Land and Environment Court of New South Wales

NA& J Investments Pty Ltd v Minister Administering the Water Management Act 2000; Arnold v Minister Administering the Water Management Act 2000 [2011] NSWLEC 51 (1 April 2011)

Last Updated: 17 April 2011

	Land and Environment Court New South Wales
Case Title:	NA & J Investments Pty Ltd v Minister Administering the Water Management Act 2000; Arnold v Minister Administering the Water Management Act 2000
Medium Neutral Citation:	[2011] NSWLEC 51
Hearing Date(s):	12 July 2010
Decision Date:	01 April 2011
Jurisdiction:	

Before:	Craig J
Decision:	1. The motion is stood over to 9.30am on Thursday 21 April for mention before me. 2. Subject to order 3, on or before 21 April 2011 the parties are to bring in Short Minutes of Order consistent with these reasons for judgment. 3. In the event that either party seeks to make application pursuant to Div 2A of Pt 9 of the *Civil Procedure Act* 2005 for the transfer of these proceedings to the Supreme Court or otherwise seeks the conferral of power upon a judge of this Court to hear and determine the claim of the applicants to damages for negligent misrepresentation, any notice of motion seeking such order or relief is to be made returnable before me at 9.30am on 21 April 2011. 4. Any notice of motion filed in accordance with Order 3, together with any evidence to be relied upon in support of that motion, must be served upon the other party or parties by 4.00pm on 15 April 2011. 5. In addition to the Short Minutes of Order required by Order 2 the parties must on 21 April 2011 bring in a draft list of directions appropriate to be made for the preparation of proceedings for hearing or, if a notice of motion is filed pursuant to Order 3, draft directions for the preparation of that Motion for hearing. 6. Costs of the respondents' notice of motion may be argued on 21 April 2011.

Catchwords:	PROCEDURE:- application to strike out pleadings - no reasonable cause of action - principles for strike out - failure to consider representations made on behalf of respondents to applicants - claim for damages for negligent misrepresentation - Water Management Act 2000 - claim not ancillary to matter within jurisdiction - Land and Environment Court Act 1979, s 16 - no jurisdiction to determine claim ADMINISTRATIVE LAW:- water sharing plan made by Minister - judicial review - representations made on behalf of respondents to applicants prior to making plan - Minister not bound to consider representations made - Water Management Act 2000, ss 5, 9, 18, 45, 47 and 50 - no reasonable cause of action
Legislation Cited:	Civil Procedure Act 2005 Federal Court of Australia Act 1976 (Cth) Land Acquisition (Just Terms Compensation) Act 1991 Supreme Court Act 1970 Water Act 1912 Water Management Act 2000
Cases Cited:	Australian Retailers Association v Reserve Bank of Australia [2005] FCA 1707; (2005) 148 FCR 446 Arnold v Minister Administering the Water Management Act 2000 [2008] NSWCA 338; (208) [2008] NSWCA 338; 163 LGERA 429 General Steel Industries Inc v Commissioner for Railways (NSW) [1964] HCA 69; (1964) 112 CLR 125 Harvey v Minister Administering the Water Management Act 2000 [2008] NSWLEC 165; (2008) 160 LGERA 50

Hoxton Park Residences' Action Group Inc v Liverpool City Council [2010] NSWSC 1312
Meehan v Commissioner of Police [1999] NSWCA 292; (1999) 47 NSWLR 284
Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24
Minister for Planning v Walker [2008] NSWCA 224; (2008) 161 LGERA 423
National Parks and Wildlife Service v Stables Perisher Pty Ltd (1990) 20 NSWLR 573
Neat Domestic Trading Pty Ltd v AWB Ltd [2003] HCA 35; (2003) 216 CLR 277
Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc [1994] HCA 54; (1994) 181 CLR 404
R v Federal Court of Australia and Adamson; Ex parte WA National Football League (Inc) [1979] HCA 6; (1979) 143 CLR 190
RT and YE Falls Investments Pty Ltd v State of New South Wales [2007] NSWCA 18
Terrace Towers Holdings Pty Ltd v Sutherland Shire Council [2003] NSWCA 289; (2003) 129 LGERA 195
Thomson Australian Holdings Pty Ltd v Trade Practices Commission [1981] HCA 48; (1981) 148 CLR
Tubbo Pty Ltd v Minister Administering the Water Management Act 2000; Harvey v Minister Administering Water Management Act 2000 [2008] NSWCA 356
Spencer v Commonwealth of Australia [2010] HCA 28; (2010) 269 ALR 233

Texts Cited:

Category: Principal judgment

Parties: NA & J Investments Pty Ltd (Applicant)

	Minister Administering the Water Management Act 2000 (First Respondent) The State of New South Wales (Second Respondent); Alan Arnold (Applicant) Minister Administering the Water Management Act 2000 (First Respondent) The State of New South Wales (Second Respondent)
Representation	
- Counsel:	Mr P E King (Applicant) Mr N C Hutley SC with Ms C C Spruce (First and Second Respondents)
- Solicitors:	Taylor & Whitty Pty Ltd (Applicant) Crown Solicitors Office (First and Second Respondents)
File number(s):	41292 of 200640049 of 2007
Publication Restriction:	

Judgment

1. **HIS HONOUR** : The applicants in proceedings 41292/06 (**the Investments Applicants)** are farmers or corporations having an interest in the agricultural use of rural lands. Relevantly, prior to 2006, they all held licences under the *Water Act* 1912 (**the Water Act**) to take and use water for farming activities in accordance with the conditions of their respective licences.
2. The applicants plead that in 2003, the Respondent Minister made the Water Sharing Plan for the Lower Murrumbidgee Groundwater Sources (**the Lower Murrumbidgee Plan)**. The Lower Murrumbidgee Plan was made pursuant to the provisions of the *Water Management Act* 2000 (**the Water Management Act**). It

related to the water sources in respect of which the applicants held their respective licences under the Water Act.

3. Between 2003 and 2006 the Lower Murrumbidgee Plan was amended on a number of occasions. These amendments were effected pursuant to s 45(1)(a) of the Water Management Act. Relevantly, the final amendment to that plan was effected pursuant to an amendment order that took effect on 1 October 2006. By operation of that Plan as then amended (**the Amended Lower Murrumbidgee Plan**), the licences held by the applicants under the Water Act were converted into licences of a different kind and made subject to the provisions of the Water Management Act. This change had the effect, so it is claimed, that the entitlements of the applicants to extract water for farming and agricultural purposes were significantly reduced.

4. The applicants in proceedings 40049/07 (**the Arnold Applicants**) are also farmers who have land holdings in the lower Murray region of New South Wales. Each of them held groundwater extraction licences under the Water Act.

5. On 17 October 2006 the Respondent Minister made the Water Sharing Plan for the Lower Murray Groundwater Source 2006 (**the Lower Murray Plan**). This plan was made pursuant to s 50 of the Water Management Act. Its operation had the effect, so it is claimed, that the Arnold Applicants' respective licences under the Water Act were replaced by licences of a different kind and made subject to the provisions of the Water Management Act. In the result, the entitlements of the Arnold Applicants to extract water for farming and agricultural uses were also significantly reduced.

6. The Investments Applicants claim that the Amended Lower Murrumbidgee Plan is invalid. Likewise, the Arnold Applicants claim that the Lower Murray Plan is invalid. The applicants in each set of proceedings seek declaratory relief, including declarations of invalidity of the respective water sharing plans. They also seek the payment of damages.

7. Amended points of claim have been filed in each set of proceedings. These have been filed pursuant to directions made by the Court. In substance, the manner in which the claims in each set of proceedings are pleaded is the same.

