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CANBERRA
AUSTRALIA'S CAPITAL UNIVERSITY

Lake Burley Griffin
Governance Issues Relating to Water Quality and
Integrated Catchment Management

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Content

Background

My Expertise

Problem Setting

Powers of the ACT

Powers of the Commonwealth Government

Governmental Land Tenures

Common Law Concepts - Riparian Rights

Riparian Rights as a Civil Law Standard of Water Quality

Riparian Rights in International Law

The National Capital Plan and the Lakes Ordinance 1976

Commonwealth Places and the Environment Protection & Biodiversity Act 1999
(Cth)

Statutory Regulatory Structures – the Environment Protection Acts of the ACT
and NSW

Land Use Planning Powers

Integrated Catchment Management

Conclusion

Option 1 – Extension of ACT Powers

Option 2 – Extension of Commonwealth Powers

Option 3 – A Catchment Management Council

Attachment 1 – Liability Issues in Division of Responsibilities Between the
Commonwealth and ACT Governments

Attachment 2 – Extract from the Agreement for the Surrender to and
Acceptance by the Commonwealth for the Purposes of the Seat of Government

Attachment 3 – Extract from Part 1.2 of the National Capital Plan

Attachment 4 – Extract from Appendix J of the National Capital Plan

Attachment 5 – Extract from the text of Section 21 of the Lakes Ordinance 1976

Background

This report contributes to the Lake Burley Griffin Investigation being undertaken by the ACT Commissioner for Sustainability and Environment exploratory research on the present legal governance framework for the management of water quality issues in Lake Burley Griffin and opportunities to pursue future directions.

My Expertise

I have pursued strong academic and professional interests in Environmental & Planning Law and Property Law for many years. I acted in my first Environmental Law case in 1985. While working with the Law Reform Commission of Victoria (1986-1989) I assisted development of the Law Reform Commission's contributions to the Planning and Environment Act 1987 (Vic), the Flora and Fauna Guarantee Act 1988 (Vic) and the Water Act 1989 (Vic). I assisted foundation of the Environment Defenders Office (Victoria), a community legal centre for Environmental & Planning Law issues, and joined its board in 1992. I chaired the board for six years before taking up my position at University of Canberra in 2006. My Ph D work, published by the international publisher Kluwer Law International,¹ examined in depth the way that a land stewardship ethic influences German civil law, identifying a seed of the same ethic in Australian property law.² I have established new units in Environmental & Planning Law and taught them in the law schools at University of Melbourne (1993 to 2000), Victoria University (2001 to 2006) and University of Canberra (2007 to date).

Problem Setting

Concern has been raised about water quality in Lake Burley Griffin and the Molonglo River which supplies it. The lake is an artificial water body created as part of the original plan for Canberra. It is a "major landscape feature which unifies the National Capital's central precincts and the surrounding inner hills" and it provides "... for National Capital uses and a diversity of recreational opportunities."³

There has been public concern about blue-green algae [*cyanobacteria*] blooms in the lake, which have led to recreational uses of the lake being restricted, or the lake being closed to them altogether. Blue-green algae blooms occur when there is a sufficient nutrient load in the water in combination with other factors, such as sunlight and temperature. Other contributions to this investigation will deal with the toxicity of blue-green algae and conditions that generally accompany it, such as oxygen depletion, however, I would like to stress the point that this is not a question of risk to

¹ M Raff, *Private Property and Environmental Responsibility – A Comparative Study of German Real Property Law*, Kluwer Law International, The Hague, 2003.

² Most recently dealt with in M Raff, 'Torrens, Hübbe, Stewardship and the Globalisation of Property Law Systems' (2009) 30 *Adelaide Law Review* 245-289 (symposium edition for the 150th Anniversary of Torrens Title Symposium held at the Law School, University of Adelaide, on 20th June 2008).

³ § 1.2.2 National Capital Plan ["NCP"]. On the NCP, see in text below following note 52. The NCP is available on the [website of the National Capital Authority](#).

human health alone but an issue of the ecology of Lake Burley Griffin and the Molonglo catchment generally, that brings with it risks to aquatic life.⁴

When considering the present regulatory structure and potential structures with respect to water quality management, it is important to distinguish between general regulatory powers of government and powers that are associated with public tenure of land.

Powers of the ACT

A large measure of political and legislative autonomy was accorded the Australian Capital Territory by the Australian Capital Territory (Self Government) Act 1988 (Cth). Section 7 recognised the ACT as a body politic –

The Australian Capital Territory is established as a body politic under the Crown by the name of the Australian Capital Territory.

and s 22 conferred plenary powers –

- (1) Subject to this Part and Part VA, the Assembly has *power to make laws for the peace, order and good government of the Territory*.
- (2) The power to make laws extends to the power to make laws with respect to the exercise of powers by the Executive.

Neither s 23 nor Part VA qualify this power in a relevant sense.

The Australian Capital Territory was defined spatially in Schedule 2 of the Seat of Government Acceptance Act 1909 (Cth) in terms that include Lake Burley Griffin, and a stretch of the Molonglo River immediately upstream, within the borders of the ACT.

Without more, there appears to be no limitation on the power of the ACT Legislative Assembly to make laws with respect to water quality in Lake Burley Griffin. The powers of the ACT government are, however, limited by its federal relationship with the Commonwealth.

Section 28 of the Australian Capital Territory (Self Government) Act 1988 (Cth) provides for inconsistency of Territory laws with other laws, doubtless referring to Commonwealth laws –

- (1) A provision of an enactment [of the ACT] has no effect to the extent that it is inconsistent with a law [of the Commonwealth] defined by subsection (2), *but such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law*.
- (2) In this section:
law means:
 - (a) a law in force in the Territory (other than an enactment or a subordinate law);⁵ or

⁴ The report of Ian Lawrence in this Inquiry, 'Water Quality Assessment Final Report' in *Investigation into the State of Lake Burley Griffin and Catchment*, Office of the Commissioner for Sustainability and the Environment, ACT, 2011-2012, identifies release of nutrient load sequestered in the subsoil of the lake and contributed regularly by urban storm water as key sources contributing to the problem.

- (b) an order or determination, or any other instrument of a legislative character, made under a law falling within paragraph (a).

In addition, s 27 of the Australian Capital Territory (Self Government) Act 1988 (Cth) makes clear that –

Except as provided by the regulations, an enactment does not bind the Crown in right of the Commonwealth.

The Australian Capital Territory (Self-Government) Regulations 1989 (Cth) sets out in a Schedule legislation of the Territory that binds the Crown in right of the Commonwealth.⁶ None of this legislation is relevant to environmental issues in issue here.⁷

Powers of the Commonwealth Government

The Commonwealth has extensive powers to legislate on a range of topics under s 51 of the Australian *Constitution*.⁸ These powers are referred to as concurrent powers, however, by virtue of s 109 a valid law of the Commonwealth will prevail over an inconsistent law of a state. With respect to territories, and the ACT in particular, the Commonwealth has yet stronger powers; the powers in the Australian *Constitution* relating to the seat of government of the Commonwealth in s 52 –

The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;

and the “territories power” in s 122 –

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

As the power in s 52 (i) is expressed to be an exclusive power, this topic of legislation is removed from the powers of other legislative bodies whether the Commonwealth has legislated or not. On a narrow reading, depending on how one defined the seat of government, this could greatly limit legislative powers of the ACT. However, on a broader interpretation, reading s 52 (i) and s 122 together, the Commonwealth may confer a wide ranging power to make laws for the government of a Territory

⁵ The apparent “double negative” in this provision created by removal of “an enactment or a subordinate law” from the definition of “law” in s 28(2) could be read in a way that removes concurrent operation in relation to them, allowing the paramountcy of Commonwealth law to prevail by virtue of other powers (see below). The present reading of the provision resolves the apparent “double negative” without this effect: Communication of the Australian Capital Territory Government Solicitor, 11 November 2011, 4.

⁶ Reg 3B.

⁷ Air Pollution Ordinance 1984 and Water Pollution Ordinance 1984 have been repealed.

⁸ These powers are also relevant to the contribution of nutrients to the Molonglo River in the State of New South Wales.

surrendered by any state and accepted by the Commonwealth, and has done so with respect to the ACT.⁹

The Commonwealth also has the potential to exercise additional powers over the Molonglo River catchment by virtue of paragraphs 2, 3 and 4 of the agreement between the Commonwealth and NSW for the surrender of and acceptance by the Commonwealth of territory for the purposes of the seat of government,¹⁰ in three main aspects –

- the waters of the Queanbeyan and Molonglo Rivers and their tributaries (east of the Goulburn to Cooma Railway) are subject to the “paramount” use and requirements of the Commonwealth “for all the purposes of the Territory”,
- all Crown lands within the catchment areas of the Queanbeyan and Molonglo Rivers are to be reserved from sale, lease or occupation except with concurrence of the Commonwealth, and
- the waters of the Queanbeyan and Molonglo Rivers are not to be polluted and must be protected from pollution by NSW “throughout their whole course above the Territory”.

Governmental Land Tenures

Commonwealth powers to legislate are closely related to powers associated with public tenure of land.

