

# AMERICA'S FASCINATION WITH AUSTRALIA'S NATIONAL WATER INITIATIVE

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## Introduction

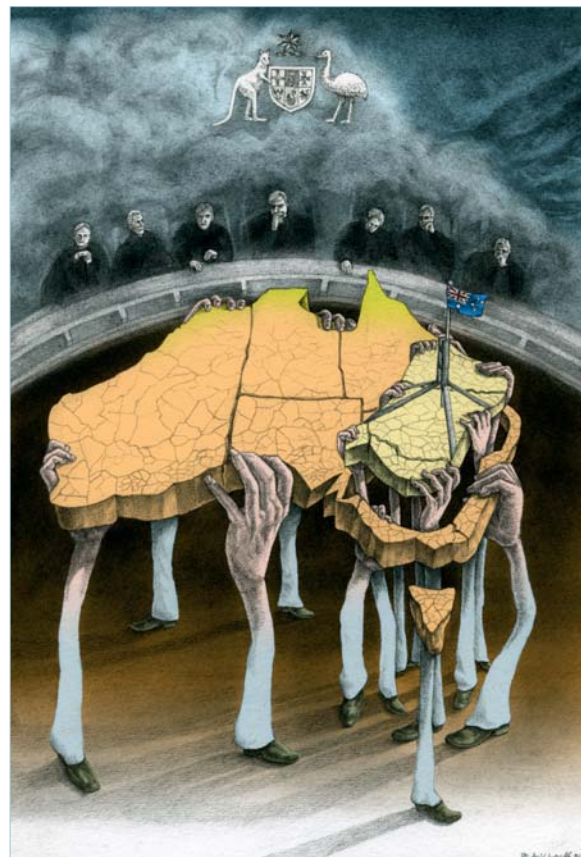
I was blessed in 2008- 2009 to be awarded a Senior Fulbright fellowship on the topic of comparative water policies and laws. I was based at Boalt School of Law and American University in Washington DC and worked on the political questions doctrine in US jurisprudence and its analogy in Australia. I also studied Human rights law and Californian legal cases. The experience was really refreshing as some of the best teachers exist in these two law schools.

The research work concerned the limits between political questions (decided by Ministers) and legal questions (decided by the Courts) and how international agreements have norms which influence national decisions. There are some issues that superior court judges have considered to be *political questions* and so feel that they cannot review a decision.

There are precedents in Australia that suggest that, where a Minister has the discretion in a particular case by reference to the interests of the general public, then in such political field questions, the discretion may be exercised free of procedural constraints<sup>1</sup>. There are High Court and NSW<sup>2</sup> decisions in support of this proposition.

I am interested in how both the domestic and international laws now play out together in relation to the relatively fuzzy concept of Ecologically Sustainable Development (ESD) and the national interest as required in our new *Water Act 2007* Cth.<sup>3</sup> ESD obligations are set out in that Act as:

1. decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
2. if there are threats of serious or irreversible environmental damage, lack



of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

3. the principle of inter-generational equity—that the present generation should ensure that the health, biodiversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
4. the conservation of biodiversity<sup>4</sup> and ecological integrity should be a fundamental consideration in decision-making; and
5. improved valuation, pricing and incentive mechanisms should be promoted

## Comparing water policies and laws.

These issues are difficult and centre around fairness and justice for all species and present and future generations. This object and litigation around similar expressions of it in state acts and other federal acts is the stuff of the new millennium.

## Lectures and Seminars

As part of my Fulbright, I was asked to give an address at the quarterly Colloquium at Berkeley for the Water Resources Center Archives on 10 January 2009. Many people in the US are interested in Australia's approach to implementation of ESD and wanted more details.

Over 90 people attended the lecture including senior students (who were writing a paper for their Masters on Australia water policy regime), several water policy officials, legislators (staffers from Sacramento) and water utility managers and academics from Engineering, Law and the Public Policy school. The seminar covered the processes leading up to the present water reforms. The audience was most interested in how the *Water Act 2007* came to be adopted and to hear about implementation issues. They were interested in community responses to policy instruments such as water allocation plans and changes to water allocation regimes, water meters, catchment levies, new water sources such as reclaimed water and water markets. I was able to draw on research from the NWI, many universities, CSIRO, CRCs Water Quality and Treatment and Irrigation Futures, legal cases and consultant reports to tell the story.

