Enforcement of Sustainable Irrigation Practices Through Current Tasmanian Law and Policy

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Water is one of our most precious natural resources. The rivers and streams through which it flows have a fundamental role in maintenance of the stability and integrity of catchments, and also have the power to enrich us spiritually. Yet, sadly, water is a much abused resource. Many private individuals and organisations fail to take responsibility for caring for our water systems, despite reaping private benefits from the use of these public assets. To avoid this tragedy of the commons, it is incumbent upon governments and regulators to ensure that our water resources are managed appropriately and sustainably. This paper considers one part of that regulation—control of irrigators.

The *Water Act* 1957 (Tas) is the only piece of legislation in Tasmania which has State water management as its principal purpose. A close analysis of the *Water Act* is clearly critical to a discussion of the legal and policy tools that may be used to ensure irrigation practices are environmentally sustainable, and is the starting point for this discussion. The consideration of the *Water Act* uncovers a number of ways in which that Act may be applied to ensure more environmentally responsible water abstraction. However, these mechanisms are inherently clumsy, as the *Water Act* was not written with environmental management in mind. The Act is clearly highlighted as an anachronism; while it was an appropriate basic approach to water utilisation in the 1950s, it has not been amended to reflect the relatively recent growth of environmental awareness and concern. This discussion therefore also considers in some depth the way in which other, more recent legislation and policy can be used to complement or supplement the *Water Act*. The *Environmental Management and Pollution Control Act* 1994 (Tas), the *Land Use Planning and Approvals Act* 1993

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(Tas), and the *State Policies and Projects Act* 1993 (Tas), are considered in this context.

Clearly this discussion is most relevant to Tasmania; the *Water Act* in particular is unique to this jurisdiction. However, the other Tasmanian legislation considered here, which forms part of the State's resource management and planning system, has similarities to recent environmental legislation in other Australian states, and in New Zealand.

The inspiration for this analysis has been a recent increase in interest about the management of the Mersey River and its catchment. Like many rivers around the State, the Mersey River is currently showing signs of ill health due to the deleterious effects of a number of human activities in the catchment. One of these activities is water abstraction for irrigation of rural land. Considerable pressure is being brought to bear on water users by a range of stakeholders not only to ensure an acceptable quality of water in the river, but to guarantee a flow of water for the environment. Clearly the solutions to the problems of the Mersey are not simple. However, better control of water abstraction is a key component of any management framework.

Where helpful, by way of example, the legal and policy tools discussed in this essay are applied to the Mersey River.

Water Act

The *Water Act* 1957, despite its age, remains the principal piece of legislation controlling water abstraction from Tasmanian rivers, including the Mersey. The Act is administered by the Rivers and Water Supply Commission (RWSC), which is established by the Act.[1] The general scope and purpose of the legislation, particularly as expressed through the functions, powers and duties of the RWSC, are discussed here. The nature of water rights issued or preserved under the Act and its regulations[2] is then set out. Finally, the control mechanisms that may be used against irrigators are analysed in the context of controlling unsustainable irrigation practices.

1 This body is established under s 4(1) of the Act. Also note s 16 of the *Water Act* 1957, and ss 7 to 10 of the *Government Business Enterprises Act* 1995 (Tas).

2 Water Regulations SR 78/1965.

Scope and Purpose

The *Water Act* is relatively detailed in its coverage of the granting and control of water rights in the State of Tasmania. This is unsurprising given its long title, which states that the *Water Act* is to:

> provide for the best use of the natural waters of the State and to that end to establish an authority to initiate and control the use of those waters, to codify the statute law affecting their use, to provide for the establishment of local river and water supply authorities.

However, it is also clear from the long title and a general reading of the Act that the legislators did not design the Act to ensure that State waters are used in an environmentally sustainable manner. That is not to say that the Act cannot be used for that purpose. The functions, powers and duties of the RWSC, expressed in section 16(1) of the *Water Act* and section 7(1) of the *Government Business Enterprises Act* 1995 (*GBE Act*) and section 16(4) of the *Water Act*, are carefully considered below to determine the extent to which the Commission may be obliged to consider environmental sustainability.

Section 16(1) of the *Water Act* is expressed in very anthropocentric terms. It states that the Commission shall:

> (a) as it thinks fit, establish and maintain waterworks for the supply of water for domestic, industrial, agricultural, and for other purposes;
>
> (ab) carry out the functions of a trust under Part VI;
>
> (b) subject to Division 3 of Part III and otherwise as it thinks fit, promote or assist the establishment and maintenance of such waterworks by other authorities and persons;
>
> (c) allow other persons to take water from rivers and lakes that but for this Act they may not take;
>
> (d) prevent in such cases as it thinks proper any unlawful taking, use, or pollution of water of rivers and lakes; and
>
> (e) take, when it thinks fit, proper steps to maintain the natural drainage systems of the State and to prevent or reduce flooding, silting up, erosion of river beds, and blocking of river channels by vegetation, fallen trees, illegal weirs, or other causes.

This subsection does very little to ensure that environmental impacts of abstraction activities are taken into account. Three of the paragraphs can be related in some way to the environment, but it is difficult to read them as considering the environmental health of the river, as follows:

- Paragraph (a) relates to water supply through waterworks. It is arguable that the RWSC could supply water for habitat protection. However, not only is this function discretionary, but such water-

works would be creating an artificial system, as distinct from conserving the existing, natural system.

- Under paragraph (d), the Commission may prevent unlawful taking and use of water. Again the RWSC has some discretion in relation to the power. Also, this paragraph can only be used to protect the environment in so far as the rest of the statute makes taking and use of water that is needed to maintain the health of the aquatic environment, unlawful.
- Paragraph (e) similarly does not operate to guarantee environmental flows,[3] despite its mention of 'natural drainage systems'. It is likely that this paragraph could be used to place an obligation on the RWSC to protect bank vegetation, and ensure sufficient flow to prevent siltation and invasion of the river bed by woody weeds such as willows. It may be that this flow level would also sustain the aquatic ecosystem. However, such a result is by default. The paragraph, especially when read in the light of the remaining subsection, is oriented towards ensuring the free movement of water. This is quite different to an environmental flow, which is the maintenance of a particular quantity of flow and flow regime. In any case, consideration of natural drainage systems is discretionary for the RWSC.

These functions, powers and duties are supplemented by the provisions of the *GBE Act*.[4] As relevant to this discussion, the principal objectives of a Government Business Enterprise are:[5]

> (a) to perform its functions and exercise its powers so as to be a successful business by
>
> > (i) operating in accordance with sound commercial practice and as efficiently as possible; and
> >
> > (ii) maximising the sustainable return to the State in accordance with its corporate plan and having regard to the economic and social objectives of the State; and
>
> (b) to perform on behalf of the State its community service obligations in an efficient and effective manner; and
>
> (c) to perform any other objective specified in the Portfolio Act.[6]

3 An 'environmental flow' is the amount of water and pattern of discharge that is required in a river to maintain the natural biological community, in terms of its species diversity and composition.

4 The RWSC is a Government Business Enterprise pursuant to Part 1 of Schedule 1 of that Act.

5 Section 7(1) *Government Business Enterprises Act* 1995.

These provisions were drafted after legislation establishing Tasmania's Resource Management and Planning System was passed. The latter legislation is based upon sustainable development principles, and sustainability is defined to include economic, social and environmental factors.[7] It is therefore surprising that the *GBE Act* only requires Government Business Enterprises such as the RWSC to have regard to economic and social objectives. The omission of 'environmental' from section 7(1)(a)(ii) means that these provisions cannot automatically be used to ensure that the RWSC meets sustainable development objectives when planning and carrying out its functions.

