

**Current environmental challenges in the Land and Environment Court: focus on coastal planning and development and inland water resources<sup>1</sup>**

**Justice Nicola Pain  
Land and Environment Court of New South Wales**

A number of recent decisions of the Land and Environment Court of New South Wales (LEC) have required consideration of wider environmental issues directly, as part of resolving the issues at hand, or indirectly as an important context for determining the issues. Two such areas, coastal planning and development and the management of inland water resources will be considered in this presentation.

**Coastal planning and development**

*Current legal regime for managing the coastal zone in New South Wales*

Changes to the coastal management regime in effect from 3 April 2018 have been made and can be summarised in the following table:

	FORMER	CURRENT
Act	<i>Coastal Protection Act 1979</i>	<i>Coastal Management Act 2016</i>
Programs under Act	Coastal zone management plans (CZMPs)	Coastal management programs (CMP)
Advisor to Minister administering the Act	NSW Coastal Panel	NSW Coastal Council
SEPP/s	State Environmental Planning Policy No 71 – Coastal Protection (SEPP 71), SEPP 14 (Coastal Wetlands) and SEPP 26 (Littoral Rainforests)	State Environmental Planning Policy (Coastal Management) 2018 (Coastal Management SEPP)

There have been a number of substantive changes to the legal regime for managing development and protection of the coastal zone in New South Wales in recent times. The *Coastal Management Act 2016* (CM Act) replaced the *Coastal Protection Act*

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<sup>1</sup> I would like to thank Georgia Pick tipstaff and researcher at the LEC of NSW for her considerable assistance in the preparation of this paper.

1979 (CP Act) with effect from 3 April 2018. The CM Act identifies four coastal management areas which make up the coastal zone, coastal wetlands and littoral rainforests area, coastal vulnerability area, coastal environment area and coastal use area.<sup>2</sup> These areas are to be identified in maps prepared under a state environmental planning policy (SEPP).<sup>3</sup> Local councils with land in a coastal zone may and must prepare coastal management programs (CMPs) if directed to do so by the Minister for the Environment which must be done in accordance with the coastal management manual.<sup>4</sup> These plans aim to set the long-term strategy for the management of land within the coastal zone with a focus on achieving the aims of the CM Act.<sup>5</sup> The Minister for the Environment is to publish the manual which will contain mandatory requirements and provide guidance in connection with the preparation and development of CMPs.<sup>6</sup> Broadly speaking, a CMP must identify the coastal management issues affecting areas to which the program is to apply, identify the actions required to address those issues and if the local government area contains land within the coastal vulnerability area and beach erosion, coastal inundation or cliff instability is occurring on that land, include a coastal zone emergency action subplan.<sup>7</sup> Local councils must have regard to CMPs when engaging in strategic planning under Chapter 13, Part 2 of the *Local Government Act 1993* (NSW) and preparing planning proposals and development control plans under the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act).<sup>8</sup> Strategic planning includes developing a community strategy plan which identifies the main priorities and aspirations for the future of the relevant council over a period of at least 10 years.<sup>9</sup>

The State Environmental Planning Policy (Coastal Management) 2018 (Coastal Management SEPP) gives effect to the objectives of the CM Act from a land use planning perspective, by specifying how development proposals are to be assessed if they fall within the coastal zone.<sup>10</sup> The coastal zone areas referred to in the CM Act are also mapped under the Coastal Management SEPP.<sup>11</sup> By doing so it updates and consolidates into one integrated policy: State Environmental Planning Policy

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<sup>2</sup> CM Act s 5.

<sup>3</sup> Ibid ss 6-9.

<sup>4</sup> Ibid ss 13, 14(1).

<sup>5</sup> Ibid s 12.

<sup>6</sup> Ibid s 21.

<sup>7</sup> Ibid s 15(1)(a)-(b), (e)

<sup>8</sup> Ibid s 22.

<sup>9</sup> *Local Government Act 1993* (NSW) s 402(1).

<sup>10</sup> Coastal Management SEPP cl 3.

<sup>11</sup> Ibid cl 6.

No 14–Coastal Wetlands, State Environmental Planning Policy No 26–Littoral Rainforests and State Environmental Planning Policy No 71–Coastal Protection which have all been repealed. Equivalent areas to the coastal vulnerability and coastal use areas established in the CM Act and mapped and regulated by the Coastal Management SEPP were not specifically regulated under the previous coastal management regime. The management objectives for the coastal vulnerability area are inter alia to ensure public safety and prevent risks to human life, and to mitigate current and future risk from coastal hazards by taking into account the effects of coastal processes and climate change.<sup>12</sup> None of the SEPPs under the former regime specifically refer to these matters in their objectives.

