

# THE HEALTHY RIVERS COMMISSION: A NEW APPROACH TO INTEGRATED GOVERNANCE

(Sub themes – Decentralisation and Water Basin Authorities)

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*The Healthy Rivers Commission was established in March 1996, as an independent public inquiry body to identify and investigate critical issues and propose strategies for the management of each river system into which it has inquired. To date, it has conducted major inquiries into 8 catchments in the State of New South Wales, and the State's 90 coastal lake catchments. The Commission is unique in Australia in providing a public process for the development of catchment specific, whole of government strategies. The strategies are considered by the Cabinet, the full Ministerial body of the state, and in that way ultimately encompass whole of government decisions that set the key direction for the management of the catchment system. The decisions are recorded publicly in 'Statements of Intent', are subject to community monitoring and formal audit by the Commission two years later. This paper considers how the Commission's processes provide a new approach for directing and promoting a system view of rivers and the critical success factors for integrating governance at the catchment level. It looks briefly at the recent proposals for administrative changes to natural resource management in the State, including the creation of a Natural Resources Commission.*

**Key terms:** legal and policy framework, community, integration, natural resource management

## 1 INTRODUCTION

'Over the past decade, a compelling body of evidence has emerged that Australia's catchment systems are facing enormous and ongoing threats from human activities. It is not overstating the matter to say that the ecologically sustainable use of Australia's catchment systems is the most pressing contemporary public policy issue facing the community. (HoR Standing Committee 2000:1)

This report of the House of Representatives Standing Committee on Environment and Heritage into catchment management in Australia, and similar reports are raising the profile of debate and interest in natural resource management issues in Australia, particularly in light of the economic implications of managing these resources unsustainably. The strength of Australia's governance is therefore coming under close scrutiny in respect of its capacity to address these problems and to manage the landscape and its natural resources sustainably. For this reason, it is useful to identify what have been new and effective approaches for integrating the management of natural resources.

## 2 NATIONAL DIRECTIONS – 1994 WATER RESOURCES POLICY

In Australia, the decision-making frameworks are still evolving and being applied at a varying pace across the seven State and two territory jurisdictions. In assessing the strengths of those frameworks, it is important to recognise that the key legal and policy frameworks within which decisions for managing these resources are made, exist substantially at the State level. The frameworks at the Commonwealth level have begun to assume greater authority in more recent years by tying funding entitlements to performance against Commonwealth criteria. However, overall those frameworks have tended to rely on a cooperative approach across the States,

without strong central direction, and have been contingent on the particular political cohesion existing between the national and state governments at any time.

The Water Resources Policy signed off by the Council of Australian Governments in February, 1994 was a significant landmark in the development and implementation of water resources policy in Australia. It derived from a broader agenda for micro-economic reform 'to support higher economic and employment growth on a sustainable basis' (COAG 1994:1), including through the application of competition principles.

Under the policy, it was agreed to implement a strategic framework to achieve an efficient and sustainable water industry. Reflecting the economic reform agenda, central elements of the framework relate to pricing of urban and rural water services, the specification of water entitlements, including provision for environmental allocations, and establishment of water trading arrangements. In addition, the framework requires institutional reform and support for environmental initiatives relating to wastewater use and landcare practices.

The stated objective of institutional reform is to ensure administrative arrangements deliver an integrated approach to natural resource management and include processes 'to consult with representatives of local government and the wider community in individual catchments'. (COAG 1994:23) State and Territory governments have continued to report against COAG as part of their obligations under the agreement and as a basis for the Commonwealth assessing their continuing entitlements to significant grants payable under the agreement.

In addition to this policy framework, the Commonwealth Government has also exerted influence on land and water management through the allocation of funding under its natural heritage trust fund. The program is not supported by a legal framework and since its establishment in 1996, has been the primary source of funding for natural resource management activities carried out by community groups.

The Commonwealth Government now has a stronger legal framework for the consideration of environmental issues through the *Environment Protection and Biodiversity Conservation Act 1999*. However, the Act does not reflect a comprehensive approach to improved management of land and water resources at the landscape scale. Rather it is focussed on establishing environmental impact assessment and approval processes in respect of specified matters of national environmental significance: world heritage, wetlands of international importance, listed threatened species and communities, listed migratory species, protection from nuclear action and the marine environment.

