

# The quest for environmentally sustainable water use

Constitutional issues for federal, state and local governments

By Jennifer McKay



Professor Jennifer McKay is a Professor of Business Law, and Director of the Centre for Comparative Water Policy and Law, at the University of South Australia, Adelaide.

*They hang the man and flog the woman  
That steal the goose from the common  
But let the greater villain loose  
That steal the common from the goose.<sup>1</sup>*

The first two lines of this poem reflect Australian water management through state laws and administrative arrangements up to 1994. The major water user is agriculture, which uses up to 70%, domestic/urban use amounts to 11% with the rest being used in commerce and industry and for power generation.<sup>2</sup> More than half of the water used for agriculture is used for livestock, pasture, grains and dairy. Of the total amount allocated by volume, 76% is surface water and 23% groundwater<sup>3</sup>

The state laws that allocated the water for agriculture were introspective and freely gave water allocations in the form of licences in order to develop the economy of each state. The water licences were treated as property rights to water attached to land even though they were mere licences. The belief that the licences were inviolate developed in all states except South Australia, where the Minister in the 1970s exercised the power to reduce allocations in time of drought.<sup>4</sup> The quantum allocated under various state schemes did not account for ecosystem services; the aim was to maximise productive output. There were often too many water users in a catchment or an aquifer and emphasis was placed on ensuring equity between them and not the greater question of what is left after allocation to preserve the sustainability of the resource.<sup>5</sup> As a result, 25% of surface water and 34% of groundwater resources were over allocated.<sup>6</sup> The results were environmental degradation such as blue green algal blooms and acute regional water shortages.<sup>7</sup>

The second two lines of this poem reflect the approach since the early 1990s, especially after 1994. The over allocation of water has been recognised and the concept of environmentally sustainable development (ESD) has been introduced into water management laws since 1992 and into natural resources management laws (NRM) generally since the late 1990s in each state and at the federal level. The definition of ESD is 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'.<sup>8</sup> Many states had introduced water law reform with the objective of ESD and these were given impetus by the first Council of Australian Governments (COAG) reforms in 1994. The National Water Initiative (NWI) followed these in 2004. The first set of reforms required:

- corporatisation of water utilities;
- separation of the functions of economic, environmental regulators from the supply of water;
- full cost recovery;
- ESD, and
- plans to address over allocation of river and groundwater systems.



The NWI reforms, in addition, aim to increase productivity and efficiency of Australia's water use, to service rural and urban communities and to ensure the health of river and groundwater systems. In particular, the NWI has 80 key actions all aimed at ESD.

Under broad headings these are:

- a common lexicon for water words;
- water access entitlements and planning framework; or risk assignment;
- Indigenous access;
- water markets and intra and interstate trade compatible registers and institutional and regulatory arrangements;
- best practice in water pricing and institutional arrangements;
- integrated management of water for environmental and other public benefits;
- water resource accounting;
- urban water use reform through demand management and water sensitive design;
- community partnerships and adjustments, and
- knowledge and capacity building.

The reforms bring to the fore the limitations of power over water in s 100 of the *Australian Constitution* and the extraterritorial limitations in state constitutions. These limitations have engendered novel methods of federal-state relations and power sharing. The quest to implement ESD in water management and use has generated a mosaic of innovative laws, regulations, and institutions mainly at the state level because of s 100 (discussed below). Of late, each state has created regional NRM bodies (there are 56)<sup>9</sup> with different legal structures, reporting relationships and definitions of ESD, surface water, groundwater and just about everything else.

These NRM boards are often charged with drafting water allocation plans. While they all aim to achieve ESD in water and NRM the definitional differences are a real impediment to interstate learning and national consistency. The lack of consistency may lead to water regulation forum shopping by water users to select the least intrusive water regulation systems.

### ***Australian Constitution, Section 100***

The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the rights of the State or of the residents therein to the reasonable use of waters of rivers from conservation or irrigation.

Some of the key constitutional issues, and the novel implementation methods adopted in the quest for ESD in water management are discussed below.

