Land and Environment Court of New South Wales

O'Keefe v Water Administration Ministerial Corporation [2010] NSWLEC 9 (27 January 2010)

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NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: O'Keefe v Water Administration Ministerial Corporation [2010] NSWLEC 9

PARTIES: David Daniel O'Keefe (First Applicant)Kathryn Michelle O'Keefe (Second Applicant)Water Administration Ministerial Corporation (First Respondent)Peter Bryan Eccleston (Second Respondent)Lucy Finette Taylor Eccleston (Third Respondent)

FILE NUMBER(S): 30531 of 2009

CATCHWORDS: APPEAL :- hearing de novo - water management - appeal by objectors against findings of local land board - licence to take and use water - whether decision to grant water licence beyond power

WATER: - access to and use of water - registered easement for water and electricity supply - capacity of the owners of dominant tenement to apply for water licence - statutory framework - basic landholder rights - application of harvestable rights order - merit considerations

WORDS AND PHRASES: - "river" - "intermittent" - "natural channel artificially improved" - "artificial channel which has changed the course of the stream" - "confluent" - "occupier"

LEGISLATION CITED: Water Act 1912 s 5, s 10, s 13AWater Management Act 2000 Ch 3 Pt 2, s 52, s 53, s 54, s 55, s 59, s 88A, s 392, s 393, s 401, Sch 7

CASES CITED: Eccleston v O'Keefe [2007] NSWSC 159Elders Rural Finance Ltd v Westpac Banking Corporation (1989) 6 BPR 13,439Gorczynski v Perera [2004] NSWCA 70; (2004) 132 LGERA 341J & J O'Brien v South Sydney City Council [2002] NSWLEC 126; (2002) 121 LGERA 203Lockwood v the Commonwealth [1954] HCA 31; (1953) 90 CLR 177 Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd (1996) 91 LGERA 31Newcrest Mining (WA) Ltd v The Commonwealth [1997] HCA 38; (1997) 190 CLR 513VAW (Kurri Kurri) Pty Ltd v Scientific Committee [2003] NSWCA 297; (2003) 58 NSWLR 631Water Administration Ministerial Corporation: In re an Application by McClure (1995) 88 LGERA 278

TEXTS CITED: Brierley, GJ & Fryirs, KA, Geomorphology and River Management: Applications of the River Styles Framework (2005) Blackwell Publishing.B Mactaggart, J Bauer, D Goldney & A Rawson, "Problems in naming and defining the swampy meadow – An Australian perspective" (2008) 87 Journal of Environmental Management 461 – 473.

CORAM: Lloyd J

DATES OF HEARING: 16 December 2009, 17 December 2009 and 18 December 2009

JUDGMENT DATE: 27 January 2010

LEGAL REPRESENTATIVES

APPLICANTS:J A Ayling SC and K E Burke (barrister)SOLICITORS:McIntosh McPhillamy & Co

FIRST RESPONDENT:C D Norton (barrister)SOLICITORS:Legal

Services BranchDepartment of Environment Climate Change and Water

SECOND AND THIRD RESPONDENT:J A D Needham SC and D J Williams (barrister)SOLICITORS:Rickards Whiteley Lawyers

JUDGMENT:

IN THE LAND AND

ENVIRONMENT COURT

OF NEW SOUTH WALES

Lloyd J

Wednesday, 27 January 2010

LEC No. 30531 of 2009

O'KEEFE v WATER ADMINISTRATION MINISTERIAL CORPORATION & (2) ORS [2010] NSWLEC 9

JUDGMENT

Introduction

1. **HIS HONOUR**: Mr Peter Bryan Eccleston and Mrs Lucy Finette Taylor Eccleston, the second and third respondents in this proceeding, own a property near Orange which has the benefit of a registered easement for water and electricity supply over part of the adjoining property owned by Dr David Daniel O'Keefe and Mrs Kathryn Michelle O'Keefe, the applicants in this proceeding. The easement allows the Ecclestons to draw water from a specified dam located on the O'Keefes' property and to use the water "*for stock and domestic supply only (not to include irrigation other than in respect of the household garden and trees along the driveway)*".

2. The validity of the easement was determined by Windeyer J in proceedings in the Supreme Court of New South Wales: *Eccleston v O'Keefe* [2007] NSWSC 159. Windeyer J held, in effect, that the easement was unenforceable unless the Ecclestons held a water licence under the *Water Act* 1912 ("the WA") or any other Act.
3. By application dated 10 February 2007, the Ecclestons applied to the Water Administration Ministerial Corporation, the first respondent in this proceeding, for a licence under s 10 of the WA for a work, namely a pump within the easement for pumping water from the "*dam on unnamed watercourse*" on the O'Keefes' land. The application was granted by the Ministerial Corporation, but because an objection to the application - in fact, a series of objections - had been lodged by the O'Keefes, the Ministerial Corporation directed the local land board at Orange to hold a public inquiry under s 11(5) of the WA. After a three-day hearing, the board found in favour of granting the application for a period of five years and otherwise on the terms, limitations and conditions proposed by the Ministerial Corporation.
4. The O'Keefes now appeal to the Court against the findings of the board. They have raised a number of contentions, including that the granting of the licence is beyond power and the decisions of the Ministerial Corporation and the board were ultra vires. Because the O'Keefes allege that there is no power to grant the licence, it is necessary to look at the relevant legislation in both the WA and the *Water Management Act* 2000 ("the WMA").
5. The right to take and use water is currently regulated in New South Wales by the two statutes mentioned above. A transitional period currently applies which means that different provisions of these Acts apply to different areas of the State. In the present case some, but not all, provisions of both Acts apply to the subject land.
6. The starting point which governs water rights is s 392 of the WMA. This section effectively appropriates to the State the right to the control, use and flow of all water in rivers, lakes and aquifers, including all water occurring naturally on or below the surface of the ground and are called the "*State's water rights*". The State's water rights are vested in the Crown, except to the extent to which they are divested from the Crown by the WMA or any other Act (subs 2). Section 393 of the WMA abolishes common law riparian rights.

7. There are a number of provisions of the WMA and the WA by which persons can take and lawfully use water. In the WMA these provisions are contained in Ch 3. A person may lawfully take water without committing an offence under the Act in two ways: (a) if the person holds an access licence under Pt 2 of Ch 3, or (b) if the person is exercising a basic landholder right. Some of the basic landholder rights are conferred by s 53, which is as follows:

"**53 Harvestable rights**

(1) An owner or occupier of a landholding within a harvestable rights area is entitled, without the need for any access licence, water supply work approval or water use approval:

(a) to construct and use a dam for the purpose of capturing and storing rainwater run-off, and

(b) to use water that has been captured and stored by a dam so constructed,

in accordance with the harvestable rights order by which the area is constituted.

(2) A single dam may be used both for rainwater run-off that has been captured and other water that has been lawfully taken from a water source, but only if the harvestable rights order so provides.

(3) This section does not allow a landholder:

(a) to supply any other land with water that has been captured and stored under this section, or

(b) to construct or use a dam that obstructs the flow of a river, unless the river is declared by the relevant harvestable rights order to be a minor stream for the purposes of this Division."