The Coastal Management SEPP identifies development controls to help protect and manage sensitive coastal environments, manage risks from coastal hazards and support appropriate development.

Upon the enactment of the CM Act, Sch 5 to the EPA Act was amended to expressly allow development control orders to be made to stop activities on beaches, dunes or foreshores that contravene the EPA Act.<sup>13</sup>

The CM Act also established the NSW Coastal Council (the Council).<sup>14</sup> The Council is responsible for providing advice to the Minister for the Environment on matters such as compliance by local councils with management objectives and the coastal management manual in preparing and reviewing CMPs and performance audits of local councils' CMPs.<sup>15</sup> At the request of the Minister the Council must conduct a performance audit of the implementation of a CMP of a local council.<sup>16</sup> The purpose of the performance audit is to determine whether a local council is effectively implementing its coastal management program.<sup>17</sup>

Land in the coastal zone will be identified as being subject to the Coastal Management SEPP on a planning certificate issued under s 10.7 – formerly known as a s 149 certificate – of the EPA Act.

A new Ministerial Planning Direction under s 9.1 of the EPA Act – formerly known as a s 117 direction – issued at the same time as the Coastal Management SEPP,

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<sup>12</sup> CM Act cl 7(2)(a)-(b).

<sup>13</sup> EPA Act Sch 5, Pt 1.

<sup>14</sup> CM Act s 24(1).

<sup>15</sup> Ibid s 25(1).

<sup>16</sup> Ibid s 26(1).

<sup>17</sup> Ibid s 26(2).

requires councils to demonstrate that any proposed zoning changes are consistent with the objectives of the CM Act and the Coastal Management SEPP.

As these legislative changes are recent no cases concerning them are yet before the LEC.

### Recent litigation concerning coastal development

#### *Blueys Beach*

A judicial review case has been commenced concerning coastal planning under the former legal regime which required the creation of coastal zone management plans (CZMPs) which are similar to CMPs. In *Boomerang & Blueys Residents Group Inc v NSW Minister for the Environment, Heritage and Local Government & Midcoast Council* the applicant incorporated association is seeking, firstly, a declaration that the decision made on 16 November 2017 by the NSW Minister for the Environment, Heritage and Local Government to certify the Great Lakes CZMP was invalid and, secondly, a declaration that the decision made on 20 December 2017 by Midcoast Council to adopt the CZMP was invalid. The hearing took place in April 2019 and judgment is reserved.

#### *Belongil Spit, Byron Bay – the legal saga continues*

In the 1960s and 1970s Byron Shire Council on the north coast of New South Wales constructed an artificial headland near Belongil Spit protected by a rock seawall. Land along the coast at Belongil Spit has eroded substantially over time. Residents at Belongil Spit consider this is due to changes in sand and current movements caused by the Council's headland.

In response to its responsibilities to regulate coastal development, Byron Shire Council developed a policy known as "planned retreat" requiring dwellings to be able to be relocated should seaward erosion approach within 20 metres restricting development near beaches. The council published a draft CZMP pursuant to the CP Act in May 2010 providing for maintenance of the seawall and included an emergency action plan. The draft CZMP was later withdrawn with the intention of drafting a new CZMP which would take into account the *Coastal Protection and Other Legislation Amendment Act 2010*. On 4 July 2018 the council submitted to the Minister for the Environment a new draft CZMP for Cape Byron to Main Beach for

certification which has yet to receive a response.<sup>18</sup> The council is developing a CMP for Cape Byron to South Golden Beach under the CM Act.<sup>19</sup>

Actions of various kinds have been brought in relation to coastal erosion at Belongil Spit in both the LEC of NSW and the Supreme Court of NSW over many years. Recent cases are considered in this paper. This review is not exhaustive. In the LEC in 2009, Byron Shire Council sought an interlocutory injunction restraining a land owner from building a wall out of rock to protect his property which had been exposed to beachfront erosion due to an interim sandbag wall being damaged in a very large storm surge.<sup>20</sup> The parties later agreed to the interlocutory injunction being varied so that the property owner could rebuild a wall with geobags and sandbags.<sup>21</sup>