### **Constitutional issues for the federal government**

#### **Section 100 is a limitation on power**

The states decided to federate in 1901 but prohibited the federal government from legislating on water under s 51(i) (the trade and commerce power) or s 98 (the navigation power).<sup>10</sup>

The parliamentary debates reveal that s 100 was inserted because NSW, Victoria and SA feared that Commonwealth laws under ss 51(i) or 98 might affect their common interest in water for irrigation.<sup>11</sup> The prohibition extends to a law made under s 51(i) or a law which is capable of being made under that power. Hence, the wider the interpretation of that section, the wider the prohibition. Section 51(i) has had a wide interpretation in the High Court as it is a grant of power.

The COAG reforms of 1994 stimulated the creation by the states of 14 legal types of water supply businesses. These—like all corporations—can only be created by the states. The water supply businesses are mainly local government but include local government owned corporations and corporations law companies. Water is a subject of trade and commerce through water markets, which were required aspects of the 1994 and the present NWI reforms.<sup>12</sup> Hence, s 100 has become wider and more inhibiting on federal action because

△ The reforms bring to the fore the limitations of power over water in s 100 of the *Australian Constitution* . . . △

△ In 1901, the term 'conservation' meant 'impounding of water' but it now has a completely different meaning △

water is managed using bodies who can be regulated under the trade and commerce power.

There are two possibilities under the Constitution for truly national laws. One would be under a referral of power and the other using template laws like the Corporations laws. However, the approach adopted has been neither of these, but instead the process has been to create a lexicon of water management words, under paragraph 17 of the NWI. This is to ensure national compatibility. The six Commonwealth government agencies with water related responsibilities have adopted this already in their legislation and other documentation. With respect to the states, this is listed as ongoing in the NWI document with no end date specified.

The qualifiers 'reasonable use' and 'conservation' in s 100 may provide some power to the Commonwealth on proof of unreasonable use but this is only likely to apply to one part of any state at any one time. In 1901, the term 'conservation' meant 'impounding of water' but it now has a completely different meaning. A litigant could now argue that the term 'conservation' in the Act should be interpreted differently.

#### Ways around s 100

Despite s 100 the Commonwealth has intervened in state water management through ss 81 and 96 of the Constitution, which gives the Commonwealth power to grant financial assistance to the states and impose conditions. In this context the emergence of salinity problems was identified as a key issue, especially along the River Murray. In 1978 the Commonwealth passed the *National Water Resources Financial Assistance Act*, which funded a broad range of works aiming to conserve water and mitigate salinity and floods, particularly in the Murray-Darling Basin.

The Murray-Darling Basin region covers more than 1,000,000 square kilometres (14%) of Australia, unevenly spread over the five jurisdictions of Queensland, NSW, ACT, Victoria and South Australia. The water resources of the Murray and Darling Rivers have been the subject of an innovative (albeit underpowered) inter-jurisdictional water sharing agreement since 1915. In light of the state-based power,

the process for the operation and development of this agreement comprised of a Council of State Ministers agreeing on legislation and then seeking its approval by state parliaments. The current Murray-Darling Basin Agreement was signed by NSW, Victoria and South Australia in 1992, with Queensland agreeing in 1996 and the ACT in 1998. The Agreement covers all natural resources management and, among other goals, works to reduce the salinity impacts of river water use for irrigation.

In the light of an Audit Report of 1995, an interim cap was imposed in June 1995 limiting the amount of water able to be diverted by the states for consumptive uses to the quantum diverted on 30 June 1994. There was an independent review of equity issues and this cap was made permanent for NSW, Victoria and South Australia from 1 July 1997. This has been heralded as one of the most important decisions ever made in Australian water history.<sup>13</sup>

Under the cap arrangements each state is required to monitor and report to the Murray Darling Basin Commission (MDBC) on diversions, water entitlements announced, allocations, trading of water within, to and from the state and report on compliance with the target. The state must also report on measures undertaken or proposed to ensure that the water taken does not exceed the annual diversion target for every ensuing year. The MDBC appoints an Independent Audit Group (IAG), which annually audits the performance of each state government and reports.<sup>14</sup> There is also power to order a special audit if:

- the diversion for water supply to metropolitan Adelaide has exceeded 650GL, or
- the cumulative debit recorded in the register exceeds 20% of the annual average for a particular river.

#### Environmental Protection and Biodiversity Conservation Act 1999 (Cth)

This Act requires any person who proposes to take any action on Commonwealth land, or which may impact on Commonwealth land or water, to apply to the Department of Environment and Heritage for a decision by the Minister for approval. Actions include extraction



or diversion of water. The Act also applies to matters of national environmental significance and these include all Ramsar wetlands. The environment is given a broad ESD definition and includes ecosystems, natural and physical, qualities of locations, heritage and indigenous values of places and social economic and cultural aspects.

