

## ***Overcoming legal obstacles associated with property rights and registration to implement successful water resources planning regimes<sup>1</sup>***

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### ABSTRACT

All water planning regimes in the world are extremely complex(Caponera 1992) The Australian water industry is no exception but suffers from an additional burden of a relatively small population managing water in a very introspective ways. The seven systems of water law in Australia were of themselves already flawed although some aspects in some jurisdictions were world class. However, all suffered from the blights of modern resource management namely short parliamentary time frames, lack of adequate data on environmental, economic and social adaptations, lack of interjurisdictional co-ordination, lack of intra jurisdictional legal consistency and multiplicity of laws,vested interests with partisan agenda which reinforce the status quo and rigid introspective property rights regimes. The Council of Australian Governments reforms in 1994 set a national agenda for water to change many of the above and clearly require triple bottom line and integration of water resources planning regimes. This adds further complexity to the flawed systems and the people in the old institutions were given little guidance on how to achieve the COAG agenda. Hence the systems are so complex that there is legal indeterminacy in the administration of many of the regimes.

To be effective, the Australian water resources planning regimes require huge fundamental changes. To provide a certain and stable framework and to encourage better use of human resources it would be useful for the States to work together to create template legislation covering water allocation policies and water use planning at the farm level, the nature of the right to use and trade

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water which will reflect current practice which makes it a licence<sup>2</sup> not a property right, regard to environmental, social and economic outcomes and trade offs in use in water shed regions, catchment management water sharing plans, indigenous rights, governance issues in privatised bodies, price and value of water, use of market based instruments, community participation in drafting water plans, alteration of pre-existing rights, conditions for compensation and incorporation of environmental requirements. Each State would then have identical legislation and a major legal obstacle (different laws) would be removed. The identical legislation would still be administered by a State based Minister.<sup>3</sup> However, this new proposed law needs two pillars not found in pre-existing laws or CoAG. These are, a fundamental re-examination of the concepts of

- **water ownership.**

The States should be vested with all rainfall, runoff and storages such as aquifers and have the right to allocate between all users in a catchment on a share basis. Real not half baked State property ownership of water in all forms to be allocated on a share basis under a commons culture. (Conner and Dovers 2002) not a culture expecting growth in the environment (Daly 1993). Licences to use and capture would exist subject to capacity sharing formulas that reflect the nature of the seasons i.e. like those existing in the present States especially NSW. The property rights system could only ever provide a right which is subject to environmental constraints. Dealing between licence holders would need to be secure and there could be improvements to this and the mechanisms to trade water including information to market participants. In this last regard the *WaterMove* concept in Victoria is a useful starting point for the trading of surface water. Such a re-examination of water ownership to encompass a broader ownership would of course require different types of property rights to be articulated for the different forms of water including the regulation of overland flow. This is however an effective foundation and the way forward to deal with the present water allocation issues and capacity sharing issues.

- **performance based assessment of water management bodies.**

This requires information and schemes to be set up to work out ways to monitor and evaluate the performance of the various water bodies on environmental, economic and social criteria. For Australia, at present there is a dire lack of agreed criteria on these key issues including water allocation policies and these have the potential to pull apart the whole process and contribute to unproductive use of existing human resources. (Australian Government 1999) The process to achieve agreement will of course be protracted but there are many good regimes in each State act which could be adopted.

