WATER RESOURCES - JUDICIAL DISPUTE RESOLUTION

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- Summary -

The paper concentrates upon the judicial resolution of water disputes occurring within New South Wales - Australia's most populated State. It identifies how the application of the doctrine of terra nullius had the consequence that the common law of England operated to protect the rights of riparian owners until the Water Act of 1896. The principles which have emerged in the resolution of disputes under that Act and successive Water Acts are discussed.

The paper concentrates upon disputes which have arisen in the Murray Darling Basin - Australia's most significant river system. Having identified the failure of the Commonwealth Constitution to provide guidance in the resolution of water disputes, the approach adopted by Land Boards and the Courts is examined. Two major disputes are considered in detail. One involves proceedings brought by South Australia in an attempt to stop the issue of further irrigation licences by New South Wales. The other is the dispute known as the Whalan Case, a dispute between a large group of existing irrigators and another large group of prospective irrigators. The dispute related to claims for allocation of irrigation waters in the tributaries of the Upper Darling River.

The conclusion is that the judicial dispute resolution mechanisms provided by the legislation may not be adequate to resolve disputes in a fully allocated and integrated water regime which exists in the latter part of the 20th century.

A final matter discussed in the paper is the impact of native title legislation on the availability and use of water. Its impacts are uncertain, the first major case is presently before the Australian Federal Court for determination.

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Introduction

The white settlement of Australia occurred first in Sydney. Like any community, water was essential to its survival and Sydney was provided with abundant water from nearby streams. As development occurred away from Sydney it extended along the coastal river system. The early settlers were anxious to explore and develop the "new land". Journeys were made to the south eastern corner of the continent where the town of Melbourne was created in 1837 on the Yarra River. Development of the land between Sydney and Melbourne soon followed.

The Murray River lies between Sydney and Melbourne. It is 1,518 miles long and rises in the mountain range known as the Snowy Mountains, which has as its highest peak Mr Kosciusko. It is joined by the Darling River at Wentworth. The Darling, which rises in Queensland, travels generally south and has a length of 1,600 miles. After the Darling joins it, the Murray continues through South Australia from Wentworth before discharging to the ocean. The Murray Darling Basin which provides the catchment for the river system is approximately 14% of the land mass of Australia. It is the most important river system in Australia.

White settlement brought with it the doctrine of terra nullius. By this doctrine Britain acquired sovereignty over Australia and its waters. Terra nullius has recently been reconsidered and set aside by the High Court in Mabo v Queensland No.2 (1991-1992) 174 CLR 1. However, in the meantime from the time of settlement the application of the doctrine meant that the inland river

system was controlled by the English common law which provided a mechanism for the adjustment of rights and the settlement of disputes between individual users of the river waters. It endorsed the right of the owner of land through which a stream passes to take water, providing there was no interference with the water available to a downstream owner. The law proved adequate to control the early settlements - indeed, during the greater part of the 19th century the Colonial Governments had little apparent interest in or need to consider controlling the waters used for irrigation. Water was assumed to be abundant, as in fact it was for the needs of the relatively small community.

Towards the end of the 19th century this situation changed. As the colonies developed it was recognised that there was the potential to manage the available water to boost the productive capacity of lands both adjacent to the water source and further removed from it. There was also an increased appreciation of the benefits which might flow from the damming of rivers creating storage waters which could be utilised depending on the variation of the season.

These matters were comprehensively examined by the Deakin Royal Commission - the Victorian Royal Commission on Water Supply established by the State of Victoria which reported in 1884. As a result of the Commission's report, legislation was enacted in Victoria and subsequently in New South Wales, which sought to provide a state-regulated regime for the distribution and use of water. At the same time the same matters were being reviewed in other countries. In Canada there was the General Report on Irrigation and Canadian Irrigation Surveys (1894) and in the United States the Second Report of the State Engineer to the Legislature of California(1881) and

other reports were published. The fundamental object in colonial Australia was the State control and distribution of the available water.

The ethic of the latter part of the 19th century dictated that the available water should be used for industrial, domestic and agricultural production in the most efficient manner possible. At that time, the prospective problems which might come from depletion of the river system and the introduction of irrigation to vast areas of otherwise semi-arid lands, had not been recognised.

Australia became a Federation of States on 1 January 1901. It was created by an Act of the British Parliament which followed intense debate in the colony at various times in the previous decade. Curiously, Manning Clark (Manning Clark's History of Australia (abridged), Michael Cathcart, 1995, p.448) records that initially there was little enthusiasm for the proposal and there was, and remains today, different views in the community about the powers which the Commonwealth Government, as opposed to the States, should exercise. The fact that the Constitution did not give the Commonwealth control over the waters of the inland rivers, or at least of the Murray Darling Basin, reflects a failure to recognise the significance of the resource - perhaps not surprising, given the assumed abundance of water at the time. In fact the Constitution expressly left water to the States, providing in section 100 that:

> *"The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation."*

Notwithstanding later agreements between the States and the Commonwealth, the legacy of this failure has been reflected in the struggle by South Australia to achieve better quality water for that State. The inadequacy of the constitutional position was reflected in the litigation commenced by South Australia in the 1980s.

In the latter part of the 20th century the development of land by irrigation has become increasingly controversial. The controversy has been accompanied by a recognition that the philosophy which underpinned the development of irrigation schemes and the increased productivity of agricultural lands failed to recognise the environmental constraints which are fundamental to all natural systems. The response has been to limit new licences, impose volumetric allocation schemes and seek efficiencies of use by allowing the market to trade water entitlements. All familiar mechanisms, I have no doubt.

This paper seeks to identify principles which the courts have applied to water disputes and suggests that they have not always reflected an appropriate philosophy for water use. It is apparent that the changes which have occurred in community attitudes to the administration of the river system may not always have been appreciated in the litigation context. This is inevitable with litigation in an adversarial system where the parties, for a variety of reasons, adopt a defiant stance and pursue it to the desired outcome - i.e. a win in the litigation. However, it is not always compatible with the objective of achieving the preferred community use of a limited resource.

To enable water to be managed by the State it was necessary to legislate and provide mechanisms for both the control and fair distribution of the water. The common law doctrines which concentrated on the rights of individuals with access to the stream were no longer adequate (see the discussion in S.D. Clark and I.A. Renard "The Riparian Doctrine and Australian Legislation" (1970) 7 Melbourne University Law Review 475. The initial legislation in New South Wales is the Water Rights Act 1896.

