Extending Rights to the Environment; the Victorian Water Reforms

By Natalia Kowalczyk[1]

1.0 Introduction

The Victorian Government has granted legal recognition and protection to water set aside for environmental purposes, through the creation of an Environmental Water Reserve (EWR). The reforms recently enacted in amendments to the *Water Act 1989 (Vic)*, through the *Water (Resource Management) Bill 2005(Vic)*, enables the Minister for Water to set water aside for environmental purposes through, amongst other things, issuing legally recognised and enforceable environmental entitlements.[2]

To date, the Australian legal system has not recognised the environment as a separate entity with legal rights, but rather has protected the environment primarily through the use of direct regulatory instruments. Has the creation of the Environmental Water Reserve marked the start of the issuing of legal rights to the environment in Australia?

I will argue that, through the creation of the EWR, rights have indeed been granted to the environment through extending an existing regulatory framework, which assigns consumptive rights to individuals, to include water set aside for the environment. In this paper I will outline the possibility, desirability and viability of extending rights to the environment, with the EWR cited as an example of how this can be achieved. The limitations and implications of extending rights to the environmental will also be discussed.

2.0 What is a right?

In its most simple and strict form, a legal right is a claim which is recognised and enforceable at law.[3] For a right to be a legal right, rather than just a moral claim or privilege,[4] it must have several features:

1. Recognition: A clearly defined right must exist.
2. Recourse: A public body must be prepared to review actions which are inconsistent with that right.[5] This requires the holder of the right to have standing to enforce the claim.[6]
3. Remedy: Some sort of remedy or corrective action must be available to the holder of the right if it has been infringed.[7]

The fact the something or someone has a legal right does not necessitate that they are the beneficiary of a full gamut of legal rights, such as those that a citizen of a state enjoys. In the past the law has extended various rights to abstract entities such as corporations, trusts, joint ventures, partnerships, municipalities and states.[8] An entity may be the holder of a limited number of legal rights as long as they satisfy the qualifying criteria outlined above. For example, a corporation has the right to hold property, enter into contracts with other real or artificial legal persons and have standing in court. However if a corporation is sued it cannot claim privilege against self incrimination, as this is privilege is considered by the courts to be a human right (as it was intended protect human dignity) and as such is not applicable to corporations.[9]

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2 *ss 4A& 4B Water Act 1989 (Vic)*, State of Victoria, Department of Sustainability and Environment (2004) *Victorian Government White Paper Securing Our Water Future Together*, p 20

3 The term 'right' may also be used to describe morally acceptable forms of conduct in society which lack legal underpinning or have some legal basis but lack specific legal remedies and as such are not enforceable Such rights will not be discussed in this paper as they provide no potential mechanism which could be used to protect the environment Piotrowicz, R and Kaye, S (2000) *Human Rights in International Law and Australian Law*, Butterworths, Australia, p 4, Kingley D (ed), (1998), 'Legal Dimensions of Human Rights' in *Human rights in Australian law*, Federation Press, p 3, O'Neil, N and Handley, R (1994) *Retreat from Injustice Human Rights in Australian Law* The Federation Press, p 21

4 According to Hohfeld, a privilege is not enforceable Campbell, D , and Thomas, P (2001) *Fundamental Legal Conceptions as Applied in Judicial Reasoning by Wesley Newcomb Hohfeld*, Ashgate Publishing Company, p 14,

5 This may be a court or an administrative body, depending on whether the right which is being enforced is a legal or socio-economic right

6 Stone, C (1974) 'Should Trees Have Standing Toward Legal Rights For Natural Objects,' *Southern Californian Law Review*, Vol 45 450, p 458

7 *Ibid*

8 *Ibid*, p 452

9 Environment Protection Authority v Caltex Refining Co Pty Ltd (1993) 178 CLR 447

There are several reasons that legal rights have traditionally not been extended to the environment in Australia or in common law countries generally. Firstly, the environment has not been considered important enough to warrant legal rights being extended to it. Rights, both legal and socio-economic have traditionally been reserved for citizens of a State. While legal rights have been extended in increments to non-citizens, such as corporations, trusts and joint ventures, such extensions of the rights concept have always occurred incrementally in response to a strong need to modernise the legal system to provide for the proper functioning of modern economic institutions.[10]

The environment is also difficult to box into a rights framework. It is harder to anthropomorphise the environment than it is a corporation- it is complex, abstract and has fewer human attributes. And if it were to have rights, how would they be defined? However the biggest legal limitation is one of standing. The environment is not a legal person and if rights are to be extended to it, a legal person must be appointed to act on its behalf.[11]

3.0 Environmental law in Australia

3.1 The current legal environment

The environmental legislation enacted by Australian Federal and State governments has been dominated by systems of direct regulation which prohibit activities with undesirable consequences without approval from the government (which may be conditional on compliance with prescribed standards).[12] Self-regulation, economic instruments and education and information instruments are also prevalent as tools for environmental management.[13] To date, neither Commonwealth nor State jurisdictions have recognised environmental rights.[14]