Most recently, the Council of Australian Governments announced the development of a further policy framework. In November, 2000 the Council agreed 'that the issues of salinity, particularly dryland salinity, and deteriorating water quality are of major national significance and are appropriately handled through a national action plan.' (COAG 2000:1) The Commonwealth and the States are currently working on the detail for implementing the National Salinity Action Plan and the expenditure of \$1.4 billion over the next seven years to support that implementation.

### **3 1995 WATER REFORMS IN NEW SOUTH WALES**

In 1995, the New South Wales Government introduced a water reform program that was designed to address many of the issues raised by the COAG water resources policy that was expanded by further initiatives in 1997. The latter included a clearer basis for water use including provision for environmental needs. The Government's reform program also incorporated a perspective on the public's involvement in water resource decision-making processes that reflected a clear broadening of views. It went beyond previous

practice and beyond the concept of 'consultation' referred to in the national water resources policy.

## **4 ESTABLISHMENT OF THE HEALTHY RIVERS COMMISSION**

One of the earliest and central initiatives of the new reforms was the establishment of the Healthy Rivers Commission. The Commission was set up under the State's pollution control legislation, *Pollution Control Act 1970* (with relevant provisions subsequently carried over into the *Protection of the Environment Operations Act 1997*) to provide independent advice and recommendations to the Government on the key strategies for addressing river health. In particular, its terms of reference provide that the Commission is to make recommendations on:

- Suitable objectives for water quality, flows and other goals central to achieving Ecologically Sustainable Development in a realistic time frame;
- The known or likely views of stakeholder groups on the recommended objectives;
- Strategies, instruments and changes in management practices needed to implement the recommended objectives; and
- The economic and environmental consequences of the recommended strategies. (HRC2000:83)

It does this through the conduct of public inquiries into priority river systems referred by the Government which include the consideration of environmental, social and economic needs. The Commission has carried out investigations into a range of river systems each of different socio-economic character: rural, semi-rural, urban and water supply. These have included investigations into the Hawkesbury Nepean, Shoalhaven, Georges-Botany Bay river systems (all three are water supply catchments for Sydney), the Hunter and Williams rivers (a water supply catchment for Newcastle), the predominantly rural catchments of the Clarence and the Bega rivers, the North Coast rivers, and the coastal lakes (over 90) along the New South Wales coast.

The Commission comprises the Healthy Rivers Commissioner, Dr Peter Crawford, Assistant Commissioners, and a small multi-disciplinary team of professional staff, with backgrounds in economics, law, hydrology, geomorphology, engineering and environmental sciences.

Importantly, Commission processes provide early and on-going opportunities for public involvement in the development of integrated natural resource management strategies for a catchment rather than in respect of particular resource allocation decisions or resource planning processes.

It uses a range of participation processes to engage the public in the development of strategies that will address water resource management as part of an integrated view of the particular environmental, social and economic catchment system. That of course, includes influences beyond the catchment system. It uses the traditional tools of public hearings at which members of the public can make oral presentations, and provides opportunities for the public to respond to discussion papers, draft strategies, and draft reports. It also facilitates roundtable discussions and workshops amongst agency and community participants to identify impediments and develop strategies. It engages independent expert panels to integrate scientific views on river health and management issues.

As observed in its strategic report in 2000, *Securing Healthy Coastal Rivers*, communities have seen:

‘the Inquiry processes as a mechanism for increasing understanding of the processes that are influencing river health ...citizens welcomed opportunities for highly public analyses of their various concerns about rivers. They sought better understanding of the decisions that must be made, and assistance in articulating their choices’. (HRC2000:84)

## **5 A NEW APPROACH TO INTEGRATED NATURAL RESOURCE MANAGEMENT**

A catchment view on natural resource management issues, such as that provided by the Commission, is not new. The *Catchment Management Act 1989* gives legislative recognition to the policy of ‘total catchment management’ directed to the integration of land and water management. The Act’s objects are to be given effect by the establishment of a network catchment management committees and catchment management trusts, “linking the Government and the community” and confers revenue raising powers on trusts. However, catchment management committees have predominantly fulfilled a community educative role in promoting implementation of total catchment management policies and programs but they have been inadequately equipped and resourced to co-ordinate the natural resource management activities of public authorities, groups and individuals.

