WATER LAW

A Practical Guide to the Water Act 1989

MASONS IN ASSOCIATION WITH THE CENTRE FOR ENVIRONMENTAL LAW

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MASONS IN ASSOCIATION WITH
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Preface

This book, which takes as its subject the new regime of water resources in England and Wales, in itself represents a new departure. It is the result of collaboration between a major firm of commercial solicitors, Masons, with a developing practice in environmental law, and a research institute in the law faculty of Southampton University, which is distinguished by its long association with the development and teaching of that branch of law.

Hitherto, not enough attention has been paid to the role of water as the life-blood of industry and commerce. Water supply and quality are now a matter of everyday concern to industrial managers. Management is concerned, not only by the security and cost of supply, but also increasingly by the need for assured water quality (for process requirements) and the prevention of pollution, especially at a time when such intense public interest in the subject is evident. Now that water pollution fines have topped £1 million, no industrial manager can afford to be lackadaisical about water quality and the impact which, for example, his own waste-management operations may have on it.

Water issues may now also play a part in investment decisions. Not only is the privatised water industry itself an appealing target for acquisitions, but the impact of water and waste management on the profitability of almost every manufacturing enterprise make it now a perfectly legitimate area for investors to address.

Collaboration between commercial practitioners and a university law faculty active in this field is no accident, for the management and conservation of the environment is a discipline in which lawyers, no less than other specialists, are learning that many of the principles by which they are accustomed to direct their affairs are uncertain guides, as unparalleled and unprecedented demands are laid upon them. It is

this new urgency and commitment in industry and commerce which is the distinctive feature of environmental affairs in the 1990s, and it has produced a state of affairs in which much of the creative development in the law over the next few years will take place, not so much in the law professor's study or even in the chambers of Lords Justices of Appeal, but in the offices of solicitors throughout the country.

The sheer speed of change and development of the subject, however, and the enormous volume of legal material which it generates, both within the jurisdiction and beyond, are such that most industrialists, or even the most active and alert practitioner, must doubt their ability, amid all other concerns, to keep abreast of what is happening, far less to be able to predict what may come to pass, especially as so much of the future shape of the national law is fashioned in an international or transnational forum.

This book, on a topic which in itself combines fundamental matters of natural resources law with questions of everyday importance to enormous numbers of people, corporations and public bodies, presents an ideal subject for what would perhaps have been regarded, not so very long ago, as a curious symbiosis between practitioner and academic lawyer. If environmental conservation depends on changing attitudes, then perhaps one can now make a case for saying that lawyers, perhaps not always thought of as the embodiment of progressive thinking, have at least made a start.

We should like gratefully to acknowledge the invaluable contribution of Mark Christensen, a New Zealand solicitor, who undertook the preparation of the text.

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Introduction: historical background to the Water Act 1989

Prior to the coming into force of the Water Act 1989 on 1 September 1989, the structure of the water industry was that established by the Water Act 1973. This Act came about as a result of recommendations by the Central Advisory Water Committee in 1971 on ways to improve the organisation of functions relating to water management, water supply, sewerage, sewage disposal and prevention of pollution then exercised by river authorities, public water undertakings and sewerage and sewage disposal authorities. The Water Act 1973 was designed to enable a comprehensive water management plan to be formulated for each river basin, to be put into effect by a smaller number of regional water authorities, thus avoiding the conflicts of interest that were generated by the divisions of responsibility between the various authorities. From 1 April 1974, responsibilities for the provision of water supplies, sewerage services and the protection of water resources were transferred from a large number of diverse public authorities to ten regional water authorities. This combined role of having both utility and regulatory functions gave rise to a potential conflict of interest, in that the water authorities were in the position of being both a major discharger to water and the pollution control authority. To rectify this potential for conflict of interest, the Water Act 1973 provided that new outlets and discharge by water authorities were subject to control and consent by the Secretary of State.

In 1974 the Control of Pollution Act brought about a range of reforms in the law relating to water pollution, although the rationale behind the legislation remained consistent with that of earlier legislation. This was the existence of a licensing system where controls over discharge to water were exercised through discharge consents, and the legality of such discharge could be determined by the extent of its compliance with conditions attached to the consents.

In February 1986 the Government announced its intention to privatise the water industry. The White Paper *Privatisation of the Water Authorities in England and Wales* (Cmnd. 9734, February 1986) proposed to maintain the system of so-called integrated river basin management of the water cycle as the responsibility of public limited companies (with the exception of land drainage), but within a clear framework of national regulatory environmental policy (see *The Water Environment: The next steps* (DoE WO Consultation Paper, April 1986)).

A major weakness of the integrated river basin management system, however, remains the conflict of interest where a body is at the same time charged with monitoring and maintaining water quality and is also given effluent treatment and disposal responsibilities.

As the consultation process progressed it became clear that the idea of keeping the authorities intact was both politically unacceptable to almost all interests and susceptible to challenge in the European Court of Justice as being inconsistent with European Community legislation on water pollution. Accordingly, in July 1987 the Department of the Environment issued a discussion paper, *The National Rivers Authority: The Government's proposals for a public regulatory body in a privatised water industry*, which announced the intention of transferring the main regulatory and water management functions of water authorities to this body, while leaving the utility roles of water supply and sewerage services to be carried out by the private sector.

In 1988, the Public Utility Transfers and Water Charges Act paved the way for the changes by conferring powers on water authorities to transfer property and functions to new bodies and to reorganise themselves internally into standard regulatory and utility divisions.

The Water Act 1989 obtained the Royal Assent on 6 July 1989 and most provisions were brought into effect by 1 September 1989. The water industry was publicly floated in November 1989. The price of shares was announced on 22 November, and the share offer closed on 6 December. The public flotation of the water industry was the second most popular privatisation, with the shares being oversubscribed by some six times.

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