

# Challenge to Farmer's Will (cont)

deceased's estate, the relationship between the applicant and the deceased and the relationship between the deceased and other persons having legitimate claims on the deceased's estate. This can be a difficult process as often the Court is faced with reasonable claims by applicants in circumstances where there are insufficient assets in the estate to satisfy those claims.

In this case, the Court acknowledged the deceased's obvious concern to ensure that his sons received his farming properties. The Court acknowledged that the testator's view as to how his estate should be distributed was not uncommon, but stated that such a view should not influence the Court in making its determination as the Act requires it to consider the individual circumstances of each child and what is the appropriate provision for each child in all of that child's circumstances, without differentiating between sex.

The Court decided that the shares of D1 and D2 should be increased by \$250,000.00 and \$175,000.00 respectively with

those amounts to come out of the assets left to S1 and S2. This would probably involve the sale of one of the rural properties.

A testator is, of course, entitled to leave his estate as he wishes. It should, however, be realised that those beneficiaries who receive smaller shares in the estate and who are able to show that, given their circumstances, the deceased should have been more generous to them, may succeed in claims under the Act. If proceedings are instituted, the usual costs order is that the costs of all of the parties are taken out of the assets of the estate. If there are multiple parties, these costs could run into hundreds of thousands of dollars. Accordingly, a testator should be careful to explore comprehensively with his legal advisor the possible ramifications of his testamentary wishes at the time he makes his will - and he should review his will at regular intervals to take account of changing circumstances - both his own and those of his beneficiaries.

## LEGAL BRIEFS

A lawyer doing conveyancing work for an elderly lady decided, due to the client's age and frailty, to reduce the charges. Instead of billing her at the scale fee of \$1,200 she sent an account for \$1,000. The elderly lady misread the bill and sent the lawyer a cheque for \$10,000.00. This presented the lawyer with a terrible ethical dilemma. Should she share the windfall with her partners or keep it all for herself?

Acknowledgment "The Jokes on Lawyers" (Ross)



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# National Water Initiative and Irrigation Corporations

**One of the main thrusts of the National Water Initiative is to "free up" permanent trading in water entitlements. This is a delicate and difficult issue for irrigation districts and schemes in the various affected States where there are restrictions on transfers of water entitlements outside the area of operation of the district or scheme. In particular, these issues now need to be dealt with by irrigation corporations in this State, with complying arrangements being fully effected by 31 January 2006.**

Currently the shareholders in NSW irrigation corporations typically own land and shares in the corporation; water entitlements are "stapled" to the shares held by individual irrigators, which permit them to call on the corporation to deliver water available to them as a result of the water entitlements stapled to their shareholding. Under current arrangements there are restrictions imposed by constitutions of irrigation corporations on irrigators selling their water entitlements and shares.

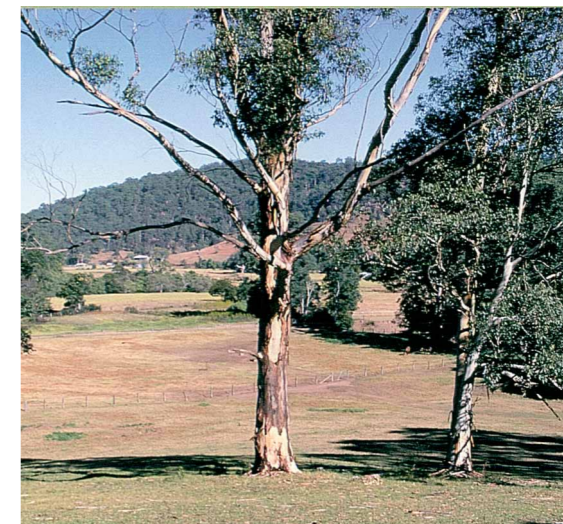
For this system to be changed to comply with the Federal and State policies encompassed in the National Water Initiative, and consequently enacted law, fundamental changes are required to the constitutions of irrigation corporations, in particular to remove the stapling of shares and water entitlements and to remove the requirement for shareholders/irrigators to own a landholding within the corporation's area of operations.

Kemp Strang is one of a team now involved in implementing these fundamental changes for an irrigation corporation.

# Land Clearing - The Two Hectare Exemption

Readers may know that one of the exemptions available to clearers of native vegetation is "the clearing of up to 2 hectares per annum for any contiguous land holding in the same ownership". What has been unclear is just what the 2 hectares refers to. Did it refer to clearing on 2 hectares of land? Or did it refer to clearing of 2 hectares of tree stems (land being measured around each tree stem) or 2 hectares of crowns?

