

Water Rights in NSW: Properly Property?

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Abstract

In 1994, the Council of Australian Governments adopted a strategic framework for the reform of the Australian water industry. A key element of the framework was that the State government members of COAG would create clearly defined water property rights that were separate from land title. The existence of property rights in water was considered a necessary precondition to water trading, which was one of the mechanisms set out in the framework for achieving sustainability. However, affording such protection to private interests in water does not sit as easily with the other mechanisms set out in the framework for achieving sustainability. There is also a tension between the existence of property rights in water and the flexibility required for adaptive management of water resources. As such, there has also been pressure on States to create water rights that are actually something less than property rights even if they are rhetorically described as such. This article discusses the current nature of water rights in Australia in light of this balancing act being performed by States, using the approach to water management in New South Wales as an example.

1. Introduction

[T]he State government members of the Council would implement comprehensive systems of water allocations or entitlements backed by separation of water property rights from land title and clear specification of entitlements in terms of ownership, volume, reliability, transferability and, if appropriate, quality.

CLAUSE 4(A) OF THE 1994 COAG WATER RESOURCES POLICY¹

In 1994, the Council of Australian Governments (COAG) adopted a strategic framework for the reform of the Australian water industry. The framework was designed to deliver an efficient and sustainable water industry.² A key element of the framework was that the State government members of COAG would create

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1 Council of Australian Governments, 'Attachment A – Water Resources Policy' (Council of Australian Governments' Communiqué, 25 February 1994) [1].

2 Ibid [1], Clause 2.

clearly defined water property rights that were separate from land title. The existence of property rights in water was considered a necessary precondition to water trading,³ which was one of the mechanisms set out in the framework for achieving efficiency and sustainability.⁴ This is because property rights are seen as being stable, secure and flexible and thus capable of sustaining a market.⁵

However, affording such protection to private interests in water does not sit as easily with the other mechanisms set out in the framework for achieving efficiency and sustainability; in particular, those that focus on environmental protection and social welfare.⁶ There is also a tension between the existence of property rights in water and the flexibility required for adaptive management,⁷ which is increasingly recognised as a key principle underlying the management of natural resources such as water.⁸ As such, there has also been pressure on States to create water rights that are actually something less than property rights even if they are rhetorically described as such. This article discusses the current nature of water rights in Australia in light of this balancing act being performed by States, using the approach to water management in New South Wales as an example.

Part 2 of this article explains the nature of water rights in Australia prior to the reforms, and provides some background to the reform process. Part 3 explores the elusive concept of property, beginning with an analysis of the conditions under which statutory rights in resources may be considered property rights (as water rights in Australia are now statutory). It then details the particular characteristics of a property right. Part 4 examines the nature of water rights under the *Water Management Act 2000* (NSW) (*WMA*) and whether it is appropriate to characterise them as property rights. It also looks at the impact that the *Water Act 2007* (Cth) is likely to have on the nature of water rights in New South Wales. In conclusion, Part 5 suggests that it is reasonably likely that certain water rights under the *WMA* amount to rights of property at law and considers the significance of this result.

3 See, eg, Agriculture and Resource Management Council of Australia and New Zealand, 'Water Allocations and Entitlements' (Taskforce on COAG Water Reform Occasional Paper No 1, October 1995).

4 Council of Australian Governments, above n 1, [1], Clause 5.

5 See D E Fisher, 'Markets, Water Rights and Sustainable Development' (2006) 23 *Environmental and Planning Law Journal* 100, 101; Alistair Watson, *Property Rights and the Environment* (paper prepared for the 2006 Australian State of the Environment Committee, Department of the Environment and Heritage, Canberra, 2006) Department of the Environment, Water, Heritage and the Arts <<http://www.environment.gov.au/soe/2006/publications/emerging/property-rights/pubs/property-rights.pdf>> at 7 March 2009.

6 See Council of Australian Governments, above n 1, [1], Clauses 1, 4, 6 and 8; See also Lindsey Alford, 'The Law, the Rules and Mechanisms to Consider when Dealing in the Property Rights of Water: Comparing the regulation of an emerging water market in Queensland with New South Wales, Victoria and South Australia' (2007) 14 *Australian Property Law Journal* 259, 264.

7 Adaptive management involves learning from management actions and using that learning to improve on the next stage of management: See Phillip Pagan and Lin Crase, 'Property Right Effects on the Adaptive Management of Australian Water' (2005) 12 *Australasian Journal of Environmental Management* 77, 77.

8 *Ibid.*

2. Background

A. Water Rights Prior to the Reforms

Water law in the former Australian colonies was originally based on English common law, which in turn was influenced by Roman law.⁹ Reflecting the fluid nature of the resource, the common law did not confer ‘ownership’ of water.¹⁰ Rather, it provided that the owner of land bordering or overlying a water source acquired certain rights to use the water, together with certain duties in respect of that water.¹¹ These rights could only be exercised by the land owner. In the case of land bordering a water source, the riparian doctrine applied. The owner of the land could take and use the water for domestic and ordinary purposes, and for other purposes provided that there was no sensible diminishment of the resource.¹² Where the water flowed unconfined over the surface of the land, there was no limit as to the quantity that could be used.¹³ In the case of groundwater percolating beneath the surface of the land and coming to the surface as a spring, there was also no quantity limit.¹⁴ In all cases, land owners were subject to a duty not to diminish the quality of the water resource, although how this duty intersected with the unlimited right to take unconfined surface water and underground water was never really tested.¹⁵

It quickly became apparent that the common law rules were ill-suited to Australia’s semiarid climate. There were concerns that common law claims would undermine efforts at water supply and irrigation.¹⁶ Towards the end of the nineteenth century, each of the Australian colonies conducted various public inquiries into the management of their water resources. All the inquiries recommended bringing water resources under statutory control.¹⁷ In NSW, this was first achieved through the *Water Rights Act 1896* which vested in the Crown the right to water in rivers and lakes and water contained in any works to which the Act applied.¹⁸ A similar approach was taken under the *Water Act 1912* (NSW) (the 1912 Act), which was the first comprehensive piece of water legislation in NSW. However, some important changes were brought about by the introduction of the *Water Administration Act 1986* (NSW) (the 1986 Act) to which the 1912 Act became subject.

9 Janice Gray, ‘Legal Approaches to the Ownership, Management and Regulation of Water from Riparian Rights to Commodification’ (2006) 1 *Transforming Cultures eJournal* 64, 69–70.