1. Section 53 is, in effect one of a number of exemptions from the general prohibitions on taking water found in Pt 2 of Ch 3. Mr J A Ayling SC and Ms K E Burke, appearing for the O'Keefes, submit that the effect of s 53(3)(a) is to make it unlawful for the O'Keefes to

supply to the Ecclestons water that has been captured and stored in the dam on their property. I am unable to agree. As pointed out by Mr C D Norton, appearing for the Ministerial Corporation, the function of s 53(3) is not itself to prevent the taking of water, but to provide limits on the extent to which s 53(1) may be relied upon to take water. This is apparent from the opening words of subs (3): "*This section does not allow...*". Thus, if a harvestable right in s 53(1) is relied upon to prevent an act of taking water from being in breach of the Act, subs (3) operates to define the limits of that right. It is common ground that the subject land is within a harvestable rights area. In any event, Pt 2 of Ch 3, which regulates the access to and use of water, does not apply to the subject land. This does not mean, however, that s 53 may be irrelevant, as it may need to be relied upon to avoid other injunctions against the taking of water elsewhere.

2. The WMA repeals the WA: s 401 and Sch 7. However, Sch 7, which repeals the WA, has only commenced in respect of s 7 and Pts 3, 4, 6 and 7 of the WA: Proclamation, 20 December 2000, New South Wales *Government Gazette*, No 168, 22 December 2000, at 13,469. This means that those other parts of the WA which are not repealed continue in force.

3. The provisions of Pt 2, dealing with licences, and Pt 3, dealing with approvals, in Ch 3 of the WMA have not commenced across the whole of the State. These parts only apply where a proclamation declares them to apply: s 55A and 88A. That is, those provisions apply only in respect of specified parts of the State. The effect of these provisions and of Sch 7 of the WMA is that Pt 2 of the WA continues to apply to those parts of the State to which Ch 3 and, in particular Pts 2 or 3 of Ch 3, of the WMA have not yet commenced in relation to a particular area or water source and the licensing and approvals regime under Pt 2 of the WA continues to apply. Whilst there have been some proclamations applying Pts 2 and 3 of Ch 3 of the WMA to certain areas, no such proclamation has been made in relation to the subject land, dam or stream. It follows that Pt 2 of the WA continues to apply in the present case.

The issues

1. Originally a large number of issues were raised for determination, but during the hearing the issues were refined to the following:

(a) The "work" intended by the Ecclestons is not connected with a river or lake as the definition of a "river" does not include the watercourse that the dam is located on.

(b) The Ecclestons are not "occupiers" within the meaning in s 10 of the WA.

(c) An easement is not a criterion referred to in the legislation as a basis upon which to grant an application.

(d) The Ecclestons have a number of Strahler type streams running through their own property and accordingly they are not landlocked and any criterion associated with a decision to grant an application ought to consider whether the Ecclestons have or are using their basic landholder and/or own harvestable rights under the WMA.

(e) The granting of the application equates to the Eccelstons encroaching upon the O'Keefes' basic landholder rights and as such offends the paramount basic landholder rights afforded to rural landholders under the WMA.

(f) The O'Keefes remain to be prohibited under s 53(3) of the WMA to supply water notwithstanding the grant of the application.

(g) The granting of the application will cause the O'Keefes to breach the provisions of s 53(3) of the WMA.

(h) The allowance of 4 megalitres per annum as allowed under the terms and conditions of the grant of the application misrepresents the easement terms relating to the 4 megalitres level and is excessive in the circumstances.

Issues (d), (e) and (h) are questions of merit. Issues (b), (c), (f) and (g) are questions of law. Issue (a) is a mixed question of law and fact. This appeal is a full appeal involving a hearing *de novo* of questions of both merits and law.

The relevant provisions of the WA

1. Section 10 (in Pt 2) of the WA enables application to the made to the Ministerial Corporation for water licences. It relevantly states:

"**10 Application for licences**

(1) Any occupier of land whereon any work to which this Part extends (not being a joint water supply scheme) is constructed or used, or is proposed to be constructed or used, for the purpose of:

(a) water conservation, irrigation, water supply, or drainage, or

(b) (Repealed)

(c) changing the course of a river,

may apply to the Ministerial Corporation in the form prescribed for a licence to construct and use the said work, and to take and use for the purposes specified in the application the water, if any, conserved or obtained thereby, and to dispose of such water for the use of occupiers of land for any purpose.

(1A) An application for a licence may be made under subsection (1) by a person who proposes to construct or use any such work as is referred to in that subsection subject to the person obtaining the right to occupy the site of the work, and for all purposes of or relating to such application such person shall be deemed to be an occupier:

Provided that a licence shall not be issued upon any application made under the authority of this subsection unless and until the applicant has obtained the right to occupy the site of the work."

1. A number of defined terms apply to Pt 2: see s 5.

"Occupier, in relation to land, means:

(a) the holder of any tenure of the land or, if it is shown that some other person is in actual occupation of the land, that other person,

...

River includes:

(a) a stream of water, whether perennial or intermittent, flowing in a natural channel, or in a natural channel artificially improved, or in an artificial channel which has changed the course of the stream,

(b) an affluent, confluent, branch or other stream of water into or from which a stream referred to in paragraph (a) flows, and

...

but does not include anything declared by the Ministerial Corporation by order published in the Gazette as not being a river...

Work includes any dam, lock, reservoir, weir, regulator, flume, race, channel (whether an artificial channel or a natural channel artificially improved), any cutting, well, excavation, tunnel, pipe, sewer, and any machinery and appliances.

Work to which this Part extends means a work:

(a) which is connected with, or which affects the quantity or use of water in, a river or lake,

(a1) which impounds water and is within an area declared by the Ministerial Corporation by order published in the Gazette to be an area within which a work impounding water is a work to which this Part extends, whether or not it is a work referred to in paragraphs (a), (b) and (c),

(b) which affects the quantity of water flowing in, to or from, or contained in, any such river or lake, or

(c) in or through which flows, or is contained or used, water taken from any such river or lake,

being a work which is used, or is to be used:

(d) for water conservation, irrigation, water supply or drainage, or

..."

Issue (a): a "river"? a "work to which this Part extends"?

1. The Court took a view together with the parties and their representatives. The Court also had the benefit of the opinions of two expert witnesses, Dr D Goldney (on behalf of the O'Keefes) and Dr D Outhet (on behalf of the Ministerial Corporation), who provided written reports and gave oral evidence. Both of the experts agree that a stream is present on the O'Keefes' property, on which the dam is situated and to which the Ecclestons easement extends (although Dr Goldney says only in the sense that the term "stream" is used to refer to a landform where water may flow). The first question for determination is whether the stream is a river as defined in the definition in s 5 of the WA.