Nevertheless, it may be possible to import environmental considerations into the objectives of the RWSC, as follows:

- In order to interpret what are the economic objectives of the State, one may look to other parts of Tasmania's laws for assistance. Schedule 1(1) of the *Environmental Management and Pollution Control Act* 1994 sets out a number of objectives, including the following:

  (a) to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity; and

  (b) to provide for the fair, orderly and sustainable use and development of air, land and water; and

  (c) to encourage public involvement in resource management and planning; and

  (d) to facilitate economic development in accordance with the objectives set out in paragraphs (a), (b) and (c); and

  (e) to promote the sharing of responsibility for resource management and planning between the different spheres of Government, the community and industry in the State.

  In this Schedule, economic development is clearly read to be subject to environmental and social considerations. It could be argued that economic and environmental objectives are intrinsically linked, such that when one has regard to the economic objectives of the State, one must also consider the environmental objectives.

- Similarly, one can look at Schedule 1 for enlightenment on what the social objectives of the State are. Schedule 1(2) defines sustain-

6 In the case of the RWSC, the Portfolio Act is the *Water Act* 1957: s 3(1) *Government Business Enterprises Act* 1995.

7 See Schedule 1 of the *Environmental Management and Pollution Control Act* 1994 (Tas).

able development in a way that suggests its pursuit is critical to the social well-being of the community; that is, social objectives include sustainable development. It states that 'sustainable development' means:

> managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while
>
> (a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
>
> (c) avoiding, remedying or mitigating any adverse effects of activities on the environment.

- Under section 7(1)(a)(ii), the Commission must maximise the *sustainable* return to the State. This is likely to mean sustainable financial return. However, it could be argued that such returns will only be sustainable if environmental and social needs are also met.

Section 16(4) of the *Water Act* is the third provision that is relevant to the general functions, powers and duties of the RWSC. This section arguably provides the greatest scope for interpreting the pursuit of sustainability, including environmental flow requirements, into the functions and duties of the RWSC. This subsection limits the provisions considered above and any other power granted to the RWSC under the *Water Act*. It states that:

> In the exercise of its powers under this Act or the *Government Business Enterprises Act* 1995 the Commission shall avoid unnecessary damage to
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> (a) cultivated, meadow and pasture lands;
>
> (b) navigation;
>
> (c) forests;
>
> (d) fisheries; and
>
> (e) the natural beauty of the countryside,
>
> and to that end shall consult with [a number of organisations] as the case may require, and shall have regard to the following matters, so far as they are relevant, along with any other proper consideration:
>
> (f) the character, catchment, and flow or level of the stream or lake;
>
> (g) the extent to which any source of water is or may in the future be used for agriculture, forestry, water supply, fisheries, navigation, transport, industrial purposes, or sanitation;
>
> (h) the effect of proposed work on land drainage, the productivity of land, and the water-table under lands affected.

It is submitted that there are two main ways in which consideration of environmental sustainability can be read into this subsection, as follows.

First, it could be argued that the natural beauty of the countryside will be unnecessarily damaged by the failure to maintain a particular level of flow in a river. For example, it could be argued to be aesthetically right, given the natural character, catchment, and flow or level of the Mersey River,[8] for a flow sufficient for the maintenance of the natural system to be guaranteed at the mouth of the river throughout the year. This argument could be justified on the basis that a lesser flow would leave shingle beds exposed and would allow the proliferation of unattractive algae and weeds.[9]

Secondly, it could also be argued that maintenance of environmental flows is a 'proper consideration' in relation to protecting fisheries from unnecessary damage.[10] It is submitted that 'fisheries' includes not only commercially exploitable resources, but also native fish populations and the food chains that support them.[11] In order to prevent unnecessary damage to these natural resources, adequate environmental flows must be maintained in the river. This concept is a measure of what is required to ensure environmental sustainability of the aquatic ecosystem.

This latter means of importing sustainability is ethically more attractive than the first, as it attempts to justify a minimum flow on the basis of the needs of the river ecosystem, not human desires. It also provides a more objective and scientifically verifiable measure of the scope of the RWSC's powers.

As a whole, it therefore appears that there is some opportunity under the Act to require the RWSC to exercise its powers in a manner that does not threaten the integrity of the natural river system. This may be critical to the success of the enforcement and control mechanisms that may be available under the Act, as discussed below.

8 A relevant consideration from paragraph (f).

9 This is indeed what has been occurring on the Mersey River (John Reed, Latrobe Landcare, personal comments).

10 Paragraph (d).

11 'Fishery' is not defined under the *Water Act* 1957. Its definition under s 3 of the *Inland Fisheries Act* 1995 is very broad, and simply includes 'an area of water or land'. The inclusion of un-economic fish species is therefore open.

Nature of Water Rights

The *Water Act* confirms or creates a number of different water rights, including rights of the RWSC itself, riparian, quasi-riparian and commissional water rights. These rights define the boundaries of legal water abstraction from a river. This section discusses the nature of each of the rights under the Act, illustrating that although a number of rights allow water abstraction, only commissional water rights allow a significant quantity of water to be abstracted for irrigation. Prior to this discussion, the relationship between the rights is set out.

The principal water right defined by the *Water Act* is the right of the RWSC to 'take the water of every river and lake'.[12] This right is subject only to the rights and restrictions listed in section 83(2) of the Act, as follows:

(a) the rights confirmed in section 88 [existing rights, including riparian rights];

(b) rights depending on section 89 [validation of existing public waterworks];

(c) quasi-riparian rights depending on section 93;

(d) the rights validated by section 7 of the *Local Government Act* 1952;

(e) the rights related to any source of supply created under [Local Government Acts], or any special Act within the meaning of the *Waterworks Clauses Act* 1952 or the *Irrigation Clauses Act* 1973;

(f) any right arising under the *Mining Act* 1929;

(g) the effect of the exercise of any power mentioned in this Part upon the use and flow of the water in any river or lake; and

(h) Section 104 [protection of public rights of navigation].

Commissional water rights are omitted from this exhaustive list. These rights are statutory, and may be granted by the RWSC under section 94 of the *Water Act*. It is clear from section 83(2) that commissional water rights do not have primacy over the RWSC's power to take water. Rather, it appears from a reading of section 94(4) that these commissional water rights are delegated out of the RWSC's general right to 'take the water of every river and lake'. Section 94(4) states that 'the Commission shall do its best not to grant commissional water rights in excess of the quantity which it may lawfully take'.

12 Section 83(1).

This interpretation is also supported by section 100C(6), which states that occupiers of land to which a commissional water right for irrigation is annexed, may 'take water for irrigation in accordance with that right *so far as the Commission has the right to grant it*' (emphasis added).

Under this interpretation, commissional water rights are therefore also subject, inter alia, to riparian and quasi-riparian water rights.