10 Ibid 70–71.

11 Alex Gardner, ‘The Legal Basis for the Emerging Value of Water Licences – Property Rights or Tenuous Permissions’ (2003) 10 *Australian Property Law Journal* 1, 3.

12 Ibid.

13 Ibid.

14 Ibid.

15 Ibid; See also Brian Haisman, ‘Impacts of Water Rights Reform in Australia’ in Bryan Randolph Bruns, Claudia Ringler and Ruth Meinzen-Dick (eds), *Water Rights Reform: Lessons for Institutional Design* (2005) 120.

16 Poh-Ling Tan, ‘Foot in the Water: A critique of approaches to the allocation of ‘property rights’ in water in Victoria, Queensland and New South Wales’ (Paper presented at the First Australasian Natural Resources Law and Policy Conference, Focus on Water, Canberra, 27-28 March 2000).

17 Haisman, above n 15, 120.

18 *Water Rights Act 1896* (NSW) s 1(1).

The 1986 Act vested rights to water in rivers and lakes, water occurring naturally on the surface or ground, and water conserved by any works and sub-surface water, in the Water Administration Ministerial Corporation.¹⁹ Under the 1912 Act, land owners retained some limited riparian rights for livestock watering and domestic purposes.²⁰ For all other extractions of water, a landholder was required to apply for a licence.²¹ The licence was for a fixed term and could be renewed, amended or cancelled. Licences originally contained no volumetric allocations and were instead granted on the basis of the area of land that they had to service. However, in 1977, volumetric allocations on 'regulated' streams were introduced.²² From 1986, it became possible to transfer water allocations on a temporary or permanent basis.²³ Irrigation farms were exempt from licensing and were allocated a water right that was an annual volume of water which was effectively guaranteed as a minimum supply.²⁴

B. The Reform Process

In the second half of the 20th century, a number of problems emerged with the way that water was being managed under the 1912 Act, and similar Acts in other States. Water resources had been over-allocated, which had consequences for water supply reliability and was causing considerable environmental degradation. No effective provision had been made for water allocations for the environment or sustainable yield limits. In addition, water pricing was considered inadequate and mechanisms for trading water were underdeveloped. Water did not acquire a true value, and many licences remained dormant.²⁵

COAG's 1994 endorsement of a strategic framework for the reform of the Australian water industry was the first major step in the reform process at a national level. Amongst other things, the framework covers: pricing based on 'full-cost' recovery and transparency, a comprehensive system of water allocations including environmental allocations, more effective water trading including across borders, and institutional reform aligned with the National Competition Policy.²⁶ Ultimately, national competition payments became contingent on the satisfactory implementation of the water reforms.²⁷

A key aspect of the framework, particularly in the context of water trading, was the implementation of clearly defined water property rights that were separate

19 *Water Administration Act 1986* (NSW) ss 12.

20 *Water Act 1912* (NSW) s 7(1)(a).

21 *Water Act 1912* (NSW) s 10.

22 *Water Act 1912* (NSW) s 20W.

23 *Water Act 1912* (NSW) s 20AH.

24 Tan, above n 16.

25 See Haisman, above n 15, 124–126; Gardner, above n 11, 4.

26 Lin Crase, Leo O-Reilly and Brian Dollery, 'Water Markets as a Vehicle for Water Reform: the Case of New South Wales' (2000) 44 *The Australian Journal of Agricultural and Resource Economics* 299, 301

27 Lin Crase, Leo O-Reilly and Brian Dollery, 'Water Markets as a Vehicle for Water Reform: the Case of New South Wales' (2000) 44 *The Australian Journal of Agricultural and Resource Economics* 299, 301–302.

from land title.²⁸ In 1995, the Agriculture and Resource Management Council of Australian and New Zealand (ARMCANZ) published a policy document on how property rights in water might be implemented in accordance with the COAG framework for reform.²⁹ ARMCANZ suggested that a system of tradeable water property rights required that the rights be: in demand, well specified in the long-term sense, exclusive, enforceable and enforced, and transferable and divisible. However, it also recognised that the rights should be issued in a way that was not detrimental to the environment and the broader community.³⁰

To give effect to COAG's framework for water reform, the *WMA* was passed in New South Wales. Similar legislation was also passed in the other States and Territories. The object of the *WMA* is 'to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations'.³¹ The Act also lists a number of particular objects including:

- to apply the principles of ecologically sustainable development;
- to protect, enhance and restore water sources, their associated ecosystems, ecological processes and biological diversity and their water quality;
- to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water; and
- to provide for the orderly, efficient and equitable sharing of water from water sources.³²

The *WMA* also includes a long list of water management principles, which have a particular focus on environmental protection and specifically state that the principles of adaptive management should be applied.³³ It is these objects and principles that must be kept in mind when evaluating the NSW Government's approach to defining water rights under the Act.

The *WMA* expressly abolishes common law riparian rights,³⁴ and vests in the Crown the right to the 'control, use and flow' of (i) all water in rivers, lakes and aquifers, (ii) all water conserved by works under the control of the Minister, and (iii) all water occurring naturally on or below the surface of the ground (the State's water rights).³⁵ In respect of the water covered by the State's water rights, the Act separates the right to extract or divert the water (for which an *access licence* is required)³⁶ and the right to use it for a particular purpose at a particular place (for which a *water use approval* is required).³⁷ Exceptions apply in relation to basic

28 Council of Australian Governments, above n 1,[1], Clause 2.

29 Agriculture and Resource Management Council of Australia and New Zealand, above n 3.

30 Ibid.

31 *WMA* s 3.

32 *WMA* s 3.

33 *WMA* s 5.

34 *WMA* s393.

35 *WMA* s392.

36 *WMA* Ch 3, Pt 2.

37 *WMA* Ch 3, Pt 3.

landholder rights,³⁸ harvestable rights³⁹ and native title rights.⁴⁰ The *WMA* will be considered in greater detail in Part 4 of this article.