The Commonwealth is able to legislate for the environment under indirect heads of power in the Constitution.[15] The Commonwealth has passed legislation of a regulatory nature primarily relating to environmental management of nationally significant environment issues.[16] The *Environmental Protection Biodiversity Conservation Act 1999* (Cth) is especially prescriptive and requires Commonwealth approval for a range of activities that have environmental consequences.[17]

State governments have enacted the bulk of environmental legislation in Australia with an emphasis on integrating natural resource management, in areas such as pollution control,[18] protection of the quality of the environment,[19] environmental management (bio-diversity, forest, land, catchment, water, coast),[20] planning schemes,[21] national parks,[22] allocation and extraction of natural resources (water, minerals and energy resources, fisheries),[23] sustainable development frameworks.[24]

10 Ford, H A , Austin, R P , Ramsay, I M , (2003), *Ford's principles of Corporations Law*, Butterworths, p 29

11 Stone argued that individuals could be appointed as legal 'guardians' for the environment Stone, C , (1974), 'Should Trees Have Standing- Toward Legal Rights For Natural Objects,' *Southern Californian Law Review* Vol 45 450, p 471

12 Fisher, D E, (2003) *Australian Environmental Law*, Lawbook, p 131

13 *Ibid*, p 137

14 *Ibid*, p 132

15 There is no direct reference to the environment in the Australian constitution The indirect heads of power which allow the Commonwealth to legislate for the environment are the external affairs power *Commonwealth Constitution* s 51(xxix), trading corporations power *Commonwealth Constitution* s 51(xx), the overseas and interstate trade and commerce power *Commonwealth Constitution* s 51(i) and the race power *Commonwealth Constitution* s 51(xxvi), Fisher, D E, (2003), *Australian Environmental Law*, Lawbook, p 90

16 *Environment Protection and Biodiversity Conservation Act* 1999 (Cth), *Ozone Protection Act* 1989 (Cth), *Industrial Chemicals (Notification and Assessment Act)* 1989 (Cth), *Hazardous Waste (Regulation of Exports and Imports) Act* 1989 (Cth), *Protection of Moveable Cultural Heritage Act* 1986 (Cth), *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth), *World Heritage Properties Conservation Act* 1983 (Cth), *Wildlife Protection (Regulation of Exports and Imports) Act* 1982 (Cth), *National Parks and Wildlife Conservation Act* 1975 (Cth), *Great Barrier Reef Marine Act* 1975 (Cth)

17 Fisher, D E, (2003) *Australian Environmental Law*, Lawbook, p 100

18 *Protection of the Environment Operations Act* 1997 (NSW), *Environmental Protection Act* 1970 (Vic), *Environmental Management and Pollution Control Act* 1994 (Tas), *Environment Protection Act* 1993 (SA), *Environmental Protection Act* 1994 (Qld)

19 *Protection of the Environment Operations Act* 1997 (NSW), *Environmental Management and Pollution Control Act* 1994 (Tas), *Environment Protection Act* 1993 (SA) and *Environmental Protection Act* 1994 (Qld)

20 Ramsay, R and Rowe G , (1995), *Environmental law and Policy in Australia Text and Materials*, Butterworths, Chapters 17-20

21 *Planning and Environment Act* 1987 (Vic), *Environmental Planning and Assessment Act* 1979 (NSW), *Integrated Planning Act* 1997 (Qld), *Land Use Planning and Approvals Act* 1993 (Tas)

22 *National Parks and Wildlife Act* 1975 (NSW), *National Parks Act* 1975 (Vic), *Parks Victoria Act* 1998 (Vic), *Nature Conservation Act* 1992 (Qld), *National Parks and Wildlife Act* 1972 (SA), *Wilderness Protection Act* 1992 (SA), *Conservation and Land Management Act* 1984 (WA), *National Parks and Wildlife Act* 1979 (Tas), *Territory Parks and Wildlife Conservation Act* 1976 (NT), *Territory Parks and Wildlife Conservation Act* 1976 (NT), *Nature Conservation Act* 1980 (ACT), *Land (Planning and Environment) Act* 1991 (ACT)

23 Ramsay, R and Rowe G , (1995), *Environmental law and Policy in Australia Text and Materials*, Butterworths, Chapters 18-21

24 *State Policies and Projects Act* 1993 (Tas), *Environment Protection Act* 1993 (SA) and *Environmental Protection Act* 1994 (Qld)

In the area of water law, regulatory frameworks which place controls on the extraction of water have been favoured by lawmakers in Australia. Some protection for environmental flows in rivers has been achieved to date as State governments attempt to implement Council of Australian Governments (COAG) agreements to increase flows to the Snowy river.[25] The *Water Management Act* 2000 (NSW) defines 'environmental water' which includes water committed to the environment through management plans or conditions on access licences.[26] However, whilst the management plan must contain provisions for the identification, establishment and maintenance of environmental water, the Act does not specify how these environmental water rules could be enforced if they were to be infringed by a third party.[27]

The recent COAG agreement to the National Water Initiative and Living Murray constitutes a further push for State Governments to set aside and protect water for the environment. This is an attempt to rectify the failure of past regulatory frameworks to protect the needs of the environment. While the shortcomings of regulatory frameworks are particularly apparent in extractive regimes where environmental limits have not been considered in the past, they can also be quite rigid as a tool for managing the environment. While regulatory frameworks, such as the water allocation or environmental protection frameworks, allow prohibited behaviours by individuals to be penalised or at least regulated, they do not typically provide for the responsive and active management of the environment so as to improve environmental outcomes.[28] In order to achieve good environmental outcomes, the environmental manager or guardian must be able to go beyond just protecting the environment and be empowered to do positive acts to improve the condition of the environment in a responsive and tailored manner.