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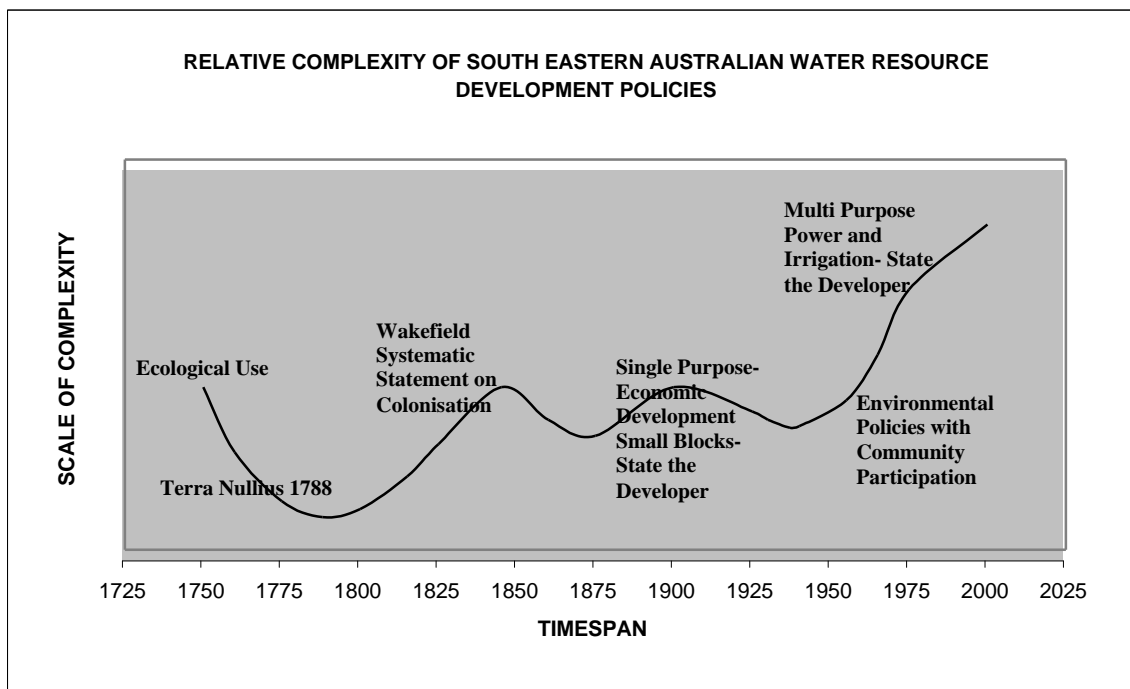
<sup>2</sup> If the holder has a reasonable expectation of an amount of water subject to the Ministers' reasonable decision making process on the current condition of the aquifer or water course.

<sup>3</sup> This system would parallel the present regime for the regulation of corporations in Australia where because under the Constitution the Commonwealth does not have power to form corporation, the States reached an agreement that each State would pass template legislation. A Ministerial council meets to discuss reform. This is made up of Federal and State representative and the voting formula ensures that a clear majority must agree and then the law is reformed in the same way in each State.

**Key words** Australian water policy, water laws, regulatory complexity, utility regulation

**Introduction.**

The last 100 years the era of hydro-carbons has seen a revolution with a schism not a positive nexus between social systems and ecosystem co-evolution and human welfare. Societies have felt liberated from immediate environmental constraints and have ignored ultimate ones believing wrongly in ecosystem growth. (Norgaard 1988). The question is how to respond. It is no longer possible to add on to existing regulatory models because to do so with the complex economic and social goals creates legal indeterminacy. What is needed is a new regulatory model based on new fundamentals .



**Who owns Australia' s water-the problem**

Ownership of assets generally brings with it the temptation to believe that the owner has the “right” to use and consume and generally manage the asset in their own interests. This may still apply to chattels but in a pluralistic modern society,ownership of natural resources is an anathema. Indeed, the concept has always been flawed as Hardin so ably demonstrated in the Tragedy of the Commons.(Hardin 1977)

So in Australia whilst the common law clear that ownership of surface water rested with the Crown the problem was that the ways the Crown divested itself of

the ownership created beliefs and expectations in the minds of the rural community that paralleled their ownership of it. The Crown in the right of the State ( because of section 100 of the Constitution)<sup>4</sup> retained the right of ownership and in each State the Minister or his delegate would issue licences for the taking of water and for works to control water. Each State did this in its own introspective way pretending that the rivers did not exist beyond their boundaries. This coupled with flawed ecological information has led to a situation where water is massively over-allocated under the licences (NLWRA 2002). It has only been since the 1970's that the Senate and non governmental organisations such as the Australian Conservation Foundation have realised the ecological problems with these schemes. (Senate 1970)

The question is how to reverse a suite of community expectations and industries predicated on free water whilst not dislocating the community and the primary production economy.