The 1896 Act

The 1896 Act provided in section 1 that:

> *"(1) The right to the use and flow and to the control of the water in all rivers and lakes which flow through or past or are situate within the land of two or more occupiers, and of the water contained in or conserved by any works to which this Act extends, shall, subject only to the restrictions hereinafter mentioned, vest in the Crown,. And in the exercise of that right, the Crown, by its officers and servants, may enter any land and take such measures as may be thought fit or as may be prescribed for the conservation and supply of such water as aforesaid and its more equal distribution and beneficial use and its protection from pollution, and for preventing the unauthorised obstruction of rivers. ... "*

The rights of the Crown were made subject to three express exceptions including the rights of the holders of licences under the Act (section 1(II)(c)). Limited riparian rights to the water for stock and domestic purposes were also preserved. These have been the subject of recent judicial

consideration (Van Son v Forestry Commission of New South Wales (1996) 86 LGERA 108) which is discussed later.

Provision was made in the Act for the grant of licences to take and use water. Section 8 provided that any application must be notified and before being granted a public inquiry must be held. The inquiry was held by the Local Land Board or other person authorised by the Minister. Central to the process was the right of any person *"whose interests appear to be affected by the granting of the application to be heard at the inquiry".* Land Boards were provided under the Crown Lands Act and were utilised to resolve many rural problems for the Government. They included people from the local community with a practical knowledge of rural problems. This was a significant advantage in resolving competing claims between individual irrigators. Whether it is still an appropriate mechanism when the river waters are fully allocated and environmental problems raise complex questions may be questioned.

There was an appeal from a Land Board to a judge sitting in the Land Court. If the Report of the Land Board or Court recommended the grant of the licence the Minister was effectively bound to issue it. Importantly, the Act provided no guidance to the principles which the Land Board or the Land Court were to apply to resolve disputes.

These fundamental elements of the legislation remained unchanged in the 1902 and 1912 acts. The 1912 Act provided the structure for all subsequent legislative control, although it has been amended on many occasions. Disputes did arise, although initially, when water was thought to be abundant, they were probably not commonplace.

Riparian rights

Section 1 of the 1896 Act which was repeated in the later legislation has been the subject of judicial decision and some controversy. There are three New South Wales Supreme Court decisions which have held that section 11 abolished common law riparian rights. Hanson v Grassy Gully Gold Mining Co (1900) 21 LR(NSW) 271 is probably the most important and stated emphatically that riparian rights had been taken from land owners. The judgment recognised the difficulty which had been experienced in attempting to apply English law to Australian conditions:

> *"It is plain that the plaintiff in this case relies upon his right to have the water flow past his land ... has the plaintiff, since the passing of the Water Rights Act any right to bring this action? It cannot be denied that for years and years past the question of the rights of riparian owners in this country, where the conditions are so totally different from the condition of things in England, has been a source of almost insuperable difficulty. There has been a great deal of expensive litigation, and I suppose, for that reason, the Legislature passed this Act, in order to prevent riparian owners above and below from bringing actions against one another. If this Act does not aim to take the old common law rights from the riparian owners and vest them in the Crown, then I do not know what it was passed for nor what it means. It was passed in the public interest to prevent litigation and to determine rights which up to the time of the passing of the Act it was almost impossible for the best lawyer to determine. ... I do not think the language of the Act could be clearer, and plainly the rights of the riparian owners were divested and vested in the Crown."* (p.275)

The decision was followed in Dougherty v Ah Lee (1902) 19 WN(NSW) 8 and Attorney General v Bradney (1903) 20 WN(NSW) 247.

In Thorpe's Ltd v Grant Pastoral Co Pty Ltd (1954-55) 92 CLR 317, considerable doubt was cast upon this approach, Fullagar J suggesting that riparian rights continued but gave way to the rights of the Crown under the statute when there was a conflict. A controversy was created which has been the subject of academic discussion. P.N. Davis in his paper " 'Nationalization' of Water Use Rights by the Australian States", The University of Queensland Law Journal, Vol.9, No.1, p.1, argues that the approach suggested by Fullagar J should not be accepted. He discusses and expresses disagreement with the views of S.D. Clark and I.A. Renard in "The Riparian Doctrine and Australian Legislation" (1970) 7 Melbourne University Law Review 475.

That debate received recent judicial attention in Van Son v Forestry Commission of New South Wales (1995) 86 LGERA 108. In that case the plaintiff sought damages, inter alia, alleging against the Forestry Commission that its activities had restricted the flow of the river thereby interfering with her rights as a common law riparian owner.

Cohen J considered the earlier decisions and the comments by Fullagar J in Thorpe's case. Revealing no inclination of his own, he decided that Hanson's case should be followed considering both its antiquity and the fact that the legislature had never determined, notwithstanding many opportunities, that its effect should be dealt with by legislative amendment. He concluded that the right to a flow of water no longer existed (p.125). He went on to consider whether *"a remnant of those riparian rights was still available because of the*

exceptions contained in each of the various Acts to the vesting of water in the Crown, Commission or Ministerial Corporation, as the case may be". He held that the continuing right to take water for domestic purposes included the right to have that water of appropriate character and quality. *"Unreasonable interference causing pollution restricting the use of the water will cause the Court to intervene."* (p.126).

Cohen J held in that case that there was no interference with the plaintiff's rights sufficient to justify a claim in nuisance.

Whether or not the conclusion expressed by Cohen J was that intended by the original legislators, it is a sensible working out of the competing claims of individuals to river waters in a regulated system. However, it cannot address the structural problems to which the systems have been subjected in New South Wales.

Disputes under the Act - some initial problems

One of the early difficulties with the legislation was identifying the role expected of the government body responsible for administering the Act in the resolution of any dispute. For a time it adopted the view that there was no role for it to play before a Land Board or the Court. It believed it should remain independent from any judicial decision making. This changed following the decision in Marshall v Lance and Ors (1923) 2 LVR 43, where the Court held that the Water Conservation and Irrigation Commissioners, being public trustees, should be represented before the Land Board at the hearing of cases dealing with applications under the Act. The application involved a licence to pump from a lagoon near Sydney. The Court held

that the Commission was the body which could most effectively provide the Land Board with an unbiased assessment of the hydrology of the lagoon and the effect which pumping might have upon it.

The principles for the resolution of disputes

Because the legislation provided no guidance it was necessary for the Land Boards and the Court to define the principles to be applied in the resolution of individual disputes.

The most significant of the earlier decisions defining the principles to be applied is that of Roper AJ in F.W. Hughes Pty Ltd v Water Conservation and Irrigation Commission (1937) L&V V-C 11. By this time the Act had been amended to provide for an appeal in the event of objection or a decision by the Water Commission to reject the particular application (Water (Amendment) Act 1936). This reflects a significant change. The Minister now accepted a greater responsibility for decisions made under the legislation.

