

Duelling Objectives – Water Rights and Victorian Water Legislation

Benjamin Rankin
Swinburne University, Melbourne

The history tracing the connections between water resources and human civilisation is one that reflects the social endeavour to clarify rights as to abstraction and use. This history also reflects the extent to which water resources have underpinned social and economic development. This article considers how legislative design for water resources in the Colony/State of Victoria has focussed on maximisation of developmental objectives in agriculture through the provision water rights in conjunction with land ownership. In contrast, more recent micro-economic reforms influenced by the Council of Australian Governments and the Public Bodies Review Committee appear discontinuous with these objectives. The reforms have attempted to realign statutory water law to create property in the water itself. Tracing the development of English common law legal doctrines over water resources additionally draws attention to the differences emphasised by Victorian legislators as a necessary stimulant for legislative action. Ultimately, this article contends that the stated objectives of Victorian water resources legislation provide a significant insight into the central purposes of its design and how this design contrasts with a subsequent trajectory of legislative reform.

Though the water running in the fountain be every one's, yet who can doubt, but that in the Pitcher is his only who drew it out? His *labour* hath taken it out of the hands of nature, where it was common, and belonged equally to all her children, and *hath* thereby *appropriated* it to himself.

John Locke¹

TRUE to the universal understanding of water as a resource essential to human existence, societies throughout time have attempted to clarify rights as to its abstraction and use. This history also reflects the extent to which water resources have underpinned social and economic development. This article explains how legislative design for water resources in the Colony/State of Victoria has attempted to maximise developmental objectives in

¹ John Locke, Second Treatise of Government, s 29, *John Locke Second Treatise of Government* (C.B. McPherson (ed.), Cambridge, 1980) 19.

agriculture through the provision of rural water resources and how more recent micro-economic reforms appear discontinuous with these objectives. Understanding the development of English common law legal doctrines over water resources will draw attention to the differences emphasised by Victorian legislators as a necessary stimulant for legislative action. This article asserts that the initial objective of Victorian water resources legislation was fixed on vesting water rights in the Crown and distributing water in conjunction with land ownership. Recent reforms are contrary to this legislative design and inconsistencies have given rise to discontinuity in the operation of Victorian statutory water law.

The Common Law Riparian Doctrine

The emergence of the common law riparian doctrine is unique in that it protected rights to water that were invariably connected to its usage. Rights to the use of water in this regard rely primarily on interpretations of land use and typically treat water as an intangible secondary object. “The [common law] water doctrines were built from Roman law and Roman-derived civil-law concepts of common goods and the natural rights of ownership, together with the English sources of Bracton and Blackstone...”² As a reflection of Blackstone’s influence, the clarification of the actionable basis of a claim transitions from older doctrines that recognise the antiquity of a diversion to the general principle of first occupancy.³ The central tenet of the riparian rights doctrine is that any person who owns and occupies land on the bank of a natural stream acquires water use rights which are

² Joshua Getzler, *A History of Water Rights at Common Law*, (Oxford, Oxford University Press, 2004), 1-2.

³ Carol Rose, “Energy and Efficiency in the Realignment of Common-Law Water Rights,” *Journal of Legal Studies* 19 (1990): 267-69.

commonly known as ‘riparian rights’ by virtue of the occupation of that land. Therefore, riparian rights are essentially considered as entitlements to exploit the flow of water where it is attached to the ownership of riparian land.⁴

“Water resources were central to England’s precocious economic development in the thirteenth and sixteenth centuries, and then again in the industrial, transport and urban revolutions of the eighteenth and nineteenth centuries.”⁵ Pre-industrial water law emphasises ‘natural rights’ incident to the ownership of land although Bracton additionally recognises ‘servitudes created consensually by private persons’.⁶ Rather expectedly, the legal doctrine reflects the dominant usage of water resources at the time placing fairly limited demands on existing streams (e.g. powering of mills, navigation, and domestic and stock abstractions on a small scale).⁷ “It follows that Bracton was mainly concerned with abuses relating to the use of watercourses *in situ*.”⁸ In this sense an actionable claim would stem from a use that clearly impacted a neighbour’s usage such as works that flood a neighbour’s lands or a diversion that significantly alters the level of flow to properties downstream. Such aspects of early water law in England subsequently provide the basis of the reasonable use test incorporated in the later riparian doctrine.⁹ While such conceptions reflect aspects of modern riparian law the intent of the measures was to protect rights to water that existed in antiquity. Essentially, Bracton had provided

⁴ Getzler, *History of Water Rights*, 121.

⁵ *Ibid.*, 1.

⁶ T.E. Lauer, “The Common Law Background of the Riparian Doctrine,” *Missouri Law Review* 28 (1963): 67.

⁷ Rose, “Realignment of Water Rights,” 268.

⁸ Lauer, “Background of Riparian Doctrine,” 68.

⁹ *Ibid.*

an initial attempt to “...formulate principles of user-rights within the common law, analysing the assize of nuisance using Roman concepts of praedial servitude and natural right.”¹⁰

The use of public law to protect Roman water resources is highlighted by pertinent examples such as the *Lex Quinctia* c 9 BCE, which protected the public waters of Rome from knowing and malicious damage.¹¹ Substantially predating the *Lex Quinctia*, the Babylonian code of Hammurapi c1750 BCE established a negligence standard for flooding damage caused by private diversions.¹² The code developed “...a coherent set of principles pertaining to the management of water.”¹³ Ancient Egypt and India also provide further examples of water resources regulation throughout history. However, it is the Romans that extend water resources regulation beyond the realm of public law. “[T]he civil law erected a web of individual property rights over water, delegating to users the legal power to regulate water access.”¹⁴ Moreover, Roman laws broadly classified water resources as: *res communis* (common to all) and *res publica* (property of the state).¹⁵ Water occurring in less regular seasonal water bodies was considered to “...[fall] within the patrimony of the individual landowner...”¹⁶ but by and large most water sources were *publici juris* (of public right). Ultimately, the Roman measures have held considerable

¹⁰ Getzler, *History of Water Rights*, 65.