3.2 Alternative approaches

Extending the rights framework to components of the environment may create an active environmental management system by assigning the responsibility for the ongoing health of a particular aspect of the environment to an 'environmental manager' who acts on its behalf.

The environmental manager can not only have standing in court to enforce the rights of the environment against encroachment by third parties, but can also perform positive acts to improve and sustain the health of the environment. *It is this ability of the environmental manager to perform positive acts as well as prevent damage by third parties that is a key advantage of rights-base regimes over normal regulatory regimes.* In short, under a rights framework the environmental manager is given all the powers necessary to achieve good environmental outcomes. The appointment of an ongoing environmental manager avoids any confusion regarding responsibility for the health of the environment thus avoiding a 'tragedy of the commons,' which is the unfortunate fate of many rivers.

Extending the rights to the environment also means that the needs of the environment are raised to the same level as consumptive needs and as such, are factored into the decision making process from the outset rather than just being an afterthought.

As the scarcity of water has increased in recent years because of drought and over allocation, public awareness of its value as an economic input, particularly in the area of primary production, has increased. The blue-green algae blooms in the Murray-Darling Basin in the early 1990s clearly demonstrated the link between river health and water quality and the need to increase environmental flows to rivers. The economic value and increasing scarcity of water means that water law has the potential to be a frontier for legal innovation in the push for better environmental management.

25 COAG agreements on increasing flows to the Snowy have been implemented by, amongst other things, amending the Murrary-Darling Basin Agreement 1993 The agreements are incorporated into the Commonwealth, NSW, Victorian and South Australian law by reference The agreements are in the schedule of *Murray-Darling Basin Amendment Bill 2002* (Cth), *Murray-Darling Basin Amendment Bill 2002* (Vic), *Murray-Darling Basin Amendment Bill 2002* (NSW) and *Murray-Darling Basin Amendment Bill 2002* (SA)

26 S 8 *Water Management Act 2000* (NSW)

27 Even s.35 *Water Management Act 2000* (NSW) which outlines the form of a management plan does not make any reference to enforcement provisions

28 *Protection of the Environment Operations Act* 1997 (NSW), *Environmental Protection Act* 1970 (Vic), *Environmental Management and Pollution Control Act* 1994 (Tas), *Environment Protection Act* 1993 (SA), *Environmental Protection Act* 1994 (Qld), *Water Administration Act* 1986(NSW), *Water Management Act 2000* (NSW) , *Snowy Mountains Hydro-electric Agreement Act* 1987 (NSW), *Water Act 2000* (Qld), *Water Act* 1957 (Tas), *Water Resources Act* 1990 (SA), *Waterways Conservation Act* 1976 (WA), *Water Act* 1992 (NT), *Water Supply and Sewerage Act* 1983 (NT)

4.0 The Environmental Water Reserve

4.1 What is the Environmental Water Reserve?

Established in the recent amendments to the *Water Act 1989(Vic)* ('Water Act'), through the *Water (Resource Management) Bill* 2005 (Vic), the Environmental Water Reserve (EWR) is a legal construction which represents, protects and sets out the management standard for the environmental water. The EWR comprises of several types of water, namely:

- *Environmental entitlements:* Water can be set aside for the environment by the Minister for Water through the creation of environmental entitlements that are then transferred to the Minister for Environment who is legally responsible for their management. In the allocation framework, environmental entitlements have an equal status to consumptive bulk entitlements. Environmental entitlements cannot be permanently transferred, but seasonal allocations under the entitlements may be transferred where the Minister for Environment is of the opinion that the transfer would benefit the EWR. The Minister for Environment is expected to appoint Catchment Management Authorities to manage the environmental entitlements on the ground.[29]

- *Water outside caps and plans:* includes water under any management plan under the Water Act,[30] any other provision of the Water Act or any other Act or specified regulation,[31] which is not to be used for consumption. This includes permissible consumptive volumes set under s.9 of the Act and caps set under the *Murray Darling Basin Act* 1993 (Vic) and *Groundwater (Border Agreement) Act* 1985 (Vic). The Minister for Water is legally responsible for this water; and

- *Consumptive water with environmental conditions:* includes water that through the operation of conditions on a bulk entitlement, permit or authority under any Act or regulation which is not to be used for consumptive purposes.[32] The holder of a bulk entitlement (usually a Water Authority) may transfer the whole or part of a bulk entitlement permanently or temporarily to another water authority or irrigator, or may temporarily transfer it to a person outside Victoria. The Minister for Water must refuse the transfer if it is likely to have an adverse affect on maintaining the EWR in accordance with the EWR Objective.