Riparian rights are confirmed by section 88 of the Act.[13] In addition to this confirmation, these water rights are given better definition in sections 91 and 100J. The former section relates not to taking of water, but to the delivery of natural flow and quantity of water, including the rights:

(a) to have the water-table under his riparian tenement thereby maintained in its natural state neither sensibly raised nor sensibly lowered;

(b) to have the natural facilities of his riparian tenement for access to the water, navigation thereon, and fishing therein not sensibly altered; and

(c) to have the use of the water as a fence so far as through such flow it may serve as a fence.[14]

Section 100J declares ordinary riparian rights to be the right to take water for certain specified purposes, including drinking, cooking and washing, stock water, and water for a domestic garden. The general confirmation of riparian rights under section 88 is subject to this provision. The quantities of water that may be taken for these purposes are set out in the *Water Regulations* 1965,[15] and are relatively insubstantial. These provisions amend the position at common law, where the riparian right holder could use the water for extraordinary purposes, including irrigation, provided the rights of other riparian owners lower down the watercourse were not thereby unduly affected.[16]

Quasi-riparian rights are defined under section 93 of the *Water Act*. Such a right exists where 'any land would be a riparian tenement but for the existence of a Crown reserve not exceeding 20 metres in width

13 This confirmation is subject to Part IV of the Act, except s 83(1). Further, riparian rights apply only to land that borders the river, which had a riparian right at common law. See s 92.

14 Section 91(1).

15 SR 78/1965.

16 *McCartney v Londonderry Rly Co* [1904] AC 301, in G Bates, *Environmental Law in Australia* (4th ed, Butterworths, 1995).

between it and a river'. As with riparian rights, takes of water are quite limited under quasi-riparian rights.

Potentially the most significant quantity of water may be taken from a river under a commissional water right, which may be granted by the RWSC under section 94(1) of the *Water Act*. The powers of the RWSC are broad under this provision, but are clearly subject to the restrictions on power under section 16(4), and are also likely to be subject to the RWSC's own right to take water under section 83. Section 94(1) states that:

> The Commission may grant under its common seal rights to take water from rivers and lakes at such places for such purposes, at such times, in such quantities and subject to such conditions as it thinks fit.

Commissional water rights are annexed to land and will usually be issued for a renewable period of five years.[17] Section 94A limits refusals to renew or unfavourable renewals to circumstances where:

> in the opinion of the Commission, there is not enough water in a river or lake to satisfy all persons entitled thereto, whether by commissional water rights or otherwise

Under these circumstances, the Commission also has the power to restrict existing commissional water rights that are not due for renewal.[18]

Enforcement and Control Mechanisms

There are three main mechanisms under the *Water Act* that may be used to enforce its provisions:

- offence provisions,[19] which may be used against irrigators who are operating without or in excess of a water right.
- the power of the RWSC to restrict existing rights or refuse to renew them when they fall due; and
- the power of the RWSC to sue in equity to protect itself or other riparian owners.[20]

Environmental protection notices may be used by the Director of Environmental Management under the *Environmental Management*

17 Section 94. Rights may be issued for a lesser term, and may also be issued for a longer term or in fee in certain circumstances [s 94(2)(d)]. Rights are renewable under s 94(2A).

18 Section 94A(1)(b).

19 Sections 100EA and 100G.

20 Section 84.

and Pollution Control Act 1994 (*EMPC Act*) to control both irrigators and the RWSC. This tool is discussed below, in the context of the *EMPC Act*.

In addition to these statutory mechanisms, there is potential for other parties, such as local landowners, the holders of riparian and other water rights, and local environmental groups, to seek equitable remedies to prevent damage to a property right, and to enforce statutory rights. Their actions may include the following:

- to have all or part of an existing commissional water right declared invalid on the basis that the RWSC did not have the power to grant it; and
- to prevent—by injunction—the RWSC from issuing or renewing commissional water rights that, as a total, allow abstraction beyond the sustainable capacity of the river.[21]

Standing may be a bar to these equitable actions if the parties cannot gain the support of the Attorney-General to take the actions. Therefore, in addition to consideration of the strength of the statutory and equitable actions listed above, standing will be considered.

Standing

The *Water Act* does not contain any provision for standing of individuals to enforce public or private rights under the Act. In this circumstance, the common law rules are used; standing may be obtained when a private right is interfered with, or the person has suffered special damage peculiar to herself.[22]

Riparian and quasi-riparian rights are annexed to land, and are clearly private rights. Therefore, under the first limb of *Boyce v Paddington*,[23] any holder of such a right will have standing to sue, where the actions of the RWSC or others are interfering with that right.

A number of categories of special damage have been established by the case law in relation to the second limb of *Boyce v Paddington*. As relevant to water allocations in the Mersey River, standing may be established as follows:

21 This action is discussed below under the section headed 'Restrictions on Commissional Water Rights', in the context of statutory restrictions on issuing or renewing commissional water rights.

22 These categories were originally established in *Boyce v Paddington Borough Council* [1903] 1 Ch 109 at 114.

23 Ibid.

- Property interests may be used as a basis of standing by local landholders. Merely living adjacent to the river would be an insufficient property interest.[24] However, if the landholder could establish that inadequate water flows reduces the amenity of the river and the value of the adjacent farming land, then he may be able to gain standing.[25]
- A landholder living adjacent to the Mersey River may also be able to establish standing on the basis of commercial interest. If the RWSC has over-allocated commissional water rights, an irrigator in the lower catchment may have insufficient water to sustain her crops through the summer.[26] The link of water with commercial cropping makes it likely that a special interest could be established.
- Environmental groups may also have standing, provided they can establish an interest that is more than an emotional or intellectual concern.[27] The local environmental groups that may wish to seek standing in the Mersey River catchment include Waterwatch and Landcare groups. The courts have demonstrated an increasing willingness to give standing in environmental cases to reputable conservation organisations. It appears from three relatively recent cases[28] that the ability of the organisation to properly represent the public interest is a critical consideration in the granting of standing.[29] Relevant to determining this ability are the organisation's objectives, government financial and public support for those objectives, and the closeness of its interests with the subject matter of the action.[30]

24 *Boyce v Paddington Borough Council* [1903] 1 Ch 109 at 114; *Thorne v Doug Wade Consultants Pty Ltd* [1985] VR 433. This is unless, of course, the landholder has a riparian or quasi-riparian water right.

25 See *Day v Pinglen* (1981) 148 CLR 289 and *Thorne v Doug Wade Consultants Pty Ltd* [1985] VR 433.

26 Compare this with *Yates Security Services Pty Ltd v Keating* (1990) 98 ALR 68, where standing was refused on the basis that the applicant had a mere prospect of gaining a commercial interest.

27 *Australian Conservation Foundation v Commonwealth* (1980) 28 ALR 257.

28 *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200; *Tasmanian Conservation Trust v Minister for Resources* (FC, No NG536, unreported); and *North Coast Environment Council v Minister for Resources* (FC, No NG614, unreported), all as discussed in G Bates, *Environmental Law in Australia*, note 16 above.

29 In *ACF v Minister for Resources* (1989) 76 LGRA 200, the size of the organisation and the national significance of the issue in question also appeared to be important factors in the organisation gaining standing.

30 See particularly *ACF v Minister for Resources* (1989) 76 LGRA 200.

Landcare groups in particular may be able to establish standing on this basis. These government-supported and funded, predominantly agriculturally-based groups, have been established with the specific objectives of ensuring sustainable development of natural resources, particularly in the local areas in which they are based. The groups are community based, and have strong public support for their objectives.

Offence Provisions

It is possible for both irrigators and the RWSC to take—or grant—water in excess of their statutory rights. However, the RWSC is protected from the operation of the offence provisions by section 94(4), which states:

> The Commission shall do its best not to grant commissional water rights in excess of the quantity which it may lawfully take, but if it does grant in excess it is under no legal liability therefor.

The principal offence provision, sections 100EA and 100G, therefore only appear to apply to irrigators. The nature of these provisions, the parties who may bring a prosecution and defences that may be available, are considered here.