Section 125 of the Australian *Constitution* states that the land provided for the seat of government “... shall be vested in and belong to the Commonwealth ...” It followed from the Seat of Government Acceptance Act 1909 (Cth) and the Seat of Government (Administration) Act 1910 (Cth) that all land in the ACT was to be held of the Commonwealth¹¹ and private title to it could not be granted in freehold,¹² in order to secure a range of benefits in the common interest. Private title to land in the ACT is consequently a form of Crown lease.¹³

A large measure of political and legislative autonomy was accorded the Australian Capital Territory by the Australian Capital Territory (Self Government) Act 1988 (Cth), as noted above, however, the accompanying Australian Capital Territory (Planning and Land Management) Act 1988 (Cth) did not vest land in the ACT. On the contrary, the land remained Crown land held by the Crown in right of the Commonwealth and a

⁹ Communication of the Australian Capital Territory Government Solicitor, above note 5, 3, citing PH Lane, *Lane’s Commentary on The Australian Constitution*, 2nd ed, LBC Information Services, Ryde, 1997, 382.

¹⁰ Schedule 1, Seat of Government Acceptance Act 1909 (Cth) – the relevant paragraphs are set out below in Attachment 2.

¹¹ s 7 Seat of Government Acceptance Act 1909 (Cth).

¹² s 9 Seat of Government (Administration) Act 1910 (Cth).

¹³ See further, A J Bradbrook, S V MacCallum & A J Moore, *Australian Real Property Law*, 4th ed, Law Book Co, Sydney, 2007, Chapter 5 ‘Public Lands’.

distinction was created for land management purposes between “National Land” and “Territory Land”.¹⁴

National Land is a specified area of land in the Territory declared by the relevant Commonwealth Minister by notice published in the *Commonwealth Gazette* to be National Land.¹⁵ National Land is land used or intended to be used by or on behalf of the Commonwealth.¹⁶ National Land is managed by the National Capital Authority [NCA]. It is recorded in the National Capital Plan.¹⁷ Examples include the Parliamentary Triangle, Commonwealth administrative areas and some other areas considered nationally significant, such as approaches to Canberra like the Monaro Highway. The definition of “land” in s 4 of the Australian Capital Territory (Planning and Land Management) Act 1988 (Cth) includes *water*. Lake Burley Griffin is designated as National Land.

Land in the Territory that is not National Land is *Territory Land*.¹⁸ Section 29 of the Australian Capital Territory (Planning and Land Management) Act 1988 (Cth) provides for the administration of Territory Land, and most relevantly –

29 Administration of Territory Land

- (1) The Executive, on behalf of the Commonwealth:
- (a) has responsibility for the management of Territory Land; and
 - (b) subject to section 9 of the *Seat of Government (Administration) Act 1910*, may grant, dispose of, acquire, hold and administer estates in Territory Land.¹⁹

A further category of land created for planning purposes, the *Designated Area*, is referred to in s 10(1) of the Australian Capital Territory (Planning and Land Management) Act 1988 (Cth) –

The [National Capital] Plan may specify areas of land that have the special characteristics of the National Capital to be Designated Areas.

The National Capital Plan prevails over an enactment that is inconsistent and no activity may be undertaken that is inconsistent with it by –

¹⁴ ss 27 and 28 Australian Capital Territory (Planning and Land Management) Act 1988 (Cth). A map of Declared National Land is included as Appendix D of the NCP, above note 3.

¹⁵ s 27, Australian Capital Territory (Planning and Land Management) Act 1988 (Cth). See for example, Notification of Declaration of National Land of 23 August 2007 (Paddy’s River) and accompanying Explanatory Statement, containing a questionable reference to a “... transfer legal ownership of [the] land ... from the ACT Government to the Commonwealth.” See also Revocation of Declaration of National Land of 8 February 2010 (Gungahlin and Canberra Central) and accompanying Explanatory Statement, which describes the change of public land tenure in terms that following revocation the land will be recognised as Territory Land and “... the ACT Government will assume management and control.”

¹⁶ s 27(2) Australian Capital Territory (Planning and Land Management) Act 1988 (Cth).

¹⁷ A map of Declared National Land may be found in Appendix D of the National Capital Plan, above note 3. Instrumental declaration of relevant parcels of “National Land” is to be found in the Commonwealth Government Gazette, as per s 27 Australian Capital Territory (Planning and Land Management) Act 1988 (Cth).

¹⁸ s 28 Australian Capital Territory (Planning and Land Management) Act 1988 (Cth). See generally *Canberra Drag Racers Club Inc v Australian Capital Territory and Commonwealth of Australia* [2000] ACTSC 61

¹⁹ The remaining three subsections deal with private tenure issues, perhaps illustrating general pre-occupation with the ACT leasehold system.

- the Commonwealth, or a Commonwealth authority, or
- the Territory, or a Territory authority.²⁰

The National Capital Plan may set out detailed conditions of planning, design and development in Designated Areas and priorities in carrying out such planning, design and development.²¹ No work may be undertaken in a Designated Area unless the NCA has approved the works in writing and the works are in accordance with the National Capital Plan.²² The National Plan, and amendments to it, are drafted by the NCA, submitted to consultation with the Territory planning authority and the public, and approved by the Commonwealth Minister responsible for administration of the Australian Capital Territory (Planning and Land Management) Act 1988 (Cth).²³

The ultimate object of the Territory Plan, made and administered by the Territory government, "... is to ensure, in a manner not inconsistent with the National Capital Plan, the planning and development of the Territory to provide the people of the Territory with an attractive, safe and efficient environment in which to live and work and have their recreation."²⁴ It is expressly provided in s 25(6) that the Territory Plan does not apply to Designated Areas. There is considerable potential for overlap of the National Land and Designated Area categories, because of the national character of Commonwealth governmental activities pursued in the capital and this is in fact the case; for example, the Parliamentary Triangle. An example of ambition in the National Capital Plan to achieve a consultative approach to the management of overlapping functions of the NCA and the ACT government may be found in the National Capital Open Space System [NCOSS].²⁵

The purposes of the land management categories of National Land and Territory Land and the planning category of Designated Area must always be kept in mind. As a matter of public land tenure, as noted above,²⁶ regardless of these categories, the dictate of s 125 of the Australian *Constitution* prevails with the effect that the lands that comprise the Australian Capital Territory remain vested in the Commonwealth.

Common Law and International Concepts - Riparian Rights

It is necessary to consider the background provided by the Common Law approach to management of water quality issues, namely riparian rights, before examining how exercise by the ACT and Commonwealth governments of the powers explored above affects the regulation of water quality. The Common Law principles concerning riparian rights are important because (1) they provide a basic civil law standard for water quality in a riverine environment, and (2) the principles applicable to relations between private water users are reflected in international law riparian rights applicable between nation states. These common law rights have been significantly

²⁰ s 11 Australian Capital Territory (Planning and Land Management) Act 1988 (Cth).

²¹ s 10(2)(c), *Ibid.*

²² s 12, *Ibid.*

²³ Part III, Division 2, *Ibid.*

²⁴ s 25(2), *Ibid.*

²⁵ See National Capital Plan, 8. [National Capital Open Space System](#).

²⁶ See above, in text at note 14.

modified by statute, and particularly the Deakin water schemes,²⁷ which vested water in the Crown and provided for distribution to irrigation water consumers. The Water Resources Act 2007 (ACT) establishes such a water scheme for the ACT. However, it is clear that the private common law riparian right to receive water of reasonable quality in the stream has not been affected by the statutory schemes, so upstream users can still be held liable for detracting from downstream water quality.²⁸ Another important aspect of this topic for the purposes of the inquiry is the *community of interest* recognised in a river that is shared by riparian states.

Riparian Rights as a Civil Law Standard of Water Quality

In European private law generally it is not possible to own the water in a flowing stream until it is removed or captured, and the English common law reflected this. Rather, common law riparian rights a stream and access to water in it are conceived as an incident of holding a proprietary right in the land that forms the banks of the stream.²⁹ These principles apply to a watercourse with an identifiable channel, bed and banks, possessing the qualities of a river or stream, but not to depressions in the ground in which water may gather or a flood plain.³⁰ The Molonglo River retains these qualities of a stream as it flows through the artificially constructed Lake Burley Griffin and on to join the Murrumbidgee River.

With respect to the types of proprietary rights in land that give rise to riparian rights in a stream flowing by it, a possessory right, such as a Crown lease of a stream bank would be a sufficient private proprietary right for these purposes but a Crown licence alone would not.³¹ When one thus holds riparian rights with respect to a stream, one gains a common law right to reasonable –

- quantity,
- force (for water mills and so forth),
- quality and
- natural drainage

of water.

Although I have been unable to find a previous court case specifically dealing with nutrient loads, there is no reason why in principle a discharge of nutrients that leads to algal blooms would not be a relevant interference with water quality. It might be said that the nutrients are not toxic *per se*, and only become harmful cumulatively and depending on the condition of the receiving water. However, the effect is to render the water unfit for drinking and bathing. Analogous examples, such as raising

²⁷ Gardner, Bartlett & Gray (2009), above note 29,184. The schemes were adopted widely around Australia: see generally, J M Powell, 'Enterprise and Dependency: Water Management in Australia' in T Griffiths & L Robin (eds), *Ecology and Empire: Environmental History of Settler Societies*, University of Washington Press, 1997, Chp 7.

²⁸ *Van Son v Forestry Commission of New South Wales* (1995) 86 LGERA 108.