¹¹ Ibid., 11.

¹² Ibid., 10.

¹³ Barry Hancock, “Watershed or Water Shared? An Inquiry into the Politics of Rural Water Allocations in Victoria,” (PhD diss., Swinburne University of Technology, 2010), 16.

¹⁴ Getzler, *History of Water Rights*, 11.

¹⁵ Hancock, “Watershed or Water Shared,” 16.

¹⁶ Ibid.

influence over the early trajectory of English common law in relation to property, as well as land and water-use.

“[B]racton employed broad legal principles in his writing; he was concerned not only with English law as it then was, but also with what he thought the law ought to be, in the light of universal legal maxims derived from Roman and natural law tradition and elsewhere.”¹⁷ In contrast, Blackstone asserts the positive protection of natural rights through an institutionalist lens. Blackstone views water as a publicly available corporeal right that is subjected to a “...qualified individual property or title during use.”¹⁸ This conception defends the notion of prior use in time while continuing to treat the accepted view that water is common property.

By this concept, water flowing in a stream could be ‘occupied’ by the act of putting a bucket into the stream and abstracting some of the water. However, only the water in the bucket would actually be occupied by such an act; the remaining water in the stream would still be common property, and subject to occupation by other persons for their own use.¹⁹

The most influential aspect of Blackstone’s *Commentaries* with respect to water resources was that it no longer regarded the ancient use test as adequate and thus opened the possibility of defending uses that were contemporary to the time.²⁰

¹⁷ Lauer, “Background of Riparian Doctrine,” 65.

¹⁸ Getzler, *History of Water Rights*, 154.

¹⁹ Lauer, “Background of Riparian Doctrine,” 97.

²⁰ Rose, “Realignment of Water Rights,” 269.

The modern riparian doctrine emerged from this history as a usufructuary right to water access as a natural incident of land ownership or occupation.²¹ This right extends to the use and control of water only for as long as it remains in the possession of the user. Importantly, the riparian doctrine does not establish a property right in the water itself; rather it is a right that is connected to the ownership or occupation of riparian land.²² The riparian doctrine applies a ‘reasonable use’ test that entitles the user to ordinary uses of the water that flows past riparian land.²³ Users are additionally entitled to extraordinary use (including the construction of a dam on the alveus of a watercourse) of the water provided that usage does not ‘interfere with the rights of other riparian owners, either upstream or downstream.’²⁴ The riparian doctrine additionally distinguishes between water that flows over riparian land through a known and defined channel, and water that flows indiscriminately over riparian land.²⁵ Through the reception of English common law in Australia with the first English settlers, the riparian doctrine became binding on Australian jurisdictions.

Water and the Development of Victoria

The exploration and subsequent settlement of Victoria was dictated by the requisite need for water. The earliest attempts at Victorian settlement in Sorrento and Corinella were

²¹ Stoeckel et al., *Australian Water Law*, (Pyrmont, Thomson Reuters Australia, 2012), 13.

²² Ibid., 14.

²³ Ibid., 15.

²⁴ Ibid.

²⁵ Ibid., 14-15.

stymied due to the absence of a reliable supply.²⁶ Natural surface streams are regarded as contingent to settlement selection and this is mirrored in other Australian capitals with the Tank stream in Sydney and the Wellington Rivulet in Hobart.²⁷ In this respect the chosen site of Melbourne on the Yarra became the epicentre of a general occupation of Victorian land on the basis of water availability. “The first half dozen years of Victoria’s history [witness] an amazing influx of pastoralists with their flocks, and the occupation of practically all the well-watered portions of the State – then known officially as the Port Phillip District.”²⁸ This pastoral surge shaped how the colony subsequently developed and held a number of related implications as to how it would be governed.²⁹

The ‘gold rushes’ are an additional influence over the colony’s early development and further intensified the stresses on Victorian waters. The methods employed by the miners (especially the use of ‘puddlers’) resulted in numerous implications for other water users particularly those relying on the same streams for domestic supply.³⁰ However, the most pronounced and lasting impact of the gold rushes were the significant population increases. “[I]n Victoria, where the maximum impact of goldmining was felt, the [population] soared from 77 000 in 1851 to 460 000 in 1857 and 540 000 at the end of the decade.”³¹ This rise in population was the central factor in the progression of urban,

²⁶ Donald Garden, *Victoria – A History*, (Melbourne, Nelson, 1984), 18-21.

²⁷ David Ingle Smith, *Water in Australia: Resources and Management*, (Melbourne, Oxford University Press, 1998), 143.

²⁸ Ronald East, “Irrigation and Water Supply in Victoria,” *Journal of the Institution of Engineers* 5 (1934): 103.

²⁹ Joseph Powell, *Watering the Garden State: Water, Land and Community in Victoria, 1834-1988*, (Sydney, Allen & Unwin, 1989), 37.

³⁰ *Ibid.*, 50.