Section 100G is a strict liability provision, which imposes fines for taking water from a river or lake without statutory authority. The fines are relatively insubstantial and are not related either to the quantity of water illegally taken or to the impact of that taking on the environment. However, a term of up to six months' imprisonment may be imposed for second and subsequent offences.

Section 100EA is a very practical offence provision, and was inserted into the *Water Act* in 1988. It may operate in addition to section 100G.[31] It gives power to officers of the RWSC to restrict unlawful taking of water by modifying the farmer's pump or pumps, where the owner has failed to respond to a request either to cease illegal taking of water for irrigation, or to modify his own equipment to make illegal taking impossible. Again, this provision imposes strict liability on the farmer.

The RWSC clearly has a power not only under these sections but also under section 16(1) to bring a prosecution against farmers who are in breach of these provisions. It is also evident from the Act that the RWSC need only bring such an action 'in such cases as it thinks proper'.[32] There may therefore be instances in which a private prose-

31 Section 100EA(7).

32 Section 16(1)(d).

cution is desirable. Under section 27 of the *Justices Act* 1959 (Tas),[33] any person may lay a complaint against an irrigator for a breach of the *Water Act* within the last six months.[34]

The common law defence of mistake of fact is the principal defence that may be available to irrigators against whom such a complaint is laid. Certainly equitable defences, such as laches if the irrigator has been over-abstracting with apparent immunity for a long time, are not available; equitable defences can never be used in prosecutions.

The *Water Act* offence is one of strict liability, so the defence of mistake may only be used in relation to its external elements. That is, the accused must entertain an honest and reasonable belief in the existence of facts, which, if true, would make the act charged against him innocent.[35] The complainant has the onus of proving that the mistaken belief was not honest or reasonable.[36] In this case, an irrigator may argue in his defence that he honestly believed he was acting within his commissional, riparian or other water rights, and that it was reasonable to hold that belief. It may be difficult to prove such a belief to be unreasonable when the infringement is minor. However, if the irrigator was taking water far in excess of an existing water right, there is likely to be substantial evidence not only that such a belief was not objectively reasonable in the circumstances, but that the offender did not genuinely or honestly hold the belief that he was acting within his rights.

Restrictions on Commissional Water Rights

In this section, the powers of the RWSC to restrict commissional rights are discussed, as is potential for a third party to prevent the RWSC from issuing or renewing commissional water rights in certain circumstances. The possible grounds of appeal for irrigators whose rights have been curtailed are also discussed.

33 Although not expressly stated in the *Water Act* 1957, the offence provisions are summary offences by virtue of s 38(3) of the *Acts Interpretation Act* 1931 (Tas). This means that the *Justices Act* 1959, not the *Criminal Code* 1924 (Tas), applies in relation to procedures, and the common law applies in relation to defences.

34 Limitation period for simple offences in s 26 of the *Justices Act* 1959. For continuing offences, the period begins to run from the time the offender ceases to be in non-compliance with the *Water Act* 1957: *Federation Saw Mill v Alexander* (1912) 15 CLR 308.

35 *Bank of New South Wales v Piper* [1897] AC 383.

36 High Court in *He Kaw Teh* (1985) 157 CLR 523, followed in relation to summary offences in *L v F* Unreported Serial No 44/1985, and *Gibbon v Fitzmaurice* [1986] Tas R 137.

There are two sections that may be applied to restrict water rights. Section 94A(1) states that:

> Where in the opinion of the Commission, there is not enough water in a river or lake to satisfy all persons entitled thereto, whether by commissional water rights or otherwise, the Commission to secure the rights of persons otherwise entitled may
>
> (a) refuse to renew commissional water rights or renew them in a less favourable form; or
>
> (b) by order authenticated as prescribed, forbid the holder of a commissional water right to take
>
> (i) more than a specified quantity of water, being less than the quantity; or
>
> (ii) any water,
>
> that the right entitles him to take, during a specified period, or to take water except at specified times, or otherwise cut down on the right.

Section 100K is similar in operation to section 94A, and applies when 'there is not enough water in a river or lake to satisfy all rights in or over that river or lake and the requirements of persons having a liberty to take water therefrom'.

There are two material differences between these two sections. Firstly, section 100K may be used to restrict riparian and quasi-riparian rights in addition to commissional water rights. Section 94A can only be used to restrict commissional water rights. Secondly, section 100K can only be used if, as a question of fact, there is insufficient water in the river. This places a relatively high evidentiary burden on the RWSC. In comparison, section 94A may be used if the RWSC is of the *opinion* that there is insufficient water in the river. In the latter instance, the RWSC need only show that its opinion is reasonable.

Only section 94A is discussed here, on the basis that it is similar to section 100K, but, as a result of its evidentiary requirements, is easier to apply successfully.

The Commission is bound by its general grant of power[37] when exercising its powers under section 94A. The circumstances in which water rights may reasonably be restricted are therefore dependent to a large degree on the interpretation of the RWSC's powers, as dis-

37 In s 16 of the *Water Act* 1957 and s 7 of the *Government Business Enterprises Act* 1995.

cussed above. Clearly, if the Commission has a duty to ensure environmental flows in a river, then it may impose restrictions on commissional water rights when such flow requirements are not being met. However, even if the general powers are not interpreted in such a way, there is still potential for the RWSC to use section 94A to guarantee environmental flows.

As stated above, restrictions may be applied when there is 'not enough water in a river or lake to satisfy all persons entitled thereto'.[38] It can be argued that irrigators and other right holders are only ever entitled to water over and above that required for environmental flows, on the basis that there is not enough water in the river to satisfy all persons when abstraction is interfering with environmental flows. Alternatively, it could be argued that it is reasonable for the RWSC to make allowances for environmental flows in forming an opinion on whether there is insufficient water in the river. In defence of their existing rights, irrigators could argue that environmental flows are an irrelevant consideration in the exercise of the discretion.[39]

No third party can force the RWSC to exercise its discretion in a particular way, where the Commission is acting within its powers. However, if it can be shown that the need for environmental flows or the maintenance of adequate water quality are relevant considerations to the exercise of the RWSC's discretion, and that the RWSC has in fact not taken account of these factors, then a third party with standing may seek a writ of mandamus to force the RWSC to exercise its discretion to restrict rights under section 94A. Further, the Director of Environmental Management may be able to issue an environmental protection notice to the same effect as this writ.

Equitable Actions by the RWSC

One of the strongest legal tools available to enforce legislation such as the *Water Act* is the equitable injunction. It is potentially of far greater utility than statutory offence provisions, as it need only be sought once. In comparison, if an individual re-offends against a statutory enforcement provision, a new prosecution needs to be

38 Section 94A(1).

39 This argument is more likely to succeed than a submission that the decision to restrict water rights was so unreasonable that no reasonable person could have arrived at it: *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; and *Chan v Minister for Immigration* (1989) 87 ALR 412.

brought. Wide powers are granted to the RWSC under section 84 of the Act to pursue equitable actions. This provision states that:

> the Commission may sue upon the rights conferred upon it by section 83(1) not only to protect its own material interest but also in the public interest or to protect other riparian owners, and the fact that the Commission is subject to no material loss shall be no bar to relief in equity where there is a detriment to the public or to other riparian owners.

This provision ensures that the common law rules of standing are not applied to the RWSC, and gives the Commission a cause of action. It may therefore seek an injunction against irrigators in breach of the statutory provisions of the *Water Act*, subject to the exercise of discretion by the court and the success of any defences.