In the August 2005 decision of *Damien Pty Limited v Director General Department of Infrastructure Planning and Natural Resources*, the Land and Environment Court determined that the exemption relates to the clearing of 2 hectares of land, not to 2 hectares of native vegetation (which was referred to in the hearing as the "cookie cutter" approach).



# Water Trading

The water trading provisions of the Water Management Act 2000 are now in full swing. Is the new system simpler, easier, quicker and cheaper? The answer, for the most part, has to be "no" - at least for the present. For example, significant delays are currently experienced where transactions involve "old" licenses and authorities which have not yet been converted to water access licenses.

Conversion is a pre-requisite to the processing of dealings by the Department of Natural Resources and Land and Property Information. In due course, once conversion has been completed and persons dealing with and processing transactions become more conversant with the new system, transaction times should be reduced.

The types of transactions available to irrigators under the new Act have been increased. Set out below is a brief description of the types of transactions available to those dealing in water.

- **Transfer of an Access License (Section 71M)**

The most basic form of transfer is where a person sells his property and his access license (or his interest in the access license if a number of people each hold a share component under the access license). In such a case there is merely a transfer of the access license (or interest therein) with no other change to the license. However, a holder may sell only his access license (and not his property) to a purchaser wanting to use the water on another property in the same water source. Indeed, the purchaser may, at the time of purchase, not even own any lands which can be irrigated. However, before the license can be used on the purchaser's land, the purchaser will need to apply to the Minister under Section 71W to change the works approval nominated on the access license. This is usually done as part of, and as a pre-requisite to completion of, the purchase transaction.

- **Term Transfer of Entitlements under an Access License (Section 71N)**

Such a transaction is commonly referred to as a "lease" of an entitlement or share component. The term of the transfer must be not less than 6 months. During the term the transferee is taken to be the holder of the access license as regards the use of the entitlement, payment of fees, compliance with terms etc. The transferee will, of

course, need to amend the access license to nominate his own works approval so that water can be extracted via his own works on his own property. Further, the holder of an interest (with others as tenants in common) in an access license may enter into a term transfer of his interest alone.

- **Assignment of Rights under an Access License (Section 71Q)**

The holders of two or more access licenses of the same category in the same water source may apply to the Minister for consent to reduce the share component of one or more access licenses and correspondingly increase the share component of the other(s). This procedure is used if the vendor and purchaser each hold an access license and the vendor desires to sell part only of his share component. It may also be used if the vendor wishes to sell all of his share component and retain his access license with a "nil" share component, giving him the opportunity to acquire share component to add to his access license at a future time.

- **Assignment of Water Allocations between Access Licenses (Section 71T)**

This section permits water allocations currently credited to the vendor's access license to be assigned from his access license to that of the purchaser with the consent to the Minister. This equates to the old "temporary transfer".

Transactions will not always be relatively straightforward as described above. It may be that a combination of steps may be required to effect a particular transaction. For example, if a vendor wishes to transfer to a purchaser part only of his access license but the purchaser himself does not already hold an access license, the vendor will need to make application to subdivide his access license into two access licenses, retaining one of those access licenses and then transferring the other one to the purchaser under Section 71M.

*"...types of transactions available to irrigators under the new Act have been increased."*

# Challenge to Farmer's Will

The Supreme Court of New South Wales, in February this year, gave judgment in the case of *Johnston v McCallum*. The deceased, a farmer and grazier, had divided his estate between two sons (S1 and S2), two daughters (D1 and D2) and his grandson (GS), his wife having predeceased him. He had left assets (in dollar terms) as follows:

S1 - \$498,000.00	S2 - \$496,000.00	GS - \$15,000.00
D1 - \$169,000.00	D2 - \$70,000.00	

The sons shared the rural properties as part of their benefits under the will.

During his life the deceased conducted farming activities with his sons, whilst both daughters were employed in the deceased's machinery dealership for many years until it closed in 1987.

The daughters applied for a greater share of the estate under the Family Provision Act ("the Act").

In determining claims under the Act, the Court must ask itself whether the provision (if any) made for the applicant was inadequate for his or her proper maintenance, education and advancement in life having regard to the applicant's financial position, the size and nature of the