³¹ *Ibid.*, 52.

regional and rural settlement and its impact on waterways was substantial. In addition, the politically active urban classes act in concert with the new migrants and push for the colony's 'public lands' (mostly held in temporary pastoral licences) to be 'unlocked'. "...the result...was the introduction of the first in a long run of new legislation for land 'selection'."³² The *Land Acts* of 1860 and 1862 and the *Amending Land Act* 1865 concentrated the procurement of land initially as leases and later as fee simples according to the meeting of certain conditions and at a fixed price of £1 per acre.³³ In their operation, the Land Acts were intended to overcome the tenure of squatters and promote the settlement of small-scale freeholders in the interests of establishing a 'yeomanry' tradition in the antipodes.³⁴ However, where the previous acts had too often failed these objectives, whole or in part, the 1869 Land Act and subsequent land legislation encouraged the desired farming settlements.³⁵

With the Land Acts effectively achieving increases in rural population, Victorian water law required clarification in order to support those increases. The Waterworks Act 1865³⁶ took a particularly cautious approach providing for diversions of water by the Board of Land and Works without compensation to landholders. This act also authorised the 'reasonable' abstraction of water by occupiers of alienated riparian land and was essentially a qualification of the modern riparian doctrine.³⁷ However, the measures do

³² Ibid., 62.

³³ *The Argus* (Melbourne) 25 April 1868, 3.

³⁴ Smith, *Water in Australia*, 151.

³⁵ Sandford Clark and Ian Renard, *The Law of Allocation of Water for Private Use – Volume One: The Framework of Australian Water Legislation and Private Rights*, (Melbourne, 1972), 159.

³⁶ *Waterworks Act 1865* (Vic).

³⁷ Clark and Renard, *Allocation of Water*, 157.

not appear to reflect any specific government intention to preserve common law riparian rights in Victoria as the legislation was primarily about supplying "...populous mining districts with water for domestic and stock use."³⁸ Moreover, an administrative practice that was progressively developed within the Lands Department during the 1860s asserted control over Victorian waterways contrary to the interests of riparian proprietors. The department acted to "...reserve a strip of land over which a landowner could not obtain title. Landowners adjacent to such rivers thus were not owners of land laterally or vertically in contact with the stream, and were effectively denied riparian rights."³⁹

The Beginnings of a Legislative Response

Despite these developments in Victorian water law and administration, a general malaise regarding the water needs of the new Victorian settlers (and some particularly good years of rainfall) had precluded the government from taking further legislative action throughout the 1870s.⁴⁰ The most significant problem that legislators failed to anticipate related to the previously alienated lands following natural water courses that were still subject to the riparian doctrine. By the beginning of the 1880s it had been determined necessary to proceed with legislating and regulating water resources. Specifically, the idea that the riparian doctrine was considered mutually incompatible with Victorian agricultural development centred on the perception of reasonable use. To Victorian legislators English riparian law was suited to large and perennial streams where the

³⁸ Ibid., 159.

³⁹ Ibid., 161-62; Clark and Renard referred here to the application of judicial reasoning in providing an explanation of the effects of this practice.

⁴⁰ Ibid., 163-64.

dominant concern was a surplus of water rather than its absence.⁴¹ Once Victorian legislators determined irrigation to be the most effective means of developing agricultural interests, it was suggested that under the English law conserving Victoria's seasonal streams would not be considered a 'reasonable use'.⁴² Such a condition was regarded as unsuitable "...to countries of small rainfall, where in many cases no blade of grass can be made to grow without taking water from natural sources and applying [it] artificially."⁴³ This perception of the riparian doctrine coincided with the belief that intensifying agricultural production was necessary to support the increases in rural population.⁴⁴

Gradual challenges to the riparian doctrine in Victoria therefore emerged as a necessary consequence of land reform. "On 23 May 1881 the Victorian government invoked dormant powers contained in the Free Selection legislation, notably in the 1869 Land Act."⁴⁵ This represented a formalisation of the accepted administrative practice of reserving land adjacent to river banks. The formalisation of this practice extended it further to inlets, lakes and watercourses in order to preserve water access for local occupiers.⁴⁶ Furthermore, the Water Conservation Act 1881 reduced an individual riparian landholder's right to abstracting water by granting "...exclusive control and management of the various lakes, lagoons, swamps, marshes, rivers, creeks and

⁴¹ Alfred Deakin, MLA, (Victorian Parliamentary Debates, Assembly, June 24 1886), 440-41.

⁴² Alfred Deakin, MLA, (VPD, Assembly, June 24 1886) 441.

⁴³ George Swinburne, MLA, (VPD, Assembly, September 7 1904), 1420.

⁴⁴ Brent Collett, "Changing rural water management: social and historical perspectives on the introduction of regional irrigation technologies," (PhD diss., University of Melbourne, 2010), 61; Collett provides a discussion of Victoria's history of irrigation and rural water resources policy with a specific focus on the adoption of recent technological "fixes".

⁴⁵ Powell, *Garden State*, 101.

⁴⁶ Ibid.

watercourses...” to waterworks trusts created under additional provisions in the legislation.⁴⁷

The new water trusts were municipal bodies authorised under the act as an initial facilitating object to regulate waterways for the purposes of stock and domestic supply. However, the act had also authorised these bodies with extensive powers to deal with the provision of the colony’s water resources in rural areas. Amendments to the legislation in 1883⁴⁸ increase these powers through authorising trusts (and in some instances individuals) the ability to create compulsory easements over another’s land “...for the purpose of irrigating or draining land of water which has been used for irrigation or domestic supply.”⁴⁹ The compulsory easements provision clearly held potential to attract significant criticism from Victorian riparian landholders. However, the government considered that “...this [may be] a departure from the ordinary legislation that had taken place in the country, but that legislation had never before dealt with irrigation.”⁵⁰ In many ways this reflects the government’s realisation that continued land development would be reliant on its ability to assert control over the colony’s waterways. This view was especially pertinent given that the colony had only recently experienced a particularly severe and prolonged drought (1877-1881) which had affected the new settlers and pastoralists alike.⁵¹

⁴⁷ *Water Conservation Act 1881* (Vic) s 37.

⁴⁸ *Water Conservation Act 1883* (Vic) s 107.