In 2010 14 plaintiffs who owned properties along Belongil Beach commenced proceedings in the Supreme Court of NSW alleging that Byron Shire Council had a duty of care to protect their properties by modifying or removing the seawall inter alia. The plaintiffs alleged that the seawall caused erosion of the beach and consequently that their properties had been exposed to seawater and wave action. The plaintiffs alleged that Byron Shire Council has breached its duty of care to them and this has led to loss and damage of their properties. The plaintiff's actions alleged nuisance. Unknown persons had placed a wall of geobags and rocks along the beach, seemingly without development approval, to protect properties including the plaintiffs' properties, from the seawater and wave action. The parties consented to the Court making an order for judgment for the plaintiffs and against the Council in the amount of \$2,750,000.<sup>22</sup>

The most recent Class 1 (merit appeal) case concerning coastal development in the Belongil Spit area was *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel; Stewartville Pty Ltd v New South Wales Transitional Coastal Panel; Robert Watson v New South Wales Transitional Coastal Panel* [2018] NSWLEC 207 handed down in late 2018. Three separate summonses were filed. All three matters

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<sup>18</sup> Byron Shire Council, 'Coastal Planning: Cape Byron to Main Beach CZMP' (2019) <<https://www.byron.nsw.gov.au/Services/Environment/Coast-and-Waterways/Coastal-planning#section-2>> (accessed 9 May 2019).

<sup>19</sup> Byron Shire Council, 'Coastal Planning: Our Coastline: Cape Byron to South Golden Beach' (2019) <<https://www.byron.nsw.gov.au/Services/Environment/Coast-and-Waterways/Coastal-planning>> (accessed 9 May 2019).

<sup>20</sup> *Byron Shire Council v Vaughan; Vaughan v Byron Shire Council* [2009] NSWLEC 88.

<sup>21</sup> *Byron Shire Council v Vaughan; Vaughan v Byron Shire Council (No 2)* [2009] NSWLEC 110.

<sup>22</sup> *Ralph Lauren 57 v Byron Shire Council* (Order, Supreme Court of NSW, Case No 2010/426976).

were heard together. The applicants own private properties along the coast at Belongil Beach. They sought development consent for repairs to failing seawalls to protect their properties from coastal hazards from the NSW Coastal Panel. After the applications were lodged, changes to the legislative provisions occurred renaming the consent authority as New South Wales Transitional Coastal Panel (the Panel). The former legislative provisions for the coastal zone, referred to above including in the table, continued to apply due to savings and transitional provisions. The existing seawalls had been built prior to 2000, some of unknown origin, without development consent and were therefore unlawful. The seawalls were located largely on public land. The public land was zoned 7(f1) Coastal Lands Zone under the Byron Local Environmental Plan 1988 (Byron LEP). The land owners appealed the deemed refusal of consent under s 97 of the EPA Act as the Panel did not determine the applications within the prescribed time.

The development applications were assessable under the EPA Act, subject to the consent authority first being satisfied of fulfilment of the preconditions in s 55M(1) of the CP Act. Section 55M(1)(a) of the CP Act stated that development consent could not be granted unless the consent authority (the LEC in the appeal) was satisfied that the works would not unreasonably limit public access to or use of Belongil Beach and would not pose or be likely to pose a threat to public safety. The consent authority would then need to be satisfied that appropriate arrangements had been made for restoration of the beach and maintenance of the works (s 55M(1)(b)). Clause 88(3) of the Byron LEP contained similar preconditions to granting development consent on land wholly or partially within the coastal zone. These required the consent authority to be satisfied that the works would not impede or diminish the physical land-based right of access of the public to Belongil Beach (cl 88(3)(a)) and would not be affected significantly by coastal hazards, have a significant impact on coastal hazards or increase the risk of coastal hazards in relation to any other land (cl 88(3)(d)).

Preston CJ of the LEC dismissed the appeals, refusing development consent. The preconditions to granting development consent for coastal protection works contained in s 55M(1)(a) of the CP Act and cl 88(3)(a) of the Byron LEP were not satisfied. His Honour found at [117] that, as a matter of fact, the proposed works would necessarily limit public access and use of the parts of the beach where the seawalls would be physically located either largely or wholly on public land. Further, the seawalls would result in the alienation of significant parts of the public land of the beach in areas that were currently and likely in the future to be accessed and used by the public.<sup>23</sup> The limitation on public access would last for a significant period of

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<sup>23</sup> *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel; Stewartville Pty Ltd v New South Wales Transitional Coastal Panel; Robert Watson v New South Wales Transitional Coastal Panel* [2018] NSWLEC 207 at [122], [123].