²⁹ See generally A Gardner, R Bartlett & J Gray, *Water Resources Law*, LexisNexis Butterworths, Chatswood, 2009, Chapter 8.

³⁰ Gardner, Bartlett & Gray (2009), above note 29,154-155.

³¹ Gardner, Bartlett & Gray (2009), above note 29,153.

salinity³² and siltation³³ levels support the conclusion that contributing to excess nutrient load is a breach of downstream riparian rights. Breach of riparian rights is an interference with proprietary interests actionable as a nuisance and foreseeability is not necessarily a consideration. In the context of civil law rights, the identity of upstream users who might become liable when they interfere with downstream riparian rights includes private persons, corporations and governmental agencies, unless they do so in pursuit of some other clear legal power.

Riparian Rights in International Law

The riparian rights of nation states that share an international river resource reflect the principles found in domestic law, briefly explained above. This is an important consideration because, although they have never been litigated in Australian interstate relations,³⁴ other federated nations, such as India³⁵ and the United States,³⁶ consider the international principles to have corresponding application in relations between states within a federation and the principles have historically played an important role in inter-colony and interstate discourse about shared Australian river systems.³⁷ We might describe these as public law riparian rights. In the context of public law rights, the identity of upstream users who might become liable when they interfere with downstream riparian rights includes governments and their agencies and public authorities, unless they do so in pursuit of some other clear power under, as appropriate, international or constitutional law.

The importance of this is that the Commonwealth holds riparian rights in respect of Lake Burley Griffin and the Molonglo River, within the ACT, by virtue of the lands of the ACT that are “vested in” or “belong” to it, in terms of s 125 of the Australian *Constitution*.³⁸ In respect of the common law, it is thus primarily the Commonwealth that is expected to assert riparian rights in respect of water quality. However, the ACT government holds areas of the stream and lake banks in possession in order to discharge its functions and this is also a sufficient basis for relevant legal action.³⁹

The importance of arriving at a final view on this is reduced by the more important point that it is emphasised in international law that all of the states with riparian rights in an international river hold a *community of interest* in the river. The usual solution to problems in sharing the river is to form an international commission and, in the event of disputes, to submit to arbitration.

³² *Scott-Whitehead v National Coal Board* (1987) 53 P & CR 263; Gardner, Bartlett & Gray (2009), above note 29, 161.

³³ *Van Son v Forestry Commission of New South Wales*, above note 28.

³⁴ Gardner, Bartlett & Gray (2009), above note 29, 126-127, note that litigation threatened by South Australia in 1904-05 did not proceed.

³⁵ See for example Shaheed Z A Bhutto, ‘Riparian Rights in International Law’, Address at Sukkur Law College, 24 April 1961, available at www.bhutto.org/1957-1965_speech38.php

³⁶ See for example J W Dellapenna, ‘The Customary International Law of Transboundary Fresh Waters’ (2001) 1 *International Journal of Global Environmental Issues* 264, 272.

³⁷ See for example discussion of relevant historical sources in *R v Ward (No 2)* [1980] VR 209, concerning location of the Victoria – New South Wales border.

³⁸ See text above, before note 11.

³⁹ Legal action is not necessarily commenced in the jurisdiction where the affected land is located: *Dagi and Others v Broken Hill Proprietary Company Ltd (No 2)* [1997] 1 VR 428 (*Ok Tedi Mine Case*).

An example of an interstate river commission on an analogous scale in Australia is provided by the *New South Wales - Queensland Border Rivers Agreement*, providing for joint management of the Severn, Dumaresq, Macintyre and Barwon Rivers, which form part of the border between the states.⁴⁰ This arrangement is concerned with the sharing of the water resources in the river and not primarily water quality.

Arrangements made between the Commonwealth and NSW for the supply of water to Canberra with respect to the Googong Dam on the Queanbeyan River in NSW put into effect the Commonwealth's powers in respect of these rivers.⁴¹ The Canberra Water Supply (Googong Dam) Act 1974 (Cth) vests in "Australia" the "rights to use and dispose of all waters in the Googong Dam Area and to control, restrict or interrupt the flow of all waters in and from that Area" "exercisable by the Executive" of the ACT government "on behalf of Australia",⁴² "primarily and principally" for use in the ACT.⁴³ As the Googong Dam is on the Queanbeyan River upstream of the City of Queanbeyan, and its confluence with the Molonglo River, the powers in this Act have small relevance to the question of water quality in the Molonglo River and Lake Burley Griffin.⁴⁴

With the highest relevance is the Murray-Darling Basin Agreement 2008.⁴⁵ The Agreement was signed by the Chief Minister of the ACT, however, the ACT is not a "referring state" within the meaning of the Water Act⁴⁶ because the Legislative Assembly has not legislated to refer to the Parliament of the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution such matters as the powers conferred on Commonwealth agencies by the Water Act and the management of Basin water resources to meet critical human water needs.⁴⁷ In any case, § 38 of the Murray-Darling Basin Agreement provides that it will have minimal effect on the ACT. However, this probably underscores the broader irrelevance (or crucial but unrealised relevance) of the Water Act and Agreement to ecological issues, apart from the

⁴⁰ See generally, Gardner, Bartlett & Gray (2009), above note 29, 143-144; New South Wales — Queensland Border Rivers Act 1946 (Qld) and New South Wales — Queensland Border Rivers Act 1947 (NSW).

⁴¹ Outlined in text above, following note 9. See also, the Memorandum of Understanding between the ACT, NSW and the Commonwealth on ACT and NSW Cross Border Water Resources, 2006.

⁴² Section 11. Arrangements for water supply to Canberra were recently the subject of litigation in the High Court of Australia in *Queanbeyan City Council v ACTEW Corporation Ltd* [2011] HCA 40 (5 October 2011), which considered the question of whether water supply costs passed on to Queanbeyan City Council amounted to unconstitutional excises or duties.

⁴³ Section 12.

⁴⁴ Ian Lawrence, above note 4, points out that removal of the flow of water from the Queanbeyan River that would otherwise take place has a strong practical effect on the water quality of Lake Burley Griffin, especially in dry seasons.

⁴⁵ The Agreement is Schedule 1 of the Water Act 2007 (Cth) (compilation prepared on 3 August 2011 taking account of amendments up to Act 46 of 2011).

⁴⁶ Above, note 45.

⁴⁷ s 18B. It could be that the existence of the Territories power (s 122 of the Australian Constitution) makes this unnecessary and thus the ACT remains a "referring State": s 18B(1)(a). Gardner, Bartlett & Gray (2009), consider that the Water Act operates in the ACT simply by virtue of the Territories power and s 51: above note 29, 134 note 47. See s 9A(4). Section 52 of the Australian Constitution could also have relevance on this point.

preparation of water quality and salinity management plan⁴⁸ and an environmental watering plan⁴⁹ and periodic environmental watering schedules.⁵⁰ the Murray-Darling Basin Authority web site still refers to these tasks in the future tense.⁵¹

The National Capital Plan and the Lakes Ordinance 1976

The National Capital Authority [NCA] was introduced above.⁵² The NCA exercises its functions in relation to Lake Burley Griffin because the lake has been designated as National Land and it has a management role under the National Land Ordinance.

The broader functions of the NCA are set out in section 6 of the Australian Capital Territory (Planning and Land Management) Act 1988 (Cth). They are –

- (a) to prepare and administer a National Capital Plan;
- (b) to keep the Plan under constant review and to propose amendments to it when necessary;
- (c) on behalf of the Commonwealth, to commission works to be carried out in Designated Areas in accordance with the Plan where neither a Department of State of the Commonwealth nor any Commonwealth authority has the responsibility to commission those works;
- (d) to recommend to the Minister the carrying out of works that it considers desirable to maintain or enhance the character of the National Capital;
- (e) to foster an awareness of Canberra as the National Capital;
- (f) with the approval of the Minister, to perform planning services for any person or body, whether within Australia or overseas; and
- (g) with the Minister's approval, on behalf of the Commonwealth, to manage National Land designated in writing by the Minister as land required for the special purposes of Canberra as the National Capital.

The powers of the NCA are set out in section 8 –

Subject to this Act, the Authority has power to do all things necessary or convenient to be done for or in connection with the performance of its functions.

Although one would generally consider this a very broad power, it does not extend to management of upstream catchment issues, because this is not one of the functions of the NCA, set out above. The management of upstream catchment issues remains with NSW, subject to Commonwealth involvement under the seat of government agreement,⁵³ with respect to lands in NSW, and with the ACT government with respect to lands in the ACT. Nevertheless, the NCA has included important provisions concerning the lake itself in the National Capital Plan [NCP]. Part 1.2 sets out principles and policies concerning *Lake Burley Griffin and Foreshores*.⁵⁴

⁴⁸ s 25.

⁴⁹ s 28.

⁵⁰ s 29.

⁵¹ www.mdba.gov.au/basin_plan/concept-statement/key-elements (accessed 27.9.2011).

⁵² In text above, following note 14.

⁵³ See above, in text following note 8.

⁵⁴ The text of Part 1.2 is extracted in Attachment 2 of this paper.