⁴⁹ Clark and Renard, *Allocation of Water*, 171.

⁵⁰ *The Argus* (Melbourne), 26 October 1883, 5.

⁵¹ Clark and Renard, *Allocation of Water*, 163-64; Powell, *Garden State*, 98; Powell discusses the “crippling drought” of 1877-1881; Jenny Keating, *The Drought Walked Through – A History of Water Shortage in Victoria*, (Melbourne, Department of Water Resources, 1992), 50-51; Keating refers to the “Continuing Dry” between 1877-1880 which was followed by below average rainfall from 1880-1886;

In order to defend the necessity of its position the Victorian government pointed to the US example of California as a jurisdiction dealing with similar policy challenges. In introducing the 1883 amendments the government referred to earlier Californian water codes in 1872 and 1881.⁵² Reflecting the influence of the Californian legislation the new amendments promoted local responsibility with the intention of encouraging ‘self-reliance’, ‘self-support’, and ‘self-independence’.⁵³ The Californian codes were also important examples of legislative authorisation for the appropriation of water resources after two decades of water rights controversies in the California Supreme Court.⁵⁴ To the Victorian government the Californian codes were considered valuable precedents and the 1883 act replicated them closely. It was only when a touring party for the subsequent Victorian Royal Commission on Water Supply visited California and discovered that the United States Supreme Court had disallowed the 1881 code as incompatible with that state’s constitution.⁵⁵ However, the provisions did come into effect in Victoria under the 1883 act which gradually demonstrated itself to be no more than a band-aid solution for Victorian water resources administration.

By 1886 Victorian legislators were attempting to engineer a broad restatement of the Crown’s interest in water resources following less than satisfactory results from the

Among each of these authors there is agreement that the dry that continued through these years is what eventually motivated legislative action.

⁵² Alfred Deakin, MLA, (VPD, Assembly, October 10 1883), 1390-92.

⁵³ Smith, *Water in Australia*, 151-52.

⁵⁴ Wells Hutchins, *Water Rights Laws in the Nineteen Western States*, (Washington DC, United States Department of Agriculture, 1971), 175.

⁵⁵ Alfred Deakin, MLA, (VPD, Assembly, June 24 1886), 424.

previous acts.⁵⁶ The subsequent Water Supply and Irrigation Bill 1886⁵⁷ intended to amalgamate and build upon many pertinent and effective components of the previous legislation particularly the matter of riparian rights. The bill followed on from the Royal Commission on Water Supply which had reported to the parliament on the suitability of irrigation development in Victoria. At the head of the Royal Commission was the prominent Victorian politician (and future Prime Minister) Alfred Deakin. Deakin had emphasised the necessity that the Victorian government should exercise plenary authority over water resources and was openly critical of the riparian doctrine.

It is all very well for the State to assume rights of ownership and to grant rights, and for the Government to lay plans on the table of this House, showing the possibility of carrying out irrigation, but those plans will not be worth the paper they are printed on unless we are absolutely sure that they cannot be interfered with by the existence of any such thing as riparian rights.⁵⁸

Upon its enactment the Irrigation Act 1886⁵⁹ proved to be a significant step towards greater governmental intervention and control of water resources, specifically reflected in the nationalisation of water clause:

The right to the use of all water at any time in any river stream watercourse lake lagoon swamp or marsh shall for the purposes of this Act in every case be deemed to be vested in the Crown until the contrary can be proved by establishing any other right than that of the Crown to the use of such water...⁶⁰

⁵⁶ The irrigation trusts were on the verge of financial collapse as a result of having to seek funding on the open market; See: Clark and Renard, *Allocation of Water*, 170-71.

⁵⁷ Water Supply and Irrigation Bill, (VPD, Assembly, June 24 1886), 415-47.

⁵⁸ Alfred Deakin, MLA (VPD, Assembly, June 24 1886), 440.

⁵⁹ *Irrigation Act 1886* (Vic).

⁶⁰ *Irrigation Act 1886* (Vic) s 4.

This established the presumption that the Crown's right to flowing water was primary unless a private person could assert a superior riparian title.⁶¹ Clarifying any issues of proprietary interest in the water opened the door for the establishment of major head works, thereby delivering water for irrigation over large areas and long distances. Furthermore, private irrigation diversions would be propped by licensing provisions and easement of aqueduct over private lands.⁶² The broad intention of these measures was to establish the means by which the Crown could distribute water to new and existing landholders entirely for the purposes of sustaining irrigated agriculture. In this respect the Irrigation Act required that grants of water distribution would coexist with land ownership, or as Deakin put it: "...when land is sold the rights to water shall also be sold with it, and neither shall be sold separately."⁶³ This presumption was central to the Irrigation Trusts system and focused the legislation on the nexus between water rights and land ownership.

In Pursuit of Amendment

It gradually became clear that in many irrigation trust districts works were not yet operative and the trusts were expected to pay capital and interest when they were not actually receiving any water. The Irrigation Act 1886 Amendment and Extension Bill⁶⁴

⁶¹Clark and Renard, *Allocation of Water*, 175-77.

⁶² *Irrigation Act 1886* (Vic) s 121.

⁶³ Alfred Deakin, *Irrigation in Western America so far as it has Relation to the Circumstances of Victoria – A Memorandum for the Members of the Royal Commission on Water Supply*, (Melbourne: Government Printer, June 15 1885) 46.