The court will consider the availability of defences in deciding whether to grant an injunction.[40] Laches is the principal defence that may be available, where the irrigator has been operating outside her water rights for some time.[41] It is clear that a delay between the breach and the application for an injunction is not sufficient of itself; rather the acts done during this period of delay may swing the balance of justice in favour of the irrigator.[42] Such acts may include any assurances given by the RWSC that the irrigator could continue to extract in excess of her rights. Such assurances, if made, may also amount to acquiescence. Without the facts of a particular case in hand, it is difficult to ascertain whether an injunction would be granted. Certainly it is a possibility.

Challenge to Validity of Existing Commissional Water Rights

There are two possible bases on which the validity of existing commissional water rights may be challenged. First, it could be argued that the Commission was acting outside its general grant of power under section 16 of the *Water Act* and section 7 of the *Government Business Enterprises Act* 1995. Secondly, it could be argued that the RWSC was acting outside its specific power to take water, under sec-

40 Given that the RWSC has a cause of action and damages are clearly inadequate, the exercise of the court's discretion is the only remaining consideration.

41 This defence is not automatically precluded, unlike in criminal law. To exercise its discretion to accept the defence, however, the court must still be satisfied that the irrigator has 'clean hands'.

42 *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, approved by the High Court in *Turner v General Motors (Australia) Pty Ltd* (1929) 42 CLR 352.

tion 83 of the Act: that is, it granted rights to water that it had no right to itself.[43] Both these bases are considered here.

The scope of the RWSC's general grant of power is considered above. This discussion indicated that there is some potential to import requirements that the RWSC consider sustainability of water abstraction in performing its functions under the Act. If such requirements are a relevant consideration, then the RWSC must consider the sustainable capacity of the river when granting commissional water rights. If they fail to take this into account altogether, then the decision will be invalid. On the other hand, if they take it into account, but upon reasonable consideration determine it to be outweighed by other considerations, then the decision can stand.

However, if the arguments to import sustainability into the RWSC's general grant of power fail, then it remains to be considered whether sustainability principles may be imported into section 83 to restrict the RWSC's right to 'take the water of every river and lake'.

As discussed above, this power to take water is subject to, inter alia, 'the effect of the exercise of any power mentioned in this Part upon the use and flow of the water in any river or lake'.[44] There are a number of interpretations of this paragraph, as follows:

- A number of authorities may exercise powers under Part IV of the *Water Act*. These include:
    - the Inland Fisheries Commission, which may continue to exercise its powers under the *Inland Fisheries Commission Act* 1995 (Tas);[45]
    - a number of authorities including the Hydro-Electric Corporation, which have the power to raise and lower the level of a river or lake;[46] and
    - municipalities, which may divert rivulets under certain circumstances.[47]

  It may be that paragraph (g) is intended to ensure that these powers remain unfettered; the relevant authorities would not need to

43 This argument accepts the interpretation that the RWSC grants commissional water rights out of the water that it has a right to itself. See ss 94(4) 100C(6).

44 Section 83(2)(g).

45 Section 79.

46 Section 96.

47 Section 69.

consider the impact of their water use or change to flow on commissional water right holders.

- The paragraph could simply mean that the RWSC cannot grant commissional water rights to the same quantity of water twice; it must take into account the effect of existing commissional water right on flow. This interpretation could be extended to say that the Commission must consider the deleterious effect that exercising the power under the Part to issue commissional water rights has on the environmental flow requirements of the river or lake. If environmental flows are not being maintained, then the RWSC would have no right to take the water.

It is submitted that these interpretations are not mutually exclusive. If the second argument is successful, then any commissional water rights granted over and above the sustainable capacity of the river would have been granted ultra vires.

Any party with standing could challenge existing commissional water rights on this basis, and seek to have them declared invalid. This declaration may be made at the discretion of the Supreme Court by virtue of O 28 r 5 of the Rules of the Supreme Court. There appears to be no reason why the court would refuse to exercise its discretion.[48]

Summary of the *Water Act*

It is clear from the above discussion that there are a number of ways in which the *Water Act* may be used to prevent Tasmanian farmers from unsustainably abstracting water for irrigation. However, it is also clear that the courts may reject the interpretations of the Act that have been given here. This difficulty arises from the simple fact that the *Water Act* fails to incorporate environmental considerations directly into its water management framework.

Clearly then, some other tools are needed. It is here that it is useful to examine the recently introduced environmental laws in Tasmania, labelled as the Resource Management and Planning System. As discussed in detail below, some parts of this system may be used to complement or supplement the *Water Act* in relation to environ-

48 Although declarations are discretionary, the ordinary equitable questions of discretion do not apply (*Mayfair Trading Co v Dreyer* (1958) 101 CLR 428), and a declaration in this case would have clear practical outcomes that are of interest to the applicant.

mental protection, and to introduce a water management framework that is sympathetic to the need for sustainable development.

Environmental Management and Pollution Control Act

The *Environmental Management and Pollution Control Act* 1994 (Tas) (*EMPC Act*) is an important piece of environmental legislation in Tasmania. It is one of the key components of the Resource Management and Planning System. It is intended through its operation to further the stated objectives of sustainable development[49] and, broadly speaking, to minimise the extent to which human activities cause environmental harm. Both punitive and coercive mechanisms are available in the Act to meet these aims.

In the light of the apparently broad operation of the Act in environmental management, it is surprising to find that, in fact, it has limited application to circumstances of unsustainable abstraction of water from natural systems. For example, the offence provisions of the Act[50] certainly do not apply to irrigation activities. These provisions impose strict liability on persons who cause serious or material environmental harm, but apply only to *pollution* of the environment. There is no way in which the definitions of 'pollutant' and 'pollute' can be interpreted to include excessive resource extraction.[51]

Nevertheless, environmental protection notices (EPNs) may have some application against irrigators and the RWSC.[52] Their value lies not in their use to reinforce the provisions of the *Water Act*, but in their potential use to impose stricter environmental obligations on the water resource managers and users. This use will depend on the interaction of the *EMPC Act* and the *Water Act*.

This section considers the interaction of the *EMPC Act* with other Acts, and discusses the issuing of EPNs by the Director of Environmental Management against both irrigators and the RWSC.

Interaction with Other Acts

Section 9(1) is the key provision governing the interaction of the *EMPC Act* with other Acts. This section states that the *EMPC* Act 'does

49 See s 8 and Schedule 1.

50 Contained in ss 50 and 51.

51 Pollutants are restricted in definition to substances that may cause environmental harm: s 3(1).

52 Environmental protection notices may be issued in accordance with Part 4, Division 2 of the *Environmental Management and Pollution Control Act* 1994.

not derogate from the provisions of any other Act'. It may be interpreted in one of two ways. First, it could be argued that, by virtue of section 9(1), the control mechanisms of the *EMPC Act* cannot be used to limit rights granted under another Act.

Conversely, a narrow interpretation of section 9(1) is open. It could be argued that compliance with the provisions of the *EMPC Act* cannot be used as a defence to a duty under any other Act; that is, this Act does not weaken the operation of any other Act.