In this case the applicant sought two licences to irrigate for stock and other purposes. The Commission had come to an adverse conclusion but the Land Board on appeal had decided, by majority, that the licences should be granted. Roper AJ (a much respected figure in the early development of resource planning law in New South Wales) acknowledged the interest of the Commission both because of its concern in relation to general matters and the potential to affect its individual works. He identified the ultimate question for determination in the following terms:

"It may be assumed that in almost all cases the grant of the licence is advantageous and so desirable from the applicant's point of view; but I think that the question to be determined under section 11 is whether it is desirable in the public interest that the rights of the Commission should be cut down." (p.17) (emphasis added)

In that case, the licence was refused.

Hardie J adopted similar principles in Robson v Water Conservation and Irrigation Commission (1955) 36 LVR 57. In this case objections had been lodged and the matter automatically passed to a Land Board for determination. The Land Board recommended refusal of the licence, finding that *"to grant a licence to Robson might prejudice the interests of the objectors"*. The reasoning process, unlike Hughes' case does not appear to have reflected any broad consideration of the public interest. The approach of the Land Board seems to have been to endeavour to protect existing licence holders irrespective of whether this would be to the general benefit of the community. Any concept of equitable distribution of water or identification of the most productive land for its utilisation was not apparent. (See the later discussion and reasoning of Allan J in Coulton & Ors v Holcombe & Ors (1990) 20 NSWLR 138.)

Hardie J reconsidered the Land Board's approach. He identified the fact that the Act did not specify the principles to be applied to resolve the dispute but stated:

"There are indications in the Act that the main question for determination is what is necessary or desirable in the public interest; the problem is frequently one of balancing

a known advantage or benefit to one riparian holder, or to a group of riparian holders, against an apprehended or possible disadvantage or prejudice to other riparian holders." (p.60) (emphasis added)

In a later case, Gibraltar Pty Ltd v Fairymead Sugar Co Limited (1957) 36 LVR 32, Hardie J added to these principles an observation about the role which conditions might play in adjusting the consequences for individual users of the waters:

"The solution to the problem (of balancing the respective interests) is frequently found in the imposition on the applicant for the licence sought of conditions appropriate to eliminate or minimise the risk of prejudice to lower riparian owners." (p.38)

In Rofe Partnership v Water Conservation and Irrigation Commission (1964) NSWR 1848 these questions were again examined. Reflecting upon a statement in an earlier case Thorpe's Ltd v Water Conservation and Irrigation Commission (1957) 36 VLR 62 that the contest before the Court *"should not be a narrow and legalistic contest"* (p.69), Else-Mitchell J (another significant figure in the development of environmental law in Australia) reinforced the role of the Commission as the body best placed to assist the Court, indicating that *"it represents the interests of other individuals who may be affected and the public interest generally."*

In times when water was relatively abundant and any concept of environmental concerns about the river system unknown, the resolution of disputes proved relatively easy. Although existing licensees were not given priority the courts adopted the approach that if the interests of existing

and prospective licensees were adequately balanced the public interest would be satisfied. The problems which were soon to emerge in the river systems and which were to require a broader view of the public interest were to make judicial resolution significantly more difficult.

The rights of other States

The administration of the Water Act in New South Wales avoided significant controversy until the existence of major irrigation works utilising significant proportions of the available water began to reveal fundamental problems in the system. Increasing levels of salinity in the waters of the Murray as they enter South Australia were a significant indication of problems in the system. But there were others. The salinisation of irrigated lands had caused concern, as did the depletion of native species in the river system. A Report from Dr Maunsell was commissioned which sought to identify how the waters of the Murray Darling Basin might be better utilised to ensure that water quality was maintained at a high level. That Report was significant both in the emerging political debate and in litigation the State of South Australia pursued in opposition to the grant of further licences in the Murray Darling River Basin.

The Murray Darling Rivers constitute the most significant river system in Australia. The two rivers, with their many tributaries, carry water from Victoria, New South Wales and Queensland, passing to the ocean through South Australia. It drains one-seventh of the continent, an area the size of France. It provides about 75 per cent of all the water consumed by Australians. The system provides town water, water for industrial purposes and significant quantities for irrigation in New South Wales, Victoria and South Australia. Within this system many works have been constructed for the storage of water to enable its use for irrigation. The system is the subject of

an agreement originally known as the River Murray Waters Agreement which was executed by the Commonwealth of Australia and the three States on 19 September 1914. It has been amended on a number of occasions and was ultimately replaced in 1988 by the Murray Darling Basin Agreement. The original Agreement constituted a River Murray Commission to give effect to its provisions. Through the Commission the available waters are managed and dispersed. There is reference in the Agreement to potential salinity in one limited respect but otherwise the Agreement did not impose obligations which would provide for the effective management of the river system under the conditions which emerged in the 1970s. As I have noted, the Australian Constitution was effectively silent on the use and control of river water, the problems (although undoubtedly none were then envisaged) being left to be resolved by the States.

South Australia had become increasingly concerned over the quality of the water which it was receiving. Although the Agreement guaranteed South Australia an identified percentage of the waters in the system, this was not proving adequate to guarantee suitable water quality. It decided, no doubt because of political pressures from city dwellers, whose water was notoriously of poor quality, and irrigators whose livelihoods were at risk, that it would actively intervene in the process of allocation of licences and management of streams in New South Wales. It determined to use any legal means available to it to inhibit the grant of further licences. Many actions were commenced in the New South Wales Land and Environment Court claiming that existing licences had been granted in breach of the Environmental Planning and Assessment Act 1979. It also considered an action for nuisance against the States of New South Wales and Victoria and determined to oppose the grant of any further licences anywhere it could.

One matter resulted in significant litigation. It involved an application by a number of people to take waters for the purpose of irrigating for agriculture along the lower reaches of the Darling River before it joins the Murray. The matter was initially heard by a Land Board which recommended refusal of the licence. Its reasoning is important and revealed considerable insight into the emerging problems for the river. Having identified the claim of increasing salination of the river system because of irrigation, the Board referred to the caution which the Maunsell Report had suggested before further demands for water were created. It grappled with the concept of the public interest on a scale which, until it had become a State issue, had never previously been considered. It said:

> *'The Board considers that its main task in this inquiry is to balance the interest of the applicant against the public interest generally. It has been laid down in judgments in the Land and Valuation Court that the main question for determination is what is necessary or desirable in the public interest, and we have applied ourselves to that task.*
>
> *In themselves each of the applications would have only a minute effect as far as reductions in river salinity is concerned, however, taken together and also bearing in mind that applications to irrigate 3170.5 hectares are in hand up to 30 November 1979, the date which was recently announced by the Chief Commissioner of the Water Resources Commission that applications after this date for irrigation licences on the Darling River downstream from Lake Wetherell will not be granted, and also an uncontradicted statement by one of the objectors that an application and recently been advertised for a licence to irrigate 3000 hectares near Bourke, in the uncontrolled*

section of the Darling River, the position is one that assumes some considerable significance."

