notice;
- failing to maintain infrastructure;
- failing to comply with a general duty of care to take reasonable steps to prevent damage to water ecosystems.

The proposed Act will also contain civil remedies for breaches or threatened breaches of the Act. Under the proposed Act any person would be entitled to seek a remedy in the Land and Environment Court, even if their rights have not been or may not be infringed by the breach or threatened breach.

The proposed Act would provide that a person owes a duty of care not to carry out an activity that causes or is likely to cause environmental harm unless the person has taken all reasonable care and practical measures to prevent or minimise the harm. Certain offences would attract strict liability, such as taking water without approval. There would be a

statutory duty to report environmental harm or a threat to harm arising from activities relevant to the proposed Act.

The proposed Act should provide for a range of penalties including fines and Court orders designed to repair environmental damage or works.

Commentary

The NSW Farmers Association considered the compliance measures outlined in the White Paper to be ‘most severe and inappropriate, ...draconian and contradicts the philosophical approach promoted by the Department, which speaks of working together with the community to come up with co-operative management of the resource.’ The Association did not consider it acceptable that Officers of the Department of Land and Water Conservation would have the power to enter a property and dismantle or remove works and seize written documents on the basis of a threatened breach of the legislation. The Association would like to these powers to be reduced to more ‘appropriate’ levels.

In contrast, the NCC strongly supported these broad powers of authorised officers and other elements of the compliance regime. However, the NCC was seriously concerned that non-regulatory measures, such as economic instruments and incentive schemes, were not proposed to be included in the legislation.

The NCC noted that a significant omission from the White Paper was the failure to provide for mandatory and voluntary environmental audits. In addition, the NCC would have liked a range of civil penalties to be applied, as well as the stated criminal penalties. The NCC called for penalties be set at a level that is consistent with penalties in the *Protection of the Environment Operations Act 1997*.

The Water Management Bill 2000

Part 1 of Chapter 7 (Enforcement) of the Bill provides for directions to landholders and other person. The Minister may issue the following:

- direct a landholder to provide certain information about any water management works situated on the land, or the taking or using of water by the landholder;
- issue an order to take specified measures to ensure that water is used beneficially and not wasted or improperly used;
- issue an order to protect water sources;
- issue a stop work order where unlawful activity is occurring;
- issue a temporary stop work order;
- issue an order to remove any water management work whose construction is not authorised.

If a person fails to take the measures specified in the a direction, the Minister may authorise another person to take those measures and recover the money spent from the person on whom the direction was served. In addition, on application by the Minister, the Land and Environment Court may grant an injunction directing a landholder to comply with a

direction.

Clause 348 states that any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach, including a threatened or apprehended breach, of the Act or its regulations.

Part 2 of Chapter 7 provides for powers of entry for authorised officers. Clause 349 confers general powers for authorised officers to enter any premises for the purposes of inspecting any water management works, monitoring the use of water or any controlled activities, surveying or taking measurements or reading meters for the purposes of the Act. An authorised officer may also apply to an authorised justice for a search warrant if the officer believes on reasonable grounds that a provision of the Act or regulations is being contravened.

Part 3 of Chapter 7 provides for two types of offences against the Act, termed major and other offences. The major offences are as follows:

- the unlawful taking of water;
- using water without a water use approval;
- constructing or using water management work without a water management work approval;
- unlawful carrying out of certain activities, such as: carrying out a controlled activity on waterfront land or in a water source protection zone otherwise than in accordance with a controlled activity approval; penetrating an aquifer, or interfering with water in an aquifer or obstructing its flow, otherwise than in accordance with an aquifer interference approval;
- Failing to comply with a direction as served under Part 1 of this Chapter;
- The destruction, damage and interference with certain works;
- Taking water from public or private works.

The maximum penalty for the above offences are (clause 360):

- For a corporation, 2,500 penalty units (\$275,000) and 1,200 penalty units for each day the offence continues (\$132,000).
- For an individual, 1,200 penalty units (\$132,000) and 600 penalty units for each day the offence continues (\$66,000).