time and greater limitations on public access would occur whilst the works were being carried out.<sup>24</sup> Preston CJ stated that the unlawfulness of the existing seawalls did not preclude the land owners applying for development consent to carry out works to repair the walls.<sup>25</sup> Development consent can be granted to the future carrying out of a work and the future use of works on land. His Honour rejected the land owners' argument that the repaired seawalls would not result in any additional impeding of public access to or use of the beach beyond the impediment caused by the existing works because this sought to take advantage of the unlawful existing works and use. For the above reasons the extent to which and ways in which the proposed works would limit access was unreasonable for the purposes of s 55M(1)(a).<sup>26</sup> There were no practical reasons preventing the land owners from designing, locating and constructing coastal protection works that satisfied the requirements of cl 88(3)(a).<sup>27</sup>

Preston CJ stated at [143] that if consent were to be granted by the Court to the relevant development applications, it would prove difficult for the relevant consent authority to refuse other development applications for similar coastal protection works on the beach. The outcome would be a continuous length of coastal protection works built on the public land of the beach which would limit, impede or diminish public access to and along the beach and public use of the beach. The cumulative impacts of such limitation on public access to and use of the beach would be significant and unacceptable. Granting development consent to the repair of the existing unlawful works on the beach in front of each of the land owners' properties would also regularise and make permanent the works on the public beach.<sup>28</sup>

While unnecessary to decide whether a time limited consent(s) should be granted (given his finding that the above preconditions had not be satisfied), Preston CJ expressed some preliminary views on the issue. His Honour stated at [153] that imposing a time limit on consent of five or 30 years would undermine the purpose and utility of the grant of consent. The purpose of the proposed works was to protect the land owners' properties. That purpose would still be relevant and applicable five or 30 years following the grant of any consent.

### *Coffs Harbour*

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<sup>24</sup> Ibid at [124]-[125].

<sup>25</sup> Ibid at [128].

<sup>26</sup> Ibid at [130].

<sup>27</sup> Ibid at [131].

<sup>28</sup> Ibid at [144].

*Pridel Investments Pty Ltd v Coffs Harbour City Council* [2017] NSWLEC 1042 was a merits appeal in Class 1 proceedings of Coffs Harbour Council’s decision to refuse a 39-lot subdivision and boundary adjustment on land at Emerald Beach near Coffs Harbour. The Council refused the development due to the high risk of flooding and inundation inter alia. In her overview of the proposed development Senior Commissioner Dixon stated that “Emerald Beach has a single foredune with a crest elevation, at the time of the hearing, of approximately eight metres AHD [Australian Height Datum]”. The Senior Commissioner went on to say at [24]-[25]:

As it presently stands, the dune is the barrier that protects the Site from the erosive forces of the sea. It also protects the land in another way: both the dune and its vegetation provide a visual barrier to the development. The longevity of the dune, as both a protective and visual barrier to the development, is therefore of critical importance in this case.

Climate change will accelerate coastal processes and make it much more likely that the Site will be inundated from the sea, within the presumed 100-year life of the development. That said, the Council’s case is not dependent at all on climate change (Respondent’s written submissions (RWS) at [26]). Rather, the Council contended there is a clear risk in the present that the dune will be eroded and its vegetation stripped by the erosive forces of the sea. This will make the development more susceptible to coastal processes and when the foredune eventually slumps – by erosion over time – given the proximity of property boundary to the toe of the foredune – a rebuilt lower dune would be subject to periodic wave overtopping and ongoing erosion.

The applicant submitted that the risk from coastal processes was so remote it should not be considered. Senior Commissioner Dixon found to the contrary on the basis of coastal processes, town planning, flooding and ecology experts who expressed reservations about the development. The Commissioner found there had been inadequate assessment of the risk of coastal processes and that the development application should be refused.

#### *Stanwell Park*

*Fetherston v Wollongong City Council* [2016] NSWLEC 1527 was a merits appeal in Class 1 proceedings against a refusal by Wollongong City Council of a development application for a two-storey dual occupancy on land at Stanwell Park Beach. An intervener was joined on the basis that if she were not joined the impacts of coastal processes on flood risk, coastal erosion and inundation and view loss would not be adequately addressed.<sup>29</sup> The intervener adduced expert evidence in relation to site-specific impacts of coastal processes.

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<sup>29</sup> See *Fetherston v Wollongong City Council* [2016] NSWLEC 1258.



One of the issues in the appeal was whether a flood study was required to address the impact of coastal processes and relatedly whether a flood study should consider the effects of climate change on ocean conditions. The expert for the intervener stated that considering changes in climate would be best practice while the expert for the appellant stated the relevant development control plan "...did not make explicit allowances for climate change for new residential development".<sup>30</sup> The court ultimately preferred the evidence of the appellant's expert while noting there was "some merit" in the intervener's expert's approach.<sup>31</sup> Development approval was granted.