The Board also briefly turned attention to the resolution of the competing claims of New South Wales and South Australia to the water. Its conclusion underlines the inadequacy of the Australian Constitution by not providing for national "ownership" and disposition of the resource. The Board was, of course, the instrument of New South Wales and it is not surprising that it put the interests of that State ahead of others. But it is hardly a satisfactory resolution of a national problem. It said:

"It is appreciated that New South Wales as a Sovereign State is entitled to the use of its waters as provided by the legislature and subject to agreements properly entered into with other States, however it is considered that the public interest in a country like Australia should be considered beyond the borders of the State. Having said this, however, we would look firstly to the needs of the people of New South Wales and secondly to those of the other States"

The decision to give precedence to the interests of the people of New South Wales is not explained and no attempt is made to identify the weight given to the South Australia concerns. Whether it played a significant part in the ultimate decision is now impossible to identify. However, although not expressed or indeed discussed in these terms, the Board clearly embraced an approach which might be reflected in the current view of the "precautionary principle".

(United Nations Conference on Environment and Development (UNCED or Rio Conference) Agenda 21 - "Precautionary Approach".)

It is plain that this decision had great significance. Although the Board reached the conclusion that the individual applications were of little consequence it recognised their significance as part of the whole system. It also recognised, as later became plain to all, that there was insufficient knowledge of the system to justify its further depletion by irrigation. The Board urged that the Maunsell Report be given significant consideration. The conclusion of that Report was that insufficient investigation had been undertaken to enable a competent decision to be made that further irrigation was possible.

The applicants did not accept the Board's decision and appealed to the Land and Environment Court of New South Wales which had become the appeal body in 1979 (Environmental Planning and Assessment Act 1979, Land and Environment Court Act 1979). Some further evidence was given and the matter reargued. A significant issue emerged as to whether South Australia was entitled to be a party to the proceedings. Perrignon J found in favour of South Australia on this question, holding that the possibility of increased salinity of the Murray River justified its intervention.

The evidence from the Water Resources Commission before the Court was to the effect that the granting of the licences would have *"no appreciable effect upon the salinity of the waters either of the Lower Darling or the Murray"*. This was similar to the evidence placed before the Land Board. The Commission also analysed the river system suggesting that the Lower Darling did

not need waters for the purpose of dilution flows. It supported a volumetric allocation scheme with an 80% reliability rate as this would ensure that water was not "wasted". The evidence of the Commission was that the system should be utilised so as to maximise the waters available for irrigation, the environmental concerns urged by South Australia not being thought significant. (The volumetric scheme was introduced on the Murray River in 1983 although an administrative volumetric scheme lacking statutory underpinning had operated since the 1970s.) South Australia argued that the increase in salinity levels in the Murray in recent years had reached unacceptable levels. The general plea was made that the time had come for the refusal of further licences, in the interests of the river system and of the downstream irrigators.

The Judge took a different view from that of the Land Board. He said:

> *"On the evidence before me I can see no good reason for withholding the water pending the making of further investigations, or the taking of further measures, relating to salinity. The evidence of the Commission's experts satisfies me that the waters can properly be released to the present applicants without harm to the objectors or other irrigators or to the river system in general. Nor am I persuaded to the contrary by anything in the Maunsell Report, or at least those portions thereof which have been tendered in evidence. That Report is generally recognised as an important document which provides guide-lines for further research and investigation into salinity problems. Some of the measures recommended by the Report have already been undertaken."*

He went on to embrace the approach of providing 80% reliability and found that no harmful effect would ensue to existing licence holders provided appropriate conditions inhibiting the return of tail waters to the river were imposed.

As to the argument that if not allocated the waters might be used to greater benefit in the system, the Judge noted that he could not control the ultimate disposition of those waters. They might be allocated by the Commission to another irrigator. The inadequacies of a system which concentrated on the rights of individuals and which had no capacity to deal with problems of the whole system were clearly revealed. The Judge said:

> *"I do not think that the water which would be available for use if the present applications were not granted would have any beneficial effect, other than perhaps a negligible one, upon existing licence holders if it, or its equivalent in quantity, were equally distributed amongst them. In any event the disposition of such water, if these applications were not granted, would be a matter to be determined by the Commission in the light of the circumstances existing at the time of its determination and it by no means follows that the objectors would obtain any benefit at all from that water or its equivalent."*

He also considered the fact that other licence applications were pending along the Lower Darling but determined that the prospect of those licences being granted to be irrelevant. Although adverting to the fact that the main consideration in any appeal is what is necessary or desirable in the public interest, he nowhere seeks to define the relevant elements of the public interest , especially in the context of the challenge brought by South Australia.

The contrast between the decision of the Court and that of the Land Board is obvious. The Land Board both recognised the interests of the neighbouring State (although we do not know of the weight given to its concerns) and, more significantly, applied caution in its decision-making. It recognised that the system was known to be vulnerable because of past irrigation practices. The Court decision reflects a concern only with the position of the individual applicants, balancing those against the individual objectors and fails to recognise the more significant questions which arguably the public interest should have required be given determining weight. The decision was made without any recognition of the problems which the system was experiencing or concerns as to whether the available water should be allocated to be utilised to ensure the health of the river rather than the interests of the individual irrigators whether they be the applicants or others.

It is extraordinary that this decision passed with little comment. It does not reflect the analysis which would be given to the problem today. Perhaps it should be understood as the only response which the legislative structure and dispute resolution mechanism could have provided. The prospect that there might ever be insufficient water to meet all of the demands on the system, including environmental flows, and the difficulty of the legislation of one State protecting the interests of another, had never previously been considered. Neither the legislation nor any principle defined by the courts were adequate to deal with the problems which had emerged.

There was an immediate political response to the South Australian intervention. As if to confirm the inadequacy of a federation to deal with a national problem, the New South Wales Act was

amended so that South Australia could no longer be a party to any proceedings involving an application for a water licence in New South Wales. (Water (Amendment) Act 1981 No.49).

Volumetric schemes and embargos on further licences

Before the litigation between South Australia and New South Wales, there had been some administrative recognition of the stress which the river system in New South Wales was approaching. The Water Act was amended in 1977 (Water (Amendment) Act 1977) so that the volume of water available to be utilised by individual irrigators could be controlled through the licence system rather than allowing the licence holder to irrigate an area without limit as to the volume of water which might be applied to it. This was initially intended to make both the system and its management more efficient.