### **The COAG reforms in 1994**

Prior to 1994 most consumers were unfairly charged, water suppliers were inefficient, investment decisions were poor and institutional governance was inadequate.( Shadwick 2002). In February 1994, CoAG adopted a strategic framework for reform of the industry and these were linked to National Competition Payments in 1995.This was the catalyst for changes in the water industry.( Shadwick 2002)The CoAG reforms require the community to participate in the evolution and implementation of new water sharing arrangements which need to be sustainable on the three dimensions of the environment, community and economics. This new triple bottom line requirement is the basis for the evolution of a new effective regulatory model. Water management in Australia is still in a transition phase (Shadwick 2002) and most aspects will not be effective until 2005 with the environmental aspects taking much longer as the jurisdictions do not yet have adequate baseline data to assess ecological outcome

The Australian system now is that water is provided by corporatised entities in each State which has amended its laws to provide for the incorporation of the private sector in the rural and urban supply of water to achieve, full cost recovery, reduction of cross subsidies, transparent subsidies, consumption based pricing, investment appraisal, allocation reforms and water trading, environmental allocations, water property rights separated from land, institutional reforms, holistic approach to water management, Integrated Catchment Management, performance comparison and finally community consultation( see McKay 2002a). All of these then need to become the elements of a regulatory model but we need one set of words not 7 in order to promote the achievement of these difficult goals.

To date there have been reviews of the social justice issues in these reforms summarized in McKay and Bjornlund 2001 ,the environmental allocation

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<sup>4</sup> Section 100 says that the Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation. This was inserted because NSW, Victoria and SA feared Commonwealth laws under section 51 might affect their common interest in water for irrigation.( See Lane 1986)

aspects have been reviewed in Jones *et.al.*2001 and the economic aspects such as the use of market based instruments to achieve environmental goals has been restated (Action Salinity and Water 2002).

Suffice to say that it is early days yet and the reforms have been implemented at different rates and in different ways in each of the 7 States (McKay 2002a). The Australian Water acts all require all those involved in water allocation decisions to have regard to:

- ecologically sustainable development
- present and future generations
- social and economic benefits to the State, and
- integrated management

In addition, some Acts require these factors be looked at:

- indigenous rights,
- equity,
- sharing
- water management for the nation only Qld, and
- benefits to urban communities from rural management.

However, there is little guidance on how to set in place policies to achieve these goals and how to monitor and evaluate. The reforms have been interpreted in the light of the past water allocation practices which unfortunately was an over-allocation regime in some regions. The environmental requirements and the need to collect data is also handled differently in each State so at present there is a patchwork array of policies and much incompleteness in addressing environmental monitoring. However, all policy reform is a muddling through process as it is impossible for any decision maker to have enough resources to gather enough information to make decisions especially in the uncertain realm of hydrology. There is much work to be done in all the aspects above and it is fair to note that that reform fatigue is a characteristic of the persons in this sector because of the massive changes and ambitious goals of the new CoAG regime.

### **Overwhelming complexity and hence legal indeterminacy in present Australian water regulatory regimes- solution template laws**