8. By notice of motion, the respondents seek to strike out two parts of

the amended points of claim filed in each matter. The two parts in question are pleaded in the same manner in each set of proceedings. The challenged parts allege:

(i) that in considering the amendment to the Lower Murrumbidgee Plan (in the case of the Investments Applicants) or in the making of the Lower Murray Plan (in the case of the Arnold Applicants), the Minister was required, but failed, to consider representations made by or on behalf of the respondents to some or all of the applicants as to the content and effect of the respective water sharing plans, when made (**the mandatory consideration claim**); and

(ii) that the applicants are entitled to recover damages as a consequence of the representations made by or on behalf of the respondents as those representations were false, erroneous or negligently made (**the negligent misrepresentation claim**).

1. The respondents seek to strike out the relevant parts of the respective points of claim on two bases. First, it is submitted that this Court has no jurisdiction to entertain the negligent misrepresentation claim. Reliance is placed upon Uniform Civil Procedure Rules (**UCPR**) 13.4 and 14.28(1) in order to sustain the strike out application.
2. Secondly, it is submitted that, upon its proper construction, the Water Management Act imposes no obligation upon the Minister to consider the representation relied upon by the applicants before making or amending (as the case may be) the relevant water sharing plans under the Water Management Act. This has the consequence, so the Minister submits, that the mandatory considerations claim, as pleaded in the challenged paragraphs, discloses no reasonable cause of action. Reliance is placed upon UCPR 14.28(1) in order to sustain the strike out application in this regard.

The pleadings

1. In order to place the Minister's application in context, it is important to recite the terms in which the critical matters are pleaded. As the matters are, in substance, the same in each pleading, it is convenient to set out the manner in which the relevant claims are pleaded in the Third Further Amended Points of Claim filed for the Investments

Applicants. They are as follows:

"Relevant Considerations

17. The following matters were relevant considerations for the First Respondent to take into account in the exercise of power to make the Plan and the Amended Plan:

...

E. The representations made to any of the Applicants by or on behalf of the Respondents in respect of the Plan, prior to the making of the Plan, which representations were likely to have been reasonably relied upon by the Applicants or some of them, or alternatively which gave rise in the Applicants to legitimate expectations as to the contents of Plan.

Particulars

See representations below at paragraph 51

18. In making the Plan and the amended plan the First Respondent did not consider the relevant considerations in the following respects:

...

E. The Representations of the Respondents made to the Applicants and others, were ignored or alternatively disregarded in the making of the Plan or Amended Plan, without any notice being given to the Applicants.

...

Negligent Misrepresentation

50. At all material times the property and water entitlements of the Applicants and their livelihoods were vulnerable to loss or acquisition by the First and Second Respondents in that the Respondents had knowledge of the proposed legislative changes and policy which the Applicants did not have and the Respondents were aware or ought to have been aware that the Applicants were likely to reasonably rely on the Representations alleged herein, whereby the Respondents each had a duty of care not to make incorrect representations including to the Applicants and not to

thereby carelessly cause economic loss to the Applicants.

51. In or about 2005 the Respondents, their servants and agents made representations [" **the Representations** "] to the Applicants and others about the content and the effect of the plan, to the effect as follows:

1. The worst scenario for farmers in the Lower Murray [sic] (including the Applicants) under the plan is a 51% or 52% reduction in water entitlements;

2. The reductions in water allocations are across the board cuts meaning that each licence holder will be effected equally;

3. Across the board cuts was government policy;

4. Any adoption of a HOE methodology would not be worse for the Applicants than across the board cuts;

5. Anomalies would be addressed such that the reductions imposed on the Applicants would not exceed the government policy of 51% water across the board cuts;

6. Farmers and the Applicants in particular should invest heavily in irrigation infrastructure and increase their rates of water extraction as there was excess water in the ecosystem.

52. Each of the Representations made by the First and /or Second Respondents, their servants or agents were false and/or were erroneous, in that:

1. The scenario for farmers in the Lower Murray [sic] under the plan was in many cases far worse than 51% water cuts;

2. The cuts in water allocations were not across the board cuts and each licence holder and the Applicants in particular compared to other farmers who were holders of water licences were not affected equally;

3. Across the board cuts was not government policy and it was changed without informing the Applicants;

4. HOE as the basis for water cuts was adopted which was worse for the Applicants so far as loss of water entitlements were concerned compared to the across the board cuts;

5. Anomalies were not addressed with the result that the cuts imposed on the Applicants exceeded 51% reduction in water entitlement;

6. Farmers and the Applicants in particular were unwise financially and as a matter of good management to invest heavily in irrigation infrastructure and increase their rates of water extraction.

53. The misrepresentations made by the Respondents, their servants or agents were made in breach of duty of care to the Applicants.

Particulars

(a) Making the incorrect Representations;

(b) Failure to check or correct Representations made;

(c) Failure to warn that the Representations were incorrect

54. The Representations were each material and were relied on by each of the Applicants.

55. As a result of relying on the Representations the Applicants have each suffered loss and damage.

Particulars

(a) Loss in value of water entitlements, and landholdings;

(b) Loss of yield;

(c) Loss of profits

(d) Wasted expenses;

(e) Distress and disappointment."

1. In the case of the Arnold Applicants, the averment of relevant consideration referable to the representations is found in paragraph 15E and the averment of failure to consider is in paragraph 16E. In paragraph 15E particulars of the representations are said to be those set out at paragraph 44 of the pleading. Paragraphs 43 - 48 of that pleading are the equivalent of paragraphs 50 - 55 in the case of the claim by the Investments Applicants.

The strike out power: principles for its exercise

1. As I have earlier recorded, the respondents rely upon two provisions of the UCPR as the basis for their strike out application. Those rules relevantly provide as follows:

" **13.4 Frivolous and vexatious proceedings**

(1) If in any proceedings it appears to the court that in relation to the proceedings generally or in relation to any claim for relief in the proceedings:

(a) the proceedings are frivolous or vexatious, or

(b) no reasonable cause of action is disclosed, or

(c) the proceedings are an abuse of the process of the court,

the court may order that the proceedings be dismissed generally or in relation to that claim.

(2) The court may receive evidence on the hearing of application for an order under subrule (1).

14.28 Circumstances in which court may strike out pleadings

(1) The court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading:

(a) discloses no reasonable course of action or defence or other case appropriate to the nature of the pleading, or

(b) has a tendency to cause prejudice, embarrassment or delay in the proceedings, or

(c) is otherwise an abuse of the process of the court.

(2) The court may receive evidence on the hearing of an application for an order under subrule (1)."

1. The principles to be applied when determining the Minister's application are not in dispute. The power to strike out a pleading on the basis that it discloses no reasonable cause of action is a power to be exercised sparingly and only where the absence of a reasonable cause of action is "plain and obvious" (*General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69; (1964) 112 CLR 125 at 129).
2. The strictures attending an application summarily to dismiss proceedings have recently been reiterated by the High Court in *Spencer v Commonwealth of Australia* [2010] HCA 28; (2010) 269 ALR 233. Although the court was there concerned with the provisions of s 31A of the *Federal Court of Australia Act* 1976 (Cth), authorising summary dismissal of proceedings where the court is satisfied that a party "has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding", the caution necessary to be exercised before striking out a pleading was emphasised in the joint judgment of French CJ and Gummow J where their Honours said (at [24]):

"24 The exercise of powers to summarily terminate proceedings must always be attended with caution. That is so whether such disposition is sought on the basis that the pleadings fail to disclose a reasonable cause of action or on the basis that the action is frivolous or vexatious or an abuse of process."

1. The principles applicable to the application of UCPR 13.4 and 14.28 were usefully summarised by Rein J in *Hoxton Park Residences' Action Group Inc v Liverpool City Council* [2010] NSWSC 1312 at [14]. I will not repeat what his Honour there said. Relevantly, those principles include the propositions that:

(i) allegations of fact contained in the pleading are assumed to be established for the purpose of considering the strike out application, and

(ii) notwithstanding the caution to which I have earlier referred, applicable to the exercise of the power, a court is not precluded from entertaining extensive argument when determining whether the pleading discloses a reasonable cause of action (*General Steel Industries* at 130).