These broad provisions open the door for wide interpretations and give the power to stop particular actions in specific places.

The action is assessed by a state or territory assessment process accredited under a bilateral agreement. A state or territory process is accredited on a case-by-case basis or an Australian Government assessment process accredited under a ministerial declaration and the Australian Government minister decides on approval and conditions in 30 days.

### Third party access to nationally significant water facilities of a state

Under Part IIIA of the *Trade Practices Act 1974* (Cth), interested parties may apply to the National Competition Council to recommend third party access to the services provided by nationally significant water facilities. The problem is the definition of 'nationally significant water facilities'.<sup>15</sup> Services Sydney won such a declaration against Sydney Water, in relation to sewage transmission and interconnections services.

## Constitutional issues for state and local governments

### Extraterritorial limitation on state power

No state can by its laws directly affect, bind or regulate property beyond its own territory or control persons who do not reside within it unless there is a nexus. This has always made it difficult to achieve interstate compacts in water management with the notable exceptions of the MDBC and the Great Artesian Basin Commission. These are cooperative arrangements. The states may exercise exclusive control over all non-navigable rivers and concurrent control over all navigable water in their jurisdiction, subject to the proviso that they cannot interfere with freedom of trade

(s 92) nor discriminate against citizens of another state (s 117).<sup>16</sup> When the *Constitution* was made the legal rights of each colony or resident thereof to the use of waters were absolute. There was no such thing as a riparian rule between colonies. That is, each colony was not obliged to pass down to the lower riparian the natural flow of water. Indeed as stated in the introduction, the states passed their own laws to use all the water.

### Ways around extraterritorial limitation to achieve national consistency—NWI protocols

The NWI suggests a number of these, as set out above (p23).

There has been litigation by residents in a number of states complaining about some of these reforms, in particular:

- community litigation—water access entitlements and planning framework;
- risk assignment; and
- water markets and trading intra and interstate compatible registers and institutional and regulatory arrangements.

### Community litigation

Two cases of note regarding water access entitlements and planning framework are *Ashworth v State of Victoria*<sup>17</sup> and *Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources* (NSW).<sup>18</sup>

In the *Ashworth* case, a farmer challenged the validity of the new laws in Victoria, which for the first time vested in the state the right to water captured on his farm. This case involved the amended *Water Act 1989* (Vic), which restricted the previous rights of farmers to capture water in dams on property and percolating water. The plaintiff had four dams on his property. He used the water captured for irrigating pasture and crops and had been doing so for 30 years. The dams were filled by run-off from rain falling on the land and by water seeping from springs on the land.

In 2002, the Victorian government passed the *Water (Irrigation Farm Dams) Act*. This Act required the plaintiff to obtain a licence if he wished to continue with this practice. The

△ There was no such thing as a riparian rule between colonies. That is, each colony was not obliged to pass down to the lower riparian the natural flow of water. △

△ After the 1994 reforms there was much community disquiet about the issue of compensation for changes to water allocations. △

plaintiff did not obtain a licence and objected to the interference with what he saw as his right to use the water in his dams as he thought fit. He sought a declaration from the court. The Act was upheld requiring that the plaintiff be licensed to use the water in the dams. The statute replaced common law rights and the plaintiff had to pay costs.

In NSW, the *Murrumbidgee* case challenged the issue of validity of a water plan. The Minister had used the power in the Act to draft a groundwater plan himself. The plan addressed sustainable management of groundwater and identified limits on extraction; the overall aim of the plan was to reduce actual use over 10 years to the annual average recharge, less a quantity preserved for the environment. Groundwater users were subject to pro rata reductions of entitlements over a 10-year period. All users were to be entitled by year nine to only 52% of their original entitlements. There were adjustment mechanisms such as the creation of a market in access licences and supplementary water access licences.

The grounds of the challenge were:

- the purpose of the Minister in making the plan was to avoid the community drafted plan;
- the formula for reserving waters for the environment contained a mathematical impossibility;
- the uncertainty of timing of operation of the plan, and
- the imposition of uniform reductions in water allocation was irrational.