All over the world, countries are harmonising their laws on trade and environmental issues notably in the EU to overcome the legal complexity and hence legal atrophe which characterizes legal indeterminacy. This phase of massive revisions of the legal systems is best illustrated by complex bodies as the World Trade Organisation (Benitah 1999) and the globalisation of legal rules relating to trade in agriculture to create regimes that aim to look beyond mere trade to a broader sense of community issues in trade. (McKay 2003). Hence to harmonise water laws in an island nation with no history of inter State wars or major conflicts( except over water) is a relatively small task. Our nearest neighbour, New Zealand has an integrated resource management act since 1991. No matter how wedded institutions are to the past the notion laws are the felt needs of a given( small) society and therefore idiosyncratic can not be upheld

any more( Mattei 1994). Indeed, Part 111A of the Trade Practices Act sets up regimes for access to facilities of national importance and proposes tools to engage in economic regulation of access and prices. This regime which has been applied to gas, electricity, airports, rail infrastructure and telecommunications is still under evolution but at least all the parties have an agreed set of criteria to work on( which involves broad issues ) even if the definitions are at times still open to debate.<sup>5</sup> Competition has developed in areas where there was none and increased efficiencies have been achieved through corporatisation and privatisation efficiency gains and reduction in monopoly rents. (Network 2002)

The process of harmonisation in the modern world is part of a subset of legal theory on legal change which is poorly understood. If complexity leads to legal indeterminacy that is ambiguous terms or provisions then the whole foundations of the system need to be changed. It is not possible to add on. Australia needs to re draft its regulatory models to be identical over the whole country template for water.

At this time it would be better to just reinforce the achieved CoAG goals as above. Later iterations of the template law would need to consider

- different environmental conditions infrastructure and a host of other local conditions
- consumer protection issues including control of monopoly power, and
- collection and presentation of data and evaluation methods selected to measure performance on the triple bottom line criteria of economic, social and environmental sustainability

### **Performance management**

In Australia we have not been as creative in selecting models rather added on to existing ones. (McKay 2002a and b). In Canada, there has been much more experimentation at the city or municipality level with the model chosen reflecting local factors and being combinations. (Pricewaterhousecoopers 2002). This is not without the problems that beset small schemes the wilderness of the single instance therefore making it hard to research failures and the lack of funds to monitor and evaluate. So for Australia it would be best to standardize rights and responsibilities for the institutions in the regimes and derive a model to be applied in each State which reflects the best attributes of the present organizations with reference to other utilities. North 1987 has long advocated this position.

At the present time it is possible to attach these three labels to the schemes but many local municipalities are transplanting aspects and mixing and matching hence the regulatory complexity for the National Corporate regulator. There are:

1. Management contracts- private operator undertakes the operation of the utility for a limited period, in exchange for a performance based fee. The operational risk is shared between the private operator and the government which retains the demand and investment risks.

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<sup>5</sup> There is still a debate about the cost base to be used for access to facilities.

2. Lease or affermage contracts whereby the private operator takes over full operational, commercial and demand risks of the water quality, while the public sector remains responsible for financing investments
3. Concession contracts whereby the government only retains ownership of the infrastructure but transfers to a private operator all responsibilities and risks for running the water utility including financial investments.
4. One multi utility ACTEW. (Perkins 2002)

In response to the issues of scale and scope multi- utility models have appeared in Canada. This amounts to the convergence of different utility operations to take advantage of economies of scale and scope. Economies of scale are generated through scale of operation, economies of scope are generated by consolidating the background function common to most utilities such as billing and underground activities for water and gas.)

Hence, the existing water planning regimes need to be re-examined and a template body created for urban and rural water authorities. Such bodies would exist all over the country but have the some rights and responsibilities and subject to review on agreed criteria.

The outline water planning regime for urban rainfall reflects the fact that urban users are generally interested in potable tap supply and not in capturing or using significant amounts of water.

### **Urban rainfall**

Water  
Tanks            overland flow, stormwater, watercourses, aquifers, channels, reuse

### **TEMPLATE LEGISLATION IN ALL STATES REGULATING THESE**

Up to                            regulated by template bodies applying national standards  
Maximum  
Size  
No  
licence

The model for rural rainfall would need to be different to reflect that water is the vital component of agricultural industries.