Appendix J sets out the *Lake Burley Griffin Technical and Management Guidelines – Hydraulics and Water Quality*.⁵⁵

The NCA's role in relation to the lake is bolstered by the provisions of the Lakes Ordinance 1976, which was adapted to the circumstances of territory self-government by the National Land Ordinance 1989. As with the provisions of the NCP noted above, the Lakes Ordinance 1976 is concerned with control of activity in and around the lake, monitoring and action in the event of poor water quality events. The centre piece of relevant powers is section 21,⁵⁶ which allows the prohibition of use of the lake area or parts of the lake. The first important point is that it is not actually the NCA that closes the lake but the nominated Minister,⁵⁷ and, secondly, there are objective thresholds to be demonstrated⁵⁸ or a formal certificate to be obtained,⁵⁹ and not simply the Minister's satisfaction. The efficacy of the provision as an emergency power must be questioned. The National Land Ordinance itself directs the NCA to manage National Land.⁶⁰ "Management" is defined in relation to land to include "care, control and maintenance"⁶¹ with the likely effect that the management of water quality is included.⁶² The existence of these provisions leaves little room for the concurrent operation of Territory laws, and thus limited scope for the ACT to establish a more effective or more modern power to close the lake in an environmental emergency.

The NCA is in the course of preparing a new *Lake Burley Griffin Water Quality Management Plan*.⁶³ As at present proposed, this document will revise a range of scientific measures of water quality, criteria and benchmarks, in light of data gathered over 10-30 years, according to category. This initiative is to be welcomed. However, again, no and doubt in view of limits on the role of the NCA, it proposes few broader Molonglo catchment initiatives.

Commonwealth Places and the Environment Protection & Biodiversity Act 1999 (Cth)

The Environment Protection & Biodiversity Act 1999 (Cth) [EPBC] is the centrepiece of Commonwealth environmental protection legislation, embracing environmental issues, such as protection of biodiversity and conservation of world heritage, in respect of which the Commonwealth has legislative power by virtue of sections 51 and 52 of the Australian *Constitution*. Section 10 provides –

⁵⁵ The text of Appendix J is extracted in Attachment 3 of this paper.

⁵⁶ The text of s 21 Lakes Ordinance 1976 is extracted in Attachment 4 of this paper.

⁵⁷ In general principle this power could be delegated but appears not to have been.

⁵⁸ s 21(3).

⁵⁹ s 21(3)(c).

⁶⁰ s 4(1).

⁶¹ s 4 Australian Capital Territory (Planning and Land Management) Act 1988 (Cth), applied by s 3(2) National Land Ordinance 1989.

⁶² Communication of the Australian Capital Territory Government Solicitor, above note 5, 5.

⁶³ I am grateful for the opportunity that was allowed me by the NCA to consider the latest draft of this draft document in depth.

This Act is not intended to exclude or limit the concurrent operation of any law of a State or Territory, except so far as the contrary intention appears.

However, it is difficult to imagine a situation relevant to this investigation in which a clash with ACT law could occur.

The main relevance here of this law is its application in respect of *Commonwealth areas* and the activities of Commonwealth agencies. The main example is provided by potential offences undertaken on Commonwealth land that could have a significant impact on the environment,⁶⁴ leading to the need for comprehensive environmental impact assessment and approval under sections 66 – 145E. Other examples include management of –

- National Heritage places in Commonwealth areas,⁶⁵
- wetlands of international importance under the Ramsar Convention, entirely within one or more Commonwealth areas,⁶⁶
- Commonwealth Heritage places in Commonwealth areas,⁶⁷
- Commonwealth reserves,⁶⁸ and
- conservation zones.⁶⁹

Section 525 includes the ACT in the definition of a Commonwealth area, apart from *Territory Land*,⁷⁰ unless the relevant Territory Land is held under lease by the Commonwealth or a Commonwealth agency. Consequently, Lake Burley Griffin is also a Commonwealth area for the purposes of the EPBC.

Statutory Regulatory Structures – the Environment Protection Acts of the ACT and NSW

The waste discharge licensing systems of the ACT and NSW are based on the same model⁷¹ and have strong underlying similarities –

- the Environment Protection Act 1997 (ACT), which established the ACT Environment Protection Authority, and
- the Protection of the Environment Operations Act 1997 (NSW) and the Protection of the Environment Administration Act 1991 (NSW), which established the NSW Environment Protection Authority⁷².

⁶⁴ ss 26, 27 and 27A Environment Protection & Biodiversity Act 1999 (Cth).

⁶⁵ s 324S.

⁶⁶ s 328.

⁶⁷ ss 341A – 341ZH.

⁶⁸ ss 342 – 390A (marginal relevance).

⁶⁹ ss 390B – 390J (marginal relevance).

⁷⁰ The concept of *Territory Land* is dealt with in text above, following note 18.

⁷¹ Foundation of the US Federal Environment Protection Authority by President Richard Nixon in 1970 coincided with a similar Victorian initiative found in the Environment Protection Act 1970 (Vic).

⁷² See the website of the Office of Environment and Heritage [OEH]: www.environment.nsw.gov.au/

Both systems feature –

- tiered offences of creating states of pollution,
- a licensing system that regulates waste discharges,
- powers to make environment protection policies that clarify acceptable ambient and other environmental qualities, and regulations that support administration of the system, and
- administration of the Act generally, with powers such as the inspection of premises.⁷³

A significant underlying limitation found in this model of waste discharge licensing is the concentration of the system on “point source” as opposed to “diffuse” discharges. Point source discharges are those released from an identifiable point, such as a pipe or chimney stack. Diffuse discharges emanate from a site generally, such as rainwater surface run-off. While discharges laden with nutrients that enter watercourses from waste treatment facilities and storm water drains do emanate from point sources, a considerable volume of nutrient laden water enters watercourses as rainwater surface run-off or moisture percolating through soil. Such run-off, and drainage from streets and other urban areas is also the original source of storm water discharges.

It is generally accepted that the ACT EPA has authority with respect to the water quality of watercourses and other discharges that enter Lake Burley Griffin, while the National Capital Authority has primary responsibility for the water quality of the Lake itself. The ACT Health Protection Service also monitors water quality in Lake Burley Griffin.

A number of points may be made about the operation of the Act in connection with –

- immunity of government entities
- the limited ability of private citizens to enforce the Act
- territorial scope of the offences

Section 10 of the Environment Protection Act 1997 (ACT) offers a *government entity*⁷⁴ limited immunity from criminal liability under the Act, which embraces the main offences of causing pollution –

- causing serious environmental harm: section 137(3),
- causing material environmental harm: section 138(3)
- causing environmental harm: section 139(3)
- causing an environmental nuisance: section 141
- placing a pollutant where it could cause harm: section 142.

⁷³ For a general overview, see J Pitts, ‘Environmental Harm’ in A Rawson (ed), *ACT Environmental Law Handbook*, 2nd ed, Environmental Defender’s Office (ACT), 2009.

⁷⁴ Defined in s 121 of the Legislation Act 2001 (ACT) to include an instrumentality, officer or employee of the government; and a contractor or anyone else who exercises a function on behalf of the government.

The standing of private citizens to sue in environmental cases has long been debated. Issues concerning prosecution of criminal offences are less well appreciated. At common law all citizens have the right to initiate a private criminal prosecution, although this is often modified by legislation.⁷⁵ Section 127 of the Environment Protection Act 1997 (ACT) allows the EPA to apply to the ACT Supreme Court for injunctive order with the purpose of enforcing the Act. Application may also be made by “any other person with leave of the court”.⁷⁶ However, the court must not grant leave unless it is satisfied that the person has requested the authority to take action under the Act and the authority has failed, within a time that is reasonable in the circumstances, to notify the person in writing that it has taken any action that is appropriate in the circumstances, and, it is in the public interest that the proceedings should be brought.⁷⁷

In NSW private citizens may apply to the Land and Environment Court but there the applicant need only notify the EPA of the application and establish a relevant breach of environmental legislation in the substantive case.⁷⁸ The ACT requirement of first requesting action by the EPA and then applying to the court should there be no adequate response resembles health provisions regarding the remedying of nuisances at local government level, apparently of Imperial origin,⁷⁹ still found in Victorian health legislation.⁸⁰ One advantage of the Imperial provision was that the complaint could be made in the Magistrates Court rather than courts at the higher level of the NSW Land and Environment Court or the ACT Supreme Court with commensurately higher legal costs.

Section 22 of the Australian Capital Territory (Self Government) Act 1988 (Cth) conferred plenary powers on the ACT Assembly “to make laws for the peace, order and good government of the Territory” as noted above,⁸¹ a term generally connoting authority to make laws with potentially extra-territorial reach. Section 2 of the Australia Act 1986 (Cth) recognised the extra-territorial reach of State legislation, however this pre-dated the Australian Capital Territory (Self Government) Act. The Australia Act nevertheless expresses an intention to bring formal constitutional arrangements “into conformity” with a state of affairs that already existed.⁸² When section 22 of the Australian Capital Territory (Self Government) Act was drafted, it must have been recognised that the power “to make laws for the peace, order and

⁷⁵ See generally M Raff, ‘Pollution, Politics and National Competition Policy - the National Competition Policy Review of the Environment Protection Act in Victoria’ (1999) 6 *Australasian Journal of Natural Resources Law & Policy* 91.

⁷⁶ s 127(1)(b).

⁷⁷ s 127(2).

⁷⁸ s 252 of the Protection of the Environment Operations Act 1997 (NSW).