All of these were dismissed on appeal. They were dealt with as follows;

- Extraneous purpose: The appellant alleged that the Minister made the plan to avoid the notification, public exhibition and consideration required under a plan made by a management committee. It was held that the power to establish a management committee to draft a plan was discretionary and a plan formulated by the Minister was valid.
- The literal construction of the clause did provide an absurd result, so the court applied a purposive construction.

- The timing was considered to be capable of being certain and so valid.
- The case here was based on the argument that it was irrational to treat the groundwater source as a single body of water, as aquifer recharge was site specific and an activity in one area would result in changed conditions elsewhere. Historically, the groundwater system was managed in zones since in some areas use of entitlements would be unsustainable. The argument applied the precautionary principle to protect the resource in the absence of scientific data. The single system was argued to be irrational, as it was not based on water availability. However, the court upheld the pro rata reduction on the grounds that the court had a confined role and it was for the Minister to balance the desired environmental outcome and the chosen method of achieving it with the beneficial and adverse social and economic consequences.

In other states there has been litigation about the provisions of water allocation plans in relation to allocation and the states vary as to the extent that a water allocation plan is reviewable

This creates further inconsistency between the states and may of itself be a basis for forum shopping.

### Risk assignment

After the 1994 reforms there was much community disquiet about the issue of compensation for changes to water allocations. The NWI stresses that entitlement holders are to bear the risks of any reductions or less reliable water allocation under a water access entitlement arising from seasonal or long term climate change, and periodic or natural events such as bushfire and drought.

The NWI also stresses that the risks of any reduction or less reliable water allocation under a *bona fide* review of the knowledge of the capacity of the water system is to be borne by users up to 2014. After that date, risks arising under comprehensive water plans are to be shared over a 10-year period.



The states are now revising their Acts to provide these terms. The states have taken a strict approach, for example, under the *Water Management Act* (NSW), offences relating to unlawful taking of water are strict liability criminal offences. Hence, there is no requirement for the prosecution to prove a mental or fault element in the form of intention, recklessness or negligence.<sup>19</sup>

## Water markets

The current situation is that any water market rules must be consistent with the NWI, as specified in schedule G. This provides that restrictions on water trade can only be used to manage:

- i) environmental impacts, including impacts on ecosystems that depend on underground water;
- ii) hydrological, water quality and hydro geological impacts;
- iii) delivery constraints;
- iv) impacts on geographical features (such as river and aquifer integrity), or
- v) features of major indigenous, cultural heritage or spiritual significance.

The rules must be competitively neutral in their design and application especially in interconnected systems across state and territory boundaries.

For instance, differences in the approach taken in NSW, South Australia and Victoria to managing salinity have the potential to bias trading outcomes across borders. Exit fees for growers wanting to sell water must also not impinge trade and all water supply businesses must allow trade into and out of their areas where infrastructure allows.<sup>20</sup> This requirement overcomes inconsistency between states.

## Summary

The constitutional limitations on the power to pass water management laws have created some unique institutions, procedures and laws. The major problem has been inconsistency between states in their definitions of ESD and

other water terms in the water laws and their water planning processes. To overcome this, one unique solution has been that the state laws must now enact provisions to achieve some ends in a consistent way. There is also a plan to standardise the water terms in laws as well. These will achieve greater uniformity however, the underlying laws and institutions differ and despite the above there will be significant differences in interpretation of water terms in Acts of different states.