Other offences include the exposure of underground pipes, work done by an unqualified person, obstruction of an authorised officer, and the giving of false or misleading information.

Part 4 of Chapter 7 provides for the recovery of unpaid rates and charges, which may include the sale of land.

Part 5 of Chapter 7 provides for legal proceedings and appeals. Clause 374 includes the standard environment provisions that if a corporation commits an offence against the Act, each director and person involved in the management of a corporation is taken to have the

committed the same offence as the corporation if the person knowingly authorised or permitted the act or omission constituting the offence.

Proceedings for an offence against the Act may be disposed of summarily in the Local Court, where the maximum offence for a corporation is 100 penalty units (\$11,000) or 50 penalty units otherwise (\$5,500), or by the Land and Environment Court where the maximum penalties as prescribed by the Act may be imposed. Penalty notices may also be issued for certain offences.

Clause 379 itemises appeals to the Land and Environment Court against any of the following decisions made by the Minister:

- (a) refusing to grant and access licence;
- (b) granting a designated access licence, if the appellant was an objector to the granting of the licence;
- (c) imposing a discretionary condition on an access licence;
- (d) fixing the term of an access licence;
- (e) refusing consent to the transfer of an access licence;
- (f) suspending or cancelling an access licence;
- (g) refusing to grant an approval, other than a decision refusing to accept and application for an approval;
- (h) granting a designated water use approval, if the appellant was an objector to the granting of an approval;
- (i) imposing a discretionary condition on an approval;
- (j) fixing the term of an approval;
- (k) refusing to amend an approval in accordance with an application made by its holder;
- (l) suspending or cancelling an approval;
- (m) to give a direction to a landholder under Part 1;
- (n) as to a person's entitlement to compensation for damage arising from the exercise of a power of entry under Part 2.

However, no appeal is available against any decision of the Minister to which an objection has been made if: in the case of the applicant, the Minister has dismissed the application as a consequence of the applicant failing to participate in mediation or neutral evaluation; or in the case of an objector, the Minister has dismissed the objection as a consequence of the objector having failed to participate in mediation or neutral evaluation.

The White Paper: Section 14 – Transitional Arrangements

The White Paper noted that it is expected that the proposed Water Management Act would commence by January 2001. Certain provisions of the current Water Act and other legislation would continue to apply for an interim period of up to 18 months.

River management committees have been operating for some time, and these would be replaced by new water management committees appointed under the proposed Water Management Act. The Minister would be able to appoint members of existing committees

to the new committees. However there is no requirement for the Minister to do so.

During the transition period, existing water licences will continue to operate normally except they would be subject to the planning law framework, Minister's powers and compliance measures in the new Act. At the conclusion of the transition period, the Minister would issue water licence holders with replacement access entitlements and water use approvals. This transition would simply be a reformatting of existing licences. Applications for renewal of the replacement approvals would require new assessment under the proposed Water Management Act.

Commentary

The NCC was concerned that despite an 18 month lead time, the licences issued will be exactly the same as previous licences and will be granted without assessment. The NCC was concerned that it will be another five years before any conditions on licences can be imposed or changed. Similarly, it is possible that for some irrigation corporations the Water Management Act will not come into effect until the year 2015.

The NCC rejected proposals for compensation for any volumetric reduction in water licence allocation resulting from increased environmental flows. However, the NCC did support the concept of a structural adjustment package, and suggests that this could be implemented in a manner which provided incentives for water users to achieve water efficiency savings.

In contrast, the NSW Farmers Association argued that compensation should be made available when access to the resource is denied or has its reliability altered as a result of government decisions or changes in policy. The Association also called on the Government to develop a structural adjustment package to help water users adjust to the new legislation, including provisions for a buy back of licences and incentives for water efficiency.