At the same time, legislative provision was made for the embargo of further licences. Section 20Y was added to the Act in the following terms:

> *"1. Where the Commission is satisfied that a water source which is subject to a scheme is unlikely to have more water available than is sufficient to meet the water allocations of holders of existing licences, group licences and authorities, which authorise the taking of water from the water source, and the requirements of all other users lawfully authorised to take water from the water source, it may, by notice published in the Gazette and in a newspaper circulating in the district in which the water source is located, declare that, on and from a date specified*

in the notice ... no further applications - will be granted until the notice is revoked by subsequent notice so published."

The Whalan Dispute

The Whalan Creek is for most of its time a string of lagoons connected by a dry channel. When the Macintyre River, which is a tributary of the Darling River, rises sufficiently, water passes down the Whalan. This may occur when water falls in the catchment of the Macintyre or the Dumaresq which is a tributary of the Macintyre. These rivers are all situated in the far northern area of New South Wales [see **Annexure A**].

Up to the 1970s, the land in the area had been used productively for dry land activities involving the raising of sheep and cattle. There was also extensive dry land cropping. The potential to use the river waters for irrigating crops, particularly cotton, was recognised in the 1970s, and farmers were encouraged by the Water Authorities to obtain licences to permit irrigation. The ambitious or perhaps less conservative farmers applied and were granted licences, and turned dry land into highly productive and profitable ventures. They generally used Joint Water Supply Schemes under section 20 of the Act.

At the same time, the State provided capital for the construction of a dam known as the Pindari which was completed in 1969. A dam known as the Copeton had previously been completed. It was intended that these dams would provide further water for the system. As it happens they have failed to contribute anything like the volume of water originally predicted.

It was not until 1979 that the Whalan Water Users' Association became active. It had developed a scheme which it began to promote through a number of persons, notably Mr Holcombe. In August 1979, an application was lodged for a licence, the form being filled in by the principal licensing officer of the Water Resources Commission. It turned out that the application was completed in error. It was filled out as a section 10 licence application when the real intention was to seek a Joint Scheme authority under section 20 of the Act. The Scheme was intended to allow water to pass regularly down the Whalan, rather than intermittently as it would do naturally, allowing cotton and other crops to be grown.

The initial response of the Water Resources Commission was favourable to the Whalan application. However, some doubts existed. Detailed work was undertaken to calculate the waters which might be available from the Pindari and Copeton dams and by 1980 it is plain that the water which was originally contemplated as being available to the Whalan Users was unlikely to exist within the system. A lesser allocation was contemplated.

As a result of the efforts to estimate the available water and in recognition of a perceived shortage, the Minister announced in May 1980 that an administrative embargo would be placed on new allocations along the Severn and Macintyre Rivers, the relevant rivers for the purpose of this discussion. Notwithstanding this announcement, the attitude of Water Resources remained that 50,000 megalitres per annum might be allocated to the Whalan scheme. However, by the end of 1980 this had been revised and the Commission appeared favourably disposed to the grant of a licence for a lesser amount - 26,000 megalitres per annum.

On 4 October 1983, the Whalan application was referred to a Land Board for the hearing of objections. The hearing commenced, albeit briefly, on 20 February 1984. It has never been concluded. At the hearing, counsel for the objectors took the point that the Whalan application was invalid, not being an application under section 20, and accordingly the Land Board could not pursue the matter. Proceedings for declarations were commenced in the Supreme Court (Coulton & Ors v Holcombe & Ors (No. 630/1984, Lusher J, unreported)).

The dispute turned upon the precise application which had been made. Although the application had been lodged before the embargo had been imposed on new licences, the difficulty with the form was not appreciated until after the embargo had been created. An attempt was made to treat the section 10 form (with appropriate modifications) as an application under section 20. Lusher J held that this attempt failed and accordingly the application for a Joint Water Supply Scheme failed because it was the subject of the embargo under section 20Y.

What was not appreciated by the applicants for the licence at the time of the trial, although it was apparent from the material which would then have been available and could have been analysed, was that the section 20Y embargo was itself invalid. A challenge to its validity was sought to be raised when the decision of Lusher J was appealed to the Court of Appeal. That Court was prepared to allow the issue to be raised but the decision was appealed to the High Court.

In Coulton & Ors v Holcombe & Ors (1986) 162 CLR 1, the High Court considered the principles which should be applied by an appellate court when exercising its discretion to allow issues not raised in the Lower Court to be pursued. The case has become the leading decision in this area

of the law in Australia and in a joint judgment the majority of the Court determined that the applicants could not pursue the issue of the validity of the section 20Y embargo. The ground pressed for its invalidity was that it was not open to the Commission to have formed the view that the Severn River Catchment was unlikely to have more water available than was sufficient to meet the water allocations of holders of existing entitlements. Ironically, part of the argument was that when making the calculation the Commission had assumed that the Whalan Users already had their water. A further difficulty was identified in defining the catchment which could be examined for the purpose of the calculation.

The Court of Appeal when deciding to allow the issue to be litigated, identified the overriding importance of the public law aspects of the case. It contrasted these aspects with the private interests of the landholders actually involved in the case. As recorded by the High Court, reference was made by the Court of Appeal *"to the interests of the wider community ... in the clarification of statutory duties and due observance of the law by statutory office-holders"* (p.9).

However, the majority of the High Court took a different view. Although recognising that there was another case which would raise the same issue of validity it, surprisingly, decided that there was no overriding public interest consideration which would allow the issue to be raised.

The majority decision reflects the traditional approach of the courts to issues of general significance in water matters. There could hardly have been an issue of greater general significance to the water users of New South Wales than the validity of a particular section 20Y embargo, leaving aside the significance to irrigators in the particular river system.

The dissenting Judgment of Deane J (now Australia's Governor-General) was expressed in striking terms. He emphasised the fact that the section 20Y notice was a public notification by a statutory authority purportedly having statutory effect. He recognised (as in fact successfully occurred) that it may be challenged in other proceedings. He went on to say:

> *"Indeed, if the appellants' contention that the first respondents would themselves be estopped from challenging the validity of the notice and subsequent proceedings is correct and if the challenge to the validity of the notice would be soundly based, the result of a refusal to allow the first respondents to raise the point would be that they alone were excluded from being considered for access to the public waters of the system. And that by reason of the unforeseen and unintended effect of an invalid public notification by a statutory authority which they had sought to challenge on their appeal in circumstances where their failure to raise such a challenge in their defence at first instance was caused by the genuine inadvertence of their counsel and where any real prejudice sustained by the parties could have been adequately covered by an order for costs. Such a result would be unjust and regrettable. In the context of proceedings brought by a group of more than a hundred plaintiffs to establish, on technical grounds, that the public notification had had the quite unintended effect of precluding the first respondents' application for access from being even considered on its true merits, it appears to me that such a result would expose the legal system to justifiable ridicule."* (p.21)

The High Court's decision was handed down in 1986. Although the matter was remitted to the Court of Appeal for determination, the applicants for licences have never pursued the appeal.