⁷⁹ See *Mowling v Justices of Hawthorn* (1891) 17 VLR 150.

⁸⁰ Formerly Part III Health Act 1958 (Vic) and now ss 60-67 Public Health and Wellbeing Act 2008 (Vic). See also ss 124 & 125 Local Government Act 1993 (NSW), now operating in this respect through s 252 of the Protection of the Environment Operations Act 1997 (NSW), referred to above, note 78.

⁸¹ In text above, before note 6.

⁸² Preamble, Australia Act 1986 (Cth).

good government of the Territory” would bring with it this capacity where a sufficient connection to the Territory is found⁸³ –

... the test whether a law is one for the peace, order and good government of the State is, as so stated, exceedingly vague and imprecise, and a rather more specific test has been adopted; it has become settled that a law is valid if it is connected, not too remotely, with the State which enacted it, or, in other words, if it operates on some circumstance which really appertains to the State ... [518] it is obviously in the public interest that the test should be liberally applied, and that legislation should be held valid if there is any real connexion — even a remote or general connexion ...⁸⁴

ACT legislation thus potentially has extra-territorial reach.

The main events giving rise to culpability with respect to offences under the Environment Protection Act 1997 (ACT), causing serious environmental harm,⁸⁵ causing material environmental harm,⁸⁶ causing environmental harm,⁸⁷ and causing an environmental nuisance,⁸⁸ take place within the ACT and potentially form a sufficient connection to the jurisdiction, even if the discharge or release of waste causing it were to take place outside the ACT – the person responsible for such a discharge could thus potentially be prosecuted by the ACT EPA.

Land Use Planning Powers

Land use planning has been considered relevant to environmental management since its inception.⁸⁹ It goes almost without saying that both the ACT and NSW have statutory land use planning schemes.⁹⁰ Land use planning is a potentially effective tool in the management of land based activities that give rise to non-point source discharges on private land, with the capacity to scrutinise developments proposals for potential to exacerbate water quality issues.

Proactively, it would be possible to assist regulation of horticultural or agricultural practices with potential to exacerbate the situation in the catchment, for example, contributing nutrients to or withholding water flow from the river system, through conditions on relevant planning zones or permissions, or by developing a general planning overlay for land with potential impacts on the riverine environment.

⁸³ See generally T Blackshield & G Williams, *Australian Constitutional Law and Theory – Commentary and Materials*, 4th ed, Federation Press, Sydney, 2006, 153-162.

⁸⁴ *Pearce v Florenca* (1976) 135 CLR 507 per Gibbs J, 517-518. See also *Port MacDonnell Professional Fishermen’s Assn Inc v South Australia* (1989) 168 CLR 340, *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, and *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403.

⁸⁵ s 137.

⁸⁶ s 138.

⁸⁷ s 139.

⁸⁸ s 141.

⁸⁹ See generally, M Raff, ‘A History of Land Use Planning Legislation in Victoria’ (1996) 22 *Monash University Law Review* 90

⁹⁰ ACT: Planning and Development Act 2007 (ACT). NSW: Environmental Planning & Assessment Act 1979 (NSW).

Integrated Catchment Management

The ideal of *integrated catchment management* is to align human activity and systems of authority with the broader natural eco-system that underpins it all, the water catchment within which it all takes place, noting that almost everything we do will have effects on surface and groundwater in the catchment. The alignment of natural and human boundaries should facilitate the recognition and greater exercise of responsibility with respect to the interconnected ecology of the catchment.⁹¹

Victoria and NSW have undertaken significant initiatives in catchment management with related ideals,⁹² which nevertheless do not fully realise the ideal stated above.⁹³ This probably reveals the intransigence of broader political forces and established political boundaries, conceptual as well as spatial, rather than failure of the initiatives themselves. Without doubt, the relevant catchment bodies⁹⁴ play strong valuable roles in coordination and consultation at community and stakeholder levels.

Conclusion

The structure of powers and the activities of relevant Commonwealth, ACT and NSW agencies and authorities suggest that the management of water quality issues in the Molonglo River catchment has fallen back to reactive approaches, such as monitoring Lake Burley Griffin and closing it when standards are exceeded, rather than proactive approaches, such as seeking to manage conditions in the catchment that give rise to water quality problems. In my assessment, this is an understandable response in light of the complex jigsaw of authority and powers and apparent mismatches between authority and powers. Without clear authority to take necessary initiatives with respect to the catchment as a whole, what else can agencies do but adopt reactive postures to the problem? A range of water quality control measures has been identified,⁹⁵ however, these need to be supported by broader governance structures through which problems may be reduced at their sources and the implementation of direct measures can be coordinated.

At an ideal level, what is called for is a new vision for and approach to management of water quality in the catchment as a whole. However, experience suggests that new arrangements at the required scale take much time and many resources to develop and implement. Accordingly, in the governance options that I sketch and discuss below I also seek to identify practical steps forward that could potentially

⁹¹ See generally, A Gardner 'The Administrative Framework of Land and Water Management in Australia' (1999) 16 *Environmental & Planning Law Journal* 212. See also S Hatfield-Dodds, 'The catchment care principle: a practical approach to achieving equity, ecosystem integrity and sustainable resource use', CSIRO, Australia, 15 January 2004, available at www.water.org.au/pubs/pub11_dodds.htm

⁹² Vic: Catchment and Land Protection Act 1994 (Vic). NSW: Catchment Management Authorities Act 2003 (NSW).

⁹³ Gardner, Bartlett & Gray (2009), above note 29, § 6.23.

⁹⁴ For this catchment the Murrumbidgee Catchment Management Authority : www.murrumbidgee.cma.nsw.gov.au/. The ACT Natural Resource Management Council exercises analogous functions in the ACT: www.actnrmcouncil.org.au/

⁹⁵ The report of Ian Lawrence, above note 4, § 8 Management Intervention Assessment, identifies and reviews a range of achievable direct measures.

improve the situation in a shorter time frame, with less resources, while serving as a step toward the development and implementation of the broader vision.

Option 1 – Extension of Commonwealth Involvement

The Commonwealth holds a range of relevant powers that have been explored above –

- exclusive powers with respect to the seat of government in section 52 of the Australian Constitution,
- the benefit of a range of rights with respect to the Molonglo and Queanbeyan Rivers under the agreement with NSW concerning the seat of government,
- riparian rights with respect to upstream sources of water quality problems, and
- the territories power in section 122 of the Australian Constitution.

Why not develop a Commonwealth response?

Although these powers are extensive, it remains questionable that they are sufficient to form the basis of authority to undertake the comprehensive coordination that is required with respect to environmental management of lands in NSW. A Commonwealth response that could address the problems identified would require intervention on a scale that would also impair self-government of the ACT. The ongoing cooperation of relevant areas of government is essential for success at every step. A Commonwealth response of this nature would have to be cast in legislation. The result would be another layer of administration and set of legal powers in an area that appears already to have more than enough agencies at all levels of government in a complex jigsaw of powers. It is suggested that one more, even a Commonwealth mega-agency, would further confuse the way forward, rather lead to solutions. It would be a challenge for such a mega-agency, imposed on the other two jurisdictions from above, to achieve and maintain the level of cooperation required.

Option 2 – Extension of ACT Involvement

The ACT EPA already has far reaching powers with respect to water quality in the Molonglo River and within areas of the catchment within the ACT. In addition it could probably prosecute the impairment of water quality identified in NSW with respect states of pollution that ensue in the ACT, although, as presently conceived, the waste discharge licensing model found in the Environment Protection Act 1997 (ACT) focuses on point sources. The ACT also has the benefit of riparian rights with respect to upstream sources of water quality problems.

These powers and rights might form the basis of prosecution or legal claim, however, they are insufficient to form the basis of authority to undertake the comprehensive coordination that is required by the scale of the problem.

In relation to Lake Burley Griffin itself, the existence of the Lakes Ordinance and the National Land Ordinance in the least limit the power of the ACT to undertake comprehensive management of the problem by virtue of the constitutional superiority of Commonwealth.

In addition, the National Capital status of relevant areas attracts on-going Commonwealth involvement. It would be necessary to find ways within an ACT response to gain input from the Commonwealth, as well as NSW, and achieve cooperation to implement measures that are beyond the power of the ACT.

Option 3 – A Catchment Management Forum or Council

Consideration in this report of existing powers and authority that may be brought to bear on the problem suggests strongly that the missing element is coordination of existing expertise and powers, rather than the creation of new ones. The formation of a council or forum of relevant Commonwealth, ACT and NSW agencies, local government and other stakeholders, including community representatives, would provide the capacity for coordination across the Molonglo catchment of activities with potential effects on water quality, while retaining with the agencies and other interested parties direct connection to, if not “ownership” of the problems.

A catchment council is the way forward suggested by international and federal approaches to riparian rights,⁹⁶ building on the insight that riparian right holders form a *community of interest* in the resource and its broader ecological context. Inter-governmental committees have collaborated successfully on these issues in the past; for example, a Joint Government Technical Committee provided a forum in the coordination of inter-governmental agency action to remediate heavy metal pollution from an old mine at Captain’s Flat. A more permanent Intergovernmental Committee for the Environment existed between 1970 and 1990.