The EWR must be managed in accordance with the EWR Objective which is the objective that:

> *'the EWR be maintained so as to preserve the environmental values and health of the water ecosystems, including their biodiversity, ecological functioning and quality of water and the other uses that depend on environmental condition.*[33]

The EWR Objective ensures that the EWR protects not just the *volume* of water in the reserve, but *qualitative* aspects of the reserve, such as a environmental values and health. It is important to note that the focus of the EWR Objective is the health of the environment. 'Other uses that depend of environmental condition', which may be interpreted as the ecosystem services that the EWR provides to humans, are clearly secondary to the environmental objective.

The EWR Objective is used as a criterion against which the impact of various consumptive activities enabled under the Water Act on the health of the EWR is assessed. Depending on the activity, the Minister for Water must ensure that there is no adverse impact or no significant impact on the EWR Objective when authorising the following activities:

- Issuing a bulk entitlement,[34] or a take and use licence;[35]

29 S 4A(1)a) *Water Act (1989)* (Vic)

30 S 4A(b)ii) *Water Act (1989)* (Vic)

31 s 4A(b)iii) *Water Act (1989)* (Vic)

32 s 4A (1)b)i) *Water Act (1989)* (Vic)

33 s 4B(1) *Water Act (1989)* (Vic)

34 s 40(d)iii) & s 42(2) *Water Act (1989)* (Vic)

35 s 55(2B)b) *Water Act (1989)* (Vic)

- Transferring bulk entitlements permanently or temporarily to another water authority,[36] irrigators[37] or interstate;[38]
- Drafting a management plan under s. 32A of the Act;[39]
- Issuing of water shares in regulated systems;[40]
- Permanently or temporarily transferring a take and use licence[41] or a works licence[42];
- Temporarily supplying interstate water;[43]
- Where the Minister for Water directs an occupier of works on a waterway or bore to take certain measures;[44]

If the activity is likely to have an adverse impact on the maintenance of the EWR in accordance with the EWR Objective, the Minister for Water *must* refuse to approve the activity. The only exception is the allocation of a bulk entitlement where the standard for refusal is raised to that of a 'significant impact' because it involves the allocation of a large volume of water.

As the allocator of water in Victoria, the Minister for Water has a central role in managing the EWR. He not only issues the environmental but must approve the issue and transfer of consumptive entitlements, shares and licences (and consider their effect on the EWR). He also sets limits for the consumptive use of water (water above this limit is automatically in the EWR). The Minister for Environment's role is more limited; he is legally responsible for the management of environmental entitlements.

The Catchment Management Authorities (CMAs) have been charged with the practical task of managing the EWR on the ground. To enable CMAs to undertake this role, their existing waterway management functions have been expanded to include the responsibilities of managing the EWR in accordance with the EWR Objective as well as improving the health and environmental values of water systems.[45] The function of improving the health and environmental values of water systems was necessary as the EWR Objective is focussed on preservation rather than improvement.

It is expected that the Minister for Environment will appoint CMAs to undertake the management of environmental entitlements on his behalf.[46] CMAs will also be responsible for managing water outside caps and plans.[47] The management of environmental entitlements will entail the release of environmental flows to improve environmental outcomes along the river in accordance with the EWR Objective. The management of the remaining EWR would include performing works and activities which improve the condition of the EWR, advising the Water Authorities on the most environmentally sensitive flow release, and assessing the adequacy of the EWR which can inform future allocations of water for the environment.

The EWR is also considered in Sustainable Water Strategies (SWS), which are a tool for the strategic planning of the use of water resources. The SWS must, amongst other things, identify ways and set priorities for improving the maintenance of the EWR in accordance with the EWR Objective and increasing the volume of water in the EWR to improve the environmental values and health of water ecosystems.[48]

36 s 46(5) *Water Act* 1989 (Vic)

37 s 46A(3B) *Water Act* 1989 (Vic)

38 s 46B(5) *Water Act* 1989 (Vic)

39 s 32A(f)iii) *Water Act* 1989 (Vic)

40 s 33J(2)g) *Water Act* 1989 (Vic)

41 s 62(6) *Water Act* 1989 (Vic)

42 s 74(6)a)i) *Water Act* 1989 (Vic)

43 s 64H(3) *Water Act* 1989 (Vic)

44 s 78(1)b) *Water Act* 1989 (Vic)

45 s 189(1)ba)&bb) *Water Act* 1989 (Vic)

46 State of Victoria, Department of Sustainability and Environment (2004) *Victorian Government White Paper Securing Our Water Future Together*, p 162 & 164

47 State of Victoria, Department of Sustainability and Environment (2004) *Victorian Government White Paper Securing Our Water Future Together*, p 162 & 164

48 s 22C *Water Act* 1989 (Vic)

This enables the needs of the EWR to be factored into decisions regarding the future allocation and use of water. Assessments by the CMA as to the adequacy of the EWR will inform any SWS.