## Rural rainfall

Private  
Dams

overland flow, water courses, aquifers, channels reuse

### TEMPLATE LEGISLATION IN ALL STATES REGULATION OF ALLOCATION AND USE

**% SHARE TO GROWERS TO USE WATER UNDER STANDARD LICENCE WHICH IS SUBJECT TO SEASONAL/ANNUAL/REGIONAL REVISIONS BY RELEVANT MINISTER**

#### Key issues for Australian template legislation

These issues require harmonizing at least to comply with international treaty obligations.

#### Indigenous

Colonial governments from 1788 were not obliged to consider Indigenous rights to the land or water as Australia was deemed to be settled with no pre existing system of law ie *terra nullius*. This was despite the fact that there was some evidence of water holes being managed and protected by tribes at sites where animals bred and that complicated ecological wedges were created in rivers to share the bounty (McKay 2002b). The common law of England as modified by statutory schemes England, was relied on from the time of Caucasian settlement to Federation and up to 1992 and the Mabo decision (*Mabo and Others v State of Queensland 1992 107 ALR*). Indeed, as figure 1 shows this system of sharing ecological wedges and arranges to pass on rights through marriage between tribes created a system that was more complicated than the one imposed which was uni-dimensional in its notion of water as utilitarian see McKay 2002b.

#### Governance

The Australian water Acts also set in place Boards of Directors who are meant to achieve the multiple aims. However, the skill base characteristics of these Board members is often limited and in no State all the dimensions covered by Board members. In NSW for example the requirements are...*Appropriate expertise and to the intent that the Board includes directors with separate expertise in business management, protecting the environment and public health*. The selection criteria could also be more transparent and public.

#### Public participation

Australia created a hugely successful example of Community action in the National Landcare movement with over 4000 groups involved in local action planning of natural resource management. Australia has been a huge innovator in the adoption of Agenda 21 at local levels as a response to environmental

problems in rural water use. The Landcare movement is part of a wide and broad based volunteerism in community self help organisation such as volunteer fire brigades (McKay 1983). Australia with its well educated rural community is best placed to implement participatory democracy in water resources planning regimes. There is a wide international and local literature to support development in this area. (Swanson 2001, Rogers and Ryan 2001 and Syme and Nancarrow 2002). At present there are up to 19 plans out in NSW out of a potential 40 plans and commentators have described these as contentious with dissenting views noted in the drafts (Water 2002). In addition it was reported that the task of finding consensus between groups unaccustomed to doing business in that way has been arduous. The most critical challenge was the assumption that local communities could negotiate new water sharing arrangements which would improve environmental outcomes although they diminish the reliability of other water entitlements. (Martin K 2002). It is clear that guidance must be provided to the community groups on national goals for river health, and support is given to manage the process of change.

The new Water Acts all require the community to make decisions about water allocations as a way of public participation. However, the community members selected for this role need to be well trained in the multiple issues. This issue has received much press recently in a report by Lingiari Foundation and Atsic to CoAG and the threat by indigenous persons in NSW to sue NSW Government (Debra Jopson *Sydney Morning Herald*. 3 June 2002, p 15). The issues are being canvassed in relation to the incorporation of an indigenous voice on water allocation committees in NSW. Aborigines are demanding \$250m trust fund to compensate native title holders for their share of the expected \$5 Billion value of a new system of selling water rights. The article goes in to say:

*If the Government does not agree, it could face a legal challenge based on its water management legislation being inconsistent with the Native Title Act, said Tony McAvoy, a barrister representing the new body for claimants – NSW Native Title Services.*

*Individual native-title claimants could also challenge the legitimacy of the Water Management Act, which could be implemented as early as July 1. Under this act, the*

*NSW Government will treat water as private property.*

*“People on the ground are angry,” Mr McAvoy said. “The Government is adding insult to injury by going about this process of dispossession at a time when all the rhetoric is about reducing the level of disadvantage.*

*“It is entrenching a system which will further cause poverty and dispossession.*

In Victoria, the purposes of Victorian Water Act are set out in section 1 which states the triple bottom line requirements but also has the object to:

*Maximise community involvement in the making and implementation of arrangements relating to the use, conservation or management of water*

*resources.* The Minister must make sure that, as far as possible, all relevant interests are fairly represented on the Committee at least half must be owners or occupiers in the area concerned appointed after consultation by the Minister with bodies representative of those persons, any public authority directly affected must be represented if farming area then at least half must be farmers appointed by Victorian farmers federation. This is much less prescriptive than NSW.