1. It will be remembered that the basis upon which the respondents seek to strike out the negligent misrepresentation claim is that this Court lacks jurisdiction to entertain it. An application so founded involves considerations of a different kind.
2. When the jurisdiction of the Court to entertain a particular cause of action is challenged, the Court is required to satisfy itself that it has jurisdiction before proceeding further with the hearing of the proceedings (*R v Federal Court of Australia and Adamson; Ex parte WA National Football League (Inc)* [1979] HCA 6; (1979) 143 CLR 190 per Gibbs J at 215; *National Parks and Wildlife Service v Stables Perisher Pty Ltd* (1990) 20 NSWLR 573 per Kirby P at 585. Moreover when that question is raised, it is incumbent upon the party invoking the Court's jurisdiction to demonstrate that such jurisdiction exists (*Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* [1994] HCA 54; (1994) 181 CLR 404 at 426; *Meehan v Commissioner of Police* [1999] NSWCA 292; (1999) 47 NSWLR 284 at [4]).

Water management: the statutory regime

1. In order to consider the Minister's application, it is necessary to identify the key provisions of the Water Management Act, so far as those provisions are relevant to the issues presently calling for determination.
2. The Water Management Act commenced operation on 1 January 2001. Its objects are stated in s 3. They are expressed as being "to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations". Particular objects are then stated. Relevantly, they include the following:

"(a) to apply the principles of ecologically sustainable development, and

(b) to protect, enhance and restore water sources, their associated ecosystems, ecological processes and biological diversity and their water quality, and

(c) to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water, including:

(i) benefits to the environment, and

(ii) benefits to urban communities, agriculture, fisheries, industry and recreation, and

(iii) benefits to culture and heritage, and

(iv) benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water,

(d) to recognise the role of the community, as a partner with government, in resolving issues relating to the management of water sources,

(e) to provide for the orderly, efficient and equitable sharing of water from water sources,

... ".

1. Chapter 2 of the Act addresses water management planning. The first provision within that chapter is s 5. Relevantly, it provides as follows:

" **5 Water Management Principles**

(1) The principles set out in this section are the water management principles of this Act.

(2) Generally:

(a) water sources, floodplains and dependent ecosystems (including

groundwater and wetlands) should be protected and restored and, where possible, land should not be degraded, and

(b) habitats, animals and plants that benefit from water or are potentially affected by managed activities should be protected and (in the case of habitats) restored, and

...

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

...

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

...

(3) In relation to water sharing:

(a) sharing of water from a water source must protect the water source and its dependant ecosystems, and

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

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

(4) In relation to water use:

(a) water use should avoid or minimise land degradation, including soil erosion, compaction, geomorphic instability, contamination, acidity, water logging, decline of native vegetation or, where appropriate, salinity and, where possible, land should be rehabilitated, and

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

benefits to the community, and

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

1. Section 6 makes provision for the making of a State Water Management Outcomes Plan, the objective of which is to set the overarching policy for management of the States water sources and to promote the water management principles identified in s 5. I was informed that such a plan was made by the Governor in accordance with s 6(1).
2. The next provision within Ch 2 to be noticed is s 9. It provides as follows:

" **9 Act to be administered in accordance with water management principles and State Water Management Outcomes Plan**

(1) It is the duty of all persons exercising functions under this Act:

(a) to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of this Act, and

(b) as between the principles for water sharing set out in section 5(3), to give priority to those principles in the order in which they are set out in that subsection.

(2) It is the duty of all persons involved in the administration of this Act to exercise their functions under this Act in a manner that gives effect to the State Water Management Outcomes Plan."

1. Part 3 of Ch 2 addresses management plans prepared by committees that are constituted under Pt 2 of Ch 2. Section 16, which is in Div 1 of that Part, requires that a management plan be consistent with various policies, including certain statutory policies, and includes the requirement that a management plan be consistent with the State Water Management Outcomes Plan. Section 17 identifies provisions that a management plan may contain while section 18 imposes obligations upon a management committee when formulating a draft

management plan to "have regard to the socio-economic impacts of the proposals considered for inclusion in the draft plan."

2. Division 2 of Pt 3 addresses management plans that deal with water sharing. Section 20, within Div 2, identifies core provisions that such a plan must contain when addressing water sharing. Those core provisions must address the establishment of environmental water rules, identification of requirements for water within the area or from the water source to satisfy basic landholder rights, the identification of requirements for water for extraction under access licences, the establishment of access licence dealing rules for the area or water source and the establishment of a bulk access regime for the extraction of water under access licences, having regard to these rules and requirements. The bulk access regime is required to be consistent with the water management principles identified in s 5.
3. The making of a management plan is authorised by s 41. Section 42 authorises the amendment of a management plan by a subsequent management plan made in accordance with Pt 3. However, subsection (2) of s 42 provides that the section does not limit the operation of Div 9.
4. The only provision within Div 9 of Pt 3 is s 45. It relevantly provides as follows:

" **45 Minister may amend or repeal management plan**

(1) The Minister may at any time, by order published on the NSW legislation website, amend a management plan:

(a) if satisfied it is in the public interest to do so, or

(b) in such circumstances, in relation to such matters and to such extent as the plan so provides, or

(c) if the amendment is required to give effect to a decision of the Land and Environment Court relating to the validity of the plan.

(2) (Repealed)

(3) Before amending a management plan, the Minister must obtain the concurrence of the Minister for Climate Change and the Environment to the amendment.

... ".

1. The only other provision that is presently relevant to be noticed is s 50 which is found in Pt 4 of Ch 2. That section is relevant to the making of the Lower Murray Plan. It provides as follows:

" **50 Minister's Plan**

(1) The Minister may, by order published on the NSW legislation website, make a plan (a " **Minister's Plan** "):

(a) for any part of the State that is not within a water management area, or

(b) for any water management area or water source, or part of a water management area or water source, for which a management plan is not in force, or

(c) for any water management area or water source, or part of a water management area or water source, for which a management plan is in force, but only so as to deal with matters not dealt with by the management plan.

(1A) A Minister's Plan may be made for more than one water management area or water source or for parts of more than one water management area or water source.

(2) A Minister's Plan must in general terms deal with any mattes that a management plan is required to deal with, and may also deal with any other matters that a management plan is authorised to deal with, other than matters that are already dealt with by a management plan.

(2A) Part 3 (except sections 15 and 36-41) applies to a Minister's Plan. However, the Minister:

(a) may adopt any of the provisions of sections 36-41 in a particular case, and

(b) may dispense with a particular requirement of Part 3 in the case of a Minister's Plan referred to in subsection (1A).

(3) Before making a Minister's Plan, the Minister must obtain the concurrence of the Minister for Climate Change and the Environment to the making of the plan.

(4) Except to the extent to which this Act otherwise provides, a Minister's Plan has the same effect as a management plan.

(5) the Minister may decide whether to make a Minister's Plan or a management plan in respect of any matter (whether or not any draft management plan has been submitted to the Minister)."

1. The legislative scheme pertaining to water management, water management plans, including those involving water sharing, were summarised by Spigelman CJ (Allsop P and Sackville AJA agreeing) in *Tubbo Pty Ltd v Minister Administering the Water Management Act 2000*; *Harvey v Minister Administering the Water Management Act 2000* [2008] NSWCA 356 at [28] - [31]. His Honour did so, essentially embracing the summary articulated by Jagot J in that matter at first instance (*Harvey v Minister Administering Water Management Act 2000* [2008] NSWLEC 165; (2008) 160 LGERA 50). I have no need to repeat what is there set out but have embraced the respective observations of their Honours in approaching the consideration of the present application.