Management of coastal development is complex. The coastal development cases of *Fetherston* and *Pridel* reflect the circumstance that potential climate change impacts such as sea level rise are now, and have been for several years, part and parcel of consideration in Class 1 merit appeals.

The long history of litigation of various kinds concerning Belongil Spit demonstrates that complexity in areas of the coast that are subject to serious erosion by wave and storm action. Most recently, the ability of private landholders to utilise public land to build or refurbish old seawalls has required close scrutiny. The decision in *Ralph Lauren et al* identifies that where such structures impede public access and use of a beach they are unlikely to be permitted. That case considered s 55M of the CP Act now s 27 of the CM Act.

The judicial review challenge to the making of a CZMP (now CMP under the CP Act) in *Boomerang and Blueys Beach* is a challenge to the identification of coastal zones which affect their land use. There have been no other similar challenges so far as the author is aware.

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<sup>30</sup> *Fetherston v Wollongong City Council* [2016] NSWLEC 1527 at [30].

<sup>31</sup> *Ibid* at [31].



complex. The MDB has been affected by a number of problems most significantly for its down-stream recipients being pollution, water shortages and hyper-salinity due to both natural causes and upstream river usage.<sup>36</sup> This has caused significant problems particularly for South Australia which relies heavily on the Basin for its water supply.

The *Water Act 2007* (Cth) gave rise to the two key instruments which regulate the MDB today being the MDB Agreement and the Basin Plan. The MDB Agreement is found in Sch 1 of the *Water Act*. The purpose of the MDB Agreement is to “promote and co-ordinate effective planning and management for the equitable, efficient and sustainable use of the water and other natural resources of the Murray-Darling Basin” and to “give effect to the Basin Plan, the *Water Act* and State water entitlements.” Provision for the Basin Plan is set out in Pt 2 of the *Water Act*. It came into force in November 2012 and sought to return 2,750 gigalitres of water from irrigated agriculture back to the river system. It aimed to do this through a mix of water licensing arrangements and infrastructure improvements. In return for making their farms more water efficient, farmers would surrender the water saved to the Commonwealth to be put back into the river. The Basin Plan provides the limits on the quantity of water which can be taken from the MDB and the requirements to be met by the water resource plans for specified areas within the MDB (s 19(2)). It crucially contains long-term average sustainable diversion limits for the MDB as a whole and for each water resource plan area.<sup>37</sup> These limits must reflect an environmentally sustainable level of take.<sup>38</sup> When the Basin Plan came into force in 2012, a number of issues were left unresolved in order to get all of the Basin states to sign the agreement. One of these issues was an “adjustment mechanism” which could reduce or increase the 2,750 gigalitres of water to be returned to the river system under the Basin Plan. The Basin Plan is set for review in 2022.

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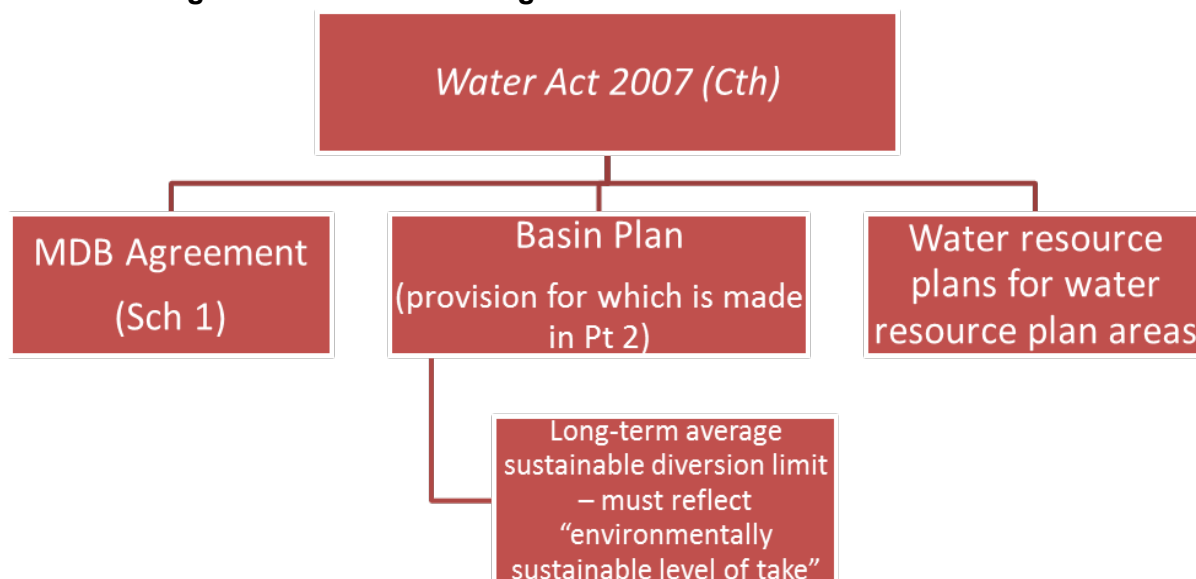
<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1301.0Chapter3042009%E2%80%9310>> (accessed 2 March 2019).