This Colloquium provoked a huge amount of interest in the water resources professionals in California and legislators and I was asked to repeat it in UC Sacramento and the California Assembly's Select Committee on

Regional Approaches to Addressing the State's Water Crisis, Olympia, Salt Lake City, Congress in DC ( through Austrade) the World Bank and at the University of Arizona Udall School of Public policy. These talks took place over several months in 2009. Finally, in February 2010 I was invited to the American Bar Association water law meeting in San Diego and in June 2010 in San Francisco at the conference organised by UC Davis *Toward Sustainable Groundwater in Agriculture - linking science and policy*. The visits were sponsored not only by Fulbright Foundation but by Alf Brandt , Principal Consultant, Office of Assembly member Jose Solorio, State Capitol Sacramento and the Resources Legacy Fund, UC and others, especially University of South Australia School of Commerce. The meetings also extended to major water law firms in several states. Further details are available at <http://www.unisa.edu.au/waterpolicylaw/news/2010.asp> and also in the Whittier Daily News-3/6/10 as "California looks to Australia for lessons on water management". [http://www.whittierdailynews.com/news/ci\\_14526188](http://www.whittierdailynews.com/news/ci_14526188)

### Water Epochs in Australia

I gave a potted version with several key photos, illustrations, cartoons and poems of the five epochs in Australian water policy. There are several aspects to Australia's water policy and law regime and these can be seen as five policy epochs between 1788 and 2010. The pre-federation epoch was characterised by water as an economic development device with scant political consideration of the environment consequences. The second epoch commenced with Australian Federation in 1901, but did little to alter the colony's (now the states) power over water. The states did create administrative allocation systems for surface and groundwater, repealing the riparian doctrine. In addition. the interpretation of the Constitution by the courts and conditional federal grants to the states by the Commonwealth (i.e. the Federal Government), pursuant to section 96 of the Constitution, did give the Commonwealth some influence over state water policy during this period. Since the 1970s, there has been community demand for sustainability in water and land use decisions. The third epoch, which commenced in the early 1980s, was chiefly characterised by an expanded interpretation of Commonwealth legislative power by the courts, allowing the Commonwealth to

legislate in some areas of water management. There was also increased community activism.

The fourth phase commenced with two waves of federal reforms in 1994 and 2004. The earliest reforms introduced requirements of ecologically sustainable development (ESD) and competition into water suppliers and also separated land from water to create water markets. The later wave was influenced by regional delivery models and the Commonwealth provided stricter guidelines to the states reinforcing the first reforms. There have been state level court decisions enforcing the water plans and reducing water allocations to farmers in favour of the environment. The final phase, commencing in 2007, reflects a different balance. The use of political deal-making (where states are required to refer power over water to the Commonwealth) and the expansion of federal constitutional powers through generous judicial interpretation have allowed the federal government to create the agenda over water management in the states in the Murray-Darling Basin. The legal architecture of the final stage is the *Water Act 2007*. This Act requires the accreditation or adoption of state "Water Plans in the Murray-Darling Basin". Further, Commonwealth gave federal funding directly to 56 state-founded regional bodies, and these bodies agreed to regional delivery of Federal initiatives. These recent reforms appear to affirm the general drift towards centralism in water regulation in Australia.

The American audiences gasped at the referral of power and many saw that process as a solution to the fragmentation of water law in California and Arizona. They were keen to hear of the factors, social, political, cultural, legal economic and environmental (the drought) that all played a role in the policy transition toward ESD. I would like to describe some of the questions and issues raised by the audiences.

### Similarities and Differences

Whilst the US shares a similarity with Australia in that we are both Federations, the nuances above and the legal meaning of the different powers mean that the pathways of these democracies has diverged in relation to water. The most important difference is that the Prior Appropriation doctrine exists in the Western states of the US. It has no parallel here. This mining type, allocation process, "first in first served" system, creates property rights in water and

whilst this can be manipulated to achieve sustainable water allocations this is inhibited by the need to provide compensation for changes.