The objects of the South Australian act are broad (section 6) and are to: ensure the physical, economic and social well being of the State and facilitate the economic development of the State while protecting the entitlements of future generations and the ecosystems dependent on those resources. The Minister appoints Committees and approves plans created by Catchment water Management Boards in prescribed areas only. The relationship between the Catchment water plans and broader water allocation plans is weak. Community representatives are involved in both processes. The Catchment Water plans give the power to impose levies. The Water Allocation plans must be consistent with the overall State Water Plan and must provide for the allocation of water on an equitable basis and which is sustainable. These plans bind the Minister. There has been some recent litigation in the Environment, Resources and Development Court which suggests that the Minister does not have power to review or correct anomaly (Strachan v Minister) or require better information( Elandes and Seidel v Minister)

Community consultation in the evolution of water plans as required by the Acts in rural communities is an active example of participatory democracy. However, the Acts are deficient in mechanisms and institutional frameworks to put this in place. The Acts do not also require that such community members be trained in the skills of conflict resolution. In many cases the implementation of the selection process could also be more transparent. In the case of transfers of water assets between water authorities the case could be made for an election within the community or at least an open process of passing a by law.

#### **Alteration of pre-existing rights and compensation.**

This is the vexed question. How to design a scheme to do this. It is such a radical change that it may be best to start again radically. The first place to start would be to assert State ownership of the rainfall and the fundamentals for designing a regulatory scheme to allocate water. Recently, two State South Australia and Victoria have imposed State control and ownership over rainwater in some special areas. This needs to be universal over the nation and achieved by template legislation.

Until this is done the administrative bodies will be would up with issues over compensation and each State has vastly different rules on this as per the new Acts. Hence, this will create confusion and a great sense of injustice and division in the community. Surely all acts should be identical to overcome the issues of legislative competence of the Commonwealth and have as their primary object

*The management of water for the benefit of the people of Australia.*

### **Incorporation of environmental requirements**

This is also a vexed issue as all acts have created new demands on the Minister to incorporate environmental requirements in water plans. Again this is likely to disadvantage existing holders of licences. It has been reported that one of the first plans drafted for the Murrumbidgee River is unsatisfactory as: *A review by a panel appointed by government of the allocation reduction plan is ``unlikely to maintain or improve the ecological health of the Murrumbidgee River in view of the level of development in the valley''*. It also found that rules in the draft plan governing water usage appear to be in conflict with water management legislation because they have been drafted with primary concern for water users rather than the environment. The plan suggested a 60 gigalitre reduction but environmental groups say at least 100 is required out of 2250 in order to restore river health. (Irrigation plan may make river sicker, Claire O'Rourke *Sydney Morning Herald* 5 Feb 2002). Litigation has been threatened.

### **Conclusions**

The time for tinkering with many types of regulatory models is over. It is time to recoil from the complexity of 7 different laws and draft a national template law built on the foundations of State ownership of rainfall with procedures and funding to gain adequate knowledge of the economic, environmental and social impact of regulatory models. Finally we need to develop clear and articulate performance goals for those managing the water and regard water more as a national resource.

In Australia, the full impact of the massive changes in 1995 and the huge complexity of water decisions are now subject to the most inclusive community debate in Australian history. The new CoAG requirements have added further complexity and new issues so there is a need to ensure that a method is found via new institutional arrangements to disentangle the complexity into manageable parts and hence move forward in achievement of sustainable water management which embraces environment, economic activity and communities.

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