## Endnotes

1. English folk poem circa 1764.
2. Australian Bureau of Statistics. *Water Account—Australia, 2000–01* (2004) ABS Cat. No. 4610.0.
3. Australian Bureau of Statistics. *Water Access Entitlements, Allocations and Trading—Australia, 2004–05* (2006) ABS Cat. No. 4610.0.55.003.
4. J McKay, 'Water Institutional Reforms in Australia' in special issue of *Water Policy—Water Institutional Reforms: Theory and Practice* (2005), 35–53.
5. See Australian Government, *National Water Initiative Implementation Plan* (2006). There are plans for each state, which stress the reduction of over allocations for all river systems and groundwater in accordance with the 1994 COAG water reform framework. These were due to be completed by the end of 2005 but are still underway in some places.
6. National Land and Water Resources Audit, *Australian Water Resource Assessment, Surface and Groundwater Availability and Quality* (2000); R Evans, 'Managing Over-Allocated Groundwater Systems', (Paper presented at the 3rd Australasian Natural Resources Law and Policy Conference, Adelaide) 2001, 194.
7. Ibid; J McKay, 'Water Institutional Reforms in Australia' in special issue of *Water Policy—Water Institutional Reforms: Theory and Practice* (2005), 35–53.
8. National Strategy for Ecologically Sustainable Development 1992 <[www.deh.gov/esd/national/esd/strategy/intro.html#WIESD](http://www.deh.gov/esd/national/esd/strategy/intro.html#WIESD)> at 14 December 2006.
9. ACIL Tasman 2005 *Institutional Arrangements in the Australian Water Sector*, prepared for the National Water Commission, Canberra.
10. P Lane, *Lane's Commentary on the Australian Constitution* (1986), 556.
11. Ibid.
12. J McKay, 'Issues for CEOs of Australian Water Utilities with the Implementation of the Integration and ESD Requirements in Australian Water Laws', *Journal of Contemporary Water Research and Education* (2006).
13. D Blackmore, 'Managing for Scarcity—Water Resources in the Murray-Darling Basin' (2000) *CEDA Bulletin* July, 50–54.
14. IAG Reports on Cap Implementation, <[www.mdbc.gov.au/naturalresources/the\\_cap/the\\_cap.htm](http://www.mdbc.gov.au/naturalresources/the_cap/the_cap.htm)> at 14 December 2006.

*Continued on page 79*



forum

## Continued from page 8: '100 years of mad ideas'

relief' for irrigators. As usual, when it comes to environmental issues, politicians ignore both science and common sense to serve short-term ends.

Unless all shoulders are to the same wheel and the number one priority is the restoration of the health of the river and a serious review of suitable crops for increasingly marginal land is conducted, free from the clutches of DOMI, then the future of Australia's largest river system looks very bleak indeed. If the High Court's recent decision that the corporate powers of the Federal Government can extend to workplace relations, perhaps these powers could extend to the waterways.

## Continued from page 27: 'The quest for environmentally sustainable water use'

15. National Competition Council, [www.ncc.gov.au](http://www.ncc.gov.au) at 14 December 2006.
16. J Quick and R Garran, *The annotated Constitution of the Australian Commonwealth* (1976), 887.
17. *Ashworth v State of Victoria* [2003] VSC 194, (17 June 2003).
18. *Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources* [2005] NSWCA 10.
19. *He Kaw Teh v R* (1985) 157 CLR 523.
20. <[www.dpmpc.gov.au/nwi/docs/nwi\\_wts\\_chapter9.pdf](http://www.dpmpc.gov.au/nwi/docs/nwi_wts_chapter9.pdf)> at 14 December 2006.

## Continued from page 72: 'Protecting personal privacy'

6. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, [163].
7. *Listening Devices Act 1992* (ACT), *Listening Devices Act 1984* (NSW), *Surveillance Devices Act 2000* (NT), *Invasion of Privacy Act 1971* (Qld), *Listening and Surveillance Devices Act 1972* (SA), *Listening Devices Act 1991* (Tas), *Surveillance Devices Act 1999* (Vic), *Surveillance Devices Act 1998* (WA).
8. *Victoria Park Racing and Recreation Grounds Ltd v Taylor* (1937) 58 CLR 479.
9. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, [41].
10. *Ibid.*, [55].
11. *Ibid.*, [107].
12. *Ibid.*, [132].
13. *Ibid.*, [187].
14. *Ibid.*, [335].
15. *Grosse v Purvis* [2003] QDC 151, [423].
16. *Tucker v News Media Ownership Ltd* Unreported, High Court, Wellington, CP 477/86 20 October 1986.
17. *Grosse v Purvis* [2003] QDC 151, [444].
18. *Ibid.*, [447].
19. *Kalaba v Commonwealth of Australia* [2004] FCA 763.
20. *Giller v Procopets* [2004] VSC 113.
21. *Ibid.* [447].
22. *Kalaba v Commonwealth of Australia* [2004] FCA 763, [6] (Heerey J).
23. *Grosse v Purvis* [2003] QDC 151.
24. The approach taken in the UK is more fully discussed in the unedited article.
25. *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63, [335].
26. *Kaye v Robertson* (1990) 19 IPR 147.
27. *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63, [335].
28. See, for example *Commonwealth v Tasmania* (1983) 158 CLR 1.
29. [1980] ATS 23.
30. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, [190].
31. *Ibid.*, [328].