Another point of divergence is that in California and many other States, groundwater use is not metered .

When explaining the pathway to our present Water Act the gasps in the audience were on these points:

1. **The universality of metering** and the penalties exacted for overuse. I did couple this with the story about the Dethridge wheels and their level in inaccuracy and the replacement by flumes, as in Coleambally for example. I also showed several photos of meters.
2. **The water planning processes** and reductions in water allocated with the move toward shares of the consumptive pool for all users. I used cases such as *Harvey & Anor v Minister Administering the Water Management Act 2000*<sup>5</sup>, which related to groundwater in New South Wales and Elandes almond industry on groundwater in South Australia

In Harvey the Minister created a water plan which altered the way water was allocated to over 1,000 farmers in the Murrumbidgee River. To achieve sustainability, the volume of water was reduced to 52% of the previous level. The plan used one method to reduce, but the Minister altered the method to achieve the reduction.

Harvey illustrates the practical issues with implementing a water allocation plan which changes water allocation rules. The first method chosen was across the board and whilst this did achieve an allocation of water within sustainable limits, it was politically unpopular Hence, the Minister in the public interest changed the method (to reflect past use) and this caused different winners and losers. The case means that the macro public interest will over- weigh individual considerations. The American audience were fascinated by this case.

I talked about other changes which were made without compensation: for example, judges in all the Australian states have upheld the decision-making processes of ministers who have:

- reduced water allocations under plans<sup>6</sup>,
- made it mandatory to hold a licence to store water in a dam,
- restricted the amount held in a dam after 30 years of unimpeded use<sup>7</sup>,
- capped water use in a region<sup>8</sup> and



- strictly enforced time periods set out in water plans for making applications for water<sup>9</sup>.

The keenest interest was on the transition in policy. I continued with the Harvey case. The region was the Murrumbidgee River which is at the heart of the most irrigated and productive land in Australia. The old Act, the *Water Act 1912*, had an explicit policy of over-use but this fell out of favour in the light of ESD principles in 1992. The judge described the evolution of policy in NSW in these terms:

Under the regime of the *Water Act 1912* entitlements under licences within the lower Murrumbidgee area reached 512,409ML per year (according to the Murrumbidgee Groundwater Assistance Model developed by the relevant NSW Government Department). This resulted from the policy of controlled depletion of groundwater directed at addressing salinity and maximising regional economic benefits from groundwater. By the mid 1990s concerns emerged about the environmental impacts of groundwater depletion and the long-term viability of groundwater resources. In August 1997, the NSW Government released a policy document directed towards achieving sustainable use of groundwater. This led to a moratorium being placed on the grant of new licences within the area on 10 September 1997. In April 1998 the Murrumbidgee groundwater system was identified as at risk by reason of resource over-allocation. By August 1999 the moratorium imposed in 1997 became an embargo on new licence applications.<sup>10</sup>

Hence, the new scheme under the WMA<sup>11</sup> was designed to ensure sustainability and the relevant government department decided after much scientific work to reduce the allocations by 52% across the board based on entitlements under the old act. The reductions were advertised to the community and initially an across the board reduction was approved by the Minister. This type of method had been used in South Australia<sup>12</sup> and in other places. Eventually, and with considerable reference to the desires of the then-Federal Minister<sup>13</sup>, the NSW Minister made a new plan which included reference in the reduction formula to be based on historical extractions of groundwater. The case concerned complaints by Harvey and Tubbo that the amendment order completely changed the basis for the allocation of reduced entitlements to licence holders. The judge had to decide on that issue and

issues of procedural fairness and the public interest. Here the two plaintiffs would lose more water if historical factors were considered rather than the across the board reduction in allocations.<sup>14</sup>

The Judge found that the breadth of the Act and the ESD objects did authorise such a change in the public interest and that, in such cases, to allow individuals to be heard would create an infinite regression of individual cases all of which could affect water allocations:

[E]very time the Minister accepted one person's submission it would be potentially adverse to every other person with an interest in the same water source because the interests are interlinked and potentially competing. This "would be unworkable, because it would lead to an infinite regression of counter-disputation".<sup>15</sup> It would also be incapable of achieving the statutory objective of "the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations."<sup>16</sup>

3. **The lack of compensation** for reductions in water allocations as above.