The approach has been poorly matched to the scale of the task at hand. In particular, it has not recognised the need for a clear mechanism either to persuade public authorities of the need for improved individual performance and integrated implementation of programs or to resolve the inevitable conflicts that arise between public authorities where there is overlap, threatened or real, in responsibilities, or between the claims of different interest groups.

Establishment and operation of the Healthy Rivers Commission has had a significant impact in addressing these needs and facilitating integrated natural resource management. It has provided an important new approach in at least two respects. Firstly, in providing a truly participative process for the determination of natural resource management directions and secondly, in promoting integrated governance across sectoral responsibilities through new accountability instruments and processes.

A critical outcome from the Commission’s reports, has been the definition of key principles that contribute to the implementation of ESD, and the future management of coastal rivers. These include the following:

- Rivers must be managed as whole systems.
- Rivers must be treated as assets with productive values to be sustained by carefully directed management and maintenance. Decisions about these must be governed by realistic assessments of their capabilities and recognition of their limitations.
- Management plans must be more rigorous, more directive, and create obligations on the entities that possess powers and resources that can be applied to river management.
- Entities with river management responsibilities, powers and resources must be accountable and answerable for the condition of rivers at the conclusion of each cycle of planning, action and assessment. The ‘accountable entity’ must be answerable for the proper implementation of agreed management processes,

where actual river outcomes are subject to a variety of uncontrollable external influences.

- Government and communities must meet their obligations within explicit ‘partnership’ arrangements for river management, based on unambiguous statements of their respective roles and responsibilities.
- Well designed strategies for managing rivers will inevitably involve an adaptive approach, given the inherent uncertainties and lack of information on many matters. (HRC2000:5)

In carrying out its investigations, the Commission gains an overview of the distribution and performance of management responsibilities across the catchment, including overlaps and gaps. Its recommendations therefore seek to address those problems and identify the actions needed to manage the river as a whole system. This includes providing direction for the discharge of specific management responsibilities under legislation and identification of the collective responsibilities for managing the river system.

The recommendations identify the interplay between the various responsibilities. For example, some responsibilities, like regional planning, may have greater importance in one catchment than in another catchment depending on the level of progress in a catchment. Its relationship to other responsibilities will therefore be different in each catchment. Some responsibilities that reappear in each inquiry are on a continuum of improvement that stretches across the various inquiries, and the decisions taken by Government on the Commission’s recommendations will reflect this. An example of this would be Department of Local Government responsibilities for improving environmental management by Councils.

Final reports on Commission inquiries are released publicly and delivered to the Minister for the Environment who presents those reports to Cabinet for decision. At the time of decision on the Hawkesbury Nepean River System Report in February, 2000 and confirmed by later decisions, the Cabinet decided that a Statement of Joint Intent should be developed to record publicly, agency commitments to implement the Government endorsed recommendations from Commission reports. (NSWGovernment2001) (In later decisions the instrument is called a Statement of Intent). Statements of Intent have now been released for almost all of the river systems into which the Commission has inquired and copies are available on its website.

Two years after public release of a Statement of Intent, the Commission audits implementation of the commitments and actions. It is to ‘report on the state of implementation action to establish whether it has been consistent with the strategic intentions of Government and the terms of the SOJI in the context of the relevant sections of the Inquiry Report’. (NSWGovernment2001:19) This provides a major impetus for agencies to undertake the required actions that could not be achieved through the mere release of the Statement of Intent.

## **6 A NEW TOOL FOR INTEGRATING GOVERNANCE: WEAVING WHOLE SYSTEM STRATEGIES ACROSS SECTORAL DIVIDES**

Statements of Intent can be described as statements of whole of government policy for the management of particular river systems. They provide a framework for the integrated application of sector specific government policy and responsibilities within a specific regional context, and provide a critical new accountability tool for integrating the management functions of the various Government agencies involved in river management.

Their role in identifying collective goals and responsibilities, and the context for the discharge of specific actions, is seen from the following extract from the Statement of Joint Intent for the Hawkesbury Nepean river system.