The catchment management council would exist within a broader framework of Murray Darling Basin and Murrumbidgee River Catchment management but focus on the Molonglo River catchment. An independent chair would be most desirable. It could develop –

- a vision for the ecological health of the Molonglo River catchment, and
- develop an environmental improvement plan for the catchment

to be implemented by its member agencies within their own spheres of operation and powers.

Its on-going coordination tasks could include⁹⁷ –

- in-Lake management measures;
- catchment management;
- designation & zoning of use values;

⁹⁶ In text above, following note 33.

⁹⁷ Priority management measures identified by Ian Lawrence in his water quality report, above note 4, § 8.

- an improved algal bloom risk forecasting capability;
- level of values and objectives maintenance management;
- user education, awareness and risk management measures;
- a monitoring program providing the scope of information supporting appropriate management and risk assessment decisions, on the part of the management authority and user groups;
- data coordination.

The main challenges of this approach relate to security of funding and lack of formal legislative or administrative powers. On the other side, it appears that across the agencies involved there is not a lack of powers but rather mismatches between functions and powers in relation to this issue that call for leadership and coordination with respect to it. There is also a need for priority setting in light of inputs from a broad range of community and agency sources.

A catchment council would have the independence needed to gather technical information and commission studies and to formulate responses that would enjoy a higher level of confidence in the eyes of agency and community participants. The task of developing greater detail for this option itself requires broad consultation, however there already appears to be acknowledgement of the need for a shared vision and successful experience of coordinating approaches in the past, such as the Captain's Flat project and Intergovernmental Committee for the Environment referred to above.

In the longer term, this coordination role could be linked to or united with the roles of other groups with similar concerns, such as the Upper Murrumbidgee Catchment Coordinating Committee.⁹⁸ In the shorter term, the catchment council could be formed as a company limited by guarantee, which is a corporate vehicle in widespread use among not-for-profit organisations, combining flexible powers with corporate governance standards and audit requirements. Most importantly the coordination role of the catchment council would not be complicated by constitutional or jurisdictional complexities. Precedents for use of private law corporate models in pursuit of these advantages in governmental, private sector and community cooperative arrangements include the Australian mapping network led by PSMA Australia Ltd⁹⁹ and G21.¹⁰⁰ Representative board positions could be held by participating Commonwealth, ACT and NSW agencies, local government, private sector stakeholders and community representatives. Such a body would develop a longer term new vision for and approach to management of water quality in the catchment as a whole. This is the approach that I recommend.

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⁹⁸ <http://umccc.org.au/>

⁹⁹ PSMA Australia Ltd, a company owned by state, territory and Australian governments, established to coordinate the collection of fundamental national geospatial datasets and to facilitate access to this data, which started in 1993 as a government consortium formed to create an integrated national digital base-map for the 1996 National Census: see <http://www.pasma.com.au/index.html>

¹⁰⁰ Geelong Regional Alliance: <http://www.g21.com.au/about-g21>

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Attachment 1

Liability Issues in Division of Responsibilities Between the Commonwealth and ACT Governments

Section 30 of the Australian Capital Territory (Planning and Land Management) Act 1988 (Cth) goes on to deal with liability issues –

30 Territory liable as manager of Territory Land

- (1) Where, apart from this section, the Commonwealth would be liable in respect of an act done or omitted to be done by the Territory in the performance of its functions under section 29,¹⁰¹ the liability is vested in the Territory and ceases to be a liability of the Commonwealth.
- (2) Where:
 - (a) a liability arises in respect of land at a time when it is Territory Land; and
 - (b) the liability arises from a covenant given by the Commonwealth at any time in its capacity as owner of the land;
 the liability is vested in the Territory and ceases to be a liability of the Commonwealth.

The provision is fairly clear that the liability of the Territory is in reference to acts or omissions with respect to management functions. Other liability not caught by this provision would remain with the Commonwealth, or at least be shared or divided between the Territory and the Commonwealth according to other responsibilities.

Section 51(1) on the other hand provides that –

The Commonwealth shall indemnify the Territory, and keep the Territory indemnified, against any action, claim or demand brought or made against the Territory in respect of any act done or omitted to be done by or on behalf of the Commonwealth, being an action, claim or demand that, apart from this Act, could be brought or made against the Commonwealth.

The indemnity extends to damages, expenses and costs.¹⁰² It does not apply to actions, claims or demands in respect of liabilities referred to in s 30.¹⁰³

The question of liability in respect of National Land managed by the Territory under separate agreements made with the Commonwealth is not answered by s 30. Under general principle, the Commonwealth would remain at least partly liable for acts or omissions of the Territory unless the separate agreement specified otherwise, or the Territory was acting outside the scope of the separate agreement at the time of the relevant act or omission. In cases of part liability in respect of acts or omissions of the Territory in its management of National Land under a separate agreement made with the Commonwealth, s 51 could well have the effect of indemnifying the Territory in respect of its part. Again, this might not be the case if the separate agreement provided otherwise, but query whether this statutory indemnity may be contracted out of, or if the Territory was acting outside the scope of the separate agreement at the time of the relevant act or omission.

¹⁰¹ Administration of Territory Land. An extract of s 29 is set out above, in text at note 19.

¹⁰² s 51(2) Australian Capital Territory (Planning and Land Management) Act 1988 (Cth).

¹⁰³ s 51(3), *Ibid.*

Attachment 2

Extract from the Agreement for the Surrender to and Acceptance by the Commonwealth for the Purposes of the Seat of Government

The text in this extract is taken from Schedule 1 of the Seat of Government Acceptance Act 1909 (Cth). This extracted text is unaffected by the Seat of Government Acceptance Act 1922 (Cth).

...

2. The right of the State or of the residents therein to the use and control of the waters of the Queanbeyan and Molonglo Rivers and their tributaries which lie to the east of the Goulburn to Cooma Railway shall be subject and secondary to the use and requirements of the Commonwealth (which are hereby declared to be paramount) for all the purposes of the Territory, and the State shall consent to the construction by the Commonwealth in the State of such works as are necessary for those purposes.
3. The State shall reserve from sale, lease, and occupation (except with the concurrence of the Commonwealth) all Crown lands within the catchment areas of the Queanbeyan and Molonglo Rivers.
4. The State shall not pollute and shall protect from pollution the waters of the Queanbeyan and Molonglo Rivers throughout their whole course above the Territory.

...

Attachment 3

Extract from Part 1.2 of the National Capital Plan

1.2 Lake Burley Griffin and Foreshores

1.2.1 Background

Lake Burley Griffin is an integral part of the design of Canberra and is a vital and key element in the plan for the National Capital. The lake is not only one of the centrepieces of Canberra's plan in its own right but also forms the immediate foreground of the Parliamentary Zone.

Lake Burley Griffin has become an important recreational resource for Canberra's residents and visitors, but there is a need to identify ways in which the lake can be used to further unify the city as a whole both functionally and in landscape terms.

The Authority will support the development of recreational, tourist and National Capital uses of the Lake and its foreshores. A well defined system of lakeside drives, park access roads and public transport access should be maintained so that residents and visitors can get to the lake and its parks without disturbing nearby areas unduly.

The lakeside pedestrian/cycle path around the entire lake needs to be completed. The link around the eastern part of the lake is to be built in a manner which does not compromise the conservation values of the Jerrabomberra Wetlands. If it is commercially feasible, a ferry service from the ferry terminal to the Parliamentary Zone and other tourist nodes will be supported.

Lake Burley Griffin and Foreshores are part of the National Capital Open Space System. The principle and policies set out at 8.2 and 8.3 will apply as well as the principle and policies below.

1.2.2 Principle for Lake Burley Griffin and Foreshores

To conserve and develop Lake Burley Griffin and Foreshores as the major landscape feature which unifies the National Capital's central precincts and the surrounding inner hills; and to provide for National Capital uses and a diversity of recreational opportunities.

1.2.3 Policies for Lake Burley Griffin and Foreshores

- (a) Lake Burley Griffin and Foreshores should remain predominantly as open space parklands while providing for existing and additional National Capital and community uses in a manner consistent with the area's national symbolism and role as the city's key visual and landscape element.
- (b) Lake Burley Griffin and Foreshores are intended to provide a range of recreational, educational and symbolic experiences of the National Capital in both formal and informal parkland settings with particular landscape characters or themes. These should be maintained and further developed to create a diversity of landscape and use zones which are integrated into the landscape form of the city and reflect the urban design principles for the National Capital.
- (c) Jerrabomberra Wetlands will be protected as a wildlife refuge in a National Capital and urban context, with facilities designed to realise the area's potential as a significant conservation and education resource for Canberra residents, tourists and international visitors.
- (d) The water quality and hydraulic operation of the lake should be maintained in a manner designed to protect Lake Burley Griffin and Foreshores' visual and symbolic role and its water uses as set out in Appendix E.

- (e) The range of uses permitted in Lake Burley Griffin and Foreshores will be the following:
- Aquatic Recreation Facility
 - Club (related to lake use only)
 - Community Facility
 - Landscape Buffer
 - National Capital Use
 - Outdoor Education Establishment
 - Park
 - Pathway Corridor
 - Public Utility
 - Regatta Point Exhibition
 - Reserve
 - Restaurant
 - Restricted Access Open Space
 - Road
 - Scientific Research Establishment
 - Tourist Facility (not including a service station)

The nature of uses permitted in Lake Burley Griffin and Foreshores is defined in Appendix A.