In summary the creation of the EWR enables:

a) *Water to be set aside specifically for the environment, thus increasing the volume of water for the environment;* Previously the environment only received water that was left over after consumptive extractions were made.

b) *Grants legal protection to water set aside for the environment, enabling it to be protected by the Minister for Water against infringement by third parties;* Previously the Act only provided for consumptive rights to be protected.

c) *Creates an active management system by enabling water in the EWR to be managed by CMAs to achieve set environmental outcomes;* To date there has not been any active management of environmental water in terms of targeting the release its flows to maximise environmental outcomes. The residual water has just flowed down the river.

d) *Requires that the Minister for Water ensures that the impact of allocations and transfers of consumptive entitlements and licences do not adversely impact the maintenance of the EWR in accordance with the EWR Objective;* Only a general consideration of environmental impacts from allocations and some transfers of bulk entitlements has been required in the past. Improper exercise of the new power could amount to an action of ultra vires against the Minister's decision.

4.2 Does the Environmental Water Reserve fit into the definition of a legal right?

4.2.1 Does a clearly defined legal right exist?

The water included in the EWR is clearly outlined in s.4A Water Act.[49] The EWR Objective outlines the standard to which the EWR should be managed which is essentially one that requires the preservation of the environmental values and health of the EWR. So the volume of water in the EWR has legal protection, while the EWR Objective sets the minimum standard to which the EWR is to be managed by the Ministers for Water and Environment.

The CMAs have a function to manage the EWR in accordance with the EWR Objective.[50] This will enable them to manage the environmental entitlements on behalf of the Minister for Environment.

CMAs also have a second function which enables CMAs to perform positive acts to improve, rather than just preserve and maintain, the environmental health and values of the EWR, as the EWR Objective is focussed on preservation.[51]

The Minister for Water must also consider the EWR Objective when considering whether to approve various consumptive activities under the Act, and must refuse to approve the activity if it has an adverse impact on the maintenance of the EWR in accordance with the EWR Objective.[52] So the health of the EWR will be considered in decisions across the consumptive as well as the environmental spectrum.

So the EWR has a minimal right to have its volume and environmental values and health protected. As the functions imposed on the CMA are enabling only, the EWR does not have a 'right' as such to being improved, only preserved in accordance with the EWR Objective. Together the Ministers for Environment and Water are the legal 'guardians' of the EWR and as such are legally responsible for its rights being met. CMAs have the practical task of managing the EWR on the ground.

The combination of the Ministers' ability to manage the EWR at high level in allocation and transfer decisions of both consumptive and environmental entitlements and their ability to protect it against infringement by third parties, provides all the legislative backing required for the desired allocation and protection of environmental water. Enabling CMAs to undertake the on-ground management of the EWR is the practical complement to the higher level Ministerial powers, and enables the CMAs actively manage environmental entitlements and other water in the EWR on a daily basis so that the EWR Objective is met.

49 s 4A Water Act 1989 (Vic)

50 s 189(ba) Water Act 1989 (Vic)

51 s 189(bb) Water Act 1989 (Vic)

52 s 4B Water Act 1989 (Vic)

This rights based regulatory framework ensures that the EWR is considered when water is allocated and when consumptive water is transferred; it also provides for the protection and active management of water in EWR. In short the EWR and the EWR Objective is considered throughout the allocation and management framework.

This arrangement is designed to ensure the management of the EWR in accordance with EWR Objective. In contrast a standard regulatory framework which lacks a rights basis would not set a management standard, may not have a specific environmental manager, may not enable the environmental manager to actively manage the environment or may lack enforcement mechanisms to protect the environment.

4.2.2 Is a public body prepared to review actions which are inconsistent with that right and provide a remedy?

There are a number of provisions in the Water Act which enable the Minister for Water to enforce a claim against an individual who either attempts to diminish the quantity of water in the EWR or jeopardises the management of the EWR in accordance with the EWR Objective.

As the EWR is an amalgam of a number of different legal types of water, there are a number of ways in which individuals who use water could try and diminish the volume or quality of the EWR including breaching licence conditions and infringing management plans rules:

- *Take and Use Licences:* The Minister for Water may revoke a take and use licence if the licence holder fails to comply with any condition.[53] The Act enables the Minister for Water to impose conditions on the licence relating to the maintenance of the EWR in accordance with the EWR Objective.[54] The conditions may impact on the volume and the quality of the EWR.

- *Water use licences:*[55] The Minister may set various environmentally focussed objectives for water use licences,[56] which he can implement by setting conditions on water use licences.[57] Conditions include requirements to minimize impacts of the use of water on the environment and controls around drainage of water from the land.[58] These conditions impact on the quality of water in the EWR.[59] Failure by the holder of the water use licence to comply with the conditions is an offence under the Water Act and attracts a penalty for breach.

- *Management plans:* Water Authorities (which are statutory authorities of the Minister for Water) are responsible for enforcing the conditions of management plans under s.32A for water supply protection areas which primarily relate the timing and volume of water extractions.[60]

- Section 63 provides a catch all penalty clause which prohibits individuals from taking water from a waterway or bore unless authorised under the Act to do so. This includes individuals who are licensed to take water but exceed their licence limits, individuals who step outside their private rights outlined under s.8 or any unauthorised taking of water.