‘It is intended that this SOJI will have effect in concerting the actions of the Agencies and Councils in implementation of its directive strategies, and promoting achievement of improved administrative, and environmental, social and economic outcomes for the Hawkesbury Nepean River system.’ (NSW Government 2001:4)

Statements of Intent represent a new and important tool because they enable recognition of the relationships between the various sector specific responsibilities, including those relating to particular planning, approval or other instruments. They provide translation of the broader societal goals and principles to a practical level and in turn, a clearer context and understanding of the connections of the particular responsibilities to the broader environmental, social and economic goals.

For example, in respect of the goal of integrated water cycle management for the Hawkesbury Nepean river system, one of Sydney’s water supply catchments, the Statement of Joint Intent identifies the relationships between water allocation, effluent management and reuse, the provision of environmental flows and weir management, with reference to the various instruments including water management licences and environment protection licences.

They provide a critical missing layer fleshing out the key priority, initial and sometimes more advanced, steps in the application of ESD to assist public authorities in understanding the steps that will take them in the direction of ESD. In that way, they influence and ‘contextualise’ the performance of the specific legal responsibilities and guide their implementation.

There is no legislative base for the statements, though there is scope for their declaration as government policy under the regulations to the *Water Management Act 2000 (Section 16)*. However, the value of the Statements of Intent is broader. It includes their whole of government foundation through the Cabinet process, whose business includes engaging ‘the collective responsibility of Government, either because they raise major issues of policy or because they are likely to occasion public comment or criticism, or on questions on which there is unresolved conflict of interest between Departments.’ (Galligan1990:34) As river system management usually involves such collective responsibilities and conflict, Cabinet endorsement of Statements of Intent derived through a public process gives significant recognition to the implementation responsibilities and some resolution of those conflicts.

Their legal effect is to present as quasi-legal responsibilities and broaden our concepts of responsibility for action. Statements of intent are an important part of the ‘spectrum’ of responsibilities that will enable a more integrated and comprehensive approach to engendering the necessary actions. Their release over several years now has highlighted the need to think beyond traditional concepts especially in identifying government responsibilities and to meet the need for active and not merely reactive management, as required by an ecosystem management approach.

## **7 BROADENING “RESPONSIBILITIES” - GOING BEYOND TRADITIONAL LEGAL CONCEPTS TOWARDS A WHOLE SYSTEM VIEW**

This weakness in approach of limiting recognition of the relationships between the sectors has been compounded by our concepts of responsibilities that have been narrow and focussed on traditional legal instruments, like environmental planning instruments and licences, and the enforceability of those instruments. The threat of legal enforceability of an instrument has been

one of the tools for effecting desired environmental behaviours. However, in earlier styles of regional environmental planning instruments under the *EP&A Act* they have often been limited in their terms so as to reduce the scope for enforceable action. In the process, this may have limited the potential for environmental improvement.

The 'spectrum' of responsibilities should therefore at least include the better recognised specific legislative responsibilities relating to planning, resource use and development decision-making processes, the general legislative responsibilities regarding achievement of ESD objectives, its principles and river system principles, and importantly, quasi-legal responsibilities for integrated application of these principles in a regional context, like those contained in a statement of intent. Although essentially policy, the latter should be considered quasi-legal responsibilities because they are critical in facilitating the implementation of the general legal responsibilities of ESD, sector principles like those under the water legislation and help direct the use of legislative tools towards clear purposes.

To consider responsibilities in these broader terms should also go some way in meeting community concerns about how Government takes responsibility for natural resource management. As we know, the legal system provides well in terms of appeal and review rights in respect of specific legal responsibilities, putting aside the issue of the costs of participating in that system. However, a broader approach should help address underlying community concerns about the lack of achievement of ESD goals and principles. It should help address the system problems that result in poor decision-making beyond the reach of effective challenge.