Attachment 4

Extract from Appendix J of the National Capital Plan

Appendix J

Lake Burley Griffin Technical and Management Guidelines

Hydraulics And Water Quality

Preamble

Hydraulics and Water Quality Criteria

A great many inter-related factors affect the Lake and the quality of its water. The usual coordination mechanism is to adopt a set of designated uses together with criteria for hydraulics and water quality.

Operation of Scrivener and Googong Dams

At present, Scrivener Dam is mainly used to maintain the level of the Lake and prevent flooding in its environs. With the development of the Lower Molonglo River for recreation, it will be necessary to impose new operating criteria.

The construction of Googong Dam has reduced the flow into the Lake and hence the overflow downstream of the Scrivener Dam. There are however Commonwealth/State agreements on riparian and other releases from Googong. In addition, provision has been made for Googong to store enough water to top up Lake Burley Griffin unless there is a severe drought.

Flood Plain Protection

Some major floods have been recorded in the Molonglo River. While development has in general been excluded from the 100-year flood plain, at this stage, there are no formal siting policies with respect to flood levels.

Soil Conservation and Siltation Control

As a result of an extensive programme of soil conservation, the carrying of sediment by the Molonglo River and the consequent siltation of Lake Burley Griffin have been considerably reduced. However, with the increasing pressures on land uses within the catchment, continual monitoring of erosion will be required.

Local and Dispersed Sources of Discharge to the Lake

While the establishment and growth of aquatic plants (eutrophication) is a natural process in the ageing of a lake, it has been intensified in Lake Burley Griffin by the discharge to the Lake of nutrients from sewage effluent, urban runoff, agricultural fertilisers and animal faeces in the catchment and by the depletion of throughflow because of the construction of Googong Dam.

Sewerage

Present recreational areas are well serviced by sewers, but several potential recreation areas around the Lake are still a long way from sewer lines.

Stormwater

There needs to be stronger control over discharges of stormwater to the Lake and discharges to the stormwater drains.

Water Supply

In some situations it may be cheaper to use Lake water rather than town mains for irrigating parks and gardens.

Water Pollution Legislation

Enactment of the Water Pollution Ordinance 1984 has provided a mechanism to control industrial and commercial waste discharges to urban drains and the Lake.

Mine Pollution Abatement

Since the Captain's Flat mine pollution abatement works were completed (1975), there has been much less heavy metal pollution of the Molonglo River.

Management of Aquatic Plants

While aquatic plants may be a nuisance, they do play an important role in the overall ecology and the protection of the water quality of the Lake. In the interests of general Lake water quality, this aspect of the Lake's ecology must be carefully managed.

Lake Deepening

The shallowness of some areas of the Lake, together with aquatic plant growth and siltation, hinders recreational uses.

Development Along the Lakeshore

The opportunity to intercept drainage, monitor water discharges, and construct trash and oil traps may be lost if development takes place right next to the foreshore.

Water Quality Monitoring

The monitoring of the quality of the water in the Lake has so far been geared to particular functions, such as the management of fish, and to dealing with specific problems as they arose. It should be carried out comprehensively to meet the needs both of planning and management.

Maintenance And Management

Preamble

Co-ordination of Planning and Management

The Lake is managed in accordance with the provisions of the Lakes Ordinance 1976 so as to improve the appearance of the national capital, preserve the environment and allow the best use of the Lake for recreation.

Park Maintenance Standards

Because they form the setting for the Lake and the National Area, and are very popular with tourists and locals, the parklands surrounding the Lake are areas of special national concern, and their present high standard of maintenance is therefore justified.

Lake Management Practices

Some established Lake management practices should be reviewed.

Lakeshore Development Sites

Sites for club houses and boatsheds have been provided along the lakeshore and areas have been set aside for future national capital and tourist developments.

Activities not compatible with the key policy objectives for Lake Burley Griffin shall not be permitted.

Guidelines

1. A Guideline is that a Lake Burley Griffin Management Plan will be prepared by the National Capital Planning Authority.
2. The Guideline is that the Designated Uses and the Hydraulic and Water Quality Criteria to protect them, as set out below, shall apply;

Wherever possible Lake waters should not be altered in ways which reduce the quality below the desirable level for the following specific uses. A complete set of water quality objectives is contained in Appendix E – ACT Water Policies. The following objectives are the main ones relevant to particular uses:

(a) Landscape Function

The quality of Lake waters should be consistent with the protection of aquatic plants and animals where this does not conflict with other uses.

Lake water should be free from:

- floating debris, oil, grease, scum or other objectionable matter
- substances that produce undesirable colours, smells, turbidity or foaming
- undesirable aquatic growth such as algae blooms or larger plants.

(b) Water Recreation

For all forms of water recreation the water quality should meet the criteria recommended for landscape purposes as well as the following additional criteria:

Fishing

Changes in water quality should produce only minimal changes in species of fish or their habitat.

Boating

Lake water should be free of:

- toxic or irritant algae
- floating and submerged debris.

Swimming

Ideally, swimming water should have:

- pH within the range of 6.5 to 8.3
- E. coli concentrates less than 200 per 100 ml
- sufficient clarity for a Secchi disc to be visible at a minimum depth of 1.2m
- temperature in the range 20–30°.

In swimming areas, water should be free of floating and submerged debris and of weed growth.

At times, because of natural processes, the Lake water will not meet these criteria.

Swimmers should be warned of the extra care required in using the Lake at these times.

(c) Irrigation Water Supply

The total suspended solids of the Lake water should be less than 200 mg/L.

(d) Protection of Aquatic Ecology

Lake waters should have:

- ortho-phosphate less than 0.025 mg/L
- unionised ammonia less than 0.025 mg/L
- suspended solids less than 80 mg/L
- dissolved oxygen greater than 7 mg/L

Water discharged to the Lake should not cause temperature variations of more than 5°C from the naturally occurring temperature.

3. The Guideline is that the Operating Criteria for Scrivener and Googong Dams as given below, shall apply:

Scrivener Dam

The ACT Administration has prepared a draft manual, Scrivener Dam Gate Operation Procedures During Floods which is currently being reviewed. The first criterion is that Scrivener Dam should be operated so as to minimise flooding of the Lake environs. The normal mode of operation of the flood gates should be to release flow at Scrivener Dam at approximately the same rate as the inflow to the Lake from all sources less losses. This will maintain a nearly constant Lake level in East Basin equal to the normal Lake level of RL 555.93 m, for flows up to 2 000 cumecs. At 2 000 cumecs all flood gates should be fully open and any subsequent increase in inflow will result in a higher Lake level.

Frequent gate operations with small incremental increases in releases from Scrivener Dam, particularly during the initial stage of a flood, minimise the rate of rise in the river level downstream more effectively than infrequent gate operations of large increments. As a safety precaution for downstream, therefore, operations should be in small increments at a suitable frequency.

Flows up to a total of 55 cumecs can be released by the three sluice gates which can be operated either manually or automatically by the level of the Lake. In the initial stages of a flood greater than 55 cumecs, there are constraints on the initial rate of release of water, on the order of operation of the gates, and on the extent to which individual gates are opened, so as to dissipate the energy of tailwater below the dam.

Releases from the Dam should maintain a base flow of 0.03 cumecs in the Molonglo River downstream of Scrivener Dam at the gauging station below Coppins Crossing. However, such releases may be suspended when there are water restrictions in Canberra or when the drawdown in Googong Reservoir is such that water restrictions might be required in the immediate future.

Modifications shall be made to the outlet arrangements at Scrivener Dam to facilitate release of water from the upper level of the Lake at the rate required for base flow maintenance.

Googong Dam

The Googong Reservoir, together with the Cotter River storages, can supply water for a population of 400,000. It can also supply riparian rights along the Queanbeyan river downstream to the ACT border, irrigation for a limited area within New South Wales and along the banks of the Queanbeyan River from Googong Dam to the ACT border, and irrigation for 400 hectares of land around the foreshores of Lake Burley Griffin, as well as topping up the lake so that it does not fall more than 0.25 metres below the normal level of RL 555.93m.

Releases of water from Googong Reservoir shall be made in accordance with the memorandum of understanding on Riparian and other Releases, as drafted by the Commonwealth.

Releases for topping up Lake Burley Griffin shall be made to maintain the Lake at not less than 0.25 metres below the normal level of RL 555.93 m. the exception to this is during periods of 'water restrictions' in Canberra or during periods when the drawdown in storage at Googong Reservoir and/or the three Cotter storages is such that water restrictions might be imposed in the immediate future. The

releases from Googong Reservoir will include the water required to compensate for evaporation losses from Lake Burley Griffin, irrigation water withdrawals from the Lake and release at Scrivener Dam to maintain a base flow of 0.03 cumecs in the Molonglo River at the gauging station below Coppins Crossing.

Within the constraints of inlet systems, water level and the requirements of the treatment plant, the quality of the releases made from Googong Dam for riparian rights and other purposes shall be the available at the time of release.

4. The Guideline for Flood Plain Protection, is to exclude structures, habitation and landfill within the floodplains, unless no alternatives are available. (Where structures are necessary, they shall be designed to minimise impacts on the passage of the flood or on flood levels. In the case of water storages, inundation of upstream land is accepted only on the basis of other benefits derived by the community.)