The latter interpretation is well supported by the following:

- The *EMPC Act* imposes new duties, and appears in the absence of section 9(1) exhaustively to delineate categories of environmental duties. The legislature is unlikely to have intended that duty provisions in other Acts have no operation if they are inconsistent with the *EMPC Act*. Conversely, and also in support of a narrow interpretation of section 9(1), the legislature is unlikely to have intended that these duties only operate in so far as they are consistent with other Acts.
- Section 9(2) lists two Acts that override the *EMPC Act* in the circumstances where they have application. If a wide interpretation of section 9(1) was adopted, it is submitted that this subsection would be redundant, as the *EMPC Act* would already be interpreted as having no application where other Acts grant rights.[53]
- Section 10 relates to the interaction of the *EMPC Act* with civil law. It states that:

> The provisions of this Act do not limit or derogate from any civil right or remedy and compliance with this Act does not necessarily indicate that a common law duty of care has been satisfied.

It is submitted that sections 9 and 10 should be interpreted consistently. A broad interpretation of section 10 is not readily open. This section preserves a plaintiff's rights to sue in tort; these rights are not limited by the fact that the defendant may have complied with the Act. That is, the Act does not derogate from civil duties. It should not derogate from duties under other Acts.

In contrast, a broad interpretation of section 9(1) is not well supported. However, if such an interpretation is adopted, it would act to

53 For example, a permit can be granted under the *Environmental Protection (Sea Dumping) Act* 1987 (Tas) to allow waste to be dumped at sea. This right would otherwise be illegal under the *Environmental Management and Pollution Control Act* 1994.

limit the power of the Director to issue an environmental protection notice against an irrigator, a number of irrigators, or the RWSC in the first instance, and to limit the scope of provisions of the notice in the second instance. That is, an EPN could not be issued against irrigators who are operating within valid water rights,[54] and the provisions of any such EPN issued must similarly not limit the irrigators' existing water rights.

In the case of the RWSC, an EPN would have no application when that body is acting within its statutory powers. Further, it is arguable that, on a broad interpretation of section 9(1), an EPN could not be used to fetter the discretionary powers of the RWSC to issue commissional water rights or restrict existing rights.

However, as a broad interpretation is unlikely to be adopted, the remainder of this discussion is based on a narrow interpretation of section 9(1).

EPNs and Irrigators

This section considers the criteria that must be satisfied for an EPN to be issued, and the likely scope or contents of such a notice issued against an irrigator.

Environmental protection notices may be issued by the Director of Environmental Management under section 44(1) of the *EMPC Act*. This section reads as follows:

> (1) Where the Director is satisfied that in relation to an environmentally relevant activity
>
> (a) environmental harm is being or is likely to be caused; or
>
> (b) environmental harm has occurred and remediation of that harm is required; or
>
> (c) it is necessary to do so in order to give effect to a State Policy; or
>
> (d) it is desirable to vary the conditions of a permit
>
> the Director may cause an environment protection notice to be issued and served on the person who is or was responsible for the environmentally relevant activity.

In order for EPNs to have any application to irrigators, irrigation of land must, as a question of statutory interpretation, be an environmentally relevant activity. Section 3 defines such an activity as one which may cause environmental harm and includes the following:

54 Issued or validated under the *Water Act* 1957.

- a level 1 activity, being an activity which may cause environmental harm in respect of which a permit is required under the *Land Use Planning and Approvals Act* 1993;
- a level 2 activity, being an activity specified in Schedule 2 of the *EMPC Act*;
- a level 3 activity, being an activity which is a project of State significance under the *State Policies and Projects Act* 1993; and
- an environmental nuisance, which requires the emission of a pollutant.[55]

Irrigation does not fit into any of these activities and nuisance categories.[56] However, it is submitted that this list of categories is not intended to be exhaustive, and that it is sufficient that an activity 'may cause environmental harm'. Given that the definition of environmental harm is itself very broad,[57] irrigation is very likely to be classified as an environmentally relevant activity.

Before issuing an EPN, the Director must then be satisfied of at least one of the remaining conditions in section 44(1) of the Act. Paragraph (1)(a) is most relevant to the issuing of a notice against irrigators.[58] Under this paragraph, a notice may be issued if the Director is satisfied that environmental harm is being or is likely to be caused. For any EPN issued under this section to be valid, the Director must have some grounds to his belief, which must be specified on the notice.[59] Relevant evidence may include scientific surveys that have been carried out on the health of the river system,[60] or of comparable systems with similar land use in the catchment. It is likely that the evi-

55 These are all individually defined in s 3.

56 The local planning schemes of Meander Valley, Latrobe and Kentish Councils do not require irrigators to seek a permit, so irrigation is not a level 1 activity. It can only be a level 1 activity if it amounts to use or development which may be regulated by a planning scheme under the *Land Use Planning and Approvals Act* 1993. Irrigation is not listed in Schedule 2 of the *Environmental Management and Pollution Control Act* 1994, and is not a project of State significance.

57 Section 5(1) states that 'for the purposes of this Act, environmental harm is any adverse effect on the environment (of whatever degree or duration) and includes environmental nuisance'.

58 Paragraph (b) may be more difficult to establish than (a), and paragraphs (c) and (d) are not presently relevant, as there is no relevant State Policy in force, and no councils in the Mersey River catchment require a permit for irrigation or any related activity.

59 Section 44(3)(b).

60 One such scientific study is the Mersey River Experimental Study. The results of this study are yet to be released.

dence indicating the likelihood of environmental harm need not be particularly substantial. This is because one of the stated objectives of the environmental management and pollution control system established by the *EMPC Act* is to adopt a precautionary approach when assessing environmental risk.[61]

A low evidentiary burden on the Director enlarges the range of circumstances in which an EPN may be issued. Also, an appeal against a notice on the basis that the Director was acting outside his discretion in issuing it, is unlikely to succeed, provided the Director has *some* evidence of likely environmental harm.

Given that the Director has the power to issue and serve a notice, the scope and content of that notice remains to be considered. The requirements that a notice may specify must be directed towards preventing, controlling, reducing or remedying environmental harm,[62] and appear to be limited to one or more of the following:

(i) that the person discontinue, or not commence, a specified activity indefinitely or for a specific period;

(ii) that the person not carry on a specified activity except at specified times or subject to specified conditions;

(iii) that the person take specified action within a specified period.[63]

By definition, insufficient environmental flow causes environmental harm. If there is some evidence that there is insufficient water in the Mersey River for environmental flows, it is conceivable that the Director could issue an EPN to each irrigator in the catchment, requiring them to take no more than a certain specified quantity of water. This quantity may be less than they are permitted to take under a commissional water right. The notice may also limit irrigated cropping activities to a certain specified level, to ensure compliance with water take requirements.

EPNs and the Rivers and Water Supply Commission

The principal use of an EPN issued against the RWSC would be to ensure that environmental impacts of abstraction are considered by the Commission in the exercise of its powers and discretions. It is not automatically clear that these exercises of discretion and uses of power are environmentally relevant activities and therefore that an

61 Schedule 1(3)(h), *Environmental Management and Pollution Control Act* 1994.

62 Section 44(3)(c).

63 Section 44(3)(d).

EPN may be issued against the RWSC; the irrigator must take action on the right granted to her before any harm can be caused to the environment.[64]

It is submitted that the reasoning in *Yates Security Services Pty Ltd v Keating*[65] is relevant here. In that case, the court considered whether a decision to allow a developer to acquire the lease for a site listed on the National Estate adversely affected that place.[66] The court held that a decision would be deemed to adversely affect the place when:

- there was interference in a physical sense; or
- the action was in the class of action which, although itself incapable of direct environmental detriment, may produce that result at second hand (in this case by permitting some development by private enterprise which could not proceed without it).