- Section 75 Water Act makes it an offence for a person to obstruct or interfere with a waterway, or erode or damage the surrounds of a waterway without being authorised to do so.[61] Obstruction or interference of a waterway could interfere with the timing and release of environmental flows in the EWR.

These enforcement mechanisms protect the quantity and quality of water within the EWR. All the breaches which are offences could be pursued by the Minister for Water (on behalf of the Crown) in a State court.

53 s 60 *Water Act 1989* (Vic)

54 56(1)(a)(v) *Water Act 1989* (Vic)

55 Once the amendments are implemented a landholder will need to have a water use licence if they wish to use a water share for irrigation purposes The water use licence will certain conditions in it

56 These include minimising salinity, managing groundwater infiltration, managing disposal of drainage, protecting biodiversity and minimising the cumulative effects of water use, all of which impact on the management of the EWR s 64U *Water Act 1989* (Vic)

57 s 64Y *Water Act 1989* (Vic)

58 s 64Z(3)b) *Water Act 1989* (Vic)

59 s 64AF *Water Act 1989* (Vic)

60 ss 32A(5) & 32B *Water Act 1989* (Vic)

61 s 75(1)a)&d) *Water Act 1989* (Vic)

Attempts to pollute water by individuals who are not authorised to use water under the Water Act would be dealt with by the Environmental Protection Authority under their pollution provisions in the *Environmental Protection Act 1970* (Vic).[62]

So it appears that the Minister for Water has the ability to protect the volume and quality of the water in the EWR by either revoking licences or enforcing penalty provisions in the Water Act in the State Courts. Under the statutory provisions, the courts have the power to order the cessation offending activity and impose a monetary penalty or imprison the offender. Thus according to the initial criterion of what a right is, water in the EWR has rights relating to quantity and quality which are enforceable by the Minister for Water. The Minister for Environment does not have the direct ability to enforce the rights of the EWR; his legal responsibility is limited to managing environment entitlements in the EWR.

5.0 Limitations of the rights concept

5.1 Political limitations

Having the Ministers for Water and Environment as the legal guardians of the EWR is beneficial if the Ministers are willing to act in the EWR's interest. Ministers are well placed to be effective legal guardians of the environment as they make water allocation decisions, which is where the environment has traditionally been overlooked. Ministers also have vast resources and political power which enables them to set and achieve ambitious goals.

However Ministers also have varying personal views and are also subject to competing political pressures. The EWR is predicated on having Ministers who are willing to act in the interests of the environment. A Minister who had a strong bias for the interests of the agricultural sector could undermine the maintenance of the EWR in accordance with the EWR Objective. However even if such a person assumed the position of Minister for Environment, environmental entitlements could not be sold out of the EWR as they are legally protected from being permanently transferred.

If a person hostile to the environment assumes the position of Minister for Water they would remain accountable, as their decisions to approve the transfer and issue of various bulk entitlements, shares and licences are potentially reviewable in the Supreme Court by a third party if standing and sufficient grounds for review can be demonstrated. This is because the legislation states that the Minister must refuse the to approve the activity in question if it is likely to have an adverse impact on the maintenance of the EWR in accordance with the EWR Objective.

Although the common law has traditionally not granted standing to matters which relate to the enforcement of public rights,[63] over the years the standing test (the 'special interest test') has been incrementally broadened and may be sufficient to grant an interested party standing in this case.[64] Public policy interests have been deemed sufficient by a court to grant standing to non- governmental organisations where close proximity to subject matter and the capacity to represent the public's interest has been demonstrated. [65]

62 Pollution under the *Environment Protection Act 1970* (Vic) is defined as, 'thermal or chemical pollution of water which makes or can be reasonably be expected to make waters poisonous, harmful or potentially harmful to animals, birds, wildlife, fish or other aquatic life, plants or other vegetations ' 391)c) & d) *Environment Protection Act 1970* (Vic), The discharge or deposit of wastes into waters must also be in accordance with the declared State Environment Protection Policy s 38 *Environment Protection Act 1970* (Vic), Victorian Environmental Protection Authority, (2003) *State Environment Protection Policy (Waters of Victoria)*

63 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 526, The decision could not be reviewed by the Victorian Civil and Administrative Tribunal as there is no enabling enactment in the Act which would allow a person whose interests are affected by the decision relating to the EWR to lodge an application Pizer, J (2004), *Annotated VCAT Act*, JNL Nominees Pty Ltd, para 1140, The grounds for review of decision in the *Administrative Law Act 1978* (Vic) are potentially too narrow in this instance The *Administrative Law Act 1978* only allows the review of decisions made by a "tribunal" and the person must be affected to a "substantial degree " In the Act a "tribunal" means a person or body of persons (not being a court of low or a tribunal constituted or presided over by a judge of the Supreme Court) who in arriving at the decision in question is or are by law required whether by express direction or not to act in a judicial manner to the extent of observing one or more of the rules of natural justice, s 2 *Administrative Law Act 1978*