This is not surprising, given the fact that they were precluded from raising the validity of the section 20Y notice.

However, another attempt to litigate a similar issue was made.

In Holcombe & Ors v Coulton & Ors (1988) 17 NSWLR 71, the validity of the application was argued on a different ground. This time the Court of Appeal refused to hear it. The events are complicated. The further ground sought to be argued was that the amendments made to the legislation by the Water (Amendment) Act 1983 and the Water (Amendment) Act 1986 had the consequence that either or both of those Acts permitted a section 20 application to be lodged, it having been lodged prior to 30 November 1987. This date was important because the effect of the legislative amendments was to revoke the original section 20Y notice and reimpose it with effect from that date. The refusal by the Court to allow this claim was the last step in this particular set of proceedings.

Other litigation involving the "same" parties

However, there was other litigation. In Coulton & Ors v McCrae & Ors ((1986) - unreported - Rogers J), a challenge was brought to the validity of a number of applications for a Joint Water Supply Scheme to take water from tributaries of the Barwon and Macintyre Rivers known variously as the Gnoura Gnoura Creek and the Wombyanna Lagoon. The trial Judge found that the applications were invalid.

On this occasion when the matter went on appeal the Court held that the trial Judge should be overruled. It found that substantial compliance was appropriate in the circumstances and that accordingly any deficiency in the application in its amended form would not preclude the Commission from accepting it. The matter went back to the Land Board and a water entitlement was eventually granted.

The ultimate case

Coulton v Holcombe & Ors and Holcombe v Water Administration Ministerial Corporation (1990) 20 NSWLR 138, finally raised the question of the validity of the original section 20Y notice. Allen J determined that the embargo was invalid. But he also found that section 41 of the Water (Amendment) Act 1986 had the effect of retrospectively giving it validity. Accordingly, a section 20Y notice which was invalid for the reasons which the applicants had sought to advance in the earlier proceedings was now made valid. The applicants were again defeated.

The judgment is of interest not the least because of the observations of Allen J on the management of water resources in New South Wales. It demonstrates a broadening judicial perspective although still limited to New South Wales. The national context of the problem had not been recognised. I have included an extract as an annexure to this paper. **[Annexure B]**

The public inquiry

Notwithstanding all of this litigation, the fundamental question of whether river water should be allocated from the system to the Whalan had not been resolved. Ultimately the Whalan Water Users' Group persuaded the New South Wales Government that because the judicial process had

failed to reach a conclusion there should be an inquiry with the potential for a political resolution of the problem. After all, they argued, no-one has ever considered, notwithstanding the constant litigious struggles, whether there was in fact water which could be made available to the Whalan Users.

The Government appointed Sir Laurence Street AC, a former Chief Justice of New South Wales, to conduct the inquiry. He was appointed in December 1993 and reported on 13 March 1996. The Report has only recently become publicly available. Sir Laurence was assisted by a Working Party of experts and held public hearings both in Sydney and Goondiwindi with a view to understanding the problem. The task proved intense and difficult.

By the time Sir Laurence considered the matter, the accepted approach to the allocation of irrigation waters had altered significantly from that prevailing at the beginning of the 1980s. Many of the water licences which had already been granted were used for cotton growing. Experience had shown that the entitlements which had been theoretically available under the allocation scheme were in reality significant over-estimates. There had been an increase in on-farm storage which had allowed off allocation water to be utilised. There was also evidence of a trade in water licences following the amendments to the Act in 1986 which allowed the transfer of water entitlements. Although designed to ensure effective use of the available waters, the consequence was that any surplus which may have been available within the system was likely to have been taken up.

Perhaps the greatest change which had occurred was the recognition given to the need for flows in the main river system to be maintained to meet environmental demands. Management of environmental flows, including deliberate releases of water from dams in order to maintain water quality, was now being acknowledged. This was a significant change from the position which prevailed when South Australia, 15 years earlier, had argued that licences should be refused on substantially the same grounds.

Sir Laurence examined the history of the application which had been made and identified the failure of the Whalan Users' lawyers to recognise the possible challenge to the validity of the section 20Y notice in the original proceedings. He found that the process of the litigation *"had brought about a result which can be characterised as manifestly unfair to the users"* (Street, p.43).

He also examined the hydrological analysis which was available for the river system, utilising the resources of a Task Force of considerable expertise. In contrast with the assertion by the Whalan Users and the earlier view of the Water Resources Commission that there was plenty of water in the river to meet the requirements of their scheme, he found *"It is plain to demonstration that there is not just a deficiency, but a serious deficiency, of regulated water available to meet the entitlements and requirements of the licensed irrigators"* (Street, p.50). He records the fact that the Task Force Report supports his conclusion that *"there is simply not enough water in the river, whether regulated or unregulated, to support the enlarging of the existing extractions in order to meet the requirements of the Whalan Users"* (Street, p.50). Again, I have included an extended extract from his Report as an annexure to this paper. [**Annexure C**]

In the ultimate event I understand the Government has recommended that all parties to the dispute be compensated for the costs incurred in the litigation. The termination of the dispute without the allocation of water marks a turning point in attitude to the allocation of water resources from the New South Wales river system.

Recognition of native title rights to water

The Mabo (supra) decision related to the Murray Islands which lie in the Torres Strait to the north of the main continent. The decision by the High Court that the doctrine of terra nullius was not part of the common law of Australia set off enormous political debate and has resulted in the Native Title Act 1993 which both recognises native title and, where appropriate, provides for the readjustment of rights upon payment of compensation to indigenous people. The essential element of the High Court's decision, which is reinforced by the statute, is that native title survives notwithstanding the British assumption of sovereignty over Australia. *"The antecedent rights and interests of the indigenous inhabitants constitute a burden on the title of the Crown"* (Mabo (supra), p.57).

There are many elements of indigenous use and occupation of the inland river system. Because native title is dependent on the fact that the relevant land remains unalienated Crown land, its application to a lengthy river such as the Murray or the Darling remains complex. Many modifications have been made to its natural form. It is possible, depending on the facts of a particular case, that only some attributes of native title remain and will be recognised by the judicial process. The Act provides for title disputes to be settled by a judge of the Federal Court.

Such litigation will involve an exploration of both the indigenous and white man's use and occupation of the river. It must be expensive.