In 2003, COAG agreed to the development of a National Water Initiative (NWI) aimed at building on the 1994 water reform framework. In 2004, all Australian jurisdictions (except Tasmania and Western Australia who joined later) signed an intergovernmental agreement on the NWI.⁴¹ The NWI placed a particular emphasis on strengthening water rights as a means of improving water management. In its 2004 progress report on the National Competition Policy, the National Competition Council expressed the view that the NWI:

requires participating States and Territories to introduce perpetual water access entitlements, with similar status to that of freehold land, and have compatible publicly accessible and reliable systems for registering entitlements ... and ... trades.⁴²

Various amendments have been made to the *WMA* to give effect to the NWI.⁴³

Alongside the broader reform process described above, a specific program of reform has been occurring in relation to the management of the water resources of the Murray-Darling Basin. The Basin extends across New South Wales, Victoria, South Australia, Queensland and the ACT. There have been various legislative and policy interventions in relation to the Basin, including the imposition of a cap on extractions in 1997. The reform process culminated in the passing of the *Water Act 2007* by the Commonwealth Parliament, which makes provision for the management of the Basin water resources and also deals with other matters of national interest in relation to water. On 3 July 2008, the Commonwealth and Basin State Governments signed the intergovernmental agreement on Murray-Darling Basin Reform.⁴⁴ Amendments to the *Water Act 2007* to give effect to the intergovernmental agreement have recently been passed.⁴⁵ The impact of the *Water Act 2007*, and in particular the recent amendments, on water rights under the *WMA* will be explored in Part 4.

38 *WMA* s 52: a landholder is entitled to take water for domestic consumption and stock watering.

39 *WMA* ss 53 and 54: a landholder can retain 10% of rainwater run off.

40 *WMA*, s 55: an aboriginal community can take water without a licence but only if its native title rights have been determined under the *Native Title Act 1993* (Cth).

41 Council of Australian Governments, *Intergovernmental Agreement on a National Water Initiative between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory* (2004), 5–7. Tasmania joined the Agreement in June 2005 and Western Australia joined in April 2006.

42 National Competition Council, 'Chapter 6: South Australia', *Assessment of the government's progress in implementing the National Competition Policy and related reforms: Volume two: Water* (October 2004), 19.

43 See *Water Management Amendment Act 2004* (NSW); *Water Management Amendment Act 2005* (NSW).

44 *Agreement on Murray Darling Basin Reform* (2008), Council of Australian Governments <http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/docs/Murray_Darling_IGA.pdf> at 21 November 2008.

45 *Water Amendment Act 2008* (Cth).

3. *What are Property Rights?*

To evaluate whether water rights in New South Wales amount to property rights, it is first necessary to understand what is meant by the expression ‘property rights’. This is a difficult task. As Kevin Gray and Susan Gray note, ‘few concepts are quite so fragile, so elusive and so frequently misused as the notion of property’.⁴⁶ To begin with, it is important to appreciate that property is not itself a thing or a resource. Rather, as noted by the High Court in *Yanner v Eaton*,⁴⁷ property is a ‘legally endorsed concentration of power over things and resources’.⁴⁸ To claim ‘property rights’ in relation to a resource such as water is, in effect, to assert a significant degree of control over the resource.⁴⁹ This Part will further investigate this idea from two perspectives. First, given that all water rights in Australia have a statutory basis, it will consider the conditions under which statutory rights in relation to resources may be characterised as property rights. Second, it will attempt to identify the various characteristics of property rights.

A. *Statutory Rights in Relation to Resources*

Judicial consideration of statutory rights in relation to resources provides an indication of how a court may view water rights created by statute. The most significant judicial analysis has concerned mining and fishing, although pre-reform water licences have also been considered by the Supreme Court of Victoria.

In *Commonwealth v WMC Resources Ltd (WMC Resources)*,⁵⁰ the High Court was asked to consider whether the rights under an exploration permit granted under the *Petroleum (Submerged Lands) Act 1967* (Cth) were rights of property. The specific question before the court was whether Commonwealth legislation that effectively reduced the size of the exploration permit area involved any acquisition of property such that the acquisition would need to be on ‘just terms’ pursuant to s51(xxxi) of the *Commonwealth Constitution*.⁵¹

At first instance, Ryan J of the Federal Court held that the rights under the permit were ‘stable and permanent enough’ to be regarded as property.⁵² His Honour stated that the fact that the permits could be transferred and dealt with for valid consideration, and that such dealings were recorded in a register of titles, was a ‘clear legislative indication that the permittee enjoys a stable interest’.⁵³ Notably, his Honour emphasised that: ‘Regulatory machinery is not antithetical to the concept of property and I do not regard the limitations on assignment of permits as inconsistent with a proprietary right’.⁵⁴ As the rights under the permit were

46 Kevin Gray and Susan Francis Gray, *Elements of Land Law* (2009) 86.

47 (1999) 201 CLR 351.

48 *Yanner v Eaton* (1999) 201 CLR 351, [17].

49 See *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1, [286].

50 (1998) 194 CLR 1.

51 Note that this article does not focus on the concept of property in section 51(xxxi) of the Constitution, but rather on the more general legal and policy concept. Some of the cases on the constitutional provision are used to inform this broader discussion.

52 *Western Mining Corporation Ltd v Commonwealth* (1994) 50 FCR 305, 335.

53 *Western Mining Corporation* (1994) 50 FCR 305, 335

property rights, and the proprietary rights of the Commonwealth were being enlarged or restored as a result of the reduction in the permit area, Ryan J concluded that there had been an acquisition of property. An appeal to the Full Court was dismissed by majority.⁵⁵

The High Court, however, held (by a 4:2 majority) that there had not been an ‘acquisition’ of property by the Commonwealth. The majority judgments focussed not on the nature of the rights enjoyed by the permit holder, but rather on whether the Commonwealth itself had ‘acquired’ proprietary rights. Importantly, however, the majority judges were willing to concede that the permit holder did have proprietary rights even if they were subject to statutory modification or extinguishment. As Brennan CJ stated:

the permit and WMC’s interest can be classified as proprietary rights. But those rights were the creatures of statute...and their continued existence depends upon the continued existence of their statutory support.⁵⁶

Gummow J took the view that the proprietary rights enjoyed by the permit holder were ‘inherently unstable’⁵⁷ but nonetheless stated that:

To accept this proposition is not to assert that the defeasible character of the statutory rights in question denies them the attribute of “property” in the “traditional” sense of the general law.⁵⁸

Thus, the High Court agreed with Ryan J that the permit holder could, and did, enjoy proprietary rights, even though it ultimately decided that there had been no acquisition of property by the Commonwealth.