⁶⁴ *Irrigation Act 1886 Amendment and Extension Bill* (Second Reading), (VPD, Assembly, 20 November 1889), 2446-59.

was introduced to alleviate the situation. A core amendment of the bill provided that by order of the Governor in Council, for a period of ten years the trusts would only pay for water they actually used. However, the legislative council insisted that the deferred payment periods be amended to five years and this was subsequently enacted.⁶⁵ The plight of the irrigation trusts was already of significant concern primarily due to high overhead costs and little prospect of early returns. A memo from Stuart Murray (Chief Engineer for water supply) in suggests that the amendment to a five year period was unfortunate and additionally notes that it was questionable whether the original ten year provision would have been successful in improving the financial circumstances of the trusts. Murray further noted:

I have given this matter of the financial position and prospects of trusts a good deal of attention of late...It is of the first importance to the success of the policy of the government, to the progress of the trusts themselves, and to the best interests of the Country, that these bodies should be placed in a permanently sound and satisfactory footing:- thus they should, on the one hand, be got to realise the full responsibilities of their position, and in the other, should not be saddled with crushing liabilities that they can never hope to meet but by the imposition of...rates.⁶⁶

Such beliefs indicating the true objective of the legislation was to gradually become instrumental to its future operation.

Further communications passing between the ministry and Murray highlighted that some trusts could not meet their immediate financial obligations. Additional amendments were drafted in an attempt to alleviate trust obligations including reinstating the ten year

⁶⁵ *Irrigation Amendment Act 1889* (Vic) s 16.

⁶⁶ Papers of Alfred Deakin, National Library of Australia, MS 1540, Series 10: Irrigation, Subseries 10.4: Notes, parliamentary papers and other documents, c.1884-1900, Item 10/266-71 (hereafter NLA, MS 1540).

deferred payment periods and reducing the interest rate paid on the deferred loans.⁶⁷ A considerable effort was also being made by within the ministry to adjust the preliminary conditions of the irrigation legislation as it pertained to riparian rights. In particular, a proposal was put before cabinet to amend the water laws by extending the limits of crown entitlements to:

The soil in the bed of all rivers whether non-tidal or tidal and of all natural streams and watercourses shall be deemed to be and the same is hereby declared to be vested in Her Majesty her heir and successors and whether the said rivers streams and watercourses flow over through or by lands now or heretofore of the Crown or heretofore or hereafter alienated leased or otherwise disposed of by the Crown.⁶⁸

The realisation within the ministry was that the original formula proposed by Deakin in 1886 was a more appropriate measure for limiting the assertion of individual riparian claims. However, upon its consideration the parliament had balked and substituted a lesser alternative. In comparison, water legislation in New South Wales had achieved a thorough and workable definition of Crown rights to water.

The New South Wales water rights acts of 1896 and 1902⁶⁹ established Crown rights to the use, flow and control of waterways. The pertinence of these acts to the Victorian government relates to their ability to subject Crown rights to a clear set of restrictions which encompassed previously conferred water rights and entitlements, the rights of riparian land holders, and the rights of holders of licences.⁷⁰ These provisions were

⁶⁷ NLA, MS 1540, Series 10: Irrigation, Subseries 10.4: Notes, parliamentary papers and other documents, c.1884-1900, Item 10/212-9.

⁶⁸ NLA, MS 1540, Series 10: Irrigation, Subseries 10.4: Notes, parliamentary papers and other documents, c.1884-1900, Item 10/197-203.

⁶⁹ *Water Rights Act 1896* (NSW) s 1; *Water Rights Act 1902* (NSW) s 4.

⁷⁰ *Water Rights Act 1896* (NSW) s 1(II); *Water Rights Act 1902* (NSW) s 4(2).

considered to offer a clearer path for governments to embark on large-scale agricultural development. In the Victorian parliament, the relevance of the New South Wales legislation to Victorian legislative reform was obvious. Minister for water supply George Swinburne stated to the Victorian parliament that the 1902 Inter-State Royal Commission on the Murray Waters had recommended: “That inasmuch as conditions in Australia are such that the common law doctrine of riparian rights is unsuitable, steps should be taken to legislate on the lines of the Water Rights Act of New South Wales...”⁷¹

The assertion of the Crown’s primary right to water resources was in this regard the central matter concerning water resources legislation in the Murray-Darling colonies/states. In New South Wales the suitability of the riparian rights doctrine to a predominantly arid country was a particular matter for public debate.⁷² Similarly, it was a significant question for debate during the Constitutional Conventions reflected by the incorporation of section 100 of the Commonwealth Constitution which was primarily drafted to protect the assertion of Crown water rights by the States. Section 100 states: “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.”⁷³ [*Emphasis added*] Essentially, the adoption of the clause was designed as a general limitation of Commonwealth power over waterways and specifically section 51(i).⁷⁴ It has been suggested that the inclusion of the words

⁷¹ George Swinburne MLA, (VPD, Assembly, 7 September 1904), 1420.

⁷² *Sydney Morning Herald* (Sydney), 16 December 1902, 5; *Sydney Morning Herald* (Sydney), 20 November 1902, 8.

⁷³ *Commonwealth of Australia Constitution Act 1900* (UK) s 100.

⁷⁴ John Williams and Adam Webster, “Section 100 and State Water Rights,” *Public Law Review* 21 (2010): 274.

“reasonable use” provided an interesting analogy with the common law. “The reasonableness of use may involve questions, not only of the amount of water taken, but of the season at which it is taken, the utility of the purpose to which it is applied, and the manner of its application to that purpose.”⁷⁵ Moreover, the application of “reasonable use” is peculiar as it does not reflect the general intention in New South Wales and Victoria to legislate contrary to the riparian doctrine. Section 100 has yet to be tested within the High Court although its inclusion appears to reflect the intention of the founders to refer such matters to the ill-fated Inter-State Commission.⁷⁶

The pertinence of surmounting common law riparian rights through legislative amendment became the clear objective for the Victorian government following federation. The Closer Settlement Act 1904⁷⁷ was the first of these legislative adaptations. It introduced measures that provided for the compulsory acquisition of nominated estates where other methods could not secure their procurement. The intention was to obtain large freeholds so that they could be subdivided and the lots established as conditional purchase leaseholds. The government then set about adjusting its water legislation to replicate the purported success of the New South Wales water rights legislation. Swinburne introduced the Water Acts Consolidation and Amendment Bill⁷⁸ and stated: “...that the changes [it] embodied...with reference to riparian rights are recognised by

⁷⁵ J. Quick and R.R. Garra, *Commentaries on the Constitution of the Commonwealth of Australia*, (Sydney, Angus and Robertson, 1901), 891-92.