64 The courts have devised a 'special interest test' to determine who has standing The special interest test is substantively the same as various statutory standing tests in Australia (such as 'person affected' or 'person aggrieved test') and is treated as such by judges and academics Douglas, R , (2004), *Administrative Law*, 2nd Edition, LexisNexis Butterworths Australia, p 92, Aronson, M , Dyer, B and Groves, M , (2004) *Judicial review of Administrative Action*, Sweet & Maxwell (3rd Ed), While the granting of standing of courts has been highly discretionary it has included consideration of the following factors the interests that are affected by the wrong, the proximity of the party's relationship to the subject matter, who is able to represent those interests, whether the applicant has participated in prior proceedings Douglas, R , (2004), *Administrative Law*, 2nd Edition, LexisNexis Butterworths Australia, p 94-95

65 *North Coast Environmental Council Inc v Minister for Resources* (No 2) (1994) 55 FCR 492, *Australian Conservation Foundation Inc v Minister for Resources* (1989) 19 ALD 70

In *Australian Conservation Foundation v Minister for Resources* (1989) 19 ALD 70 at 74, Davies J held that the ACF had standing to review the Minister's decision to grant an export licence for woodchips because it was a responsible and representative body capable of representing the public interest, and was recognised by current community perceptions and values as capable of representing the public interest.

Likewise in *North Coast Environmental Council Inc v Minister for Resources* (No 2) (1994) 127 ALR 61, NCEC was granted standing to seek reasons for the Ministers decision to grant a woodchip licence because it was a peak environmental organisation and its activities were related to the subject matter of the action; it had been recognised by the Government as having a significant role in advocating environmental values; it had made submissions on forestry management and funded a study on old growth forests; and it had a long history of coordinating projects and conferences on matters of environmental concern.

While these cases are from the Federal Court, the judgments form part of the common law and may set a precedent for Victorian Supreme Court matters. So non-governmental organisations which demonstrate a capacity to represent the public's interest, are recognised by government as have significant representative role on water reform, have made submissions into government reforms on water reform, and have generally been active in the area may be granted standing in the Victorian Supreme Court to review a Ministerial decision relating to the EWR.

If standing was granted, the Minister's (or their delegate's) decision could be reviewed by the court on a number of grounds of ultra vires including: disregard of express procedural requirements;[66] taking into account irrelevant considerations,[67] improper purpose,[68] unreasonableness,[69] no evidence,[70] and acting under dictation.[71] The Victoria Supreme Court would be able to issue a judgment or order (which includes an interlocutory order) as relief in such proceedings.[72] The order could quash the decision or require the decision maker to perform a duty.[73]

So where the Minister for Water makes a decision which is likely to significantly or adversely impact on the ability to maintain the EWR in accordance with the EWR Objective, the decisions in question may be reviewable in court if the applicant gains standing and demonstrates sufficient grounds for review. This is a useful protective measure should a future Minister for Water be hostile to environmental concerns or be pressured into compromising the EWR for in order to satisfy consumptive interests.

5.2 Practical Limitations

The extent to which the rights framework can be extended to other areas components of the environment is limited by the ability to demonstrate a social and economic value of the component in question as well as the ability to anthropomorphise it.

5.2.1 Correlative duties

The prevailing notion in the rights discourse is that legally enforceable rights have accompanying correlative duties for the individual who benefits from the right.[74] The Victorian Government has unconsciously mimicked this prevailing notion in the communications material aimed at selling the EWR concept to the broader public by stressing the social and economic function of rivers:

66 Was there legislative intention that compliance with procedural prescriptions be a condition to the exercise of power? If so a failure to do to renders the decision null and void *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355

67 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24

68 Where a power is exercised for an ulterior purpose *Thompson v Randwick Municipal Council* (1950) 81 CLR 87, *R v Toohey (Aboriginal Land Rights Commissioner), Ex Parte Northern Land Council* (1981) 151 CLR 170

69 No reasonable administrator would have acting according to law could have acted as the administrator did in the case in question This includes the failure to consider all relevant available information, *Associated Picture Houses Ltd v Wednesday Corporation* [1948] I KB233 at 230, *Prasad v Minister for Immigrtion and Ethnic Affairs* (1985) 65 ALR 549

70 That there was no logically probative evidence supporting the decision *ABT v Bond* 170 CLR 321at 367 per Deane J

71 That the Minister's delegate acted on the direction of another rather than exercising their discretion, *R v Anderson, Ex parte Ipec Air Pty Ltd* (1965) 113 CLR 177, *Ansett Transport Industries Operations v Commonwealth* (1977) 139 CLR 54

72 Relief or remedy in the nature of certiorai, mandamus or quo warranto have been replaced by judgement or order, Order 56 01 *Supreme Court (General Civil Procedure) Rules 1996*

73 Douglas, R , (2004), *Administrative Law*, 2nd Edition, LexisNexis Butterworths Australia, p 231

74 At a minimum the duties enable each citizen to benefit from the right, whether by curbing the individuals' behaviour to ensure the right is not infringe (ie obligation not to discriminate against others) and additionally may impose a positive obligation on individual to perform some socially useful act which helps sustain the right (ie that recipients of social security seek employment) Campbell, D , and Thomas, P (2001) *Fundamental Legal Conceptions as Applied in Judicial Reasoning by Wesley Newcomb Hohfeld,* Ashgate Publishing Company, p 12, Kingley D (ed), (1998), 'Legal Dimensions of Human Rights' in Human rights in Australian law, Federation Press, p 7

> *'Rivers, in good environmental condition are the economic engine in many of our regions.'* [75] and
>
> *'Health rivers are the lifeblood of Victoria and underpin our environment, our communities and economy.'* [76]

This language emphasises the 'use' value of rivers to the economy and society generally and in doing so justifies to the public why rivers require additional legal protection. The implication is that if rivers had no 'use' value, they would be unlikely to be the beneficiary of rights.

