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INTRODUCTION TO THIS SPECIAL ISSUE

Rethinking Australian water law and governance: Successes, challenges and future directions – *Cameron Holley and Darren Sinclair*

Australia has been a world leader in water law and governance reform. However, after 20 years of progress, water is quickly slipping from the national agenda. Despite many remaining implementation challenges and drought risks, there has been little detailed intergovernmental direction about the “next steps” in Australia’s water strategy. At this critical juncture, this Special Issue brings together leading water law and governance scholars and practitioners to contribute new lines of vision to Australian water governance as we move forward into the 21st century. This introductory article sets the scene for the Special Issue by outlining the key building blocks of Australia’s water governance system, before laying out the key questions explored in the subsequent eight articles, namely: How far has Australia come with the National Water Initiative? Is the current governance system a sufficient model capable of broader application to meet future water challenges and a sustainable future? And what fundamental reforms and changes might be required and what other credible water governance and policy alternatives might be available? The article concludes by summarising and synthesising the issues around four key policy parameters, namely: markets; participation; groundwater and policy mixes; and developing northern Australia.

275

ARTICLES

National Water Initiative styled water entitlements as property: Legal and practical perspectives – *Janice Gray and Louise Lee*

Since the rollout of the National Water Initiative (NWI), examination of whether NWI styled water entitlements are property has been largely neglected. While from a day-to-day perspective this question may be dismissed as being relevant only in a theoretical sense, this article reveals that ambiguous treatment of water entitlements as property can have practical consequences, particularly for entitlement holders seeking clarification of rights (commonly as a pre-condition to the establishment of a cause of action and/or the provision of a remedy). This article analyses statutory, judicial and cross-jurisdictional consideration of water entitlements as property to highlight contexts and examples of where it has been, or could be, helpful to establish if water entitlements constitute property. It then adopts a speculative lens to consider the practical consequences which would flow from strengthening property rights in water entitlements.

284

Governing water markets: Achievements, limitations and the need for regulatory reform – *Cameron Holley and Darren Sinclair*

After 20 years of water reform in Australia, the clear policy “winner” has been the cap and trade market-based instrument. Although widely promoted as an efficient tool for managing water, little critical attention has been directed to the legal and governance issues of water markets, including matters such as compliance and enforcement, water

accounting, and the overall effectiveness of water trading. In response to these gaps, this article critically evaluates Australia's cap and trade instrument, drawing on a review of the literature and new survey and interview data collected in New South Wales, Victoria and Queensland from government and non-government stakeholders. The findings reveal achievements, including: flexible responses to past and future droughts; efficiencies that contribute to economic and environmental benefits; and increasing trade and market functionality. Yet, the results also suggest cap and trade schemes are not functioning at the peak of their powers because of seven key flaws, namely: a lack of robust regulatory underpinning; limited accuracy in water accounting; challenges in addressing universality of impact and source; queries over environmental benefits; lack of accounting for wider social impacts; windfall gains; and limited operation across Australia. Some of these flaws are correctable, and the article pinpoints relevant areas for market policy reform. However, a number of the identified flaws require water law and policy to look beyond markets. The article argues that, in these areas, such as groundwater, complementary regulatory tools are needed to ensure Australia's future water security and sustainability. 301

Public participation, litigation and adjudicative procedure in water resources management – Bruce Lindsay

Water resources management is influenced and regulated by the public interest. For this reason, effective public participation is an important factor in water governance. While public participation is commonly associated with engagement and consultation procedures, especially in the formative stages of decision-making, community involvement in decision-making by way of public interest litigation under water resources law is limited. In addition, adjudicative procedures outside of the courts, such as in public inquiries, are exceptional in this sphere of natural resources management. This article considers factors constraining public participation in management by means of litigation and hearing processes, including issues of standing, costs, information provision and knowledge, administrative procedure, and the role of substantive laws. Finally, the article suggests some directions for legal and practical reform to facilitate wider use of litigation and adjudicative procedures as a tool for public participation in water management. 325

Reimagining water buybacks in Australia: Non-governmental organisations, complementary initiatives and private capital – Katherine Owens

Market-based water buybacks, purchased by State and federal governments, have been a key mechanism for facilitating environmental water recovery under the 2004 National Water Initiative and *Water Act 2007* (Cth). The programmatic and government-led approach to buybacks adopted within the Murray-Darling Basin is unique at a global level, and has enabled the Australian Government to acquire extensive environmental water holdings within a relatively short period of time. These large-scale recovery measures have also been met with considerable resistance from irrigation communities, which has resulted in a government policy shift towards infrastructure upgrades and legislative initiatives to cap Commonwealth buybacks. This article will argue that these policy shifts necessitate a reimagining of environmental water transactions within the Murray-Darling Basin, from a largely government-led process to one that involves a more flexible mix of competition and collaboration between government and non-government actors. Non-government organisations, such as water trusts, have been central to environmental water recovery efforts in some jurisdictions, and have demonstrated their talent for creating strategic partnerships and opportunities with both State agencies and irrigators for environmental water recovery. Their activities have also demonstrated the potential of "environmental entrepreneurship" to develop new and more innovative approaches to restoring environmental flows. Particularly germane in this context is the launch of the Murray-Darling Basin Balanced Water Fund, which is a new institutional model in the