The Water Management Bill 2000

Schedule 9 of the Bill contains Savings, transitional and other provisions. Licences, permits and authorities issued under the current legislation shall continue after commencement of the new Act. Clause 2 of Schedule 9 states that the Minister will declare a day, the 'appointed day', on which existing legislation is to be repealed and replaced by the proposed Act. This day will be declared within five years after commencement of the new Act.²⁷

Existing licences and permits issued under the *Water Act 1912* will be deemed to be the new licences and approvals on the appointed day. The new licences and approvals will be subject to the new management or Minister's plans and implementation programs from the appointed day. Clause 9(4) states that entitlements that were in force under the Water Act immediately before the appointed day (ie, an access licence, a works approval, and a water use approval) have effect for 10 years from the appointed day.

²⁷ Department of Land and Water Conservation, *A Guide to the Water Management Bill 2000*, July 2000.

Existing permits issued under the *Rivers and Foreshores Improvement Act 1948*, will, on the appointed day, be deemed to a controlled activity approval issued under the proposed Act. The expiry date will not change, ie, the permit will continue for the balance of the term of the original permit.

4.0 CONCLUSION

The Water Management Bill provides an opportunity to achieve sustainable water management. Considerable progress in water reforms has been made since 1995, and the passage of the Bill should consolidate these reforms.

In response to the Bill, the NCC stated that it includes significant gains for the environment such as:²⁸

- the clear definition of environmental water;
- water management plans having a duration of five years with a regular review;
- limiting compensation for changes to licence conditions;
- the granting of 5-10 year use licences subject to conditions of water management plans;
- integration of all waters out to three nautical miles.

However, the NCC also noted that elements of the Bill would work against long-term management of the State's waterways, including:²⁹

- failure to introduce an independent assessment panel to direct and advise water management committees;
- failure to appoint an independent auditor to ensure transparency in the process of water management planning.

At the time of writing the NSW Farmers Association had not released its comments on the Bill. However, extrapolating from the submission to the White Paper, farmers are likely to have a mixed response to aspects of the Bill. For instance, neutral evaluation dispute resolution clauses, 15 year water access licences, and compensation provisions for changes to the bulk access regime during the life of the relevant water management plan are likely to gain acceptance from most irrigators. However, they are likely to be disappointed with: management plans having a five year review period (the association sought a period of 15-20 years); riparian right changed to a basic water right; and that implementation plans are prepared by the Department and are not audited by a third party.

It is clear that current water legislation is in need of updating. However, it is also apparent that the plethora of natural resource management legislation in the State needs an overhaul. The Healthy Rivers Commission, in its inquiry into the Shoalhaven River, received

²⁸ "Water management Bill puts environment on the table." Nature Conservation Council of NSW *Media Release*, 22 June 2000.

²⁹ "Water management Bill puts environment on the table." Nature Conservation Council of NSW *Media Release*, 22 June 2000.

submissions that suggested that sufficiently resourced and representative Catchment Management Committees have the potential to undertake the functions of, or coordinate, Vegetation and River Management Committees, as well as Floodplain and Estuary Management Committees. Each of these Committees are responsible for one aspect of a healthy catchment, and the Commission notes that many citizens cannot understand why they could not operate as sub-committees of a Catchment Management Committee.

The Healthy Rivers Commission notes that such an arrangement would require minor amendments to legislation, and believes that an approach must be implemented to diminish the real degree of community concern about the time, energy and replication of effort needed under the current arrangements.³⁰

However, such an arrangement would still not be able to reconcile inter-jurisdictional issues between competing government departments, such as indicated by Farrier. For these problems to be resolved, a new paradigm of natural resource management in the State may need to be developed. In February 1999, the NSW Department of Urban Affairs and Planning released a discussion paper canvassing options on reforming the planning system.³¹ One such option was to change institutional structures so that portfolios are based on a regional structure rather than a sectoral one.³² How these issues can be resolved remains a key issue for the future.

³⁰ Healthy Rivers Commission of New South Wales, *Independent Inquiry into the Shoalhaven River System. Final Report*, July 1999, at 103.

³¹ NSW Government, Department of Urban Affairs and Planning, *Plan Making in NSW. Opportunities for the future – discussion paper*. February 1999, at 57.

³² See also, *Natural Resource Management in New Zealand: Lessons for New South Wales*, NSW Parliamentary Library Briefing Paper no 13/99, 1999.