4. **The creation of water plans** in each state which must be consistent with various instruments of policy<sup>17</sup> and have due regard to matters when formulating water plan including the socio economic impacts of the proposals.<sup>18</sup>

Such plans which provide for water sharing must have these core provisions:<sup>19</sup>

- the establishment of environmental **water** rules,
- the 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 user now gets an access licence and a share component to a specified share in a water source (the share component)<sup>20</sup> and a right to take water as specified (the extraction component).

5. **The buy-back schemes**, where state governments and the federal government are using the water markets to buy back

water from farmers for environmental purposes. The impact of such buy back on communities and also the impact of government purchasers on the prices and the fairness of the markets.

6. **The urban demand reduction** schemes and limits on watering gardens.

7. **The referral of power** under arrangements in the constitution in section 51(37) in four States to support the *Water Act 2007*. How did this work? and the mechanisms involved (state-based legislation mirroring each other).

8. **The powers in the *Water Act 2007*** to review state water plans in the Murray-Darling Basin region and its objects to manage water in the national interest, and to implement relevant international agreements. How were these going to work? For this I used the cartoon (Figure 1) which summarises the issues.

## Summary

The processes that have led to the making of the transition to an ESD policy and the interaction with the legal system (which have upheld these) were of great interest to the American audiences. The questions and comments revealed to me that many in their governments are seeing the need for a peaceful change to the existing regimes and their heavy path dependency on old rules. We have found this in current research with Australian irrigators and policy makers<sup>21</sup> who can see that the implementation of ESD is essential, although difficult. All political governance issues are a quest to find the balance between short and long term gains for the economy, the ecology and societies and with regard to freshwater allocation Australia is in the vanguard, in showing a transition process toward ESD.

## The Author



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## Citations

- 1 *State of South Australia v O'Shea* [1987] HCA 39; (1987) 163 CLR 378 at 411).
- 2 *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at [18],
- 3 The *Water Act 2007* defines "measures" to include also strategies, plans and programs.

- 4 “Biodiversity” means the variability among living organisms from all sources (including terrestrial, marine and aquatic ecosystems and the ecological complexes of which they are a part) and includes: (a) diversity within species and between species; and (b) diversity of ecosystems
- 5 *Harvey & Anor v Minister Administering the Water Management Act 2000; Tubbo Pty Ltd & Ors v Minister Administering the Water Management Act 2000* [2008] NSWLEC 165 (18 June 2008), New South Wales Land and Environment Court
- 6 *Rowe v Lindner and Ors* [2007] SASC 189
- 7 *Ashworth v Victoria* [2003] VSC 194
- 8 *Bates v Minister for Environment and Conservation 2006* SAERD 24
- 9 *Michelmore v Minister for Environment and Conservation 2004* SASC 415
- 10 *Harvey & Anor v Minister Administering the Water Management Act 2000; Tubbo Pty Ltd & Ors v Minister Administering the Water Management Act 2000* [2008] NSWLEC 165 (18 June 2008), New South Wales Land and Environment Court. per Jagot J
- 11 And previous legislation
- 12 *Elandes v Minister*
- 13 Minister Turnbull under the Howard government
- 14 Harvey applicants forwarded an email to the attention of the Minister protesting the unfairness of the history of extraction policy and urging a return to the across-the-board cuts policy.
- 15 *Minister for Local Government v South Sydney City Council (2002)* 55 NSWLR 381
- 16 In Harvey per J
- 17 SWMOP plan is the outcome of political processes at a very high level. For example, the State Water Management Outcomes Plan sets the over-arching policy context, targets and strategic outcomes for the management of the State’s water sources having regard to the broadest possible considerations of environmental, social and economic issues, as well as inter-governmental agreements and international agreements to which the government of the Commonwealth is a party (sections 6(2) and (3)). Per Jagot J
- 18 Section 18 of the WMA 2000
- 19 Section s 20(1)) of the WMA 2000
- 20 Section 56 of the WMA 2000
- 21 Picturing Water use and justice in rural Australia, 2010 McKay, Keremane and Gray CRC Irrigation Futures.