The experts' evidence

1. Dr Outhet has over 30 years experience as an applied fluvial geomorphologist. Geomorphology is the interdisciplinary and systematic study of landforms and their landscapes as well as the earth surface processes that create and change them. Fluvial geomorphology is a branch of geomorphology that relates to rivers.
2. Dr Outhet is of the view that the stream in question is a "river" and that a "river" includes all sizes of stream, including first order Strahler streams. Dr Outhet says that, from a geomorphologist's perspective, at locations uphill and downhill of the subject dam, there are reaches of a type of river with defined bed and banks, namely the Channelised Fill River Style. Channelised Fill River Style is a classification under the River Styles framework: see Brierley, GJ & Fryirs, KA, *Geomorphology and River Management: Applications of the River Styles Framework* (2005) Blackwell Publishing.
3. Dr Outhet acknowledges that the River Styles framework is a geomorphic classification scheme based solely on landform characteristics and not relating to stream size or flow regime. Dr Outhet also acknowledges that there is no continuous channel

because the stream comprises a combination of flow across a broad valley floor in multiple flow paths, flow in artificial channels and flow in natural channels artificially improved. However, Dr Outhet believes that a "river" does not require a continuous channel, and says that in the NSW far west, it is common for rivers to become discontinuous where they flow through low sloping areas. Dr Outhet says that in peer-reviewed geomorphology literature, it is accepted that some rivers are discontinuous. Dr Outhet says that some large New South Wales rivers – including the Macquarie River and the Lachlan River – are discontinuous. He says that the Macquarie River is discontinuous through the Macquarie Marshes, and that the Lachlan River is discontinuous through the Great Cumbung Swamp.

4. Dr Goldney is a landscape ecologist and has specialisations in terrestrial, aquatic and restoration ecology. These fields are broad and multi-disciplinary, and at times require a specialised understanding of areas such as fluvial geomorphology, hydrology and ecosystem processes. Dr Goldney's understanding of these specialised areas has been recognised by his peers. Dr Goldney has been a joint author of three recent peer reviewed papers focussing on swampy meadows. (In Dr Goldney's opinion, the stream in question was once a swampy meadow.) He has also supervised a successful PhD student whose thesis focussed on characterising and understanding swampy meadows in the central tablelands region, which is the area in which the subject stream lies.
5. Dr Goldney believes that the stream in question is not a "river". Dr Goldney says that the River Styles framework, which is used by Dr Outhet for classification purposes, is an unsuitable framework for determining whether or not there is a "river" under the WA.
6. Dr Goldney accepts that the River Styles framework has been applied to first order Strahler streams in the area and other parts of New South Wales. However, Dr Goldney notes that the framework does not provide a definition for a "river" and is inclusive of a diverse range of stream types such as estuarine rivers, valley fills with no channels, floodouts and gorges. Dr Goldney says that even if it were an appropriate tool for defining a "river", it would not properly do so in the circumstances because it characterises the stream on the sole basis of geomorphology. In Dr Goldney's view, a geomorphic model allows little or no consideration of ecological and

hydrologic characteristics of streams. Dr Goldney says that this is a shortcoming which may lead to misleading results because river systems are functions of hydrologic and ecological processes. Dr Goldney also says that the framework is unsuitable because it does not distinguish between natural causes and anthropogenic causes of stream structure.

7. Further, Dr Goldney says that there is no "river" because:

a. The stream does not exhibit a continuous channel, either natural or artificial, historic or current. In order to be a "river", a first order Strahler stream would need a continuous channel. The short channel incision observed within the minor valley floor is a discontinuous stream and is characteristic of an erosion incision or a channelised flow diversion rather than a continuous channel or a "river".

b. The channels that exist are artificial. These channels were a human-induced modification to a swampy meadow, which warrant a different classification, other than a "river". Artificially dug channels and stabilised gullies in once unchannelised valley fill provide the basis for determining whether a first order Strahler stream is a river.

c. The stream does not carry flows emanating from third, fourth or higher order Strahler streams.

d. The stream is a first order Strahler stream and the terms "river" and "first order Strahler stream" are well differentiated as non-synonymous terms in common language as well as by hydrologists, many geomorphologists and ecologists.

e. The channels in the stream have the capacity through self-healing or intervention to aggrade sediment, lose the channel formation, and revert to a valley fill.

8. The respondents submit, however, that even if Dr Goldney's opinion were accepted, the matters raised by Dr Goldney do not preclude the stream from being a "river" under the statutory definition in the WA. In accordance with the approach ordinarily adopted by geomorphologists, Dr Outhet has divided the stream into "reaches" for classification purposes. (A "reach" is a stretch of a stream comprising certain distinguishing characteristics.) Dr Outhet opines that there are certain reaches which are "*natural channels artificially improved*" and "*artificial channels which have changed the course of*

the stream" within the definition in par (a) of the definition of "river", and the stream also falls within par (b), being a confluent with Emu Swamp Creek.

Is there a "stream"? Is the flow "intermittent"?

1. As noted in par [13] above, the statutory definition provides that "river" includes:

"a stream of water, whether perennial or intermittent, flowing in a natural channel, or in a natural channel artificially improved, or in an artificial channel which has changed the course of the stream"

1. "Stream" is not defined in the legislation. The experts agree that there is a stream (and, more specifically, a first order Strahler stream), but Dr Goldney agrees only so far as the term "stream" is used to refer to a landform where, under suitable conditions, water can flow. In Dr Goldney's view, "stream" is not to be equated with a continuous flow of water in the case of the stream in question.
2. It is agreed that the stream is not "perennial". "Intermittent" is not defined in the legislation. Dr Outhet says that the flow does fall within the definition of "intermittent". He says that several scour holes and their scarps in the bed of the channel provide evidence that the channel bed was eroded by recent intermittent flows.
3. Dr Outhet accepts that the word "ephemeral" may be applied to a stream which only flows in an immediate response to a downpour of rain. However, Dr Outhet did not comment on whether the flow in question is "ephemeral" because, in his view, any distinction between intermittent and ephemeral requires the expertise of a hydrologist, a field in which he does not have special expertise. Dr Outhet states in his report:

"In the science of fluvial geomorphology, there are generally only two types of surface flow regime used in the literature. One is permanent flow where the stream flows all the time. The other is intermittent flow where the stream does not flow all the time ... The word 'intermittent' is regarded as being synonymous with other words such as 'ephemeral' and 'occasional'."

1. Dr Goldney says that the stream is not properly classified as "intermittent" because the flow is classified as "ephemeral". Dr Goldney does not agree that the word "intermittent" is synonymous with "ephemeral":

"I further do not agree, as suggested by Dr Outhet, that the terms ephemeral and occasional are synonymous with intermittent. They are often considered synonymous in the 'grey' literature; however, they are more correctly alternative terms rather than synonymous terms."

1. In support, Dr Goldney has listed three examples of hydrological and ecological publications where the terms are separately defined, and non-synonymous. Dr Goldney agrees that in common parlance the words "ephemeral" and "intermittent" might be considered as synonymous. He says that you *can* call a stream flowing from time to time intermittent, but technically, from the specialised point of view of a hydrologist or ecologist, it is more suitable to call a stream ephemeral if it flows only in response to precipitation.
2. Dr Goldney lists the following characteristics of an "ephemeral" flow:

"flows briefly only in response to precipitation, channel usually above water table, influent, generally without a well defined channel, likely to flow for less than 20% of the year".