There have also been a number of cases involving fishing rights that provide useful guidance as to the circumstances in which statutory rights in relation to resources may amount to a right of property. One particularly significant case is *Harper v Minister of Sea Fisheries (Harper)*,⁵⁹ in which the High Court considered the rights conferred by a fishing permit issued under fisheries legislation. Brennan J made the following instructive comments:

When a natural resource is limited so that it is liable to damage, exhaustion or destruction by uncontrolled exploitation by the public, a statute which prohibits the public from exercising a common law right to exploit the resource and confers statutory rights on licensees to exploit the resource to a limited extent confers on those licensees a privilege analogous to a profit à prendre in or over the property of another... A fee paid to obtain such a privilege is analogous to the price of a profit à prendre; it is a charge for the acquisition of a right akin to property.⁶⁰

54 *Western Mining Corporation* (1994) 50 FCR 305, 335

55 *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153.

56 *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, [14].

57 *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, [195].

58 *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, [196].

59 (1989) 168 CLR 314.

60 *Harper* (1989) 168 CLR 314, 335.

So, a statutory right to take fish is ‘a right akin to property’. Arguably, the same analysis holds in respect of a statutory right to take water.⁶¹

In another notable decision, *Minister for Primary Industry and Energy v Davey*,⁶² the Full Federal Court took the view that a right to take fish was not merely ‘a right akin to property’ but did in fact constitute a right of property. The case related to amendments to a plan of management for the regulation of fishing activities under the *Fisheries Act 1952* (Cth), which were argued to trigger s51(xxxi) of the *Commonwealth Constitution* because they reduced the number of units of fishing capacity available. Burchett J found that the units were property, noting that ‘[t]hey were assignable, and units have changed hands at substantial prices.’⁶³ Extending this analysis, Black CJ and Gummow J made the following comments that have parallels with the High Court’s approach in *WMC Resources*:

In the instant case, the units may be transferred, leased, and otherwise dealt with as articles of commerce. Nevertheless, they confer only a defeasible interest, subject to valid amendments to the [plan of management] under which they are issued. The making of such amendments is not a dealing with the property; it is the exercise of powers inherent at the time of its creation and integral to the property itself.⁶⁴

There have also been various other decisions, both before and after the High Court’s decision in *Harper*, where statutory fishing rights have been found to have the indicia of property.⁶⁵

It would appear, therefore, that statutory rights in relation to resources can amount to a right of property. This is despite the existence of ‘regulatory machinery’ that may limit the exercise of the rights and the fact that they are liable to defeasance. Of course, this is not to say that all statutory rights in relation to resources will amount to a right of property. This will depend on the nature of the rights under the legislation. As the Federal Court suggested in another fishing rights case that followed *Harper*, statutory rights to exploit a resource are ‘a new species of statutory entitlement, the nature and extent of which depends entirely on the terms of the legislation’.⁶⁶

Such an inquiry into the terms of the legislation has actually been undertaken in the context of pre-reform water rights in Victoria. In *Australian Rice Holdings Pty Ltd v Commissioner of State Revenue*,⁶⁷ Harper J of the Supreme Court of Victoria considered whether the rights conferred by water licences under the *Water*

61 D E Fisher, ‘Rights of Property in Water: confusion or clarity’ (2004) 21 *Environmental and Planning Law Journal* 200, 215.

62 (1993) 47 FCR 151.

63 *Minister for Primary Industry and Energy v Davey* 47 FCR 151, 171.

64 *Minister for Primary Industry and Energy v Davey* 47 FCR 151, 165.

65 See generally *Pennington v McGovern* (1987) 45 SASR 27; *Austell v Commission of State Taxation* (1989) 4 WAR 235; *Kelly v Kelly* (1990) 92 ALR 74; *Gasparinos v The State of Tasmania* (1995) 5 Tas R 301; *Edwards v Olsen* (1996) 67 SASR 266

66 *Bienke v Minister For Primary Industries and Energy* (1996) 63 FCR 567, 585.

67 (2001) 48 ATR 498.

Act 1969 (Vic) amounted to a right of property for the purposes of the full payment of ad valorem stamp duty on assignment. His Honour held that they were a right of property, stating that the rights granted to a licence holder displayed the indicia of property considered relevant in previous cases: they had value, they could be renewed and transferred (albeit only after the requisite approval had been granted), they were well defined, and they had a degree of stability.⁶⁸ Although this case needs to be considered in context (ie, the ultimate question being what amounted to property for the purposes of the payment of stamp duty), it demonstrates that statutory water rights can amount to a right of property. The fact that pre-reform water rights were taken to constitute property rights is of particular interest, given that a key aspect of the reforms was making water rights more robust.

It seems clear, then, that in order to establish whether the water rights under the *WMA* are rights of property, an analysis of the nature of the rights under the terms of the legislation must be undertaken to see whether the indicia of property are present. Before doing this, however, it is necessary to set out what these indicia are.

B. Characterising Property Rights

There is no definitive set of criteria that establish the existence of property rights. However, an analysis of the case law and academic writing reveals certain characteristics that point to the existence of a right of property.⁶⁹ These characteristics are: exclusivity, duration, security, quality of title, transferability and divisibility. The more of these characteristics that attach to particular rights, the more likely that they amount to a right of property.

Exclusivity refers to the extent to which the benefits of accessing and using the resource to which the rights attach accrue to the rights-holder. It is often associated with the idea of ‘excludability’, which is the ability to exclude others from the enjoyment of, or from interfering with one’s own enjoyment of, a designated resource. Gray suggests that it is the quality of ‘excludability’ or ‘defensive monopoly’ which gets closest to the essence of proprietary institutions.⁷⁰

Duration is the length of time that a right-holder can exercise a right. Rights may be held in perpetuity or for a specific period of time with the option of a renewal. Clearly, the greater the duration the more likely that the rights will be classified as proprietary.

Security refers to the degree of risk that attaches to the exercise of the rights over a period of time. This depends on both the susceptibility of the system as a whole to change, and the susceptibility of the instrument conferring the rights to

68 *Australian Rice Holdings* (2001) 48 ATR 498, [28].

69 See *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349–350; *National Provincial Bank v Ainsworth* [1965] AC 1175, 1247–1248; *R v Toohey*; *ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327; *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153; cases referred to n 65 above; Anthony Scott, *The Evolution of Resource Property Rights* (2008) 6–13; Rose Anne Devlin and R Quentin Grafton, *Economic Rights and Environmental Wrongs* (1998) 88–89; Productivity Commission, *Water Rights Arrangements in Australia and Overseas* (2003) 93–115; Fisher, above n 61, 210–211.

70 Kevin Gray, ‘Property in Thin Air’ (1991) 50 *Cambridge Law Journal* 252, 294–295.

change.⁷¹ *Quality of title* refers to the extent to which there is legal recognition and protection of the rights.