⁷⁶ Daniel Connell, *Water Politics in the Murray Darling Basin*, (Annandale, Federation Press, 2007), 67; The Inter-State Commission was intended to be a quasi-judicial body provided for by the Constitution. However, soon after the Commission was brought into operation, it was scuttled by the High Court.

⁷⁷ *Closer Settlement Act 1904* (Vic).

⁷⁸ Water Acts Consolidation and Amendment Bill, (VPD, Assembly, 7 September 1904), 1413-35.

statute, by code, and by fundamental law in every European country which has undertaken irrigation.”⁷⁹

The Clarification of Proprietary Interests

The legislative amendments followed a distinct line of precedent from the previous draft reforms considered in cabinet during the 1890s as well as the measures found in the New South Wales legislation. The Water Act 1905⁸⁰ clarified proprietary interests in riparian land through the declaration that the beds and banks of all waterways were to be the property of the Crown regardless of whether they had previously been alienated.⁸¹ The declaration of Crown rights incorporated similar restrictions provided by the New South Wales Water Rights Act 1902,⁸² to which the Crown’s water rights would be subjected. Swinburne particularly emphasised the connections that existed between his water bill and the objectives of the closer settlement legislation.⁸³ In this regard the government had effectively asserted that the riparian doctrine would be significantly inconsistent with the public welfare of the State. Furthermore, the broader legislative objective was to utilise the assertion of the Crown’s primary rights in water to further develop the connections between water rights and land ownership. This was clearly following from the recommendations of Deakin’s earlier Royal Commission on Water Supply “...as a matter

⁷⁹ George Swinburne MLA, (VPD, Assembly, 7 September 1904), 1420.

⁸⁰ *Water Act 1905* (Vic).

⁸¹ *Water Act 1905* (Vic) s 5.

⁸² *Water Rights Act 1902* (NSW) s 4 (2).

⁸³ George Swinburne MLA, (VPD, Assembly, 7 September 1904), 1429.

of public policy, it is desirable that the land and water be joined never to be cut asunder...”⁸⁴

The passing of the 1905 Water Act reinforced the water policy trajectory that had commenced decades earlier. The central point of concern for legislators throughout this period was the unsuitability of the common law riparian doctrine to far less reliable Australian waterways. Deakin had previously gone to considerable lengths to emphasise this point:

It may be all very well in England for every landowner to be entitled to a reasonable use of the water in any river or stream passing through his property, because there the streams are large and perennial, and the trouble is rather to get rid of the water than to get it; but, with our scanty water supply, it is perfectly plain that, if the English riparian law prevails in Victoria, irrigation can hardly even be a ‘reasonable use,’ and we shall be absolutely debarred from all irrigation worthy of the name.⁸⁵

In this respect if the State could assert a primary right to waterways this in turn permitted ‘comprehensive State control.’⁸⁶ Swinburne extended the same view in defending the necessity to override the common law. “There is no doubt that the laws of wet and foggy countries will not apply to a State where agriculture is impossible throughout a large part of its area without irrigation.”⁸⁷ Placing dominant water rights in the hands of the Crown so that it could nominate land which be benefited by water rights was driven with a view to advance the agricultural economy.

⁸⁴ Deakin, “Irrigation in Western America,” 46.

⁸⁵ Alfred Deakin, MLA (VPD, Assembly, June 24 1886), 440-41.

⁸⁶ Powell, *Garden State*, 106.

⁸⁷ George Swinburne MLA, (VPD, Assembly, 7 September 1904), 1420.

In order to oversee this core objective the legislation additionally provided for the creation of the State Rivers and Water Supply Commission (SRWSC).⁸⁸ This statutory authority was given broad-ranging powers over Victorian rural land and water resources. Essentially, its purpose was to “...overcome the difficult realities of farming with a variable supply of water.”⁸⁹ However, there was no clause within the Water Act that directed how the SRWSC should set its organisational priorities or how it should achieve the objectives Swinburne had stated in parliament:

...to conserve the whole of the available waters of the State, and to distribute them to the best possible advantage and obtain the best beneficial use of them in production...[and] see that the money is spent in the most business-like manner, and that the system should pay its way as far as possible.⁹⁰

In 1909⁹¹ the government re-affirmed the second objective by introducing a compulsory payment for water rights.⁹² Although in practice the water charges were set by the government and its view (borne out over time) was that a financial-return was effectively irrelevant in the face of productive growth in irrigated agriculture.⁹³ As a result the administration of rural water resources policy until the 1980s was dominated by the core objective utilising the primary water rights of the Crown for increasing agricultural production.⁹⁴

⁸⁸ *Water Act 1905* (Vic) Part III Division II.

⁸⁹ Collett, “Changing rural water management,” 69.

⁹⁰ George Swinburne MLA, (VPD, Assembly, 7 September 1904), 1418.

⁹¹ *Water Act 1909* (Vic) s 24.

⁹² Public Bodies Review Committee (Parliament of Victoria) , *Future Structures for Water Management*, Volume 4 (Final Report), Twelfth Report to the Parliament, (Melbourne, 1984), 67 (hereafter PBRC).

⁹³ *Ibid.*, 67-71.