So components of the environment which only have intrinsic environment values, such as biodiversity, are unlikely to warrant inclusion into the rights framework. The environment is much more likely to be the recipient of rights if it's social and economic value to society can be clearly demonstrated.

5.2.2 Language of rights

Because rights were initially developed to protect the civil and political rights of individuals against encroachment by the State and other citizens, the language of rights is anthropocentric in nature. When discussing the extension of rights to corporations, judges and lawyers have used anthropocentric language, arguably because of the ongoing perception of rights as being human focussed. For example, in *H L Bolton & Co v T J Graham and Sons* [1957] 1 QB 159, Denning LJ stated:

> *'A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre.'*

In the same way that anthropocentric language has been used to conceptualise and justify the extension of the rights framework to corporations, anthropocentric language has been used in explaining, or selling, the concept of the EWR and the need for improved river condition to the broader public.[77] In media releases and fact sheets surrounding the launch of the White Paper the rivers were referred to as the *'life blood of Victoria'* and constant reference is made to *'health* of rivers' and the fact that rivers are currently *'sick'*.[78]

In both instances it can be argued that the extension of the rights framework necessitates the use of anthropocentric language in its public presentations, because the concept originated to protect human rights and is arguably still conceived of by the public as a 'human focussed' concept. Thus extending the rights framework to objects or things that lack any human attributes, such as the atmosphere, would be potentially unworkable and impossible to sell to the broader public. It appears that the rights framework can be extended to non-human objects but only if they can be attributed human characteristics and thus stay true to the anthropocentric conception of what a right is.

6.0 Conclusion

It appears that through the creation of the EWR a component of the environment, namely water that has been set aside for the environment, has been granted a clearly defined legal right which is a right to the water within the EWR and a right to that water being managed in accordance with the EWR Objective. This has been done by extending the existing regulatory framework, which assigns consumptive rights to individuals, to include water set aside for the environment. The EWR is the legal construct which represents and sets out the rights for the environmental water.

Both the Ministers for Water and Environment are legally responsible for the management of the EWR, while CMAs are responsible for the on the ground management of the EWR. The Minister for Water is able to protect the EWR against infringement by third parties in a court of law and must protect the EWR in consumptive decisions. The Minister for Environment is legally responsible for the management of the environmental entitlements in the EWR. The joint ability of CMAs and Ministers to actively manage the EWR, as well as enforce its right to health against third parties, should result in better environmental outcomes then those produced by past regulatory tools.

75 Victorian Department of Sustainability and Environment (June 2004) *Fact Sheet for Securing Our Water Future Together*

76 Media Release, Minister for Water (23 June 2004) 'Brack's Government Invests $100m to Protect and Repair Water Resources'

77 Apart from use of the word 'health,' anthropocentric language has not be used in the construction of the right itself.

78 Media Release, Minister for Water (23 June 2004) 'Brack's Government Invests $100m to Protect and Repair Water Resources'

While the success of the EWR is predicated on the Minister for Water and Environment acting in the EWR's interests, environmental entitlements are protect from sale and decisions made by the Minister for Water relating to the allocation and transfer of consumptive water are also potentially reviewable in a court of law if standing can be obtained and grounds for review are demonstrated.

The extension of the rights framework to the environmental share of water in rivers demonstrates the importance of clean water as an economic input, the public's appreciation of the ecosystem services that rivers provide, and a recognition of the aesthetic and environmental value of rivers.

However the use of anthropocentric language in explaining the extension of rights to the environmental share of water demonstrates that the concept is still human focussed. Based on the form and language of the legal right in question, it appears that any further extension of rights to the environment would require that the component of the environment in question had an economic use and could have human characteristics attributed to it.

Despite these limitations, the application of legal rights to the environment enables the appointment of an ongoing environmental manager who is able to actively manage the environment according to its needs as well as enforce its rights against infringing third parties. This gives the environmental manager all the powers necessary to achieve good environmental outcomes. Assigning rights to the environment also means that the needs of the environment are finally on the same footing as consumptive needs and as such, are factored into the decision making process from the outset rather than just being an afterthought.

Last but not least, the incorporation of the environment into a rights-based resource allocation framework is a public acknowledgement of not only our social and economic reliance on the environment but its intrinsic values. It is for these reasons that the expansion of legal rights to the environment is an important step for environmental law in Australia and one that should be replicated in other jurisdictions.