1. Dr Goldney says that ecologists and hydrologists would use the term "ephemeral" to describe the stream in question. Dr Goldney bases this opinion on a number of factors:

a. The stream flows only in direct response to rainfall in the immediate locality and it carries water only during and immediately after rain.
b. The stream's channels are at all times higher than the water table. This is consistent with the small catchment area. There are groundwater seeps near the subject dam but the flow from these seeps is localised and is unlikely to contribute to stream flow.
c. The stream flows briefly and is likely to flow for less than 20 per cent of the year during normal rainfall.
d. In relation to the channel characteristics, a watercourse with a well

defined channel is associated with an intermittent stream, whereas a watercourse, like the one in question, with a poorly defined channel is usually associated with an ephemeral stream.

e. Waterflow is likely to be interstital (ie. within the soil) and not surface flowing. Any surface flow would tend to flow along multiple pathways across the broad valley floor.

2. Despite classifying the stream as "ephemeral", Dr Goldney describes the flow as "intermittent" in two parts of his primary report:

"Intermittent water flow from surface runoff would tend to flow along multiple pathways across the broad valley floor ...

...

[this river] is a minor valley floor and when flows do intermittently occur along this minor valley floor they eventually flow into the upper reaches of Emu Creek, and Emu Creek waters eventually flow into the Macquarie River."

1. Dr Goldney says that he was using the expression in a general sense and that it is not inconsistent with his opinion on this point.

Is the flow in a "channel"?

1. Dr Outhet has provided a number of opinions supporting his view that the water flows through a "channel".
2. *Firstly*, Dr Outhet opines that water that flows into and from the large dam does so through a "channel" that has a defined bed and banks, as evidenced by typical flat bed features and sloping bank features.
3. Dr Goldney agrees that the flow *from* the large dam is through a channel, but notes that it is more properly classified as an "artificial channel". Dr Goldney does not agree that water flow *into* the large dam flows through any feature with a defined bed and banks. In support, Dr Goldney notes that Dr Outhet has classified the reach immediately above the dam floor as an even valley fill surface with no channel and shallow flow paths.
4. *Secondly*, Dr Outhet opines that in some reaches the bed and banks of the channel have qualities of continuity such that when water

flows it does so within the limits of the channel as defined by the bed and banks. Dr Outhet accepts that the channels on the stream continue for a distance of 100 metres or less, but says that scale is irrelevant when classifying a landform as a "channel".

5. Dr Goldney says that the channels in the first order Strahler stream are discontinuous and therefore do not have the quality of continuity. In Dr Goldney's opinion, the stream is only continuous in the sense that it conveys ephemeral flows from upper catchment to lower catchment.
6. *Thirdly*, Dr Outhet opines that the bed and banks of the stream have qualities of unity in a geomorphic sense because it was once a valley fill system along most of its length. Dr Goldney agrees.
7. *Fourthly*, Dr Outhet opines that the bed and banks of the channel have qualities of permanence. In relation to the time scale of the permanence, Dr Outhet says the he is talking in a time-span of years rather than decades. Dr Outhet says that he has based his opinion on what he can see presently, and that under current management practices, the stream would not revert back to a valley fill state. Dr Outhet did not assess the consequences of changed management practices in detail because he says that future human activities are unpredictable and that soil science is outside his area of expertise. However, Dr Outhet agrees that if different management practices were adopted, the stream could revert to valley fill over a number of years (rather than decades).
8. Dr Goldney is of the opinion that artificial changes, degradation and erosion are not enough to form a permanent channel. Dr Goldney says that the artificial channels do not have qualities of permanence because they have the capacity through self-healing or intervention to aggrade sediment, lose the channel formation, and revert to a valley fill. Dr Goldney says that the reversion would be unlikely to occur in the near future and that there is very little to indicate that it is currently undergoing a reversal to a swampy meadow. Dr Goldney says that, in order to revert to a swampy meadow, different management practices would need to be adopted.
9. *Fifthly*, Dr Outhet says that at locations uphill, at, and downhill of the large dam, water flows or is capable of flowing by means of sheet flow down hill slopes and shallow flow in drainage depressions into the stream but that the stream itself is not sheet flow.

10. In response, Dr Goldney agrees that there is sheet flow, but says that this bears no assistance in determining whether or not there is a river. Dr Goldney also agrees that there is shallow flow but says that there would be multiple flow paths across the valley floor from margin to margin, and it would not be confined wholly within the artificial channel.
11. *Sixthly*, Dr Outhet says that the sheet flows and shallow flows are capable of flowing in a stream with defined bed and banks. In response, Dr Goldney agrees, but notes that sheet flow can also flow longitudinally outside of the artificial channels, and that the artificially dug channels unnaturally concentrate sheet flow. In cross-examination, Dr Outhet agreed that in a large rainfall event, you would expect to see water flowing on either side of the artificial channel. Dr Outhet also agreed that during large rainfall events, the channels in which he has identified would serve no function because they would be submerged by water.

Is the flow in a "natural channel artificially improved"?

1. The experts agree that there is a "*natural channel artificially improved"* present, but Dr Goldney agrees conditionally on the basis that the channel represents an incised swampy meadow system and the artificial improvements stabilise the degraded system.
2. In his report, Dr Outhet says that the water flows in a "*natural channel artificially improved*" in one reach above the dam. In Dr Outhet's view, a combination of natural bends and spoil heaps of material excavated from the channel and placed on top of one or both banks provide evidence that the stream is in a natural channel artificially improved by excavation to make it wider and deeper.
3. In response to this view, Dr Goldney says that he does not believe that the one reach identified by Dr Outhet provides a basis for classifying the stream as a river under par (a) of the statutory definition. Dr Goldney says, *firstly*, that although the water is not an "*artificial channel*", it cannot readily be determined whether it is a "*natural channel*". Rather, it is correctly classified as a minor erosion gully. Dr Goldney says that erosion gullies do have "*distinct channel bed and banks, although these elements do not immediately characterise gullies as rivers, especially when catchment area,*

rainfall and runoff is low". Dr Goldney says that, in any event, the erosion gully is about 50 metres long and therefore too short to constitute a natural channel because it comprises only 1.8 per cent of the total stream length.

4. *Secondly*, Dr Goldney says that the channel in question was not "*artificially improved*" to make it larger but was possibly engineered or improved to stabilise the bed and banks as evidenced by the inclusion of man-made debris on the banks. Dr Goldney says that prior to gullying, the natural channel would have been wide and shallow as it extended across the valley floor from one valley margin to the other, so the channel was improved by reducing its cross-section which, from an ecological perspective, equates to a loss of stream function (degradation). In Dr Goldney's opinion, this did not improve the channel, but gave semi-permanency to a degraded system.

Is the flow in an "artificial channel which has changed the course of the stream"?

1. The experts agree that there are artificial channels present in some reaches, some of which have changed the course of the stream.
2. Dr Outhet came to this conclusion due to the presence of straight channels and unnatural spoil heaps along the top of their banks. In other reaches, Dr Outhet found evidence of artificial channels which changed the course of the stream by changing the flow from wide shallow flow confined by the valley margins to narrow deep flow confined by a channel.
3. In response, Dr Goldney does not agree that the artificial channels characterise the stream. Dr Goldney propounds the opinion that you cannot simply create a "river" by channelising a valley fill, which was the likely character of the stream prior to channelisation. Dr Goldney does not believe that artificially dug channels in once unchannelised valley fill provide the basis for determining whether a first order Strahler stream is a river.

Is the stream a "river" as defined in par (a) of the statutory definition?