Mandatory considerations claim

1. In addressing this claim, it is convenient to refer to the claim as pleaded in paragraphs 17 and 18 of the Third Further Amended Points of Claim filed on behalf of the Investments Applicants. Unless I indicate to the contrary, in directing observations in relation to this claim I should also be understood as addressing the corresponding paragraphs in the Second Further Amended Points of Claim filed on behalf of the Arnold Applicants.
2. Consistently with the principles earlier identified pertaining to the determination of an application of the present kind, I will assume that the applicants can prove such of the matters pleaded in paragraphs 17E and 51 of the points of claim as contain allegations of fact. Having regard to the terms in which those paragraphs of the pleading

are framed, those allegations that, for present purposes, I accept, are:
(i) that representations were made by the respondents or their servants or agents to persons, including the applicants;

(ii) that the matters so represented were those identified in subparagraphs 1 to 6 of paragraph 51;

(iii) that the representations were made prior to the making of the relevant water sharing plan and, in the case of the Investments Applicants, prior to the making of the Amended Lower Murrumbidgee Plan;

(iv) that those representations were reasonably likely to have been relied upon by some or all of the applicants, or

(v) the representations were such as to give rise to a legitimate expectation as to the contents of the water sharing plan or any amendment to such plan.

Mr N C Hutley SC, who appeared on behalf of the respondents, accepted that these assumptions should be made for the purpose of determining the strike out application.

1. Paragraph 17 of the points of claim is the paragraph generally directed to that part of the applicants' claim which challenges the validity of the Minister's action in amending the water sharing plan. The paragraph identifies 13 separate matters alleged to be relevant for consideration by the Minister when exercising the power to make and amend a water management plan. In pleading 12 of those 13 matters, the paragraph identifies those provisions of the Water Management Act which are said to found the allegation that consideration of the matter was relevant. However, that has not been done in respect of paragraph 17E which, as I have earlier recorded, is the paragraph critical to the present application. The source of the requirement for consideration of the matter there pleaded is not stated.
2. Although not pleaded in terms, it is assumed that each of the matters identified in paragraph 17, alleged to be "relevant considerations", were matters, the consideration of which was mandated by the

provisions of the Water Management Act. So much is assumed by reference to the cognate pleading in paragraphs 18 and 27 of the points of claim. Paragraph 18 pleads a failure on the part of the Minister to consider those matters identified in paragraph 17 while paragraph 27 pleads that by reason of that failure (amongst others), the power to make or amend the water management plan was not validly exercised, with the consequence that the amended plan is void.

3. Importantly, unless the assumption recorded in the preceding paragraph is made, the basis of challenge to the Minister's powers as pleaded in paragraphs 17, 18 and 27 would be without legal foundation. In order to sustain the challenge to the decision of the Minister as an administrative decision maker, it is necessary to identify a matter which the Minister was legally bound to consider when exercising the statutory power in question (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39; *Minister for Planning v Walker* [2008] NSWCA 224; (2008) 161 LGERA 423 at [34]). Those matters or factors, which the Minister was bound to consider, must be determined by construing the Water Management Act (*Peko-Wallsend Ltd* at 39).

The Amended Lower Murrumbidgee Plan

1. Although the pleading of the Investments Applicants asserts that their water entitlements were affected by the Amended Lower Murrumbidgee Plan, thereby occasioning them loss (paragraphs 14-16), their Amended Application Class 4 and pleading otherwise seeks to assert invalidity of both the original plan and the amended plan. However, as I understood the submissions made on their behalf by their counsel, Mr P E King, it was the water sharing plan as amended in 2006 that they seek to impugn.

2. None of the provisions of the Water Management Act to which I have earlier referred state, in terms, the requirement for the Minister to consider representations made by or on his behalf to holders of licences under the Water Act, prior to amending a water management plan involving water sharing. It is therefore necessary to determine whether such a requirement is to be implied from the subject-matter, scope or purpose of the Water Management Act (*Peko-Wallsend* at

39-40; *Neat Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35; (2003) 216 CLR 277 at [56]).

3. It will be remembered that the objects of the Water Management Act in s 3 are expressed at a level of generality, reflected in the chapeau to the section as being the provision of "sustainable and integrated management of the water sources of the State for the benefit of both present and future generations". Provisions so generally expressed, with their particular emphasis upon environmental protection and the principles of ecologically sustainable development do not in logic, give rise to an implied obligation on the part of the Minister to consider the representations that the applicants allege before making or amending the Lower Murrumbidgee Plan.

4. It can be accepted that when making or amending a water sharing plan, the Minister was under a duty to take all reasonable steps to do so in accordance with and so as to promote the water management principles identified in s 5 of the Water Management Act. So much was required by s 9(1). That same subsection also required that the principles for water sharing be given priority in the order identified in s 5(3). Further reference to this section will be made shortly.

5. However, it should be noticed that the expression "basic landholder rights", as used in s 5(3)(b), is an expression defined in the Dictionary to the Water Management Act. It is there defined to mean "domestic and stock rights, harvestable rights or native title rights". It is not a reference to the protection of such "rights" as were created by the holding of licences under the Water Act, the loss of which is the subject of the principal proceedings.

6. The Lower Murrumbidgee Plan was made under s 50 of the Water Management Act. That plan, being a Minister's Plan, was, "in general terms" required to deal with any matters with which a management plan is required to deal (s 50(2)). However, as I have said, it is the amendment of that plan of which the Applicant's complain and which founds their action (paragraphs 14 - 16 of the Third Further Amended Points of Claim). That amendment was made pursuant to s 45 of the Water Management Act.

7. The circumstances in which the Minister may amend a management plan in reliance upon s 45 are identified in subsection (1) of that section. Those circumstances are threefold. The third of those identified in subsection 1(c), namely an amendment required to give

effect to a decision of this Court, can be put aside as not being of present relevance. The second circumstance for exercise of power arises from the terms of the plan itself. No case was made, as I understood the submissions made on behalf of the applicants, by reference to this circumstance. The first circumstance in which the Minister is empowered to amend a plan is satisfaction that it is "in the public interest to do so": s 45(1)(a). It is that circumstance that is germaine to the present application.

8. The discretion conferred by s 45(1)(a) is expressed in broad terms, effectively to act "in the public interest". Where a discretion is conferred upon an administrative decision maker in such terms, it is generally a matter for that decision maker to decide that which is relevant and that which is not (*Australian Retailers Association v Reserve Bank of Australia* [2005] FCA 1707; (2005) 148 FCR 446 at [525]). More particularly, the "public interest" is a broad concept entitling the Minister to "range widely" (*Terrace Towers Holdings Pty Ltd v Sutherland Shire Council* [2003] NSWCA 289; [2003] NSWCA 289; (2003) 129 LGERA 195 at [81]; *Harvey v Minister Administering Water Management Act* 2000 [2008] NSWLEC 165; (2008) 160 LGERA 50 at [67]).

9. The amendment of the Lower Murrumbidgee Plan pursuant to s 45 of the Water Management Act was the subject of consideration by Jagot J in *Harvey*. As her Honour there observed (at [74]), the amendment of the plan in accordance with s 45(1)(a) required consideration of the interests of the public generally rather than the interests of any individual or particular group of individuals.

10. Application of this principle would equally militate against an obligation to consider representations made to an individual or particular group of individuals of the kind reflected in the representations which the applicants plead. Indeed, it is conceivable that unless representations made to an individual or group of individuals on behalf of the Minister were consistent with the statutory discretion available to him, particularly in the implementation of the broadly expressed objects of the Act and the water management principles articulated in s 5, consideration of such representations may itself involve the taking into account of an irrelevant consideration. Whatever may be the legal effect of representations made in sustaining a cause of action against the

Minister by reason of loss said to be occasioned in reliance upon them, those representations cannot impose a fetter upon the exercise of discretion that the statute affords, such as to impugn a decision made in the lawful exercise of that discretion.