Transferability refers to the extent to which rights-holders may trade or sell their interest in the relevant resource. This characteristic provides the basis for markets in property rights, and has been given particular emphasis by Australian courts in determining whether property rights exist.⁷² The final characteristic, *divisibility*, is often considered to be a subset of transferability. It refers to the ability of right-holders to subdivide their right and trade either all or part of their right.

4. Analysis of the Water Management Act 2007

A basic introduction to the *WMA* was provided in Part 2 above. This Part will consider the extent to which the water rights under the Act reflect the characteristics of property rights just discussed. In doing so, it will explore how the NSW Government has attempted to balance the desire to create well-defined water property rights in order to sustain a market, and the need to dilute these rights to achieve the broader environmental and social objectives of the Act and apply the principles of adaptive management. It will also consider what impact the *Water Act 2007* (including the recent amendments) is likely to have on the nature of the water rights under the *WMA*.

At the outset, it should be noted that the *WMA* makes no specific reference to the nature of the water rights that it defines. This is in contrast to a number of other Australian jurisdictions, where it is specifically stated in the water management legislation that a water licence, including the right to a water allocation endorsed on it, is the personal property of the licensee.⁷³ It is not clear how a court would read such a provision if it was inconsistent with the actual nature of the rights under the legislation.⁷⁴ In any case, no such provision is included in the *WMA* so this issue does not arise.

A. Exclusivity

As previously noted, the *WMA* provides that water may only be extracted from surface or groundwater sources in accordance with an access licence except in a limited range of circumstances.⁷⁵ The analysis that follows will be confined to water rights under access licences. There are a number of categories of access licence.⁷⁶ An access licence comprises both a share component and an extraction component.⁷⁷ The share component is an allocation of a specified share in the

71 Fisher, above n 61, 221.

72 See generally, *Pennington v McGovern* (1987) 45 SASR 27; *Austell v Commission of State Taxation* (1989) 4 WAR 235; *Kelly v Kelly* (1990) 92 ALR 74; *Davey and Fitti v Minister of Primary Industry and Energy* (1993) 41 FCR 342.

73 See, eg, *Water Resources Act 1997* (SA), s29(5); *Water Management Act 1999* (Tas), s 60.

74 Fisher, above n 61, 218.

75 *WMA* Ch 3, Pt 2, Div 1.

76 See *WMA* s57.

77 *WMA* s 56(1).

available water within a specified water source.⁷⁸ The extraction component is an entitlement to take water at specified times, at specified rates or in specified circumstances (or any combination of these) *and* in specified areas or from specified locations.⁷⁹

So, an access licence does not provide exclusivity in a strict sense. It only entitles the licence holder to a proportion of a shared resource. Other shareholders, including other licence holders and those with basic landholder rights or common law native title rights, are also entitled to a proportion of the resource. Nonetheless, the rights of the licence holder are restricted to the holder; only licence holders may access that portion of the water to which they are entitled (albeit from a common pool). In this sense, there is a degree of exclusivity attached to the rights under an access licence.

B. Duration

The *WMA* originally provided that an access licence had effect for 15 years, except in the case of an access licence held by a local water utility or major utility which had effect for 20 years.⁸⁰ At any time within the 12 months before the access licence expired, the holder could apply to the Minister for renewal.⁸¹ At the end of each five-year period following the date on which an access licence was granted to a major utility, the utility could apply for a five year extension of the licence.⁸²

Under the 2004 amendments to the *WMA*, these provisions were replaced with a provision that states that ‘an access licence ceases to be in force on the date that the cancellation of the licence is recorded in the Access Register’.⁸³ This means that a licence can last in perpetuity. Making water rights perpetual was one of the mechanisms set out in the *NWI* for strengthening water rights to support a water trading market. However, the *WMA* does not provide for pure perpetual water rights (i.e. a right to a set volume of water each year) but only a perpetual share of the water resources available. As Phillip Pagan and Lin Crase contend, the specification of pure perpetual water rights would be inconsistent with the principles of adaptive management, which focus on aligning tenure periods and other characteristics of rights in resources with key risks in the ecological system.⁸⁴ Pure perpetual water rights would also be inconsistent with the need for management arrangements to reflect changing social expectations.⁸⁵

C. Security

The security of an interest is a key factor in determining whether it constitutes property. To begin with, it is important to appreciate that the legislature can vary or remove water rights under the *WMA* at any time, simply by amending the

78 *WMA* s56(1)(a).

79 *WMA* s56(1)(b).

80 *WMA* ss 69 and 70.

81 *WMA* s 69(3).

82 *WMA* s 70(2).

83 *WMA* s 69.

84 Pagan and Crase, above n 7, 85.

85 *Ibid.*

legislation. However, as the case law discussed above indicates, the fact that statutory rights are 'inherently unstable' for this reason does not mean that they cannot amount to a right of property. It should also be noted that, as a licence holder is only entitled to a share of the available water, there are also 'external' risks of a reduction in their water allocation if the consumptive pool is reduced as a result of seasonal or long-term changes in climate and periodic natural events such as bushfires and drought. The analysis below will concentrate on the security of water rights under the provisions of the *WMA*. Three issues will be considered: first, security under water management plans; second, the security of specific licences; and third, whether compensation is payable if the rights are diminished.

(i) *Security Under Water Management Plans*

The *WMA* provides for strategic planning in relation to water management in New South Wales. The over-arching policy is set out in the State Water Management Outcomes Plan (SWMOP), which deals with the development, conservation, management and control of the State's water resources in furtherance of the objects of the Act.⁸⁶ Sitting underneath the SWMOP are water management plans (WMPs) that are developed in relation to particular water management areas.⁸⁷ WMPs may deal with various aspects of water management including water sharing, water source protection, drainage management and floodplain management.⁸⁸ WMPs must be consistent with the SWMOP.⁸⁹

In relation to water sharing, the WMP must deal with various matters. These include: provisions relating to adaptive environmental water, the identification of requirements for water to satisfy basic landholder rights and for extraction under access licences, and the establishment of a bulk access regime for the extraction of water under access licences.⁹⁰ For any part of the State where there is not a water management area or where there is not a WMP in force, the Minister may make a plan which is equivalent to a WMP plan and is known as a 'Minister's plan'.⁹¹ The Minister may also establish a program for implementing a WMP (an 'implementation program').⁹²

The planning process impacts on the security of water rights under an access licence in a number of ways. Most significantly, the plans must be considered by the Minister in making 'available water determinations'. Under section 59 of the *WMA*, the Minister may make a determination at any time as to the availability of water for one or more categories of water access licence in relation to one or more specified water management areas or water sources. As an access licence entitles the holder to a share of the available water, it is the 'available water determination' that translates the share into a particular allocation of water. In making the

86 *WMA* s 6.