The approach is not entirely new because the tools incorporating these broader responsibilities for natural resource management have long been available under the State's environmental planning and assessment legislation. Rather, like the environmental planning instruments drafted with limited scope, to date the use of quasi-legal instruments has been limited. Before the introduction of the statutory and issue based regional planning instruments under the native vegetation conservation and water management legislation, Farrier et al, suggested the important role that could be played by regional 'development control plans' under Part 3 of the environmental planning and assessment legislation. Setting aside the language of 'development control', such instruments could, it was argued, effectively operationalise catchment management planning. They would not be legally binding instruments but would have effect as a relevant consideration in decision-making. Importantly, they could address the needs for 'positive' management approaches 'not only addressed to landholders, but contain management commitments of government agencies'. (Farrier 1996:23)

Similarly, Statements of Intent should have effect as an initial round in 'operationalising' and integrating competing Government objectives and policies in a particular regional context. They should therefore at least have legal effect as a relevant consideration in natural resource and land use decision-making, even though they have not been developed pursuant to a particular statutory planning regime. They are also more significant than instruments like memoranda of understanding that are limited in scope and are derivative of, rather than challenging of sectoral divides.

The clamours of traditional administrative law may find the approach a little uneasy. This is both in respect of how it views attempts to direct the exercise of legal power and the fettering of discretion. The need to ensure statutory discretion is not excluded when statutory policy instruments are being considered, is still declared strongly, as we have seen, in recent environmental legislation. However, it will be important to test the boundary of such constraints to ensure their rationale is still justified in new contexts where they may impede the achievement of key and more substantial legislative and societal goals. There may well be ongoing tensions between such administrative law principles and the needs of effective environmental governance over the longer term, but these should continue to be explored and new approaches developed.

It may also be argued that the Statements provide another layer in an already ‘over-layered’ natural resource management system, and in particular over the statutory regional planning processes currently underway. The better view is that the Statements throw down an important challenge to those processes and call up their capacity to properly recognise the relationships between instruments of other sectors, and incorporate and apply common regional and whole system goals. They will also test their capacity for adaptive management and effective review processes.

From the range of current environmental legislation and the various sector specific or other policy documents, it is clear that environmental law and policy has much further to go if it is to facilitate ecosystem management. It is becoming ever more apparent that ecological outcomes, and related social and economic outcomes, are very dependent upon how decision-making on specific functions recognises the relationships between the various functions, and to the overall functioning of the ecological and social and economic systems.

For this reason, the Commission’s processes and their outcomes, including the Statements of Intent are an important step in overcoming the impediments presented by our current sector specific legislation, by seeking to shift the view of decision-makers to one with a clear focus on the relationship of their environmental component to the whole system.

## **8 TAKING THE LEAD: EXPANSION TO A NATURAL RESOURCES COMMISSION**

In 2000, a significant report was delivered to the Australian parliament by the House of Representatives Standing Committee on Environment and Heritage into catchment management: *Co-ordinating Catchment Management, Report on the Inquiry into Catchment Management*. The report reinforced the goals of the Water Resources Policy 1994 of delivery of an integrated approach to natural resource management. However, it recommended much more substantial administrative reform including establishment of a national catchment body and catchment management authorities as the basic administrative element for each catchment. (HoRStandingCommittee 2000:113) The committee justified its recommendations on the basis they would establish mechanisms that would have a better chance of co-ordinating programs and policies on a catchment scale, and overcome the limits of the existing system where state agencies and local government are able to thwart initiatives of existing catchment management committees.

These themes have received further consideration and discussion in reports published by an expert group of Australian scientists, the Wentworth Group. The first report entitled ‘*Blueprint for a living continent - A way forward from the Wentworth Group of Scientists*’ has been the subject of extensive public debate since its release in November, 2002. The Group prepared a subsequent report, published in February, 2002 that proposed new administrative arrangements for natural resource management in New South Wales: *A new model for landscape conservation in New South Wales*.

The key components of the proposals included the following:

- Increased leadership by the State with the establishment of a Natural Resources Commission, by amendment to the Catchment Management Act 1989.
- Stronger regional decision-making by catchment management authorities.
- Enforcement of laws, regulations and standards to remain with State agencies and be taken seriously, as part of the State’s leadership role.

- Environmental statewide standards and their application to a single integrated water catchment strategy.
- Mechanisms for financial assistance.