11. The submissions made on behalf of the applicants tended to conflate the discrete issues required to be considered in order to determine the respondents' strike out application. The first requires the demonstration of a reasonable cause of action founded upon the obligation of the Minister to consider the representations said to have been made on his behalf prior to amending the Lower Murrumbidgee Plan. The second issue, calling for consideration of different statutory provisions, relates to the jurisdiction of the Court to sustain the negligent misrepresentation claim to which I have earlier referred. On the first issue, being the issue of present relevance, as I understood the applicants' submissions, it was said, although not pleaded, that the obligation arose from ss 5, 9 and 18 of the Water Management Act.

12. Reliance upon ss 5 and 9 was an interrelated reliance. It will be remembered that the obligation cast by s 9(1) is directed to the duty to act in accordance with the water management principles set out in s 5. Mr King drew attention to the provisions of s 5(2)(g) referring to the principle of maximising "the social and economic benefits to the community". The obligation imposed by s 9(1) to consider that principle provided, so he submitted, statutory support for the applicants' pleading in paragraph 17E.

13. There are difficulties with this submission. First, the applicants do not plead that the Minister was in breach of s 9(1) by reason of the failure "to take all reasonable steps... in accordance with, and so as to promote," the principle of maximising the social and economic benefits to the community. If that was to be the basis of claim, the pleading would take a different form. Further allegations would need to be made. Moreover, if additional allegations were pleaded seeking to sustain a claim on the basis argued, the question would remain as to how the failure to consider the representations was inconsistent with the water management principle sought to be invoked. The need for the Minister to have considered that principle, directed as it is to the relevant benefits to "the community" provides, so it seems to me, a breadth of latitude in the Minister's consideration of the kind earlier

addressed when dealing with the "public interest". Consideration of the social and economic benefit to the community under the water management principles would not appear to compel consideration of the representations pleaded in paragraph 51.

14. Secondly, it is significant that paragraph 17I of the Third Further Amended Points of Claim separately pleads the "social and economic benefit to the community" as being a relevant head of consideration but which, according to paragraph 18J of the pleading, received no consideration at all. Clearly, these latter paragraphs indicate a separate head of consideration relied upon to found the applicants' claim. They are not the subject of the respondents' present strike out application. Something more, or at least different, must have been intended by the pleading in paragraph 17E, but the legal foundation for it thus far remains elusive.

15. I have earlier referred to the applicants' reliance upon s 18 to sustain its pleading. In terms, subsection (1) of that section refers to the obligation of a management committee, in formulating a draft management plan, to have regard to the socio-economic impacts of the proposals considered for inclusion in a draft plan. Unlike s 50, addressing the making of a Minister's Plan, s 45 does not, in terms, call up the provisions of Pt 3 of Ch 2 (in which s 18 is found) when the Minister amends a plan in accordance with that section, as he did in the present case.

16. The breadth of the discretion afforded by s 45 was considered by Jagot J in *Harvey* and affirmed by the Court of Appeal in *Tubbo*. In *Harvey* her Honour said (at [73]):

"Section 45 is a freestanding power of amendment. The section is not to be read down because the Minister also has a power to make a plan (s 50). The constraint on the power in s 45(1)(a) is the Minister's satisfaction that it is in the public interest for the plan to be amended. The statute imposes no obligation on the Minister, when making an amendment order, to comply with s 18 (ss 45(1)(a) and 42(2))."

1. Her Honour's observations are, with respect, directly in point. Indeed, they are observations made in respect of the same amendment order as is sought to be impugned in the present case. Accordingly, I see no basis upon which to distinguish *Harvey* and the

determination there made by her Honour in relation to the operation of s 45 of the Water Management Act. Section 18 cannot be invoked to support the pleading in paragraph 17E of the Applicant's Third Further Amended Points of Claim.

2. The applicants sought to address the difficulty presented by their argument as it related to the relevance of s 18 by submitting that the reference in s 45 to the amendment of "a management plan", did not extend to a Minister's Plan made pursuant to s 50. The Lower Murrumbidgee Plan was made pursuant to that section. However, the applicant's submission overlooks the definition of "management plan" in the Dictionary to the Water Management Act which, in terms, includes a Minister's Plan. That submission, therefore, does not assist the applicants.

3. It follows that none of the statutory provisions relied upon by the Investments Applicants supports the pleading in paragraph 17E and those paragraphs consequential upon it in the Third Further Amended Points of Claim. Given the strength of the case, supported by authority, against the pleaded matter demonstrating a reasonable cause of action for invalidity of the Amended Lower Murrumbidgee Plan, paragraphs 17E and 18E of the pleading should be struck out.

The Lower Murray Plan

1. The relevant paragraphs of the Second Further Amended Points of Claim filed on behalf of the Arnold Applicants are, as I have earlier indicated, paragraphs 15E and 16E. Much of what I have already said in relation to the comparable paragraphs filed on behalf of the Investments Applicants applies to paragraphs 15E and 16E. However, there is one point of difference, namely the absence of any amendment of the Lower Murray Plan pursuant to s 45. The point of difference requires that further consideration be given to s 18 as the foundation for the claim made in paragraph 15E that the Minister was required to consider the representations identified in paragraph 44.

2. It was accepted by the respondents for the purpose of arguing the strike out application that, in making the Lower Murray Plan, the Minister was required to consider the socio-economic impacts of that plan conformably with s 18(1). Indeed, paragraph 15J of the Second

Further Amended Points of Claim pleads such impacts as a relevant consideration (presumably a relevant mandatory consideration). So also is the social and economic benefits to the community pleaded as a relevant consideration that the Minister failed to take into account (paragraphs 15I and 16I). It is also accepted on behalf of the respondents that these allegations will need to be addressed as part of their defence to the applicants' claims. This is then the context in which it is necessary to consider whether the representations alleged fall within the rubric of an obligation to have "due regard to the socio-economic impacts" of the plan, within the meaning of s 18(1).

3. I am of the opinion that the consideration of those representations is not mandated by that rubric. How the representations made on behalf of the Minister prior to the making of the Lower Murray Plan fell within the socio-economic impacts of the proposals for that plan was not articulated. However, it seems to me that consideration of socio-economic impacts would involve consideration of information relevant to those impacts gathered by or available to the Minister when considering the making of the plan rather than assertions made on his behalf as to future actions or intentions by him or as to the course of action that those to whom representations were made might, in the future, take. Moreover, the requirement to have "due regard to the socio-economic impacts" does not, as a matter of logic, compel consideration of the interests of a particular individual or group of individuals said to be affected by the representations made.

4. The scope of consideration required by s 18(1) is again reflected in the judgment of Jagot J in *Harvey*. In that context, her Honour said (at [74]):

"As noted, the 'public interest' is a broad concept and, no doubt, would often include consideration of the socio-economic impact of proposals (as contemplated by s 18). However, consideration of that matter does not require the Minister to have regard to submissions about the particular impact of the plan on the financial position of individuals. Consistent with the respondent's submissions, the level of generality or specificity at which the Minister approaches the socio-economic impacts of proposals in a plan, as part of the public interest, is not prescribed by the statute and thus is a matter for the Minister (*Foster v Minister for Customs and Justice* [2000] HCA 38; (2000) 200 CLR 442 at [23] and *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210 at 216)."

1. Although her Honour was addressing socio-economic impacts of a plan in the context of a requirement to consider the "public interest" her observations are, with respect, equally apt to the specific requirements for consideration identified in s 18(1). If, as in the case of *Harvey*, consideration of socio-economic impacts did not compel consideration of the "devastating effect on the applicants" (at [73]), as had been represented to the Minister would be the case, so also is it the case that the particular representations made to the Arnold Applicants do not engage the statutory provision in the sense of mandating their consideration by the Minister prior to the making of a plan.
2. For these further reasons, I am of the opinion that the matters pleaded in paragraphs 15E and 16E of the Second Further Amended Points of Claim filed on behalf of the Arnold Applicants do not disclose a reasonable cause of action for determining that the decision by the Minister to make the Lower Murray Plan was invalid. Those paragraphs should therefore be struck-out.