87 *WMA* Ch 2, Pt 3.

88 *WMA* s 15.

89 *WMA* s 16.

90 *WMA* s 20.

91 *WMA* Ch 2, Pt 4. References to WMPs in this article should be taken to include Minister's plans.

92 *WMA* Ch 2, Pt 5.

determination, the Minister must have regard to the provisions of any relevant bulk access regime, WMP and implementation program.⁹³ These instruments are in turn made in accordance with the SWMOP. So, the various plans directly influence the allocation of water to a licence holder, which means that the potential for the plans to change affects the security of the water rights under the licence.

A SWMOP has effect for a period of 5 years.⁹⁴ Therefore, licence holders face the risk of their water allocation being effectively downgraded in accordance with the provisions of a new SWMOP every 5 years. Again, the underlying principle here is adaptive management. The first SWMOP made under the *WMA* stated that it would be reviewed in 5 years because 'management objectives and targets must be responsive and adaptive to improved knowledge and changing social and economic circumstances and values'.⁹⁵ Notably, however, this SWMOP has yet to be reviewed or replaced since it expired in 2007.

WMPs have effect for 10 years.⁹⁶ In order to enhance the security of water rights under the Act, a new provision was inserted into the Act in 2004 which provides that the Minister, on the recommendation of the Natural Resources Commission, may extend a WMP that deals with water sharing for a further period of 10 years after the plan was due to expire.⁹⁷ Notably, there is also a requirement that a WMP is reviewed within the fifth year after it was made, but provisions dealing with water sharing (i.e. those that will affect the security of the water rights) are exempted from this review process.⁹⁸

Following the 2004 amendments, the Minister also has the power to amend a WMP at any time if satisfied that it is in the public interest to do so, as provided for by the plan, or if the amendment is required to give effect to a decision of the Land and Environment Court relating to the validity of the plan.⁹⁹ There is an emphasis on environmental considerations here, as the Minister must obtain the concurrence of the Minister for Climate Change and the Environment to the amendment.¹⁰⁰ This power of the Minister to amend a WMP at any time in certain circumstances clearly detracts from the security of water rights under a licence. So too does another power recently given to the Minister to suspend a management plan during severe water shortages.¹⁰¹

Further complicating matters is the planning regime under the *Water Act 2007*. The Act requires that there will be a Basin Plan that provides for limits on the quantity of water that may be taken from the Basin water resources as a whole and from the resources of each water resource area.¹⁰² The Act also requires that there

93 *WMA* s 60(1).

94 *WMA* s 6(6).

95 New South Wales Department of Water and Energy, *State Water Management Outcomes Plan* <http://www.dwe.nsw.gov.au/water/pdf/swmop_part1.pdf> at 31 May 2009.

96 *WMA* s 43.

97 *WMA* s 43A.

98 *WMA* s 43(2).

99 *WMA* s 45.

100 *WMA* s 45.

101 *WMA* s 49A.

be a water resource plan for each water resource plan area, which must be consistent with the relevant Basin Plan.¹⁰³ The Minister may accredit a water resource plan that is prepared by a Basin State (which in NSW would be a WMP) for the water resource plan area.¹⁰⁴

As a starting point, this may require amendments to WMPs for water plan areas located within NSW to make them consistent with the Basin Plan (possibly on the basis that the amendments are in the 'public interest'). Assuming that the WMPs are accredited under the *Water Act 2007*, they will have effect for 10 years starting on the date on which the plan is accredited, with the possibility of a one year extension.¹⁰⁵ This 10-year accreditation is consistent with the 10-year life of WMPs under the *WMA*. However, this assumes that the two periods align. It also means that even if a WMP is extended for a further 10 years under the *WMA*, it will still need to be re-accredited under the *Water Act 2007*. Moreover, if no accreditation of a WMP is forthcoming and the procedures for taking step-in action are followed, then the relevant planning instrument that will apply is a water resource plan made under the *Water Act 2007* and adopted by the Commonwealth Water Minister (the duration of which will be specified in the plan itself).¹⁰⁶ All of this serves to add uncertainty to the security of water rights under access licences granted in relation to water resource plans areas.

(ii) *Security of Specific Licences*

As noted above, there are various categories of access licences under the *WMA*. Separate categories are prescribed for surface water and ground water extraction, for extraction from regulated and unregulated rivers, and for use by utilities, domestic users and stock.¹⁰⁷ Section 58 of the Act sets out priorities between the different categories, although different rules of priority may be set out in a WMP.¹⁰⁸ Generally, access licences for utilities, domestic use and stock take priority, followed by regulated river (high security) access licences and then all other access licences.¹⁰⁹ In times of water scarcity, the water allocations of higher priority licences are to be diminished at a lesser rate than the water allocations of lower priority licences.¹¹⁰ As such, the higher the priority of a particular access licence, the higher the level of security of the water rights under that licence.

There are two important points to note about the priority rules. First, different rules of priority apply where the Minister has suspended the operation of a WMP in the case of a severe water shortage.¹¹¹ Social and environmental considerations are paramount. First priority is given to water for domestic purposes, followed by

102 *Water Act 2007* (Cth) Pt 2, Div 1.

103 *Water Act 2007* (Cth) Pt 2, Div 2.

104 *Water Act 2007* (Cth) Pt 2, Div 2, Sub-div D.

105 *Water Act 2007* (Cth) s 64.

106 *Water Act 2007* (Cth) Part 2, Div 2, Sub-div E.

107 *WMA* s 57.

108 *WMA* s 58(3).

109 *WMA* s 58(3).

110 *WMA* s 58(2)

111 *WMA* ss 49A and 60(3).

water for the environment and then the taking of water for other purposes.¹¹² The Minister also has a separate power to prohibit or restrict the taking of water from a specified water source for a specified period if it is in the ‘public interest’.¹¹³ Second, new provisions in the *Water Act 2007* require that the Basin Plan must be prepared having regard to the fact that critical human water needs are to be given the highest priority water use for communities who are dependant on Basin water resources.¹¹⁴ Presumably an amendment will be made to the rules of priority under the *WMA* to reflect this development. These departures from the general priority rules must also be factored into an assessment of the security of rights under any particular water licence.