1. Having regard to the opinions of Dr Outhet and Dr Goldney, the photographic evidence, and having also taken a view, I have come to the conclusion that, on balance, the stream in question comes within par (a) of the statutory definition of "river".
2. In this respect I prefer the opinions of Dr Outhet to those of Dr Goldney. I have come to this view for the following reasons.
3. *Firstly*, although Dr Goldney is a highly qualified landscape ecologist, he does not have the specialised experience and expertise in fluvial geomorphology to the same extent as Dr Outhet. Thus, in classifying the stream as either "intermittent" or "ephemeral", I accept the opinion of Dr Outhet that in the science of fluvial geomorphology the words "intermittent" and "ephemeral" are regarded as being synonymous. I acknowledge that Dr Goldney has given evidence that in peer-reviewed scientific literature relating to hydrology and ecology, the words are non-synonymous. However, in my view the classification of "intermittent" adopted by a fluvial geomorphologist should be applied to the definition in question. I hold this view because fluvial geomorphologists specialise in studying the physical characteristics of rivers and the processes of their formation – the criteria to which, in my opinion, this definition is directed. This view is confirmed to me by the acknowledgement of Dr Goldney that in common parlance and the "grey" literature of hydrologists and ecologists, the term "intermittent" may be used to refer to the stream in question.
4. *Secondly*, I accept Dr Outhet's opinion that the fact that the subject stream may be discontinuous is irrelevant. There is no answer to his examples of the Macquarie River and the Lachlan River as being discontinuous but nevertheless remaining as rivers. Similarly, in the present case, in places where there is the absence of a continuous channel, there is nevertheless a defined channel, both upstream and downstream and a continuous stream from the top of the catchment to the point where the stream converges with the next stream towards Emu Swamp Creek. Moreover, in cross-examination, Dr Goldney neither agreed nor disagreed with Dr Outhet's opinion that finding a valley fill along a stream does *not* disqualify that stream from being a river. In these circumstances, I have no reason to doubt that opinion.
5. *Thirdly*, I am satisfied that there are "channels" for the purpose of par (a) of the definition and I reject evidence to the contrary. It is

clear to me that Dr Outhet, who specialises the physical form of rivers, has come to this conclusion after careful consideration of the flow implications of rainfall events, including large rainfall events. It is also clear that Dr Outhet has considered the length of the channels in proportion to the remainder of the stream.

6. *Fourthly*, I reject Dr Goldney's distinction between natural causes and anthropogenic causes and his reliance on the fact that some channels that exist are artificial. In the present case, it is clear that parts of the natural channel have been artificially improved, and where there had formerly been a flow through what Mr Goldney described as a former swampy meadow, the channel may have changed the course of the stream. These distinctions are irrelevant, however, for the purpose of par (a) of the definition of "river".

7. *Fifthly*, Dr Goldney has previously expressed an opinion that when a swampy meadow is degraded with an incised channel it may then be considered a "river". As noted above, Dr Goldney has been a joint author of three recent papers on swampy meadows. During cross-examination, Ms J A D Needham SC, appearing with Mr D J Williams for the Ecclestons, took Dr Goldney to one of these papers: B Mactaggart, J Bauer, D Goldney & A Rawson, "Problems in naming and defining the swampy meadow – An Australian perspective" (2008) 87 *Journal of Environmental Management* 461 – 473.

8. In this article, the authors considered a definition of "river" from the *Rivers and Foreshores Improvement Act* 1948 which is comparable to the definition in s 5 of the WA:

"... any stream of water, whether perennial or intermittent, flowing in a natural channel, or in a natural channel artificially improved, or in an artificial channel which has changed the course of the stream of water and any affluent, confluent, branch or other stream into or from which the river flows."

1. The article states (at 468) that swampy meadows can fail to be formally protected under the legislation "*as they are not channelised landforms so are not correctly defined as rivers*". The article then states:

"It may be a moot point but when a swampy meadow is degraded with an

incised channel, it can then be considered a 'river' and have the legislature in place to protect it. If on the other hand it is not degraded, but an intact swampy meadow, there is no legal provision for its protection – this being a swampy meadow conundrum."

1. Ms Needham suggested to Dr Goldney that this extract was inconsistent with his evidence in these proceedings, highlighting his conclusion that the stream in question is a swampy meadow degraded with an incised channel. In response, Dr Goldney said that there was "*some contradiction*", but said that the observation in the article was used in a broad sense. Nevertheless, the observation in the article demonstrates that Dr Goldney held the view that creating an artificial channel through a swampy meadow can qualify the channel as a "river"; as defined.

Is the stream a "river" as defined in par (b) of the statutory definition?

1. Notwithstanding the determination of whether the stream comes within par (a) of the definition or "river", the next question is whether it comes within par (b) of that definition: "*an affluent, confluent, branch or other stream of water into or from which a stream referred to in paragraph (a) flows, ...*".
2. According to the evidence of Dr Outhet, the subject stream joins a second order Strahler stream about one and a half kilometres downstream which then joins a fourth order Strahler stream, known as Emu Swamp Creek about another 100 metres or so further downstream. I have no reason to doubt this evidence, which was confirmed on the view taken by the Court. As was also confirmed on the view, Emu Swamp Creek has a stream of water in it - despite the area being in a state of drought - which was contained within a natural channel with a bed and banks. The experts also agree that Emu Swamp Creek is a stream with a natural channel and intermittent flow that fits within the definition in par (a), but Dr Goldney agrees conditionally on the basis that it is mapped at the confluence as a channelised Fill River Style and that it is likely to have been a swampy meadow, without a continuous channel. As

noted above, however, Dr Goldney's conditional acceptance of the status of Emu Swamp Creek does not alter the fact that it is a river within the meaning of par (a) of the statutory definition.

3. These facts mean that the subject stream comes within par (b) of the definition of "river". According to the *Macquarie Dictionary*, 5th ed (2009), an "*affluent*" when used as a noun is a tributary stream; "*confluent*" when used as an adjective means "*running together*" and when used a noun it also means "*a tributary stream*". The same dictionary defined "*tributary*" when used as a noun as "*a stream contributing its flow to a larger stream or other body of water*" and when used as an adjective it means "*flowing into a larger stream or other body of water*". I have previously noted that both of the expert witnesses agree that the subject stream is "a stream" (although Dr Goldney says this is only in the sense that the term "stream" is used to refer to a landform where water may flow). Both experts agree that the "stream" is a "confluent" and not an "affluent" or a "branch". They also agree that the stream is a confluent that flows into Emu Swamp Creek. The fact that the subject stream is thus a confluent to Emu Swamp Creek - which is clearly within par (a) of the definition - brings it within par (b) of the definition. That is, it is a confluent from which Emu Swamp, a stream referred to in par (a), flows.

4. The O'Keefes nevertheless submit that the Ministerial Corporation, pursuant to its power to declare streams not to be rivers for the purpose of s 5 of the WA, has declared the subject stream as not a river for the purposes of Pt 2 of the Act. The definition of "river" in s 5, noted at par [13] above, does not include anything declared by the Ministerial Corporation by order published in the Gazette as not being a river.