Negligent misrepresentation claim: jurisdiction

1. The respondents have, in effect, challenged the jurisdiction of this Court to entertain so much of the claim made by the applicants in each proceedings as seeks damages sounding in the tort of negligent misrepresentation. The question of jurisdiction having been raised, it must be determined.
2. There are a number of statutory provisions that need to be addressed for the purpose of resolving this question.
3. Section 16 of the Court Act declares, in general terms, the jurisdiction of the Court. It does so as follows:

" **16 Jurisdiction of the Court generally**

(1) The court shall have the jurisdiction vested in it by or under this or any other Act.

(1A) The court also has jurisdiction to hear and dispose of any matter not falling within its jurisdiction under any other provision of this Act or under any other Act, being a matter that is ancillary to a matter that falls within its jurisdiction under any other provision of this Act or under any other

Act.

...."

1. As the proceedings in each of the present matters have been commenced in Class 4 of the Court's jurisdiction, it is necessary to notice s 20 of the Court Act. It provides as follows:

" **20 Class 4 - environmental planning and protection and development contract civil enforcement**

(1) The court has jurisdiction (referred to in this Act as 'Class 4' of its jurisdiction) to hear and dispose of the following:

...

(df1) proceedings under sections 335 and 336 of the *Water Management Act* 2000

... "

1. Section 336 of the Water Management Act relevantly provides as follows:

" **336 Restraint of breaches of this Act**

(1) Any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act or the regulations.

...

(3) Any such proceedings may be brought whether or not any right of the person has been or may be infringed by or as a consequence of the breach.

(6) If the Land and Environment Court is satisfied that a breach has been committed or that a breach will, unless restrained by the order of the Court, be committed, it may make such orders as it thinks fit to remedy or restrain the breach.

...".

1. As the applicants in each set of proceedings claim that the Minister's actions in making or amending (as the case may be) the relevant water management plan were not made in accordance with the provisions of the Water Management Act, the proceedings engage the provisions of s 336 of the Act.
2. Also to be noticed are the provisions of s 47 of the Water Management Act. That section provides as follows:

" **47 Validity of management plans and exercise of plan-making functions**

(1) The validity of a management plan may not be challenged, reviewed, quashed or called into question before any court in any proceedings, other than before the Land and Environment Court in proceedings commenced within the judicial review period.

(2) The judicial review period in respect of a management plan is:

(a) the period of 3 months after the date the plan was published on the NSW legislation website except as provided by paragraph (b), or

(b) in relation to a provision of the plan that was inserted by an amendment of the plan (other than an amendment under section 45(1)(c)), the period of 3 months after the date that the amendment was published on the NSW legislation website.

A judicial review period does not arise as a result of the extension of the duration of a management plan.

(3) The judicial review period cannot be extended by the Land and Environment Court or any other court, despite any other Act or law.

(4) Without limiting subsection (1), the exercise by a designated person of any plan-making function may not be:

(a) challenged, reviewed, quashed or called into question before any court in any proceedings, or

(b) restrained, removed or otherwise affected by any proceedings,

other than before the Land and Environment Court in proceedings commenced within the judicial review period.

(5) The provisions of or made under this Act and the rules of natural justice (procedural fairness), so far as they apply to the exercise of any plan-making function, do not place on a designated person any obligation enforceable in a court (other than in the Land and Environment Court in proceedings commenced within the judicial review period).

(6) Accordingly, no court (other than the Land and Environment Court in proceedings commenced within the judicial review period) has jurisdiction or power to consider any question involving compliance or non-compliance, by a designated person, with those provisions or with those rules so far as they apply to the exercise of any plan-making function.

(7) This section is not to be construed as applying the rules of natural justice to the exercise of plan-making functions for the purposes of proceedings instituted within the judicial review period.

(8) In this section:

court includes any court of law or administrative review body.

designated person means the Minister, a management committee, the Director-General or any person or body assisting or otherwise associated with any of them.

judicial review period - see subsection (2).

management plan includes purported management plan.

plan-making function means:

(a) a function under this Act relating to the making of a management plan (including relating to the amendment, replacement or repeal of a management plan or the extension of the duration of a management plan), or

(b) a function under section 46 of this Act relating to the statement of the purpose for which any provision of a management plan has been made.

proceedings includes:

(a) proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, and

(b) without limiting paragraph (a), proceedings in the exercise of the inherent jurisdiction of the Supreme Court or the jurisdiction conferred by section 23 of the *Supreme Court Act 1970*.

Clearly, the challenges which the applicants bring by way of judicial review of the Minister's decision in relation to the respective water management plans are proceedings of a kind identified in clause 47 and a category of proceedings comprehended by s 336.

1. The claim for damages for negligent misrepresentation is not a claim of a kind identified in the statutory provisions to which I have referred as attracting the Court's jurisdiction. The only section conferring jurisdiction in those matters falling within Class 4 of the Court's jurisdiction are those identified in subsections (1) and (2) of s 20 of the Court Act. I have already identified the only relevant provision of subsection (1) that would attract jurisdiction. As Gleeson CJ observed in *National Parks and Wildlife Service v Stables Perisher Pty Ltd* (1990) 20 NSWLR 573 (at 580) when addressing s 20(2), nothing in that subsection suggests "that the court has jurisdiction to hear and determine a claim in tort for general damages".
2. Notwithstanding the statutory limits upon the Court's jurisdiction, the applicants contend that the Court does have jurisdiction to entertain their negligent misrepresentation claim on the basis that it is incidental to the determination of the claims otherwise made and in respect of which there is no objection to jurisdiction. They submit that as the representations upon which they rely for the purpose of their claim in tort are the representations that found their claim for judicial review on the basis earlier discussed, the determination of the entitlement to damages based on the claim in tort is but incidental to the judicial review claim. They also rely upon the provisions of s 47 of the Water Management Act.
3. I have earlier set out the terms in which the negligent

misrepresentation claim is pleaded in each of the two sets of proceedings. It is, in substance, the same claim in each. Nowhere under that head of claim is it pleaded that the relevant water sharing plan is invalid. This is important having regard to the reliance placed by the applicants upon s 47 of the Water Management Act. That section only has effect where the validity of the management plan is being "challenged, reviewed, quashed or called into question" in proceedings. Not only does the claim, as pleaded, fail to assert invalidity of the respective plans, but relies upon its operation and effect as an essential element of the claim. So much is apparent from paragraph 52 of the pleading in the case of the Investment Applicants and paragraph 45 in the case of the Arnold Applicants. The applicants therefore derive no support from s 47 for their contention that this Court has jurisdiction to entertain their negligent misrepresentation claim.

4. For reasons earlier articulated, I have determined that the representations said to have been made on behalf of the Minister were not representations that he was bound to consider before exercising the plan making or plan amendment power under the Water Management Act. On that basis, it could not be said that the determination of the negligent misrepresentation claim was an essential step in the case otherwise pleaded seeking judicial review of the Minister's decisions. However, on the assumption that I am wrong in so determining, it is necessary to consider whether the jurisdiction of the Court is properly engaged by the pleading making the negligent misrepresentation claim.