The report concluded that the State ‘should adopt water catchments as the basic planning unit for all natural resource management (including native vegetation) across the State. Catchment strategies need to be prepared by regionally based institutions that have community support, local knowledge and scientific expertise. Each catchment needs to produce a simple map-based catchment plan that can translate the state environmental standards into practical rules that are easy to apply at a farm scale across the catchment.’ (Wentworth Group 2003:9)

On institutional arrangements, the Group reported that ‘A central reason for the failure of the existing arrangements to produce outcomes is the failure to set practical outcome based standards and to develop guidelines on how to interpret these standards at the catchment level.’ (Wentworth Group 2003:14) It therefore proposed the establishment of an expert based, Natural Resources Commission, that would report directly to the Minister on ‘statewide standards and targets (for native vegetation, water quality, salinity, biodiversity and soil conservation); accreditation of catchment strategies against these standards and targets; funding priorities implementing catchment strategies; and information and research priorities.’ (Wentworth Group 2003:14)

The Government responded to the proposals before the election in March 2003, with its plan for natural resource management: *Getting the Balance Right*. The plan accepted the Wentworth Group model and declared as one of its key objectives: ‘to put in place Australia’s largest native vegetation conservation scheme to be undertaken on private land (with) farmers paid to conserve and increase native vegetation on their properties’. (ALPNSW 2003:1)

Since its return to office the Government has been rolling out the two stage implementation process outlined in the plan. As part of the first stage, it has already effected some institutional changes, including in particular the creation of ‘Superministries’ whereby the planning, and the natural resources departments will now report to the same Minister and same Chief Executive Officer, with the individual departments led by deputy director-generals.

Importantly, the second stage entails setting up the new institutional and legislative framework for the reforms including the establishment of an ‘independent Natural Resources Commission to integrate the functions of existing resource assessment and advisory bodies...The Commission will have the following functions:

- Ensuring regional bodies produce outcomes consistent with national and NSW standards.
- Providing advice to Government on solutions to specific natural resource problems and disputes.
- Providing advice to the Minister on the effectiveness of the Government’s natural resource policies and programs.
- Including peak organisations and the community in decision-making.
- Prioritising scientific research to provide better information to farmers, community groups and government. (ALPNSW 2003:7)

It can be seen from this outline that the functions of the new Natural Resources Commission incorporate and expand on the functions of the Healthy Rivers Commission. The clear

similarities relate to the standard setting role performed by the Commission in respect of establishing river health objectives and strategies for their achievement that culminated in advice to the Minister for the Environment who then took that advice to the whole of Government through the Cabinet process, and which advice had been derived through a public inquiry process open to all. Often the recommended strategies also highlighted how the scientific research priorities could be made more relevant to management needs.

The approaches introduced with establishment of the Healthy Rivers Commission and the implementation mechanisms developed through its processes have therefore served to highlight to the Government problems with its current land and water management arrangements and practices, which has influenced the current proposals for reform of natural resource management. They are also leading to a stronger model for the Commission that will take its work beyond consideration of high priority sensitive river systems into natural resource management issues across the State.

Of special interest will be the function proposed for the Natural Resources Commission of advising on specific natural resource problems and disputes. This role was performed by the Healthy Rivers Commission in a defacto sense in the course of particular river inquiry processes, so how the scope of this function is formally defined will be important. Just as the processes of the Healthy Rivers Commission have shown the need for tools like Statements of Intent to generate support and commitment for cooperative and integrated action by Government, so too have those processes highlighted the need for open and fair processes for decision-making on natural resource management disputes. This has included seeking to provide long term management strategies to complex environmental problems that must properly accommodate and address short term social and economic needs.

Governments will continue to be presented with difficult issues for decision so how well any new arrangements provide for dispute resolution processes will be critical. One can be sure that the new arrangements will be closely scrutinised for how they provide for dispute resolution and whether and how the new Commission's advice role on dispute resolution should be integrated into these. These processes will need to facilitate access to and meaningful participation in, decision making processes that affect natural resource management and ensure any trading off between interests, for example by environmental interests against economic interests, is explicit.

These will be some of the challenges presented to the new Natural Resources Commission and other players in the new landscape for natural resource management in the State. Hopefully, in dealing with them under the new administrative order, the experience and outcomes from the Healthy Rivers Commission's processes will be built upon, and not reinvented, so that greater progress can be made towards addressing and wholeheartedly responding to the 'compelling body of evidence .....that Australia's catchment systems are facing enormous and ongoing threats from human activities', and that those catchment systems may be worthwhile inheritances for the next generation.

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