5. There is a series of such orders which have been published in the Gazette. Two orders were published in the Gazette on 23 March 2001: New South Wales *Government Gazette*, No 57, at 1480 to 1491. The first is an order dated 18 January 2001 which declares certain streams of water in Sch 1 as not being rivers and certain streams in Sch 2 as being rivers. The effect of the order was to exclude from the definition of "river" the stream on the O'Keefes' land, which is listed in Sch 1. The second is an order dated 14 March 2001, being a harvestable rights order and which enables landowners to capture all rain water run-off by means of a dam or dams on

"minor streams" - defined as the streams in Sch 1 of the order published on the same day in relation to the definition of "river". The harvestable rights order placed limits on the capacity of harvestable rights dams by specifying a multiplier depending upon area of the landholding.

6. In the Gazette of 1 July 2004, the Minister published a further order revoking the order of 18 January 2001 and made a fresh harvestable rights order in different terms: New South Wales *Government Gazette*, No 110, at 5517 - 5521. The classification of "minor streams" by reference to the 2001 order was not, however, altered. The effect of the revocation of the 2001 order was that the subject stream, although classified as a "minor stream" was no longer declared as not being a "river".

7. On 24 March 2006, a further order was published in the Gazette: New South Wales *Government Gazette*, No 37, at 1500 to 1509. This order also purported to revoke the previous order dated 18 January 2001 and published in the Gazette on 23 March 2001 that specified the definition of a "river" despite the fact that it had previously been revoked by the order published on 1 July 2004. The order again declared certain streams of water as not being rivers within the definition of a "river" in s 5(1) of the WA. The subject stream on the O'Keefes' land is one of the streams thus declared as not being a river.

8. The O'Keefes submit that the dam on the subject stream on their land is to be regarded as part of the stream, so that the order also affects the dam - a submission which I accept.

9. According to the O'Keefes' submission, the stream and the dam are outside the definition of a "river". The difficulty with the O'Keefes' submission is that paragraph 3 of the order published on 24 March 2006 states:

"[T]his order applies only in relation to dams constructed and used in accordance with a harvestable rights order made under s 54 of the Water Management Act 2000."

1. Section 54 of the WMA enables the Minister, by order published in the Gazette, to constitute any land as a harvestable rights area and to specify the proportion of average rainwater run-off that may be

captured by landowners in the area and the procedures for calculating average rainwater run-off for a landholding in the area. Section 54(3) states:

"The order may allow an existing dam to be used both for rainwater run-off that has been captured and other water that has been lawfully taken from a water source."

1. It can be seen that s 54(3) specifically provides for harvestable rights orders to include existing dams. The relevant harvestable rights order here does not do so. The order published on 24 March 2006 only exempts a dam from the definition of "river" if it was both constructed *and* used in accordance with a harvestable rights order. A dam constructed before the commencement of the WMA and not constructed in accordance with a harvestable rights order is not, therefore, excluded from the definition of a "river".
2. According to the evidence of the previous owner of the O'Keefes' land, namely Mr H Taylor, the subject dam was already on the land when he purchased the land in 1979, well before the commencement of the WMA. Moreover, the capacity of the dam is 19.42 megalitres, which exceeds the maximum harvestable right dam capacity under the harvestable rights order of 14.04 megalitres. The subject dam is thus neither one which was constructed in accordance with a harvestable rights order, nor is it used in accordance with a harvestable rights order. I, therefore, reject the submission that the subject stream and dam are declared not be a river for the purpose of s 5 of the WA.
3. Finally, if I am wrong in concluding that the subject stream is a river as defined, the Ecclestons' application falls within par (b) of the definition of "*works to which this Part extends*", noted at par [13] above. The Eccelstons propose to install a pump and pipe for the purpose of pumping water to their property, which clearly comes within the definition of a "work". The "work" clearly affects the quantity of water flowing "in" or "to" any such river. That is, the work affects the quantity of water flowing into Emu Swamp Creek. It was faintly submitted by the O'Keefes' senior counsel that Emu Swamp Creek is not a "river" as defined. I reject the submission. According to Dr Outhet, Emu Swamp Creek is a fourth order

Strahler stream and as observed on the view taken by the Court, it is self-evidently a river, since it contained of stream of water flowing within a natural channel. Moreover, the "work" is to be used for water supply as described in par (d) of the definition. Since the Eccelstons' application is for a licence for "*a work to which this Part extends*", then it can be the subject of an application under s 10 of the WA.

Issues (b) and (c): are the Ecclestons occupiers of the site of the work?

1. Section 10(1) of the WA states that an application for a licence may be made only by any "*occupier of the land*" whereon any work to which this part extends is constructed or to be constructed. The O'Keefes submit that the Ecclestons are not "occupiers" of the land.
2. The O'Keefes rely upon the definition of "occupier" - "*the holder of any tenure of the land or, if it is shown that some other person is in actual occupation of the land, that other person*". They submit that the Ecclestons do not come within the definition - the easement only gives them a limited right of access to maintain works within it; and although the Ecclestons arguably have some form of tenure of the land within the easement, there can be little doubt that the O'Keefes are the actual occupiers of the land. Accordingly, the O'Keefes submit that the Ecclestons had no capacity to apply for or obtain the licence: *Water Administration Ministerial Corporation: In re an Application by McClure* (1995) 88 LGERA 278 and *Elders Rural Finance Ltd v Westpac Banking Corporation* (1989) 6 BPR 13,439.
3. In *Water Administration Ministerial Corporation: In re an Application by McClure*, Pearlman J said (at 285):

"Section 5(1) defines an 'occupier' to be the holder of any tenure of the land, but if some other person is in actual occupation of the land then that other person is deemed to be the occupier rather than the holder of tenure."

1. In *Elders Rural Finance Ltd v Westpac Banking Corporation*, Bryson J held that the rights created by entitlements under the WA cannot exist independently of the right to occupy land and the right of occupation is part of the control exercised by ownership. Bryson J said (at 13,497):

"In my view the right to whatever water rights might exist under the Water Act 1912 is involved in and is not separable from ownership of the land in any estate which would give direct or indirect control over lawful occupation of the land."

1. As the Ecclestons have the benefit of the easement they qualify as the holder of "any tenure" of the land within the easement within the meaning of the first limb of par (a) of the definition of "occupier". The terms of the easement in the present case allow the owners of the dominant tenement the right to obtain a supply of water for stock and domestic purposes across and through the land, the right to lay and use pipes within the servient tenement and the right to enter the servient tenement for the purpose of inspecting, maintaining and repairing those works.
2. The Ecclestons submit that the concept of tenure is adequate to encompass shared tenure, and the distinctive part of the definition - "*or, if it is shown that some other person is in actual occupation*" - refers to a situation where some third person is in actual occupation of the land. They submit that there is no such other person here because there are two persons having tenure, namely the O'Keefes and the Ecclestons, so that they both qualify within the definition of "occupier".
3. Whilst I accept that the Eccleston have a limited right of tenure, it seems to me that the second limb of the definition excludes the Ecclestons. As Windeyer J observed at par [20] of his judgment, the easement does not give exclusive rights to the dominant tenement but rather limits rights in the servient tenement, as does any easement. Windeyer J also observed, however, that the servient owner has possession, and the dominant owner does not. The O'Keefes occupy the land in question and they can use the land for any purpose which is not inconsistent with the rights granted by the terms of the easement. They can graze stock, grow crops and exclude others from the land, apart from the Ecclestons exercising their rights of tenure granted under the terms of the easement. Although not entirely free from doubt, I am accordingly inclined to the view, that although the Ecclestons are holders of tenure of the land, the fact that the O'Keefes are in actual occupation means that it is only the O'Keefes

who can make an application for a licence under s 10(1) of the WA.