<sup>36</sup> Janice Gray, ‘The Legal Framework for Water Trading in the Murray-Darling Basin: An Overwhelming Success?’ (2012) 29 *Environmental and Planning Law Journal* 328, 329.

<sup>37</sup> *Water Act* s 22(1) item 6.

<sup>38</sup> *Ibid* ss 22(1) item 6, 23 (1).

## Legal framework for management of MDB at Commonwealth level



The MDB is currently experiencing significant drought. Rivers have stopped flowing in north-west New South Wales and some towns have severe water restrictions.<sup>39</sup> Several major fish deaths have occurred in New South Wales, including two of unprecedented scale at Menindee on the lower Darling.<sup>40</sup>

On 29 January 2019, the South Australian Murray-Darling Basin Royal Commission Report commissioned by Bret Walker SC was released.<sup>41</sup> It found that the Basin Plan ignored potentially catastrophic risks of climate change.<sup>42</sup> Further, a “triple bottom line” approach was adopted in setting the “environmentally sustainable level of take” (ESLT) under the Basin Plan – that is, social and economic factors were balanced with environmental factors.<sup>43</sup> However, the determination of an ESLT does not involve political compromise and must be based on the best available scientific

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<sup>39</sup> Anne Davies and Lorena Allam, ‘When the River Runs Dry: the Australian Towns Facing Heatwave and Drought’ (The Guardian, 25 January 2019) <<https://www.theguardian.com/australia-news/2019/jan/25/when-the-river-runs-dry-the-australian-towns-facing-heatwave-and-drought>>.

<sup>40</sup> Anne Davies, ‘Hundreds of Thousands of Native Fish Dead in Second Murray-Darling Incident’ (The Guardian, 7 January 2019) <<https://www.theguardian.com/australia-news/2019/jan/07/hundreds-of-thousands-of-native-fish-dead-in-second-murray-darling-incident>>.

<sup>41</sup> Commissioner Bret Walker SC, ‘Murray-Darling Basin Royal Commission Report’ (Government of South Australia, 29 January 2019) <<https://www.mdbrc.sa.gov.au/sites/default/files/murray-darling-basin-royal-commission-report.pdf?v=1548898371>>.

<sup>42</sup> Ibid 55-6.

<sup>43</sup> See, for eg, ibid 53.

knowledge.<sup>44</sup> Ultimately commonwealth officials had committed gross maladministration, negligence and unlawful actions in constructing the Basin Plan.<sup>45</sup>

The report recommends a complete overhaul of the Basin Plan including revising the ESLT based on the best available science including climate change risks.<sup>46</sup> Future water recovery for the environment should be purchased through buyback.<sup>47</sup> Further the 70 gigalitre reduction in the amount of water to be recovered in the Northern Basin should be repealed.<sup>48</sup> Scientific analyses should be conducted to ascertain the causes, effects and available ecological responses to the continued decline of the Menindee Lakes and the Lower Darling, and the Menindee Lakes Water Savings Project.<sup>49</sup>

The management of the MDB and of water more generally relies heavily on state laws being implemented and enforced.

### Inland water management in New South Wales

In New South Wales, the key legislative instrument is the *Water Management Act 2000* (NSW) (WM Act) which has largely (but not entirely) replaced the *Water Act 1912* (NSW). The purpose of the WM Act is to “provide for the sustainable and integrated management of the water sources of the State...”<sup>50</sup> and to “apply the principles of ecologically sustainable development”<sup>51</sup> inter alia. The WM Act states that all of the State’s water rights are vested in the Crown and any private right an owner may have to a river/lake is abolished.<sup>52</sup> This necessitates that there is a licensing scheme for using water. The WM Act also created water sharing plans.<sup>53</sup> Until recently the functions under the WM Act are carried out by the Department of Industry-Water.<sup>54</sup> The Department is responsible for creating and regulating water

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<sup>44</sup> See, for eg, *ibid* 53.