⁹⁴ *Ibid.*

Objective Shift – The Recent Reform Trajectory

Victorian water legislation continued to reflect the core objective until the introduction of more recent micro-economic reforms.⁹⁵ In terms of water resources policy these have centred on the imposition of market-based solutions for water related environmental problems.⁹⁶ Fundamentally, the reforms advocate a market in water and advance this through the creation of water property rights. The advanced state of environmental degradation as a result of continued irrigated-agricultural development throughout the 20th century necessitated the development of a reform framework. The largest advancement of reform has occurred through the Council of Australian Governments (COAG) process commencing in 1992. In particular, COAG advocated adjustments to state-based water policy objectives through agreements reached on a strategic water reform framework and more broadly through the implementation of National Competition Policy and the Hilmer Report.⁹⁷ Central to this reform strategy was the transition to a framework of water property rights and transferable entitlements. This notion was also reflected in the final recommendations of the Public Bodies Review Committee in Victoria which investigated rural water management and recommended the introduction of a flexible system of transferable entitlements.⁹⁸ These significant reform initiatives

⁹⁵ Hancock, “Watershed or Water Shared,” 86.

⁹⁶ Kathryn Parker and Edward Oczkowski, “Water Reform and Co-operation,” *Journal of Economic and Social Policy* 8, 1 (2003): 38.

⁹⁷ John Pigram, *Australia’s Water Resources – From Use to Management*, (Collingwood, CSIRO Publishing, 2006), 65-71.

⁹⁸ PBRC, “Future Structures for Water Management,” 20.

essentially required governments to “...turn their back on long established legal principles which have informed the development of statutory water law in Australia.”⁹⁹

The Council of Australian Governments Water Reforms

The importance of water reform to COAG is reflected by the 1992 agreement on a National Strategy for Ecologically Sustainable Development (NSED). It emphasised two essential goals for Australian water resource management (the establishment of an integrated approach to the development and management of water resources, and the implementation of the most efficient mix of water resource management mechanisms).¹⁰⁰ Although it was criticised for having little more than a perfunctory impact on decision-making,¹⁰¹ the NSED was an important step that clarified the central components of future Commonwealth/State exchanges over water resources policy (Integrated administration and management, economic efficiency, and ecological sustainability). Within two years COAG had released its Strategic Water Reform Framework and focused the federal and state governments on “a mixture of micro-economic reform and sustainable development ideals...”¹⁰² The COAG process established eight broad areas of water reform: pricing, allocation and entitlements, water trading, institutional reform,

⁹⁹ Hancock, “Watershed or Water Shared,” 95.

¹⁰⁰ Smith, *Water in Australia*, 270.

¹⁰¹ Ibid., (Quoting State of the Environment Advisory Council, *State of the Environment Australia 1996*), 262.

¹⁰² Parker and Oczkowski, “Water Reform and Cooperation,” 11.

consultation and public education, environmental considerations, water-related research and water-related taxation issues.¹⁰³

Contained within the broader outline of the reforms was a clear focus on three central aspects of the federal reform process. In particular, the foremost consideration was the corporatisation of State and Territory water authorities.¹⁰⁴ Market-based economic reforms had come to occupy a central position in the federal/state political debate and as a result guided the COAG initiatives. In this respect, the COAG water reform process was undeniably one element of a broader reform strategy championed by then Prime Minister Paul Keating, with unrestrained agreement from State Premiers Jeff Kennett (Vic), Nick Greiner (NSW) and Wayne Goss (Qld).¹⁰⁵ The connection of the strategic water reform framework to the subsequent COAG agreement over national competition policy and the implementation of the Hilmer report clearly demonstrates that market-based solutions were preferable.¹⁰⁶ A second influential aspect of the reform process was the recognition of water-related environmental issues relating to the management of Australian water resources.¹⁰⁷ The specific attachment of the reforms to environmental concerns emphasised the need to develop a national solution to waterway degradation, declining water quality and increasing salinity. Essentially, this aspect of the water reform framework was a restatement of the sustainability criteria previously established by the

¹⁰³ Smith, *Water in Australia*, 271-72.

¹⁰⁴ Ibid., 287-88.

¹⁰⁵ Michael Keating, John Wanna & Patrick Weller, *Institutions on the Edge? Capacity for Governance*, (St Leonards, NSW, 2000), 135.

¹⁰⁶ Pigram, *Australia's Water Resources*, 65.

¹⁰⁷ Ibid., 65-66.

NSESD. Thirdly, the COAG water reforms focused on the issue of institutional reform of state-based rural water authorities. This focus highlighted the need for nationally consistent water pricing structures, the clarification of water property rights and a requisite spotlight on establishing a system of water trading arrangements.¹⁰⁸ In Victoria, the first and third aspects of the water reform strategy certainly adhered to the broader agenda of the Victorian government at the time. However, the focus on water property rights and water trading was particularly well received and complimented an established reform trajectory which had been initiated by the government through the process of parliamentary review.

Water Reform by Parliamentary Review – The Public Bodies Review Committee

The Parliamentary Committees (Public Bodies Review) Act 1980¹⁰⁹ provided for the creation of a joint-select parliamentary committee for the purposes of reviewing the structure and operation of public bodies referred to it by the Governor in Council. The central purpose for establishing the committee was guided by its first reference: “That the State Rivers and Water Supply Commission and each constituted water, sewerage, drainage and river improvement trust or authority, except the Melbourne and Metropolitan Board of Works, be referred to the Public Bodies Review Committee for review.”¹¹⁰ By 1980 the size and extent of the 375 rural water authorities referred to the committee effectively placed them beyond the reach of any practical ministerial

¹⁰⁸ Ibid.

¹⁰⁹ *Parliamentary Committees (Public Bodies Review) Act 1980* (Vic).