4. That, however, is not the end of the matter. Section 13A enables an applicant who is not an occupier of the land to apply for a licence, provided the conditions precedent for the exercise of the power under that section are satisfied. An act purporting to be done under a particular statutory power may be supported by another statutory power: *Lockwood v the Commonwealth* [1954] HCA 31; (1953) 90 CLR 177 at 184, *Newcrest Mining (WA) Ltd v The Commonwealth* [1997] HCA 38; (1997) 190 CLR 513 at 618, *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 at 85, *J & J O'Brien v South Sydney City Council* [2002] NSWLEC 126; (2002) 121 LGERA 203 at [45], *VAW (Kurri Kurri) Pty Ltd v Scientific Committee* [2003] NSWCA 297; (2003) 58 NSWLR 631 at [28] - [34] and *Gorczynski v Perera* [2004] NSWCA 70; (2004) 132 LGERA 341.

5. Section 13A(3) incorporates the relevant provisions of s 11 of the WA, which apply *mutatis mutandis* to an application under the section. Those provisions relate to the advertising of the application for a licence, notification of the application to any person whose interests may be affected and the making of objections. Section 13A(4) relates to the referral of applications to a public inquiry by the local land board or a magistrate and the right of appeal from any decision of the board to the Court. These steps have all been followed in the present case.

6. Section 13A(5) states that an application shall not be granted unless the Ministerial Corporation, local land board, magistrate, or court, as the case may be, is satisfied that:

"(a) it is not reasonably practicable for the applicant to obtain or make provision for a supply of water on the land on which the applicant desires to use the water adequate for the purpose or purposes specified in such application otherwise than in pursuance of a licence granted under this section, and

(b) the land on which it is desired to use the water is reasonably fitted for such purpose or purposes, and

(c) the interests of riparian occupiers will not be unreasonably affected by the granting of such application."

1. For the reasons given below in relation to issues (d) and (e), the requirements of s 13A(5) are satisfied in this case. It follows that it does not matter that the Eccelstons' original application for a licence was made under s 10. The alternative source of power under s 13A may be relied upon. Accordingly, provided the Court is satisfied that it would have had the power to hear and determine an appeal from the local land board if the application had been made under s 13A and the Court considers that on the merits the licence should be granted, then it is open for the Court to so find and to dismiss the O'Keefes' appeal.
2. The O'Keefes submit that the existence of the easement is not a factor to be taken into account in deciding whether to grant an application for a licence. I reject the submission. There is nothing in the subject matter, scope and purpose of the WA which suggests that the existence of the easement is an irrelevant consideration. Moreover, in this appeal the Court is exercising its Class 3 jurisdiction: s 19(h) of the *Land Environment Court Act* 1979. In such an appeal the Court must have regard to "*the circumstances of the case*": s 39(4). One of the circumstances of the case is the fact that the easement is a registered easement which is indefeasible. Another circumstance is that the O'Keefes purchased their property in the full knowledge that their land was burdened by the easement. A third circumstance is the finding of Windeyer J that the easement includes a written and/or implied term entitling the Ecclestons to operate and maintain a pump shed and pump and electrical connection on the O'Keefes' land for the purpose of pumping water from the subject dam. A fourth circumstance is that the easement was varied at the O'Keefes' request in 2002, which suggests that they were content with the easement as varied. I take all of these matters into account as circumstances of the case.

Issues (d): the Ecclestons' need for a licence

1. The O'Keefes submit that the Ecclestons have not chosen to take advantage of their own harvestable rights - they have captured only a small proportion of the water they are entitled to capture - and they have a sufficient number of Strahler type streams running through

their own property and accordingly are not landlocked.

2. The evidence, however, is to the contrary. The previous owner of the original holding comprising both the O'Keefes' property and the Ecclestons' property was Mr Hedley Taylor. The subject dam was already on the property when he purchased it in 1979. In 1999 Mr Taylor decided to subdivide and sell the property. The original holding was subdivided into five lots. In February 2000 he sold lot 5 to the Ecclestons (together with the benefit of the easement over lot 4) and in 2002 he sold lot 4 to the O'Keefes. The undisputed affidavit evidence of Mr Eccleston is that "*this easement for water was essential for the viability of our farm*". Mr Eccleston further states in his affidavit:

"17 We need the full 4 megalitres approved by the Department of Water for our farm particularly as we have been in drought. As an emergency measure we drew some water from an existing well. The well and the small dams on our property are inadequate as a permanent water source. My wife and I obtained water for domestic and livestock purposes by going to the considerable expense of putting down a bore on our property as an interim measure as an alternate source of water needed for my livestock and garden including vegetable garden for domestic use. However the bore is not as secure a source of water as an approximately 19 megalitres dam which until now has never been known to be empty. The loss of our water licence which secures our access to plentiful water would considerably devalue out property."

1. Mr Eccleston further states in his affidavit:

"23 The Orange area, like most of New South Wales, has been experiencing a severe drought and we have been greatly distressed and inconvenienced by our inability to exercise our rights to access water for stock and domestic purposes via our Easement. We wish to maintain our rights to the easement and to restore the pump shed and pump and electrical connection which are an integral part of the watering system for our property, cattle and horses. Most importantly this easement is vital to the underlying value of our property."

1. Mr Eccleston was not cross-examined. I thus accept his evidence.

There is no evidence to suggest that the Ecclestons have a sufficient number of Strahler type streams on their own property or that they have not taken advantage of their own harvestable rights. I reject the O'Keefes' submission noted at par [86] above.

Issue (e): encroachment upon the O'Keefes' basic landholder rights

1. The O'Keefes next submit that the grant of the licence would fail to protect their basic landholder rights including their harvestable rights. They submit that the Ministerial Corporation was required to protect and ensure no prejudice ensued to their basic landholder rights, which include their harvestable rights, relying upon s 5(3), 9, 52(1) and 53(1) of the WMA. The O'Keefes further submit that these statutory rights take priority over any private rights between neighbours.
2. It is necessary to consider the concept of basic landholder rights under the WMA. Section 5 sets out the water management principles of the Act, which relevantly include the following:

"...

(2) Generally:

...

(d) the cumulative impacts of water management licences and approvals and other activities on water sources and their dependent ecosystems, should be considered and minimised, and

...

(g) the social and economic benefits to the community should be maximised, ...

...

(3) In relation to water sharing:

...

(b) sharing of water from a water source must protect basic landholder

rights, and

(c) sharing or extraction of water under any other right must not prejudice the principles set out in paragraphs (a) and (b).

(4) In relation to water use:

...

(b) water use should be consistent with the maintenance of productivity of land in the long term and should maximise the social and economic benefits to the community, and

(c) the impacts of water use on other water users should be avoided or minimised.

..."