In recent months the Federal Court has been hearing evidence in a dispute known as Members of the Yorta Yorta Aboriginal Community & Ors v The State of Victoria & Ors - the first native title case relating to water. The plaintiffs, an aboriginal tribe, relying upon the provisions of the Native Title Act 1993, have made claim to the waters of the Murray River, as well as other lands. The matter is being heard before Olney J in the Federal Court with a judgment not expected until 1998. It is difficult to predict an outcome although success for the plaintiffs to any degree must affect the future management of the river system and the rights of existing licence holders.

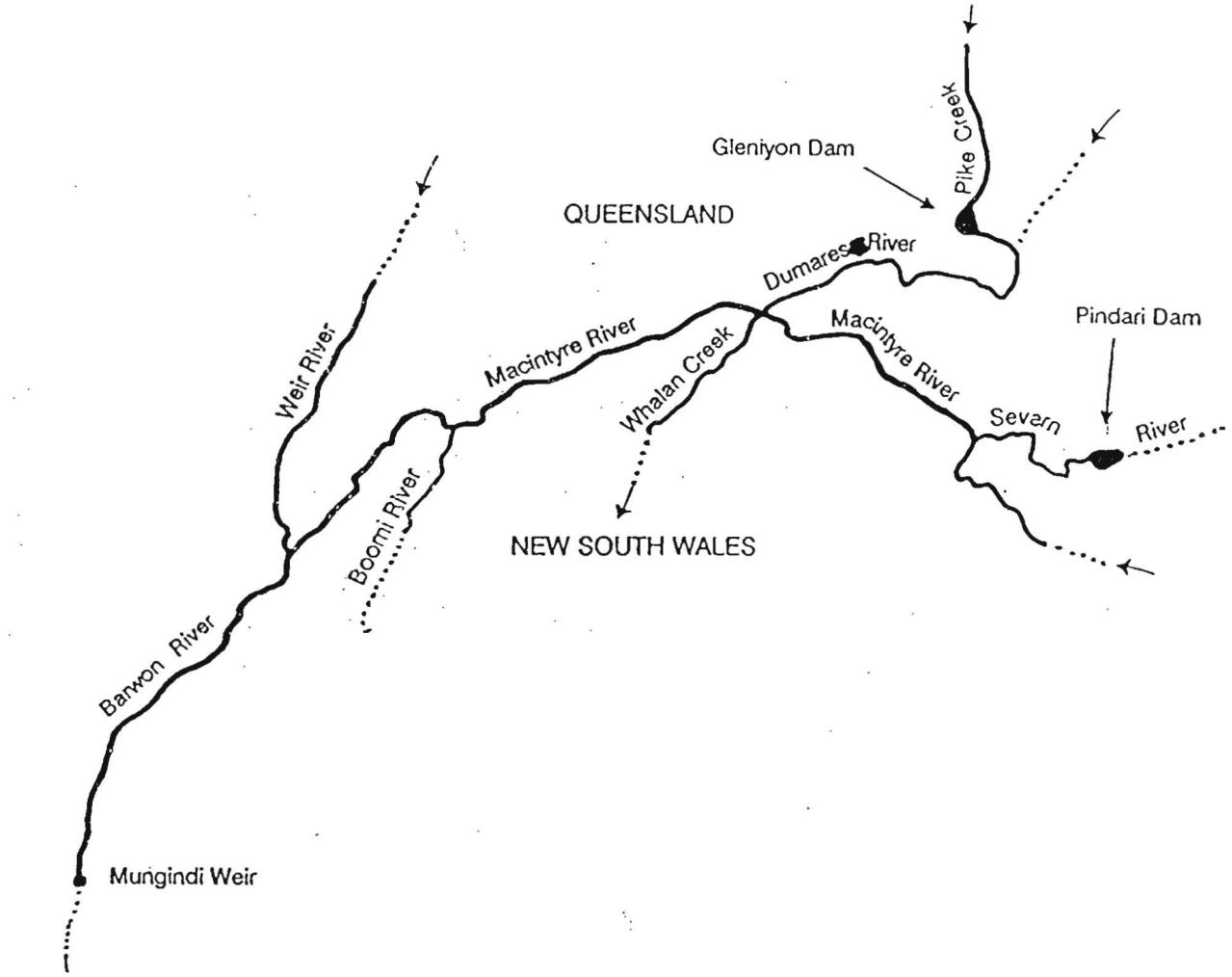
Conclusion

In this paper I have considered some of the elements of the legislative regime for the control of water in New South Wales throughout its history. It is important to that regime that there be a capacity for the judicial resolution of disputes. Many disputes between individuals have been adequately resolved, others have not. Significantly, the judicial dispute resolution mechanism has proved inadequate for the management of an integrated system where all the water has been allocated and there are identifiable environmental constraints. In New South Wales as I prepare this paper the Government has announced a major administrative initiative in an attempt to address the problems of the river system - an initiative which the judicial dispute resolution mechanism was not capable of providing.

It is also important to appreciate that in recent weeks the New South Wales legislature has responded to the lack of statutory criteria for judicial decision making by incorporating section 4A in the Water Act. The section requires the courts to have regard to policy matters, State water resource management objectives and relevant inter-government agreements (Water and Environmental Planning Legislation Amendment Act 1997 No.63) when determining judicial outcomes. It will be obvious that the amendment was long overdue.

Finally, the future of native title claims to inland waters is not yet known. Whether it will have a significant effect upon the management of the rivers can only be determined after the courts have resolved disputes under the Native Title Act 1993.

Annexure A


Glenlyon Dam
Pike Creek
QUEENSLAND
Dumaresq River
Macintyre River
Weir River
Macintyre River
Whalan Creek
Pindari Dam
Severn River
Boomi River
NEW SOUTH WALES
Barwon River
Mungindi Weir
To the Darling

Annexure B

Coulton v Holcombe & Ors and Holcombe v Water Administration Ministerial Corporation (1990) 20 NSWLR 138 at 141:

"A practical State scheme of general application for sharing the taking of water from the rivers of the State requires the taking into account of a host of considerations. The considerations which are to be accepted as having priority and those which are to be made subordinate or even ignored are matters for a legislative prescription and, within those limits, for administrative decision. One would anticipate that it would be likely that attention would be given, whether by legislation or as a matter of administration, to the interests of the State as a whole on the one hand and to fairness between existing water users as between themselves and as between them and likely future water users. A likely feature of any rational scheme would be that the State would encourage in particular places the drawing of water from rivers yet discourage it in other places. It may be apparent, for example, that some lands would yield prolifically if irrigated and thereby contribute greatly to the common weal. On the other hand it may be apparent that other lands would require inordinate watering to be reasonably productive. In some areas the watering of the land might be likely to give rise to salinity problems. In others the risk of such problems might be minimal. The particular use of the water is a consideration which well might be considered relevant. In some areas it might well promote the welfare of the State as a whole for there to be intensive utilisation of riparian waters for growing crops which demand high water usage. In others the more economic return, for the State as a whole, might be from growing of fruit trees. In others the most economic return for the State as a whole might be not from agriculture or horticulture but from industry - which itself had demands for water. Water is a precious resource of the State. It is notorious that in this State there is, generally, not enough to go around and satisfy all reasonable expectations. It must be rationed. This must lead

to conflicts of interest. One would think it likely that the rush of individuals to procure rights to riparian waters would not be permitted to be analogous to an old time gold rush - the early applicants being the winners and the latecomers being, in general, those who will be disappointed. One would expect that a long range view would be taken - accepting that the State will become progressively more developed, imposing greater strain upon the limited water resources. Future needs must be considered. On the other hand one would expect it to be likely that some priority in consideration be given to early applicants for water use. It might be thought that pioneers should not be denied a fair reward. Likewise it might be thought that rights which the State has granted to individuals in respect of water use ought not lightly be diminished or taken entirely away. The utilisation of lands benefiting from such rights may well have been selected on the assumption that the rights would continue and the utilisation might involve heavy capital expenditure which would be wasted if the rights are not constant. There are years of drought, years of flood and no reliable methods of predicting what the future holds in those respects. Yet it is common for droughts and for floods not to affect the whole of the State at the same time. They tend to occur in particular areas - albeit to an extent which is variable and unpredictable. Any rational scheme must be one which is flexible enough adequately to deal with these variations. In times of drought or of flood a decrease in permitted water consumption or an increase in permitted water consumption appropriate in one part of the State might be utterly inappropriate elsewhere."

Annexure C

Whalan Creek Inquiry : Extract from the Report of Sir Laurence Street : 13 March 1996

"I have, as required by paragraph (b) of the Terms of Reference, sought a resolution of the dispute over the claim by the Whalan Users in relation to the diversion of water into, and the use of water from, Whalan Creek 'that is fair and just to all parties and that gives full weight to the consideration of the public interest'. The outstanding relevant consideration of the public interest relates to protection of the environment.

It is the opinion of the Environment Protection Authority, New South Wales, that 'given the degraded nature of the Northern Rivers in New South Wales, the overall level of water use in these rivers will need to be reduced from present consumptive uses'. [Letter from Director-General EPA, 19 October 1995.] The letter further states that 'increases in development in Whalan Creek will cause pressure for future diversions of new water harvesting schemes and will also cause some water losses as a result of transmission inefficiencies. Whilst control over total diversions and sharing between users is theoretically possible, the fact is that any development in Whalan Creek will create a long term and ecologically unsustainable demand'.

The opinion of the Environment Protection Authority necessarily carries considerable weight. I have nevertheless appraised for myself the various aspects of this topic and I am of the view that no valid criticism can be made of this opinion and that it must be accepted as effectively ruling out the opening of the Whalan Creek land for the proposed irrigation scheme. The unfairnesses and injustices suffered by the Whalan Users over the years, substantial though they undoubtedly are, cannot preponderate over the weight that must be given to the environmental

considerations enunciated by the Environment Protection Agency.

My sustained attempts in recent months to find a solution that has any reasonable prospect of being carried into effect have, tragically, come to nothing. The barriers standing in the way of obtaining water for the Whalan Users are, for all practicable purposes, insurmountable. The balance between on the one hand the claims of actual and would-be irrigators in this part of the State, and on the other hand the conflicting environmental requirements of the whole riverine system down to South Australia has, in the period since the Whalan Users made their initial application for an irrigation scheme in 1979, swung heavily in favour of the environment. Not only is this swing manifested in public perception and expectation, but its underlying validity in the public interest cannot be gainsaid. Moreover, as the extent of the over licensing in past years of water extractions for irrigation has become more obvious, wide ranging policy considerations enter into the evaluation of any proposals for reallocation or readjustment of existing water entitlements.

The processes of the Courts have all but been exhausted by the Whalan Users and have resulted in their being denied a hearing on the merits at a time when they might have had some prospects of obtaining a licence. There is an outstanding appeal that has been in limbo for a long time and it is improbable in the extreme that this can achieve for the Whalan Users their objective of being granted a licence.

The Court processes, as is discussed in Chapter 6, have themselves brought about an injustice in that the Whalan Users were not permitted to rely on a ground, since recognised as well

founded, which would have entitled them to have the application determined on its merits by the Land Board. But the train has now left the station and, whereas others were granted licences virtually for the asking ten or fifteen years ago, there now exists a situation in which the combined operation of the perceived gross over licensing of the Border Rivers system and the incontrovertible needs of the environment leave no room for establishing a new irrigation scheme such as the Whalan Users envisage. The frustrating delays suffered by the Whalan Users have allowed these two considerations to develop in the way they have.

Try as I have mightily in relatively wide-ranging personal approaches over the recent months, I have not been able to formulate any proposal which would have any (let any reasonable) chance of overcoming the barriers confronting it and obtaining water for the Whalan Users.

...

I am sympathetically responsive to the devastating disappointment of the Whalan Users in the way things have turned out, but, in evaluating whether they have a prospectively successful moral claim for compensation, it must be recognised that they have not had any property taken away from them. Subject to the independent issue of the diversion of water from Whalan Creek (which I shall consider separately), from the point of view of their property rights they are no further behind now than they were before the age of irrigation arrived; they are simply not participants in the economic prosperity the State bestowed on others by granting irrigation licences to such others. Whilst moral claims to make good actual detriment can in appropriate cases be recognised, it is a very different thing to claim a moral entitlement to compensation for not having shared in beneficence conferred on others. Stripped to the bare essentials their loss is that they have been denied the fair opportunity of having their licence application evaluated

at a time and on a basis enjoyed by other applicants who were granted licences that have conferred enormous financial benefits on the successful applicants - benefits running up into millions of dollars on some properties. This can be alternatively expressed that their loss is that they have been denied the opportunity to share in the financial benefits enjoyed by those who were granted licences It is not easy to see how this can give rise to a prospectively successful case for their being morally entitled to be compensated out of the public funds of the State for what has taken place in the past.

The complaint of the Whalan Users in its essence is that they did not receive the free handouts that had been allocated to them, but that they had done nothing to earn or qualify for except for the fact that they happened to own land adjoining the Whalan Creek. It is galling for the Whalan Users that other landholders within this system did receive free handouts that they likewise had done nothing to earn. I regret the hurt that this mode of expression must occasion them, particularly in the light of the injustices and unfairnesses visited upon them. But I am not able to formulate a closely reasoned and compelling case to support a recommendation that the State should compensate them from the public purse because they did not have the unearned benefit of being granted a licence."