The security of water rights under access licences is also threatened by the Minister’s powers under the *WMA* to interfere with access licences in certain circumstances. The Minister may impose conditions on an access licence at any time (including conditions relating to the protection of the environment), in addition to any conditions imposed by the WMP and the Act itself.¹¹⁵ The Minister may suspend or cancel an access licence on various grounds. These include where the holder has failed to comply with a condition of the licence and where the holder is convicted of an offence or has not paid any fees, charges or civil penalties relating to the licence.¹¹⁶ The Minister may also compulsorily acquire an access licence if, in the special circumstances of the case, the public interest requires compulsorily acquisition.¹¹⁷ However, the water rights under an access licence are otherwise secure. In particular, the Minister does not have any power to amend a licence.¹¹⁸

(iii) *Compensation*

Given that water rights under an access licence may be diminished in various ways under the *WMA*, an important issue that arises is whether compensation will be payable when this occurs. Clearly, the water rights will be more secure where compensation is payable.

The *WMA* only makes provision for the payment of compensation in a limited range of circumstances. Compensation is payable where an access licence is compulsorily acquired, with the amount of compensation to be agreed between the Minister and the licence holder or determined by the Valuer-General where agreement cannot be reached.¹¹⁹ However, compensation is not payable where a licence is cancelled or suspended.¹²⁰

112 *WMA* s 60(3).

113 *WMA* s 324.

114 *Water Act 2007* (Cth) s86A.

115 *WMA* s 66.

116 *WMA* s 78.

117 *WMA* s 79.

118 Although note that the Minister is required to vary each local water utility licence every 5 years to reflect any variation in population together with any variation in associated commercial activities: *WMA* s 66(3).

119 *WMA* s 79.

120 *WMA* s 87A.

Compensation is also payable in certain circumstances for reductions in water allocations resulting from variations to a WMP. The *WMA* draws a distinction between reductions arising *during* the initial period that a WMP is in force, and reductions arising *after* the initial period that a WMP is in force. In the former case, a holder of an access licence (other than a supplementary water access licence) whose water allocations are reduced as a consequence of a variation of a bulk access regime may claim compensation, subject to a number of exceptions.¹²¹ Compensation is payable at the discretion of the Minister.¹²² In the latter case, the requirement to pay compensation in certain circumstances was introduced by the 2005 amendments in order to strengthen water rights in accordance with the NWI. Compensation is payable to certain categories of access licence holders,¹²³ subject to limited exceptions,¹²⁴ where their water allocations are reduced after the initial period that a WMP is in force:

- due to a change in State government policy; or
- for the purpose of providing additional water to the environment because of more accurate scientific knowledge demonstrating that the previous amount is inadequate.¹²⁵

If the allocation is reduced as a result of more accurate scientific knowledge, no compensation is payable for reductions of 3% or less.¹²⁶ The Act currently provides for a reduced amount of compensation for reductions over 3%, reflecting the amount of risk that States agreed to bear under the NWI.¹²⁷ The remainder of the risk for reductions over 3% was to be borne by the Commonwealth Government after 2014.¹²⁸

The Commonwealth's agreed share of risk under the NWI is reflected in the risk allocation provisions of the *Water Act 2007*.¹²⁹ Under the provisions, compensation is payable to access licence holders for reductions in water

121 *WMA* s 87; Compensation may not be claimed where the variation to the bulk access regime results from: (a) a WMP that is made following the expiry of the plan that established the regime; (b) a WMP that had been made on the basis of a draft plan prepared by a management committee and is in the form in which it was finally submitted to the Minister; (c) an amendment of the WMP by the Minister that is authorized by the plan or required to give effect to a decision of the Land and Environment Court; or (d) an amendment by an Act to the WMP.

122 *WMA* s 87(4).

123 *WMA* s 87AA(1).

124 *WMA* s 87AA(3); Compensation may not be claimed if the reduction in water allocations: (a) occurred while the first WMP was in force; (b) occurred as a result of an amendment of the WMP by the Minister that is authorized by the plan or required to give effect to a decision of the Land and Environment Court; (c) for the purposes of restoring water to the environment because of natural reductions in inflow to the water source.

125 *WMA* s87AA.

126 *WMA* s87AA(6).

127 See *Intergovernmental Agreement on a National Water Initiative*, clauses 48 to 50.

128 Note that compensation is only payable where there is an agreement in force between NSW and the Commonwealth in respect to supplementing the payment of the compensation, and where the Commonwealth has met its obligation under such an agreement: *WMA* ss 87AA(8)–87AA(9).

129 *Water Act 2007* (Cth), Pt 2, Div 4.

allocations in the Basin due to changes in Commonwealth Government policy. Compensation is also payable for reductions over 3% as a result of more accurate scientific knowledge. In accordance with the Agreement on Murray-Darling Basin Reform of 3 July 2008, the Commonwealth has now taken on 100% of this risk (and hence compensation payments) in respect of those Basin States that have applied the NWI risk assignment framework.¹³⁰

Compensation arrangements for reductions in water allocations have certainly improved as a result of the NWI, as reflected in the compensation provisions under both the *WMA* and the *Water Act 2007*. This strengthens the security of water rights under those access licences in relation to which compensation is payable. Nonetheless, the risk of reductions under 3% as a result of more accurate scientific knowledge remains with licence holders, along with all those risks to their water allocations that fall outside the compensation provisions.

D. Quality of Title

Quality of title is one of the characteristics of property rights that is most clearly manifested by the water rights under an access licence. All access licences, and all transactions relating to access licences, must be registered in the Water Access Licence Register (the Access Register) which must be kept by the Minister.¹³¹ Transactions only take effect on being recorded in the Access Register, with the exception of assignment dealings which take effect when entered in the water allocation account for the access licence.¹³² The Minister must make the Access Register available to the public.¹³³ For some time, a reliable registration system of this kind has been seen as playing a key role in efficient market operation by underpinning the security of water rights.¹³⁴

There is also adequate legal protection of water rights under the *WMA*. The Act includes a large range of offence provisions in relation to actions that would infringe a licence holder's water rights, with offenders liable for a significant fine.¹³⁵ Authorised officers are also provided with the power to enter premises for various purposes including investigating alleged contraventions of the Act or the accompanying regulations.¹³⁶ Further, the Act provides that any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the Act or the regulations.¹³⁷ Finally, an appeal lies to the Land and Environment Court against various decisions of the Minister including a decision suspending or cancelling an access licence and a decision refusing consent to a

130 If it has not, the Commonwealth only takes on the share of the risk it agreed to under the NWI.

131 *WMA* Ch 3, Pt 2, Div 3A.