1. Section 9(1) of the WMA relevantly states that it is the duty to all persons exercising functions under this Act to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles under the Act.
2. It can be seen that some water management principles are inconsistent with each other. That is, not all of the principles could be applied simultaneously. For example, the requirement to maximise the social and economic benefits to the community appears to be inconsistent with the requirement to protect basic landholder rights. Moreover, there is nothing to suggest that one right should prevail over another.
3. The Dictionary to the Act (s 4) sets out the following definitions of relevance:

"***basic landholder rights*** means domestic and stock rights, harvestable rights or native title rights.

...

domestic and stock rights means the rights conferred on a landholder by section 52.

...

harvestable rights mean the rights conferred on a landholder by a harvestable rights order.

...

harvestable rights order means an order in force under section 54."

1. Section 52(1) sets out domestic and stock rights under which an owner or occupier of land is entitled, without the need for a licence or other approval, to take water from any river, estuary or lake to which the land has a frontage, or from any aquifer underlying the land, for domestic consumption and stock watering, but not for any other purpose, and to construct and use a water supply work for that purpose. Subsection (2) sets out certain limitations on those rights. Subsection (3) defines the terms "*domestic consumption*" and "*stock watering*".
2. Sections 53 and 54 relate to harvestable rights. Section 53 is set out at at [7] above. Once a harvestable rights order is made the owner or occupier of land within that area is entitled to construct and use a dam for the purpose of capturing and storing run-off and use the captured water in accordance with the relevant harvestable rights order.
3. Section 54 enables the Minister, by order published in the Gazette, to constitute any land as a harvestable rights area. The section states what must be included in the order, including limitations on the proportion of average rainwater that may be captured and the types and locations of harvestable rights dams. As previously noted, a harvestable rights order applies to the area within which both the O'Keefes' and the Ecclestons' properties are located. The O'Keefes, and the Ecclestons, are thus able to capture water in and extract water from harvestable rights dams subject to the terms of the harvestable rights order.
4. I do not understand the O'Keefes to contend that there is no power to grant a licence under the WA where granting that licence would encroach upon basic landholder rights of another person under the WMA. If that is their contention then I reject it. The relevant

provisions of the WA - Pt 2, Div 3, ss 10 to 18 - relating to applications for licences continue to apply. In the present case both sets of provisions thus apply and it is appropriate, in my view, for the Court to take into account, at least as a circumstance of the case, the water management principles under the WMA and the basic landholder rights which the O'Keefes enjoy under s 52, s 53 and s 54 of the WMA. In taking these matters into account, however, I do not agree that these rights would be infringed if the licence sought by the Ecclestons is granted.

5. The extent of the rights enjoyed by the O'Keefes is not unlimited. They may only be exercised to the extent permissible under the harvestable rights order. The O'Keefes have, however, exceeded their maximum harvestable rights under the order. Under the terms of the order, a landholder has the right to capture 10 per cent of the average regional rainwater run-off on the land by means of a dam or dams having not more than the total capacity calculated in accordance with Sch 1 to the order. The maximum harvestable right dam capacity for the O'Keefes' property has been calculated as 14.04 megalitres. However, the total dam storage volume on the property is 29.69 megalitres and the subject dam has a capacity of 19.42 megalitres according to the surveying evidence. That is, the dam storage capacity on the O'Keefes' property exceeds the allowable capacity under the order by 15.65 megalitres.

6. Mr Eccleston states in his affidavit:

"25 Since the O'Keefes' purchase of 'Tremearne', the O'Keefes have built two dams on their property in the watercourse above the subject dam on which our pump shed was erected. Those two dams rely on such watercourse to fill them. In addition he has built another large dam on Emu Swamp Creek on the other side of his property from which he has done some spray irrigation and which depleted the flow in Emu Swamp Creek. De O'Keefe filled one of these dams by pumping water uphill from the subject dam on which our pump was situtate [sic] and both of these dams have remained near full whilst he has kept the subject dam near empty."

1. There was no evidence from the O'Keefes as to if, or how, the granting of the licence sought in the present case would adversely

impact upon their entitlements. In the absence of such evidence I must accept the evidence noted at par [99] and par [100] above. I am not satisfied, therefore, that granting the licence in the present case would unfairly infringe the O'Keefes' basic landholder rights.

2. Moreover, in performing the balancing exercise in applying the water management principles under the WMA, I am satisfied that, on merit, the application for a licence should be granted, particularly since the Ecclestons have demonstrated a need for the licence, as noted under issue (d); whereas there is no evidence of the extent of the O'Keefes need, if any, noting that they have greatly exceeded their storage entitlement under the harvestable rights order.

Issues (f) and (g): the effect of s 53(3) of the WMA

1. These issues are dealt with and disposed of at par [7] and par [8] above. There is no substance in the O'Keefes' submission that the grant of a licence would breach s 53(3) of the WMA or that, as a consequence, no power exists to grant a licence.

Issue (h): allowance of 4 megalitres per annum

1. The O'Keefes contend:

"The allowance of 4 ML per annum as allowed under the terms and conditions of the grant of the application misrepresents the easement terms relating to the 4 ML level and is excessive in the circumstances."

1. I accept the contention that an allowance of 4 megalitres per annum misrepresents the terms of the easement. The easement does not specify that the Ecclestons must be provided with an allowance of 4 megalitres per annum, rather it merely prohibits the O'Keefes from irrigating from the dam once the volume of water in the dam has dropped to 4 megalitres. The question remains, however, as to whether an allowance of 4 megalitres per annum to the Ecclestons is excessive.
2. The O'Keefes submit that an allowance of 4 megalitres per annum (with a right to draw up to two times that amount within a one-year period), proposed by the Ministerial Corporation and as adopted by the local land board, appears to be unsupported by any objective

evidence or investigations to the likely amount of water that would make its way into the dam; and there is no objective evidence to assist the Court with any degree of confidence relating to the question of whether the dam has the potential capacity to provide so much water to the Ecclestons. They submit that, having regard to the capacity of the dam in which, as the evidence suggests, the average water level is about 7 megalitres, it would give to the Ecclestons a disproportionately large part of the O'Keefes' water allowance which would be totally unfair and unjust.

3. In its reasons for decision, the local land board noted that evidence was given by Mr Mark Campbell, an experienced officer of the Department of Water and Energy. The board's reasons state, inter alia:

"83 In cross examination Mr Campbell said that when he considered the Application he took into account that the dams on the Objectors land had a combined harvestable right capacity of 14.04 meg/l and that 4 meg/l limit for the Applicants was reasonable."

1. The board apparently adopted this reasoning in finding in favour of granting the application. The response of Mr Campbell seems to me to be reasonable and I am not persuaded that an allowance of 4 megalitres per annum is a disproportionately large part of the O'Keefes' water allowance or is otherwise unfair or unjust. Moreover, the Ecclestons' undisputed evidence, noted at par [87] above, is that they have a need for the 4 megalitres as approved by the Department.

Conclusion and orders

1. None of the O'Keefes challenges in which they allege an absence or power to grant a licence have been successful, and I have found the application should otherwise be granted on the merits.
2. I make the following orders:

(1) The appeal against the decision of the local land board is dismissed.

(2) The decision of the local land board dated 5 June 2009 is confirmed.

(3) The exhibits may be returned.

I hereby certify that the preceding 110 paragraphs are a true copy of the reasons for judgment herein of the Honourable Mr Justice D H Lloyd.

Associate

Dated: 27 January 2010