5. It can be accepted that the determination of both facts and law that are essential to the determination of a claim that is unarguably within jurisdiction are questions which the Court is empowered to determine. The power to determine such questions would seem to fall within the general conferral of jurisdiction by s 16(1). In that regard the observations of Gleeson CJ in *Stable Perisher* are pertinent, where his Honour said (at 582):

"The Land and Environment Court, of course, in resolving a claim that is properly brought within its jurisdiction, has the power and the duty to decide all questions of fact or law that need to be decided in order to deal with that claim. Such questions might be questions of such a nature that they could also very well have arisen for decision in another forum. There

is nothing unusual about that. There are many tribunals of limited statutory jurisdiction which, in exercising that jurisdiction, may find themselves called upon to resolve issues of fact or law that could also have arisen, in another way, elsewhere."

1. Practical effect to the principle there stated can be given by way of example. Proceedings seeking to impugn the decision of a statutory decision-maker, asserting breach of the legislation under which the decision was made, would not fall within the Court's jurisdiction unless the decision was one made under legislation expressly identified in s 20 of the Court Act. However, if in the course of challenging a decision expressly comprehended by s 20, it is asserted that legislation taken into account was invalid, then the determination of invalidity can be made within jurisdiction, even if that legislation is not comprehended by the Court Act as, itself, founding a claim for relief (*Arnold v Minister Administering the Water Management Act 2000* [2008] NSWCA 338; (2008) 163 LGERA 429 at [82]).
2. The determination of the negligent misrepresentation claim involves no such issue. The validity of either of the water sharing plans in question does not necessitate the determination that the tort of negligent misrepresentation was committed, involving the assessment of damages payable to each of the applicants.
3. It is next necessary to consider whether the negligent misrepresentation claim is "ancillary" to the pleaded judicial review claims within the meaning of s 16(1)A of the Court Act. In addressing this provision, it is appropriate to summarise separately the claims pleaded in each case, other than the claim for damages by reason of negligent misrepresentation.
4. In the case of the Investments Applicants, invalidity is pleaded upon the following bases:

(i) the Minister failed to take into account relevant considerations assumed, for reasons earlier stated, to be mandatory (paragraphs 17 - 18);

(ii) the Minister took into account irrelevant considerations (paragraph 19);

(iii) the decision of the Minister to make the amended plan was manifestly irrational (paragraph 20);

(iv) the respondents failed to afford procedural fairness to the applicants (paragraphs 21 - 25);

(v) the Minister failed to comply with mandatory statutory procedures in making the amended plan (paragraph 26);

(vi) the respondents compulsorily acquired an interest in the lands of the applicants but failed to provide compensation to the applicants as they were required to do under the *Land Acquisition (Just Terms Compensation) Act* 1991 (paragraphs 28 - 40); and

(vii) the amended plan is invalid for reasons arising under the Constitution (Cth).

1. The matters pleaded by the Arnold Applicants as founding their claim for invalidity of the water sharing plan are as follows:

(i) the Minister failed to take into account relevant considerations assumed, for reasons earlier stated, to be mandatory (paragraphs 15 - 16);

(ii) the Minister took into account irrelevant considerations (paragraph 17);

(iii) the decision of the Minister to make the plan was manifestly irrational (paragraph 18);

(iv) the Minister failed to comply with mandatory statutory procedures in making the plan (paragraph 20);

(v) the respondents compulsorily acquired an interest in the lands of the applicants but failed to provide compensation to the applicants as they were required to do under the *Land Acquisition (Just Terms Compensation) Act* 1991 (paragraphs 21 - 33); and

(vii) the amended plan is invalid for reasons arising under the Constitution (Cth) (paragraphs 34 - 42)

1. When regard is had to the paragraphs to which I have referred in each of the points of claim, together with the particulars supporting each of those paragraphs, it is readily apparent that the only basis of

claim with any potential connection to the negligent misrepresentation claim is that which I have described earlier in this judgment as the mandatory considerations claim. As already stated, the present consideration is proceeding on the assumption that paragraphs 17E and 18E, in the case of the Investments Applicants and paragraphs 15E and 16E, in the case of the Arnold Applicants, are not struck-out.

2. There are a number of observations made by Spigelman CJ (Allsop P and Handley AJA agreeing) in *Arnold* about s 16(1A) that are relevant for present purposes. They may be summarised by reference to the judgment in that matter in the following way:

(i) the word "ancillary" as used in the subsection means "incidental, accessory or auxiliary" at [73];

(ii) for a matter to be an "ancillary matter", a concept of subservience is implicit [74];

(iii) it is significant that while s 32 of the *Federal Court of Australia Act 1976* (Cth) may have been the model for the subsection, where the former gave jurisdiction to the Federal Court in respect of "associated" matters, the same term was not used in s 16(1A), with the result that a matter which is "ancillary" should be seen as more limiting than one which is "associated" with a matter falling within jurisdiction [72].

Each of these matters is significant in determining the question of jurisdiction in the present context.

1. The mandatory consideration claim, as pleaded, requires determination of three issues. First, whether the representations were made in the terms pleaded or at all. Secondly, whether the first respondent was bound to consider those representations when determining to make or amend the relevant water sharing plan. Thirdly, whether the Minister did take the representations into account when making or amending the relevant plan. Of those three issues only the first, namely whether the representations pleaded were made, is relevant to or common with the negligent misrepresentation claim.
2. By way of contrast, there are a number of issues necessary to be

determined in the claim for negligent misrepresentation that require no consideration when determining the mandatory consideration claim or, for that matter, any other of the bases of claim that I have earlier summarised. Issues peculiar to the negligent misrepresentation claim include -

(i) whether the representations were misleading;

(ii) whether each of the applicants relied on those representations;

(iii) whether, in the circumstances, the respondents or either of them owed a duty of care to the applicants;

(iv) the content of that duty of care;

(v) whether that duty of care was breached by either of the respondents;

(vi) whether each of the applicants suffered loss and damage as a result of any such breach, and

(vii) the quantum of any loss or damage so incurred or sustained.

1. The issues that I have identified as being peculiar or solely referable to the negligent misrepresentation claim are fundamental to the determination of the jurisdictional issue raised by the Minister. In the context of the principles earlier identified as being applicable to the consideration of s 16 of the Court Act, it cannot legitimately be claimed that the determination of those issues is necessary for the determination of what I might call the judicial review challenges to the validity of the actions of the respondents. They are issues that are in no way subservient to the determination of the judicial review issues and they are neither incidental or auxiliary to those latter issues. Arguably, the negligent misrepresentation claim may be "associated" with the judicial review claim, but as the decision of the Chief Justice in *Arnold* makes clear, that is a wider, or more expansive concept than that articulated in s 16(1A), namely that a matter will be within jurisdiction if it is "ancillary" to a matter that falls within jurisdiction.
2. The applicants submit that the negligent misrepresentation claim is

an essential step in the challenge to the validity of the water sharing plans. This is the case, so they contend, because the making of representations by departmental officers as to government policy can give rise to liability under the general law. They cite the observations of Ipp JA (Beazley and Hodgson JJA agreeing) in *RT and YE Falls Investments Pty Ltd v State of New South Wales* [2007] NSWCA 18 at [137] - [138] in support of their submission. That was a case in which the appellants had sued the State seeking damages for negligent misrepresentation.

3. It can be accepted that representations made on behalf of a Minister may give rise to a cause of action in tort, as was held to be so in *Falls Investments*. However, representations founding such a cause of action have no logical nexus in law with a claim that the failure by a Minister to consider those same representations when exercising a statutory discretion invalidates the exercise of that discretion. Even less so does it support the exercise of jurisdiction by this Court to sustain the applicants' negligent misrepresentation claim.
4. The applicants also rely upon the observations of Spigelman CJ in *Arnold* to support the exercise of jurisdiction in this case. A number of those observations have already been cited. Although not determining the "outer boundaries of s 16(1)A" (at [82]), the Chief Justice formulated the principle for the purpose of that case in the following paragraph (at [75]):

"For present purposes it is sufficient to state that, where the determination of a legal issue constitutes an essential step in the course of determining an issue that is within the jurisdiction of a court, then the determination of the former will be 'ancillary' to the determination of the latter."