132 *WMA* s 71B.

133 *WMA* s71J.

134 See ACIL Tasmin in association with Freehills, *An Effective System of defining Water Property Titles* (2004) ACIL Tasman <www.aciltasman.com.au/images/pdf/effective_water_pt.pdf> at 20 November 2008, 7.

135 *WMA* Ch 7, Pt 3.

136 *WMA* Ch 7, Pt 2.

137 *WMA* s 336.

dealing in an access licence.¹³⁸ The validity of a WMP may also be challenged in the Land and Environment Court, although the Act imposes a limited judicial review period of 3 months after the making of the WMP.¹³⁹

E. Transferability and Divisibility

Water rights under access licence may be both transferred and divided under the *WMA*. Indeed, the Act provides for a wide range of dealings with access licences including: the transfer of access licences,¹⁴⁰ term transfers of entitlements under access licences,¹⁴¹ subdivision and consolidation of access licences,¹⁴² assignment of rights under access licences,¹⁴³ assignment of water allocations between access licences,¹⁴⁴ interstate transfer of access licences,¹⁴⁵ and interstate assignment of water allocations.¹⁴⁶ Importantly, all of these dealings except transfers and term transfers require the consent of the Minister. An application for the Minister's consent is dealt with in accordance with the water management principles, access licence dealing principles which the Minister may establish,¹⁴⁷ and the access licence dealing rules established by the relevant management plan.¹⁴⁸

The requirement for Minister's consent is one of the clearest examples under the *WMA* of how the desire to create robust water rights to facilitate a water market is tempered by broader environmental and social concerns (as set out in the principles and rules to which the Minister must have regard). Still, the fact that consent is not required for transfers and term transfers, and the flexibility that licence holders have in dealing with their interest, is suggestive of a right of property. In this context, it is worth recalling Ryan J's finding in *Western Mining Corporation Ltd v Commonwealth*,¹⁴⁹ that regulatory machinery (including limitations on transferability) is not antithetical to the existence of a proprietary right.¹⁵⁰

The *Water Act 2007* will also impact on the transfer of water entitlements under the *WMA*. The Act includes a schedule which is designed to co-ordinate the transfer between States and between valleys within the Murray-Darling Basin of water entitlements and allocations in a way that minimises any detrimental effects upon the environment and upon other water users.¹⁵¹ New provisions have also been inserted into the Act which provide that the Minister may make water market rules:

138 *WMA* s 368.

139 *WMA* s 47.

140 *WMA* s 71M.

141 *WMA* s 71N.

142 *WMA* s 71P.

143 *WMA* s 71Q.

144 *WMA* s 71T.

145 *WMA* s 71U.

146 *WMA* s 71V.

147 *WMA* s 71Z.

148 *WMA* s 71Y.

149 *Western Mining Corporation* (1994) 50 FCR 305.

150 *Ibid* 355.

151 *Water Act 2007* (Cth) Schedule D of Schedule 1.

- relating to any act by an irrigation infrastructure operator which prevents or unreasonably delays arrangements being made that would reduce the share component of a water access entitlement of the operator to allow a person's entitlement to water under an irrigation right against the operator to be permanently transformed into a water access entitlement that is held by someone other than the operator; or
- that contribute to achieving the Basin water market and trading objective and principles.¹⁵²

These provisions should promote water trading in the Basin, which in turn will strengthen the associated water rights under the *WMA*. However, environmental considerations remain paramount in the Basin and prohibitions or restrictions will be placed on transfers that would cause environmental harm.¹⁵³

5. Conclusion

To understand the nature of water rights under the *WMA*, it is useful to chart the water reform process that has been occurring in Australia since the early 1990s. One of the key objectives of this reform process has been the creation of clearly defined water property rights that were separate from land title in order to facilitate water trading as a mechanism for achieving efficiency and sustainability. However, there is a tension between creating property rights in water and some of the broader goals of water reform relating to environmental protection and social welfare. Robust water property rights can also frustrate the application of the principles of adaptive management which are integral to water management in Australia.

An analysis of water rights under the *WMA* reveals these various tensions at play. The NSW Government has stopped short of explicitly defining water rights under a water access licence as personal property. However, as the case law makes clear, whether the water rights amount to property rights depends on the terms of the legislation. So, do water rights under the *WMA* have the characteristics of property rights? It is perhaps unsurprising that there is no easy answer to this question. Water rights under the Act are not strictly exclusive as the rights only provide access to a portion of a shared resource; still, the rights of the holder of a water allocation are restricted to the holder and not available to anyone else. A water access licence can now last in perpetuity, although it must be remembered that the holder is not entitled to a fixed amount of water but only a share of the water available.

All water allocations are susceptible to change as a result of changes to the planning regime, but water allocations under higher priority categories of water licences are more secure. Licence holders also face the risk of having their licence cancelled, suspended or acquired by the Minister. The potential for water rights under a licence to be diminished has been partially addressed by improved

152 *Water Act 2007* (Cth) s 97.

153 See *Water Act 2007* (Cth) Schedule D of Schedule 1.

compensation arrangements, although licence holders still bear a significant amount of risk. The quality of title of water rights under an access licence is reasonably strong. So too is the ability of licence holders to transfer and divide their interests, although dealings with water rights will always be subject to environmental considerations. Looking at all the characteristics together, there is probably enough to suggest that the water rights under access licences do amount to rights of property. However, depending on the context and the type of access licence, it would not be such a surprise if a court found otherwise.

Whether the rights under a particular access licence amount to rights of property at law will be a critical issue in certain circumstances. However, it should be remembered that the NSW Government (along with other Australian governments) is not trying to achieve a legal outcome but rather a commercial one. For the NSW Government, it is not the legal status of 'property' itself that is important but rather what it signifies: namely, that the rights in question have the requisite stability, security and flexibility to make them a valuable commodity that can be traded in markets. Where potential participants in a water market are satisfied that the rights have the indicia of property, the market is more likely to be a success. Of course, a functioning water market is not in itself an indication that the NSW Government has achieved its objectives. Whether a water market, sustained by (something like) property rights in water, can in fact be effective as one of several mechanisms to deliver an efficient and sustainable water industry remains to be seen.

