

Water unbundling – beware!

It has been nearly 18 months since the unbundling of water rights in Northern Victoria was introduced. The practitioners in the Goulburn-Murray irrigation district have experienced a huge learning curve in coming to grips with all the changes and implications for their clients. This bulletin is based on their experience.

Practitioners south of the divide in the Southern Water and Grampians Water areas have been grappling with unbundling issues since July this year.

While it is not possible to give a detailed analysis of all of the issues surrounding the unbundling in this bulletin, LPLC seeks to bring to the attention of practitioners the difficulties attendant on the sale and purchase of irrigated land. This is such a technical and difficult area that practitioners should not be tempted to dabble in water rights.

New terminology

The *Water Act 1989* (Vic) was amended by the *Water (Resource Management) Act 2005* (Vic) and the *Water (Governance) Act 2006* (Vic).

These amendments created a new bundle of entitlements and new terminology:

- **Water share** (either **high reliability** or **low reliability**) – previously water entitlements came in the form of a *water right*, a *stock and domestic allowance*, a *temporary water allowance*, a ‘*take and use*’ licence on a regulated waterway, or *sales water*. A water share is a legally recognised, secure share of the water available to be taken from a water system. It can be sold, mortgaged and leased.
- **Water-use licence** – issued to properties that previously held water rights or diversion licences. It stays with the land and authorises the use of water on the land. It will include an **annual use limit** which sets the maximum amount of water that can be used on the land in any water season. It also determines how much water can be associated with the land.
- **Delivery share** – this was allocated to all properties that previously had an interim delivery share. It gives the right to have water delivered to the land. It is linked with the land and stays with it even if a water share is sold. It is the basis on which various infrastructure fees are charged to property, regardless of water use.
- **Allocation** – is the amount of water actually available for water share holders. It is expressed as a percentage of the water share and allocation announcements are made fortnightly by the Goulburn-Murray water authority throughout the water seasons. A water share holder has an **allocation bank account** and all allocations are credited to that account. Usage is debited from the account.

Information about a client's water share or water-use licence is only available electronically and can only be accessed with the client's **water share identification number** or '**WEE number**'.

Unconfirmed water shares

When the unbundling occurred there was a cross referencing of information held by the water authorities and the land titles office. Where the name of the holder of the water right and the owner of the property was the same, the entry in the new water register was confirmed.

However, there were many instances where the name of the holder of the water right or licence did not match with the name of the owners of the land; often this was because the water right related to several different parcels of land with different owners. In cases where there was no 'exact match' the water shares were registered as 'unconfirmed'.

In order for the water right to become a confirmed share, the parties need to come to an agreement and notify the water authority how they want the ownership of the water share recorded. **In the Goulburn-Murray District, if this is not done before 31 December 2008 the register will be updated with a default ownership structure which will assume that all owners of the land affected by the water right have an equal ownership in the water share.**

An unconfirmed water share can be transferred, as the process of transfer deals with the confirmation of rights. However, an unconfirmed water share cannot be dealt with in any other way until it is confirmed.

Ministerial consent

Ministerial consent must be obtained in order to transfer a water share. On average, the application to obtain Ministerial consent takes 2 – 4 weeks with the relevant authority. Clients and practitioners need to bear this in mind when arranging settlement dates.

60 days to register a water transfer

Once Ministerial consent is obtained to transfer water share, there is a time limit of 60 days from the date of consent to have the transfer registered. Practitioners have experienced difficulties in meeting that time limit for many reasons including:

- Goulburn-Murray Water always sends the transfer document to the client (not sent to the legal representative). Initially the clients did not realise they had the relevant document and did not notify their solicitor of its arrival, wasting valuable time; or
- the bank holding the mortgage over the water share took the transfer at settlement but waited too long to have it registered.

Where the consent expires, it cannot be reinstated. The Ministerial consent process must commence again from the start. In cases where the matter settles and then the consent expires before registration, the vendor has the money and the water share, and the purchaser has nothing but a right to sue for specific performance or damages (if the contract is properly drafted). Purchasers may be confronted with significant practical problems if the vendor is not co-operative, or has died and the purchaser has to wait for a grant of probate.

Subdivision

Subdivision of land subject to a water-use licence and delivery share, or the sale of a parcel of land that has a water-use licence incorporating other parcels of land has become more complex since unbundling. Now, the water-use licence needs to be cancelled and a new one applied for, and the delivery share must be divided and allocated. The division of the delivery share requires careful assessment of its value and its liability, bearing in mind that it will affect infrastructure fees charged on the land.

Estate planning

The unbundling of water rights has also raised an issue in relation to existing wills where the client has bequeathed specific irrigated land. If only the land has been bequeathed and not the water share, then the water share may end up in the residue of the estate, something which may not have been intended by the testator. Practitioners should consider whether there are any wills they hold which may fall into this category and where possible consult with the client about whether a new will needs to be made.

Strategies

This is a technical and difficult area of law that is fraught with traps for practitioners who do not practice regularly in this area. The value of these new water shares and other rights may, in some instances, outweigh the value of the land itself and could run into hundreds of thousands of dollars. A mistake could prove to be very costly for a practitioner and the LPLC.

If you are asked to do a conveyance involving irrigated property, for either vendor or purchaser, and you don't practice regularly in this area, we strongly recommend that you give consideration to declining the retainer and refer the client to a firm with relevant expertise in water law. If you do act in relation to the sale of land involving water shares the LPLC has set up a new water hotline.

Water hotline

The LPLC has decided to run a water hotline along similar lines to the initial GST hotline. Practitioners (with client related questions) can phone or email or fax their queries to us and we will provide an answer on the spot or refer you to one of our experts on our water panel for specialist advice. The first half an hour of our expert's time will be funded by the LPLC.

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**Legal Practitioners' Liability Committee
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