1. While the Chief Justice accepted that the concept of an "essential step" articulated in the principle just quoted may be a narrower concept than an "ancillary matter" contemplated by s 16(1A) (at [78]), he nonetheless articulated the limits upon the concept of "ancillary matters" in the manner to which I have earlier referred. For this reason and those earlier articulated, I find no statement of principle within the judgment in *Arnold* supporting the existence of jurisdiction to determine the applicants' negligent misrepresentation claims.

2. There are two further matters that need to be noticed in relation to the negligent misrepresentation claim. First, in the written submissions filed in accordance with the Court's directions in both sets of proceedings, the applicants assert that there was an agreement reached between counsel for the parties in 2007, to the effect that objections then taken by the respondents to the pleaded negligent misrepresentation claim would be withdrawn. Notwithstanding the assertion of such an agreement, the negligent misrepresentation claim was removed from an earlier iteration of the pleading but reinstated in the amended pleading filed in each case in April 2010. For their part, the respondents deny the existence of any such agreement.
3. At the hearing before me, the applicants sought to rely upon an affidavit sworn by their solicitor which sought to address, in an inadmissible form, the agreement said to have been reached between counsel. The affidavit was objected to by the respondents. Nonetheless, it was admitted subject to relevance being established by the applicants. However, Mr King did not on their behalf thereafter address the relevance contained in that affidavit with the result that the existence of any agreement was not established.
4. However, even if evidence had established the existence of an agreement to litigate the negligent misrepresentation claim in this Court, that would not have been an answer to the jurisdictional question. Agreement between parties does not establish the jurisdiction of a statutory court to determine proceedings before it: only the statute conferring jurisdiction can achieve that result (*Thomson Australian Holdings Pty Ltd v Trade Practices Commission* [1981] HCA 48; (1981) 148 CLR 150 at 163).
5. The second matter to which reference must be made was raised by the respondents in their outline of written submissions. They draw attention to s 87AB of the Water Management Act. That section provides:

" **87AB Compensation is not payable in relation to certain conduct**

(1) Compensation is not payable by or on behalf of the Crown in respect of any relevant conduct in relation to a management plan.

(2) In this section, *relevant conduct* in relation to a management plan,

means an act or omission occurring before the commencement of the management plan in respect of the content, effect or State Government Policy concerning the management plan, including the following:

(a) any act or omission, whether unconscionable, misleading, deceptive or otherwise,

(b) a representation of any kind, whether made verbally or in writing and whether negligent, false, misleading or otherwise.

(3) This section has effect despite section 87.

(4) In this section, a reference to a management plan includes a reference to an amendment of a management plan."

1. The respondents submit that if, contrary to their primary submission, the Court is vested with jurisdiction to determine the negligent misrepresentation claim, nonetheless the negligent misrepresentation pleading ought to be struck-out by reason of the provisions of s 87AB. This, they argue, is because the section, in terms, proscribes the recovery of any damages in the very circumstances relied upon by the applicants.
2. The submission was not developed in oral argument. Given that I am determining the matter in the context of a strike out application, I prefer to determine the fate of the negligent misrepresentation claim on the basis of the jurisdictional arguments, as they were the arguments fully developed by the parties in oral submissions.

Determination of the notice of motion

1. For reasons that I have explained, I propose to accede, at least in principle, to the respondents' strike out motion. The pleading in each matter alleging invalidity of the Minister's decisions to make the Amended Lower Murrumbidgee Plan and to make the Lower Murray Plan on the basis that he failed to consider the representations alleged, discloses no reasonable cause of action. In the case of the former plan, the basis of the claim cannot be sustained having regard to the provisions of ss 5, 9 and 45 of the Water Management Act

while the latter plan cannot be sustained upon the only bases claimed, namely ss 5, 9 and 18 of the Water Management Act. None of the provisions prayed in aid by the applicants sustained the application of the well-settled principle of judicial review that, when exercising his statutory discretion, the Minister was bound to consider the representation that the applicants allege.

2. Moreover, the jurisdiction of the Court is not engaged by the claim alleging negligent misrepresentation. Such a claim is not comprehended by the conferral of jurisdiction in s 20 of the Court Act or in s 47 of the Water Management Act. Further, it is not "ancillary" to the applicants' judicial review claim, within the meaning of s 16(1A) of the Court Act.

Disposition of the proceedings

1. The applicants submit that should I determine, as I have, that the Court does not have jurisdiction to hear and determine the negligent misrepresentation claim, steps should be taken, so far as the law allows, to have all proceedings heard by the one judge in the one court. In this context, reference is made to the cognate conferral of power upon judges of the Supreme Court to act as judges of this Court (*Supreme Court Act* 1970, s 37B) and upon judges of this Court to act as judges of the Supreme Court (Court Act, s 11A). However, those provisions do not of their own force, confer jurisdiction to hear a matter where that jurisdiction is not otherwise conferred by legislation.
2. Reference is also made to the provisions of Div 2A of Pt 9 of the *Civil Procedure Act* 2005 permitting the transfer of proceedings between the Supreme Court and this Court in the circumstances there identified. However, the exercise of the transfer power available under Div 2A depends upon proceedings having been commenced in each court: s 149B. I was informed that a small number of the Investments Applicants had commenced proceedings in the Supreme Court but whether those proceedings seek damages for negligent misrepresentation was not made clear. I have no information before me as to the commencement of proceedings in the Supreme Court by the Arnold Applicants.
3. The legal means by which the practical outcome sought by the

applicants in each case is able to be achieved was not fully explored in submissions. The respondents submit that the appropriate course to be taken, before considering any application of the kind contemplated by the applicants, is for the parties to have the opportunity to consider my determination of the present motion. Thereafter, the parties may make such substantive application as they may be advised to make either under the provisions of Div 2A of Pt 9 of the *Civil Procedure Act*, if otherwise entitled so to do, or otherwise make such application as is appropriate.

4. I propose to adopt that course. As a consequence, I will refrain from making any final order striking out the relevant paragraphs of the pleading in each case until the parties have had the opportunity to consider these reasons and, if considered appropriate, to make such application as is available to have all issues determined in the one court.

Costs

1. The applicants have been unsuccessful in sustaining their further amended points of claim in the form presently pleaded. In that circumstance costs would ordinarily follow the event (UCPR 42.1) with the result that it would seem appropriate to order that the applicants in each matter pay the respondents costs. However, as the question has not been argued I will refrain from making any order at the present time. Should the applicants wish to argue the question of costs, they should do so on the date upon which the matter is stood over for further mention before me.

Orders

1. In light of the reasons that I have given, I make the following orders:

   (1) The motion is stood over to 9.30am on Thursday 21 April 2011 for mention before me.

   (2) Subject to order 3, on or before 21 April 2011 the parties are to bring in Short Minutes of Orders consistent with these reasons for judgment.

   (3) In the event that either party seeks to make application pursuant to Div 2A of Pt 9 of the *Civil Procedure Act* 2005 for

the transfer of these proceedings to the Supreme Court or otherwise seeks the conferral of power upon a judge of this Court to hear and determine the claim of the applicants to damages for negligent misrepresentation, any notice of motion seeking such order or relief is to be made returnable before me at 9.30am on 21 April 2011.

(4) Any notice of motion filed in accordance with Order 3, together with any evidence to be relied upon in support of that motion, must be served upon the other party or parties by 4.00pm on 15 April 2011.

(5) In addition to the Short Minutes of Order required by Order 2, the parties must on 21 April 2011 bring in a draft list of directions appropriate to be made for the preparation of the proceedings for hearing or, if a notice of motion is filed pursuant to Order 3, draft directions for the preparation of that motion for hearing.

(6) Costs of the respondents' notice of motion may be argued on 21 April 2011.

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