It was held that allowing acquisition of a lease of a site did not match these criteria, so the action fell outside the Act. By contrast, it could be argued that the issuing of commissional water rights is in a class of actions that may produce environmental detriment by allowing lawful over-abstraction by farmers from the river. Such over-abstraction would be unlawful in the absence of such commissional water right.

If these arguments succeed, and the RWSC powers and discretions are interpreted as environmentally relevant activities, the Director must then be satisfied of one of the conditions in section 44(1). Again, a likelihood of environmental harm could be used as the basis for issuing an EPN, but subject to the same difficulties expressed above.

The Director may instead be satisfied that issuing an environmental protection notice is necessary in order to give effect to a State Policy.[67] At the present time, there is no relevant State Policy in force. However, in the future, it is likely that the State Policy on Water Quality Management (currently a draft) will be relevant.[68] Clause 14.1, as modified by the Sustainable Development Advisory Council, states that:

> When issuing or reviewing water rights and other licences or permits which allow water abstraction ... water management authorities must

64 This is even assuming the success of arguments that irrigation itself is an environmentally relevant activity.

65 (1990) 25 FCR 1.

66 Section 30, *Australian Heritage Commission Act* 1975 (Cth).

67 Section 44(1)(c) *Environmental Management and Pollution Control Act* 1994.

68 If a State water use management policy is introduced, as discussed below, this also would be relevant.

> take account of the likely effects of the proposed action on water quality, and whether it will prejudice the achievement of water quality objectives.[69]

No water quality objectives have been set for the Mersey, so the application of this draft clause cannot be discussed fully. However, over-abstraction is likely to have a deleterious effect on water quality, as it reduces the quantity of water available to dilute pollutants. The State Water Quality Management Policy makes the impact on water quality a relevant consideration in the exercise of the RWSC's discretion to issue or review commissional water rights under section 94A of the *Water Act*. Given that the RWSC has a discretion in this regard, it is unlikely that an EPN can be used to force the RWSC to act in a particular way. Rather the scope of the EPN is likely to be limited to ensuring that the RWSC considers the environmental impacts of abstraction in exercising its discretion.

Land Use Planning and Approvals Act

The *Land Use Planning and Approvals Act* 1993 (Tas) (*LUPA Act*) is the primary piece of legislation governing the preparation and content of planning schemes and the enforcement of planning control. It functions in a practical sense through local planning schemes, where local management and planning provisions are prescribed. There is some potential for planning schemes in the Mersey catchment to be used to regulate some aspects of water use in the river, and this potential will be discussed in this section. However, there are many limitations on the application of planning control to water management, and therefore on the utility of the *LUPA Act* as a management tool. These include the following:

- If a particular use or activity is either not considered by the scheme or is permitted as of right, then planning control provisions of the *LUPA Act* have no application. In this case, neither of the principal planning authorities in the Mersey River catchment (Meander Valley and Latrobe/Kentish Councils) have any provisions in their planning schemes relating to irrigation or water abstraction.[70] This means that amendment to the schemes is needed before any planning control can be applied.

69 From Sustainable Development Advisory Council, 1997. *The SDAC Report on the Draft State Policy on Water Quality Management*. Sustainable Development Advisory Council, Tasmania.

70 As at May 1997.

- If the local planning schemes are amended, the continuing, non-conforming use provisions of the *LUPA Act*[71] will apply to minimise the impact of the new provisions on existing irrigation activities. Even if these provisions are interpreted narrowly, they will prevent the application of an integrated management regime.
- Municipalities are not delineated on catchment boundaries. There is no guarantee that the planning provisions introduced in local planning schemes will be consistent between the councils within a catchment, and therefore that a uniform management regime will have application throughout a particular catchment.

Clearly, the *LUPA Act* itself is not geared towards facilitating the introduction of integrated management regimes for activities occurring in particular catchments or regions. In fact, the *State Policies and Projects Act* 1993 is the element of the resource management and planning system that is designed to accommodate this need. This Act is discussed below. Nevertheless, the former Act will be discussed briefly here, in the interests of completeness. This discussion will address the types of provisions that may be included in planning schemes, the manner in which schemes may be amended, and the way in which the continuing, non-conforming use provisions may apply.

Types of Provisions

Section 20(1) of the *LUPA Act* sets out in very broad terms what a planning scheme can provide for. It states that a scheme may 'make any provision which relates to the use, development, protection or conservation of any land in the area'.[72] Land, as defined in section 3, includes land covered with water and water covering land, and so includes rivers. This means that councils have considerable scope to incorporate provisions relating to irrigation management, including irrigation and abstraction, into their planning schemes. The only fetters to this are that the scheme:

(a) must seek to further the objectives set out in Schedule 1 within the area covered by the scheme; and

(b) must be prepared in accordance with State Policies.

These do not provide any hindrance to introducing a system of water management in council areas. Such a scheme would certainly pro-

71 Section 20(3).

72 Section 20(1)(c).

mote sustainable development objectives, and there is no applicable State Policy at this stage.

As an example of the type of provision that could be included in the scheme, the council could require a permit for irrigation of land for the purpose of commercial cropping.[73] This could be listed as a discretionary use in the table of uses. The council would then be obliged to consider the sustainability of irrigation practices on the river as a whole, in granting a permit.[74]

This provision would apply in addition to the requirements of the *Water Act*. For example, a farmer could be granted a commissional water right, but require a permit from the council in addition, before that right can be exercised.

Amendment of Schemes

All three planning schemes that currently have application in the Mersey catchment are valid under section 46 of the *LUPA Act*, and will cease to operate on 31 December 1998.[75] In response to this pressure to introduce a new planning scheme, Meander Valley Council has had their draft scheme certified, and hearings pursuant to section 27 are currently being heard. Neither Latrobe nor Kentish Councils have yet submitted a draft planning scheme to the Panel for certification under section 24 of the *LUPA Act*.[76]

The re-drafting and review that must occur in relation to these schemes presents an excellent opportunity for incorporating water management provisions. This is particularly simple for Latrobe and Kentish Councils, where the provisions are drafted with Council co-operation. Provided the scope of the provisions complies with section 20(1), as discussed above, and the procedural requirements of the Act are met, the provisions will be valid.

For the Meander Valley Council, there are two avenues for the incorporation of water management provisions. Firstly, the Council may choose to amend its scheme, once brought into force, to include

73 This is a use of land, and is a matter in respect of which a permit may be required under s 51.

74 Section 5 requires powers and functions under the Act to be performed or exercised 'in such a manner as to further the objectives set out in Schedule 1'.

75 Both the planning authorities were operating under interim order. Following a substitution of s 46 of the *Land Use Planning and Approvals Act* in 1995 (SR 104/1995), these interim orders were converted into planning schemes. The sunset clause for the schemes is contained in s 46(1)(c).

76 As at April 1997.

relevant provisions.[77] Secondly, the Land Use Planning Review Panel may give direction to the planning authority to amend the scheme, under section 34(2) of the *LUPA Act*.[78]

The extent of this power, which may also be exercised in relation to the Latrobe and Kentish Schemes at a later date, is unclear. It is doubtful whether the Panel could force an amendment where the planning authority has simply omitted to deal with water management. However, such forced amendment could be argued to be valid on the basis that failure to ensure irrigation abstraction is carried out sustainably breaches section 20(1)(a). This paragraph states that a planning scheme *must* seek to further the objectives set out in Schedule 1.