<sup>45</sup> See, for eg, *ibid* 54-56.

<sup>46</sup> *Ibid* 71.

<sup>47</sup> *Ibid* 72.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid*.

<sup>50</sup> *WM Act* s 3.

<sup>51</sup> *Ibid* s 3(a).

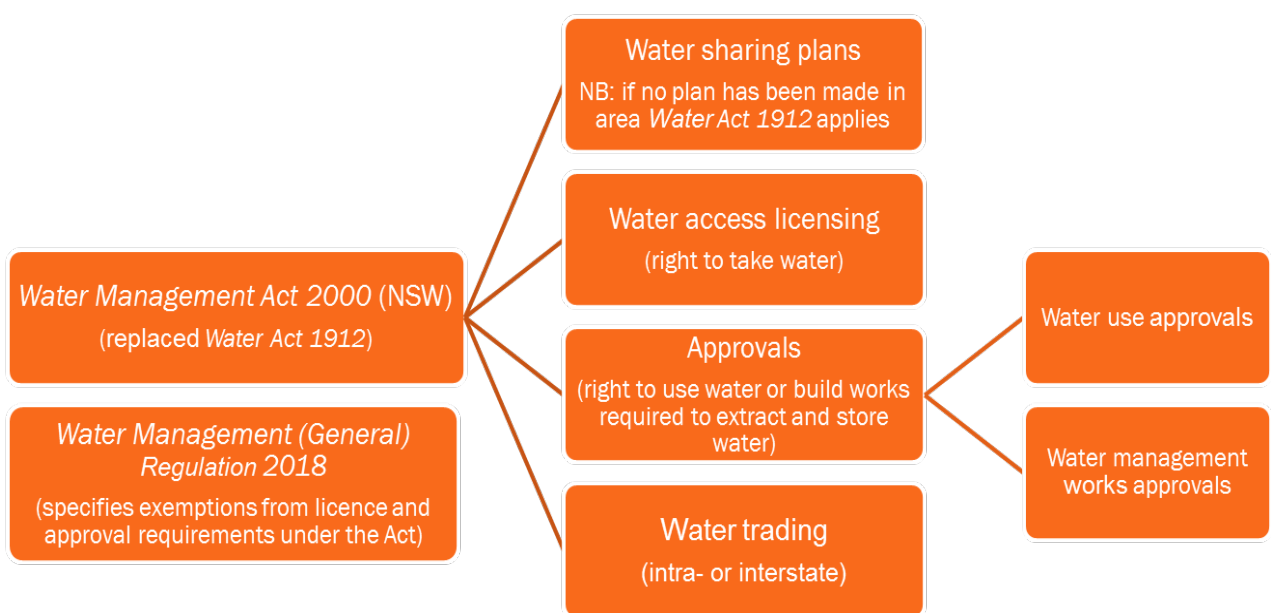
<sup>52</sup> *Ibid* ss 392-93.

<sup>53</sup> See *ibid* ss 19-21.

<sup>54</sup> NSW Government, ‘Roles of Water Management Agencies in NSW’ (June 2018) <[https://www.industry.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0019/166024/Roles-of-water-management-agencies-in-NSW.pdf](https://www.industry.nsw.gov.au/__data/assets/pdf_file/0019/166024/Roles-of-water-management-agencies-in-NSW.pdf)> (accessed 2 March 2019).

sharing plans which define the rules for sharing water resources.<sup>55</sup> A water access licence is required to take specified shares in the available water within a given area covered by a water sharing plan.<sup>56</sup> It is an offence to take water from a water source without a water access licence.<sup>57</sup> The *Water Act 1912* (NSW) continues to regulate the taking of water from a water source outside water sharing plans.<sup>58</sup> Further, water use and water management works approvals are required to use water for a particular purpose at a particular location and to construct water supply, drainage and flood works at a particular location.<sup>59</sup> The WM Act also makes provision for water trading within New South Wales and between states.<sup>60</sup> A simplified table of regulation under the WM Act follows.

### Legal framework for management of water – NSW



<sup>55</sup> Ibid.

<sup>56</sup> *WM Act* s 56(1).

<sup>57</sup> Ibid s 60A.

<sup>58</sup> Department of Industry, 'Water Act 1912 Licences' <<https://www.industry.nsw.gov.au/water/licensing-trade/licences/types/water-act-1912>> (accessed 2 March 2019).

<sup>59</sup> *Water Management Act 2000* (NSW) ss 89-90.