To achieve this objective the following will apply;

(i) Development shall be excluded from the 1:100 AEP flood area unless no alternative is available.

(ii) Peak flood levels shall not be increased above existing levels unless it can be demonstrated that the rise does not adversely affect leases or services.

(iii) Peak flood velocities shall not be increased above existing levels unless it can be demonstrated that the increased velocity does not adversely affect the stability of the flood plain or safety. An average velocity of 2 m/s is the maximum acceptable velocity over the natural flood plain.

(iv) The duration and frequency of flood inundation shall not exceed existing flood inundation frequency and duration unless it can be demonstrated that such changes do not adversely affect the flood plain.

(v) Velocity-depth values shall not be increased above existing velocity depth values unless it can be demonstrated that increased values do not adversely affect safety.

(vi) Ponding or reduction of flows shall not be acceptable if significant sedimentation, which is detrimental to the flood plain, can be expected.

5. The Guideline for Soil Conservation and Siltation Control, is that the Commonwealth shall periodically review erosion in the Lake catchment in conjunction with other authorities and seek agreement to incorporating planning controls over subdivision and land use policies.

Land use and development in the catchment areas draining to the Lake will be coordinated with soil conservation requirements under the ACT Water Pollution Ordinance and the ACT Building Ordinance.

The system of bed load traps is to be extended, covering all discharge outlets to the Lake, and is to be maintained on a regular basis.

6. The Guideline for Local and Dispersed Sources of Discharge to the Lake, is that all discharges of waste to the Lake shall be contained, either by connection to the Canberra sewerage system, or by treatment to remove pollutants before discharge.

7. The Guideline for Sewerage, is that the sewers shall be extended to match a programme of recreational development.

8. The Guideline for Stormwater, is that trash, oil and bed load traps shall be incorporated into all major drains discharging to the Lake.

The location of stormwater drain outlets in relation to Lake water quality zones and designated uses is to be reviewed. Drains are to be relocated in some locations to facilitate the maintenance of parklands.

9. The Guideline for Water Supply, is that the economic and environmental benefits of using Lake water to irrigate parks and gardens be investigated. After the amounts available for such purposes have been determined, all taking of water from the Lake and River is to be controlled.

10. The Guideline for Water Pollution, is that compliance with the requirements of the Water Pollution Ordinance 1984 be monitored.

11. The Guideline for Mine Pollution Abatement, is that the results of monitoring of the Molonglo River downstream of the Captains Flat mine abatement works shall be kept under review to ensure that the pollution of the Lake from this source is controlled.

12. The Guideline for Management of Aquatic Plants, is that established areas of macrophyte growth, including East Basin, Sullivans Creek Inlet and Acacia Inlet shall be protected and managed as weed growth habitats, except for designated recreation uses requiring direct access to the water's edge.

13. The Guideline for Lake Deepening, is that consideration shall be given to deepening the Kingston Boat Harbour, the area between Springbank Island and Hospital Point, Acton ferry terminal and other areas as needs dictate. In the short term, aquatic plant beds in the east end of the Lake will be retained as a nutrient trap to protect the water quality of the Lake.

14. The Guideline for Development along the Lakeshore, is that it shall be so sited that all drainage and waste discharges from the site can be intercepted and discharged to drains and sewers, and the drains equipped with trash, sediment and oil traps.

The drainage requirements for developments may be included as development conditions at the developer's expense.

15. The Guideline for Water Quality Monitoring, is that a comprehensive programme of water quality monitoring shall be agreed on and undertaken.

16. The Guideline for Coordination of Planning and Management, is that these guidelines be adopted as a basis for coordinated planning and management.

17. The Guideline for Park Maintenance Standards, is that the lakeside parkland shall continue to be maintained to a high standard.

18. The Guideline for Lake Management Practices, is that the following Lake management practices be reviewed;

- Lifebuoys, emergency telephone and rescue procedures
- Moorings
- Use of Lake water for irrigation
- Control of dogs and horses on the foreshores
- Resolving conflict between users
- Hire concessions
- Maintenance of clear shorelines
- Licensed Clubs
- Safety and security aspects of Lake management facilities.

19. The Guideline for Lakeshore Development Sites, is as follows;

- Commercial concessions:

The placement, form and colour of buildings and/or structures on any land leased for these developments are to be subject to detailed site planning standards to ensure that the development is in harmony with the Lake landscape and does no harm to the environment of the Lake. Public access is to be maintained around such buildings and between the buildings and the lakeshore.

- Boatsheds, clubhouses and other recreational or community development directly related to the use of the Lake:

The placement, form and colour of buildings on any land leased for these developments will be subject to detailed site planning standards to ensure that the development is in harmony with the Lake landscape and does no harm to the environment of the Lake. Public access is to be maintained around such buildings and between the buildings and the lakeshore.

- Major lakeside buildings, special national capital attractions and other tourist developments:

The placement, form and colour of buildings on any land used for these developments will be subject to detailed site planning standards to ensure that the development is in harmony with the Lake landscape and does no harm to the environment of the Lake.

- Lake maintenance and boat servicing

The placement, form and colour of buildings on any land used for these developments will be subject to detailed site planning standards to ensure that they are in harmony with the lakeside setting.

20. The Guideline for Siting of Buildings in the Lake Flood Zone shall be as set out below;

Siting Policies

Buildings in the Lake flood zone shall be subject to the following controls:

- Residential Areas: All habitable floors are to be above the 100 year flood level.
- Commercial Areas: Walkways, service areas, basements are to be above the 100 year flood level.
- Institutional Areas: Walkways, service areas, basement carparks are to be above the 100 year flood level.
- Archives, reference collections, etc are to be above the 500 year flood, with the establishment of emergency measures to safeguard collections in the event of a more extreme flood.

Structures shall be so designed and sited that they in no way make flood levels worse, upstream or downstream. They shall be capable of withstanding the forces created by flood water pressure and prevent accumulation of flood debris, in accordance with the requirements of the Building Ordinance.

Floating structures must be securely and suitably anchored or be capable of rapid removal to safe anchorage in the event of a very large flood; otherwise they could be a danger to the flood gates on Scrivener Dam.

These gates are approximately 5 metres in height and if damage or blockage prevented them from closing after a flood, the Lake level could fall 5 metres, enough to empty it over much of its area.

A rare flood, e.g. a 500 year flood, would raise Central and East Basin by 2.5 to 3.0 metres. An extreme flood which might have a return period of one in a million or more, would raise the Lake level in these basins by 6.0 to 6.5 metres. (These extreme flood estimates are currently being revised).

Flood Warning System

The present system has been in operation for more than 15 years. The performance of the system should be checked about every 10 years.

Attachment 5

Extract from the text of Section 21 of the Lakes Ordinance 1976

s 21 Prohibition of use of lake area or parts of lake

21 (1) Subject to subsection (3), the Minister may, by notice published in a newspaper circulating in the Territory, prohibit entry to a lake area.

(2) Subject to subsection (3), the Minister may, by notice published in a newspaper circulating in the Territory, declare an area of a lake to be a prohibited area.

(3) The Minister shall not prohibit entry to a lake or declare an area of a lake to be a prohibited area unless-

- a. the condition of the waters of a lake or that area, as the case may be, is such as to constitute a threat to the health of a person entering those waters;
- b. the prohibition or declaration is reasonably necessary in connexion with the maintenance or preservation of a lake or the maintenance, preservation or testing of an associated work;
- c. the Commissioner of Police has given to the Minister a certificate in writing stating that the prohibition or declaration, as the case may be, is reasonably necessary to enable members of the Police Force of the Territory to carry out their duties in a lake or in a lake area;
- d. by reason of an emergency in a lake or a lake area, it is necessary or desirable to do so; or
- e. to do so is otherwise in the public interest.

(4) The Minister may cause a boundary of a prohibited area to be defined by such means as he thinks necessary.

(5) A person shall not, while a notice under subsection (1) is in force in respect of a lake area, enter, or remain in that lake area after he has been informed by an inspector or a member of the Police Force that a notice under subsection (1) is in force in respect of that lake area and that entry to that lake area is prohibited.

Penalty:

- a. in the case of a natural person-\$500; and
- b. in the case of a body corporate-\$2,500.

(6) A person shall not enter, or remain in, an area of a lake that is a prohibited area after he has been informed by an inspector or a member of the Police Force that that area is a prohibited area and that it is an offence to enter, or remain in, that area.

Penalty:

- a. in the case of a natural person-\$500; and
- b. in the case of a body corporate-\$2,500.

(7) It is defence to a prosecution for an offence against subsection (5) or (6) for the defendant to prove that he was in the lake area or the prohibited area, as the case may be, with the consent in writing of the Minister and in accordance with the conditions (if any) subject to which that consent was given.

(8) Subsections (5) and (6) do not apply to-

- a. a person concerned in, or employed or engaged in or in connexion with, the maintenance or preservation of a lake or the maintenance, preservation or testing of an associated work;
- b. an Australian public servant or a Territory public servant;
 - a. a member of the staff of an authority established for a public purpose by or under a Territory Act or a law of the Commonwealth;
- c. an inspector; or
- d. a member of the Police Force,

who enters a lake area or a prohibited area in the execution of his duty or for the purposes of his employment or engagement.