Non-Conforming Uses

Depending to some extent on the manner in which planning scheme provisions are drafted, the continuing non-conforming use provisions in the Act would have substantial application. The relevant provision states that:

> subject to subsections (4), (5) and (6), nothing in any planning scheme is to
>
> (a) prevent the continuance of the use of any land, upon which buildings or works are not erected, for the purposes for which it was being lawfully used before the coming into operation of the scheme.

For the purposes of the *LUPA Act*, 'use' is defined in section 3(1) as follows:

> 'use', in relation to land, includes the manner of utilising land but does not include the undertaking of development.

This definition is likely to prevent a farmer arguing that, as part of his continued use of the farm for irrigation, he could develop new areas for irrigation.[79] That is, continuing use rights are likely to be very narrow under the Tasmanian planning legislation.

Although this is an advantage in relation to introducing controls on unsustainable irrigation through planning schemes, significant parts of the Mersey catchment are currently being irrigated; existing use rights are likely to be significant.

77 Division 2 of Part 3 of the *Land Use Planning and Approvals Act* 1993.

78 Note that the approval of the Minister is also needed.

79 This argument succeeded under South Australian planning legislation in *Dorrestijn v SA Planning Commission* (1989) 59 ALR 105.

State Policies and Projects Act

State Policies may be created under the *State Policies and Projects Act* 1993 (Tas) (*SPP Act*). They are intended to be the cornerstones of the Resource Management and Planning System in Tasmania; the pursuit of requirements set out in State Policies is relevant to the exercise of discretions under the *Environmental Management and Pollution Control Act* 1994[80] and the *Land Use Planning and Approvals Act* 1993. Further, and more particularly, all planning schemes in Tasmania must be consistent with State Policies.

The breadth of potential application and legal force of these policy documents make them attractive vehicles for introducing a State water management framework, particularly coupled with the fact that their development is non-legislative. This potential is discussed here, in the context of the possible content and scope of a State Policy on water use management.

The draft State Water Quality Management Policy is not discussed in this section. The relevant provisions of this draft policy are considered to the extent of their potential operation, in relation to environmental protection notices issued against irrigators.

State Policy on Water Use Management

Part 2 of the *SPP Act* sets out the requirements for making State Policies. All of these requirements must be satisfied for a State Policy to be valid. The following three requirements are particularly important:[81]

- The State Policy 'must seek to further the objectives set out in Schedule 1'.[82] The nature of these objectives has significant implications for the style of policy that may be prepared under the legislation. This is particularly because it appears from the wording of the statute that *each of* the objectives must be furthered. It would be wise to address specifically each of these objectives in the Policy.

80 For example, giving effect to a State Policy is one base on which an environmental protection notice may be issued by the Director of Environmental Management.

81 The requirements of a consistent and co-ordinated approach throughout the State [s 5(1)(c)] and the incorporation of a minimum amount of regulation [s 5(1)(d)] can really only be assessed in the light of an existing State Policy. Suffice it to say that they are unlikely to nullify a State Policy on water use management.

82 Section 5(1)(a).

- Under section 5(1)(b), the Minister for Environment and Land Management has a power of veto over a draft State Policy, where she considers there is no matter of State significance to be dealt with. At the present time, the exercise of such a veto power is unlikely to occur and is highly contestable if it does. This is because reform of the water industry is a key item on the agenda of the Council of Australian Governments.[83]
- Matters set out in submissions from agencies must be taken into account in preparation of the State Policy.[84] This could be an issue here, because the RWSC would have an interest in the draft and would have the opportunity to comment.[85] Given that the Policy may act to restrict its powers, it may look upon the Policy unfavourably.

The makers of the State Policy would then need to comply with the administrative procedures set out in Part 2 of the Act, in order for the Policy to be valid.

Prima facie, there appear to be no significant impediments to the introduction of a State Policy on Water Use Management. The contents of such a policy remains to be considered.

A state policy on water use management will be most useful if it introduces a management *framework*, as the absence of an integrated system is the key problem with the current system. It is likely that the State Policy cannot be used to amend legislation such as the *Water Act*, but it appears to be the intention of the *SPP Act* that State Poli-

83 The Council of Australian Governments endorsed a strategic framework for water resource reform on 25 February 1994. Under this framework, the State is committed to do the following:

- separate water property rights from land title;
- formally determine allocations or entitlements to water, including allocations for the environment;
- adopt trading arrangements in water entitlements, within the social, physical and ecological constraints of catchments, so that water is used in the most economic manner; and
- implement institutional reform, including the facilitation of integrated catchment management.

Community consultation and education are seen to be key elements of implementation of the framework, particularly in integrated catchment management and where changes in water resource allocations are proposed.

84 Section 5(2).

85 Section 6(2).

cies form a layer of management and regulation over and above existing requirements.[86]

Commissional water rights are the key target of such regulation, and their issue and use has potentially the most significant impact on the river system. It is submitted that the Policy could not be used to affect the issuing of commissional water rights, except in so far as it may be a relevant consideration for the RWSC in the exercise of its discretion to renew the rights,[87] or its power to grant them in the first place.[88] However, the policy can be used to regulate the manner in which those water rights are used.

A discussion of the manner of operation of the Policy is outside the scope of this paper. However, as an example, the Policy could require water use limits to be set by community members and other stakeholders for particular river systems, rivers and tributaries. These limits should be required to be set in accordance with the best available scientific information on the impact of water abstraction on environmental health. The holders of valid water rights could then be prohibited from exercising those rights unless they obtain a tradeable permit under the Policy. Permits would only be issued up to the total abstraction limit, and applicants would be issued permits according to the social and economic benefits of their abstraction and use activities.[89]

Clearly, it would be useful for the Policy to deal with water management issues as a whole, including abstraction and/or use by industry and other non-agricultural users. It is also important that the policy be integrated with any policy on water quality management.

Conclusion

This discussion clearly reveals the inadequacies of the current system of control of irrigation abstraction. The *Water Act* 1957, despite being the principal piece of legislation in this area of environmental

86 State policies bind the Crown (s 4), and will only be useful to 'ensure a consistent and co-ordinated approach is maintained' [s 5(1)(c)] if the policy must be complied with in full.

87 Under s 94A of the *Water Act* 1957. The State Policy would also be a 'proper consideration' for the purposes of s 16(4) of the *Water Act* 1957, which governs the Commission's general functions, powers and duties.

88 Under s 94(1) of the *Water Act* 1957.

89 A policy that includes community consultation, tradeable water rights and environmental flows is at least preliminarily consistent with the Council of Australian Governments reform agenda.

management, fails to come to grips with environmental sustainability in general and environmental flows in particular. The *Environmental Management and Pollution Control Act* 1994 is focused on preventing or regulating environmental harm caused by pollution, rather than unwise use of natural resources. Its environmental protection notices may have some utility, but are at best a piecemeal solution. Similarly, council planning schemes, enforceable under the *Land Use Planning and Approvals Act* 1993, do not consider water abstraction. Any regulation in this area is dependent on the introduction of appropriate planning provisions into planning schemes in the first instance, and the scope of operation of continuing use provisions under the *LUPA Act* in the second instance.

The *State Policies and Projects Act* 1993 arguably provides the best opportunity for overcoming some of the problems with current water management arrangements in Tasmania, without the introduction of new legislation. While there is no State Policy currently in force that can be of assistance, the Act provides an appropriate framework for the development of such a policy.

Reform of the water management framework in Tasmania is becoming urgent, both environmentally and politically. The passage of new legislation to replace the *Water Act* may take considerable time. A State Policy would not only be an appropriate and useful medium-term solution, but could also complement any new legislation in the long term.