¹¹⁰ PBRC, First Report to the Parliament on the Activities of the Public Bodies Review Committee, (Melbourne, 1980), 10.

oversight. In particular, the SRWSC had become so large and unaccountable that its annual reports to the parliament were predominately occupied with “...unaudited financial statements for waterworks, sewerage and irrigation districts in Victoria.”¹¹¹ The Public Bodies Review Committee (PBRC) commissioned a series of independent reviews of the state’s rural and regional water authorities, and these combined with its own investigations produced six reports relating to future structures for water management.

While the structure and operation of the nominated public bodies was the central concern for the PBRC, its terms of reference allowed for a significantly broader review of Victorian water management to occur. In particular, the PBRC when reviewing a public body was directed to inquire into: “Whether or not the objects of the body are worth pursuing in contemporary society.”¹¹² The PBRC identified the two central objectives that were considered fundamental to the operation of the 1905 Water Act: “...to develop the land and water resources of the State and to obtain the best beneficial use of them in production, and...to achieve this in an efficient manner resulting in a direct financial return to the State.”¹¹³ However, the PBRC determined that in practice: “A clear pattern of government decisions...consistently favoured the objective of closer settlement and increased production ahead of the other objective of direct financial return and economic efficiency.”¹¹⁴ Moreover, the PBRC closely considered the means by which economic efficiency could be improved in Victorian water resources management. Ahead of all

¹¹¹ PBRC, Report on a study of the Audit and Reporting responsibility of Public Bodies in Victoria, (Melbourne, 1981), 37-38.

¹¹² *Parliamentary Committees (Public Bodies Review) Act 1980* (Vic) s 2; inserted s 48c (5) (a) into the principle act.

¹¹³ PBRC, “Future Structures for Water Management,” 63.

¹¹⁴ *Ibid.*, 71.

other matters, this focus on economic efficiency directed the committee towards market-based devices that would achieve the desired outcomes.

Following the advice of an earlier commissioned report which emphasised the allocation of water to individual holdings based on market principles,¹¹⁵ the PBRC commissioned a study into the distribution of costs and benefits in Victoria's irrigation systems.¹¹⁶ In considering the question of improving the efficiency of the allocation of irrigation water the study determined that the development of a free market in water through the introduction of transferable water rights would result in improved financial outcomes for the state.¹¹⁷ As a result, the final report of the PBRC on irrigation and water resource management recommended to the parliament that the future allocation of water resources should be substantially based on market principles.¹¹⁸ The implication of this change for Victorian rural water management would prove to be significant. However, the legislative implications of recommendation forty-four were considerably greater. "The Committee recommends that the existing nexus between the title to land and the entitlement to water be broken so as to permit the transfer of water more in accordance with the economic needs of users."¹¹⁹ Transfer of water rights provisions were subsequently included in the Water Act 1989¹²⁰ and since this time Victorian water legislation has progressively been altered to encourage market-based outcomes.

¹¹⁵ PBRC, *Irrigation Management in Victoria*, (Melbourne, 1981), 6.

¹¹⁶ Centre of Policy Studies (Monash University), *Study of the Distribution of Cost and Benefits of Victoria's Irrigation Systems*, (Melbourne, 1983).

¹¹⁷ *Ibid.*, 94-100.

¹¹⁸ PBRC, "Future Structures for Water Management," 282.

¹¹⁹ *Ibid.*

¹²⁰ *Water Act 1989* (Vic) ss 224-228.

The central focus of these initiatives was the progressive detachment of water entitlements from land ownership. The progression of the reforms has also increased exponentially since the beginning of the 21st century. In particular, the COAG agreement on the National Water Initiative and the Murray-Darling Basin Water agreement have significantly advanced the trajectory of these reforms.¹²¹ Changes to Victorian water legislation since its consolidation in 1989 have progressively reflected these objectives through a continual realignment of Victorian water law to encourage market-based efficiency.¹²² The extent to which these reforms are in direct contrast to the initial assumptions incorporated in the initial legislative design is considerable. Moreover, the notion of privately-owned rights/shares in water is a distinct leap beyond the common law riparian doctrine. At the very least, both the riparian doctrine and state assertions of control share a basic commonality over the connection between water rights and land ownership. The micro-economic reforms however have effected a reversal of this position. While emphasising that the state maintains the primary interest in water resources, the reforms have realigned water law to create property in the water itself. In this regard the reforms appear discontinuous to the broader objectives central to the original design of Victorian water legislation.

Conclusion

The early development of Victorian water legislation was centrally fixated on formulating effective responses to the common law riparian doctrine. Importantly, this development

¹²¹ Pigram, *Australia's Water Resources*, 71-81.

¹²² Stoeckel et al., *Australian Water Law*, 246; The ways in which water shares are tradeable or can be otherwise dealt with are set out in Part 3A, Division 5 of the *Water Act 1989* (Vic).

was underpinned by an emphasis on the continued development of land and objectives centred on advancing the agricultural economy. The historical doctrines of water law are clearly based in protecting the common interest and emphasise natural rights. In this sense riparian rights centre on the nature of water as a resource common to man and allow usufructuary rights connected to riparian land ownership/occupation. Victorian water legislation has consistently challenged the common law doctrine through asserting primary rights to water resources in the Crown. Victorian governments gradually advanced the establishment of statutory water law over the course of three decades until a relatively robust system was in place. However, development of Victorian water legislation continually asserted the central objective that water rights be connected to land ownership in order to advance the agricultural economy. With the initial design of Victorian water legislation focused on the connection between water rights and land ownership, breaking this connection is significant. The recent reform focus on achieving efficiency within the provision of water resources asserts contrary objectives and appears to generate a significant discontinuity of purpose within the legislation itself.