Chapter 11
Australia: The Problem of Sustainability in Water

Jennifer McKay and Simon Marsden

Abstract This chapter identifies five paradigms in Australian water quantity and quality regulation from the period before white settlement to the present day. After white settlement, these paradigms progressed from the common law, to State statutes, and finally to a more centralized approach. The chapters describe the social drivers in each transition, which in the last three phases were (and are) acute, involving both resistance to legal change and growing public emphasis on environmentally sustainable development. This chapter uses cases to illustrate the issues and also identifies major legal events leading to the latest paradigm and the difficulties of achieving environmentally sustainable development.

Keywords Common law · water law · water politics · sustainable development · common law rules

11.1 Introduction

Water management involves complex eco-social processes, implemented at least in part by laws, imposed over complex and variable ecological systems. Although it is easier to regulate one item than to regulate a commons composed of entire ecosystems, the water commons needs to be managed to achieve ecologically sustainable development. The past 2 centuries has seen increasingly unsustainable exploitation of water on the planet’s driest continent, resulting in institutional and legal reforms to establish ecologically sustainable development as the overriding goal in 1994. Lack of coordination between states initiatives and policy coherence
between and within States remain key issues (Editorial 2006; McKay 2005). These concerns led to the Water Act of 2007, by which the Commonwealth aims for a basin plan for the whole Murray Darling Basin area (see map) built on State plans that the new Murray Darling Basin Authority will endorse or adopt. This process will increase coordination between the States and also introduce full consideration of the interrelations of upstream/downstream users.

This chapter identifies key water law cases and relevant events related to water quantity and quality, analyzing particular water laws and issues for surface- and groundwater for each paradigm. Australian water law is an historical patchwork of common law and State-based statutory schemes, with a more recent layer of federal intervention driving change in water laws. This has resulted in five paradigms of water laws: (1) 1788–1901: State colonial laws (2) 1901–1983: fiscal federalism (3) 1983–1994: multi-state cooperation (4) 1994–2007: environmentally sustainable development requirements (5) 2007 to present: justiciable protocols. The remainder of this chapter, after a brief consideration of aboriginal practices, explores these five paradigms

11.2 Aboriginal Practices

When white settlers first arrived in Australia, the continent was already peopled by the aborigines. The aborigines had a deep economic and spiritual connection to water, as suggested by their languages, surviving cultural practices, and tribal boundaries (Australian Government 2007; Rose 2006). Aboriginal water practices were much less intensive, and less polluting, than were the practices of the white settlers. The white viewed the land as terra nullius, and aboriginal society was simply swept aside and the water practices were largely ignored (McKay 2002). Until the decision in Mabo v. Queensland (1992), the common law view prevailed that the Crown enjoyed absolute ownership of all the lands and that all rights in land derived from the Crown. Mabo recognized aboriginal Australian titles to land and focused attention on aboriginal practices in relation to land and water.

11.3 Paradigm 1: The Common Law Rules (1788–1901)

The white settlers apparently believed that water could be developed endlessly and even that rain follows the plough (Sinclair 2001). They therefore treated water as a free good and applied the English common law to resolve disputes over water. The doctrine of riparian rights conferred limited water rights on landowners across or along whose land water flowed in a defined surface channel (Clarke & Renard 1970; Rochford 2004). The riparian doctrine only gave a usufructuary right to water; ownership remained vested in society and riparian owners were limited to making reasonable uses (Embury v. Owen 1851). A reasonable use was held to allow use ‘without sensible diminution or increase and without sensible alteration in the character or quality’ (Young v. Bankier Distillery Co. 1893). The common law, however, treated surface waters and groundwater differently. The groundwater rule did not