Murray-Darling Basin that seeks to generate new sources of impact investment for environmental water transactions, and is the product of a partnership between The Nature Conservancy, the Kilter Group and the Murray-Darling Wetlands Working Group Ltd. 342

Broadening regulatory concepts and responses to cumulative impacts: Considering the trajectory and future of groundwater law and policy – Rebecca Nelson

The regulation of groundwater extraction has shifted, almost seismically, through Australia’s water reform era, which culminated in the National Water Initiative and the federal *Water Act 2007* (Cth). Its starting point was minimal regulation, targeted at controlling selected extractions and pursuing sustainability for consumptive purposes. Since then, groundwater laws have imported regulatory concepts from the surface water sphere; among them, regulating extraction through statutory plans and in a broad-based way, and protecting dependent ecosystems. One issue emerges at the heart of both the history and future of groundwater reform: dealing with the cumulative impacts of extraction. This article reviews how groundwater reforms in Australia have approached cumulative impacts – albeit often implicitly rather than explicitly – measured against concepts of cumulative impact assessment derived from the scientific environmental assessment literature. It finds that both regulatory and non-regulatory, incentive-based measures have been used. As water reforms have progressed, arrangements for assessing and managing the cumulative impacts of groundwater extraction have taken a dramatically broader view of potentially affected natural systems, as well as consumptive values. However, they have not focused significantly on the implications of connections between natural systems. Reforms have also resulted in a much broader view of the impacting activities that are relevant to an assessment of cumulative impacts, though often with an unclear temporal scope. Remaining weaknesses in approaches to managing cumulative impacts and a lack of empirical evidence as to the effectiveness of existing measures warrant attention. The article concludes by charting key challenges that remain for resolution, and setting out an accompanying research and reform agenda. 356

Water law reform in the face of climate change: Learning from drought in Australia and the western United States – Barbara Cosens

Western societies have developed three approaches to governance of common pool resources such as water: (1) the division of the resource into private property; (2) government regulation; and (3) local self-organisation. This article asserts that all three are needed in varying combinations to rise to the challenge presented by the impact of climate change on water supply and demand. Drought presents a preview of potential future climate scenarios and Australia and the western United States are both responding to its harshness through innovation in water governance. These experiments present an opportunity to compare the approaches of Australia and the western United States to begin to understand the combination of governance approaches that lead to greater adaptive capacity. 372

Creating the next generation of water governance – Paul Martin

Australia has taken different approaches to water governance, first relying on common law riparian rights, then upon administered allocations, and now on water markets. Each iteration has taken something from its predecessors but also each reflects the circumstances and imperatives of its time and, to some degree, policy fashion. The current version emphasises markets and science, and aims to diminish the role of traditional instruments such as regulation and administration. An important lesson of history is that public policy often fails, at least to some degree, or causes adverse “spillovers”. Whatever is perceived to be today’s perfect solution is likely in time to be understood to have been inadequate, or perhaps foolish. Even as current water policy settings are being put in place, it is important to envisage their inevitable change and replacement. Drawing on the

history of water governance, emerging challenges and opportunities, and basic concepts of natural resource governance, this article considers what might be needed for the next generation system of effective, efficient and fair water governance. The article is particularly informed by the expectation that the renewed interest in infrastructure development and the proposed substantial investment in the north of Australia will trigger the need for new legal arrangements, and be the catalyst for further policy reforms. 388

Australia, wet or dry, north or south: Addressing environmental impacts and the exclusion of Aboriginal peoples in northern water development – *Lily O’Neill, Lee Godden, Elizabeth Macpherson and Erin O’Donnell*

In view of the drive in policy circles to develop northern Australia and the concomitant dependence on water resources this will involve, this article argues that environmental and distributive justice considerations are critical to the sustainable development of the region’s water resources. Without appropriate provision to involve Aboriginal peoples in the planning, development and governance of water resources, northern Australia development will continue the historical exclusion of Aboriginal peoples’ rights to water in Australian water resources policy. This article also draws attention to the concerning absence in the current policy for northern Australia development of lessons learned from the experience in the Murray-Darling Basin reform process with respect to environmental water. It is essential that environmental values be embedded in strategic planning and governance of water resources in northern Australia. This involves creating legal rights to environmental water to protect existing ecological values, and establishing a system of governance to promote the effective and efficient use of environmental water. Addressing these issues now before water entitlements are allocated will avoid complications and considerable expense in the future. 402