<sup>60</sup> Ibid ss 71M, 71U.

## New South Wales regulator under scrutiny

The ABC's Four Corners program 'Pumped' was aired on 24 July 2017 identifying significant concerns with lack of enforcement of water licence conditions by the Department of Industry and WaterNSW. In response to this an independent investigation into New South Wales water management and compliance was conducted by Ken Matthews, the final report for which was published on 24 November 2017.<sup>61</sup> After the publication of this report the Natural Resources Access Regulator (NRAR) was established on 14 December 2017 as an independent regulator under the *Natural Resources Access Regulator Act 2017* (NSW) with complete carriage of the compliance and enforcement of water management legislation in New South Wales.<sup>62</sup> Prior to the NRAR, enforcement of the WM Act was split between the Department of Industry and WaterNSW.<sup>63</sup>

## Criminal enforcement in New South Wales: prosecutions in the LEC

According to LEC data, between January 2016 and July 2017 WaterNSW lodged five Class 5 (summary criminal enforcement proceedings) summonses. Between July 2017 and February 2019 (a similar period) WaterNSW and the NRAR lodged 30 Class 5 summonses, a substantial increase.

Two examples of cases currently before the LEC reflect the greater focus of the regulator(s) on prosecuting.

In *Water NSW v Harris* the defendant pleaded not guilty to two charges of contravening a term/condition of a water use approval, water management work approval or an activity approval pursuant to s 91G(2) of the WM Act. The alleged conduct occurred in Brewarrina. Judgment is reserved before Robson J.

In *Water NSW v Barlow* [2019] NSWLEC 30 the defendant was fined a total of \$102,866 for two charges of taking water from the Barwon River when metering equipment not working (s 91I(2) of the WM Act), a strict liability offence. The defendant was also fined \$86,625 for one charge of failing to comply with an embargo on taking water (s 336C(1)), a strict liability offence.

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<sup>61</sup> Ken Matthews, 'Independent Investigation into NSW Water Management and Compliance: Advice on Implementation' (Final Report, NSW Department of Industry, 24 November 2017) <[https://www.industry.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0019/131905/Matthews-final-report-NSW-water-management-and-compliance.pdf](https://www.industry.nsw.gov.au/__data/assets/pdf_file/0019/131905/Matthews-final-report-NSW-water-management-and-compliance.pdf)>.

<sup>62</sup> Department of Industry, 'About NRAR' <<https://www.industry.nsw.gov.au/natural-resources-access-regulator/about-nrar>> (accessed 2 March 2019).

<sup>63</sup> Ibid.

## Civil enforcement in the LEC

In *Inland Rivers Network Incorporated v Harris and Others* the applicant community organisation has commenced Class 4 judicial review proceedings seeking a declaration that the respondents during various time periods took water from the Barwon-Darling in contravention of s 60A(4) WM Act (being a volume of water taken in excess of that authorised to be taken under the relevant water access licence). Section 60A(4) prohibits the holder of an access licence taking water from a water source otherwise than as authorised by the licence. The applicant is also seeking an order restraining the respondents from taking water otherwise than in accordance with the water access licence, and an order requiring them to return a volume of water equivalent to what was taken. These proceedings are presently stayed pending the outcome of the contested Class 5 criminal hearing in *Water NSW v Harris* referred to above.

## Judicial review of water sharing plans

A number of judicial review challenges to water sharing plans have occurred over recent years in the LEC.

*Randren House Pty Ltd v Water Administration Ministerial Corporation (No 4)* [2019] NSWLEC 5, a recent decision, is an unsuccessful judicial review challenge to water sharing plans for the Murrumbidgee Regulated River Water Source and the Murrumbidgee Unregulated and Alluvial Water Sources. The complexity of these arrangements is highlighted by the facts in that case.

Managing inland water resources is challenging due to the complex legal, environmental, social and economic factors at play. These factors are exacerbated by climate change impacts and recent severe drought. Recent changes in the regulatory body responsible for enforcement of water regulation laws in New South Wales and better resourcing of that body has resulted in a substantial increase in criminal enforcement of water laws in the LEC. The legal complexity of the regulation of water through water sharing plans is highlighted by *Randren House*.



*In conclusion*

The varied recent cases concerning coastal management outlined and commented on above and the inland water management litigation both criminal and civil demonstrate that the LEC continues to have a significant role to play in adjudicating on complex environmental and planning issues. Climate change impacts either directly or indirectly affect the cases brought before it in two areas of great significance to the citizens of New South Wales.