



AIDA
International Association
For Water Law
caponera@kbero.it



CEPMLP
Centre for Energy Petroleum
and Mineral Law and Policy
Program for Water Law and Policy
p.k.wouters@dundee.ac.uk



YuAWL
Yugoslav Association for
Water Law
slavkob@eunet.yu



IWB
Institute of Waters Bijelina
irs_voda@gorstet.net

R E G I O N A L C O N F E R E N C E O N W A T E R L A W

Legal Aspects of Sustainable Water Resources Management

Teslić, Republic of Srpska, Bosnia and Herzegovina, 14 - 18 May, 2001

©2001

Professor Jennifer McKay
(Australia)

5.9.05
WORKSHOP IN POLITICAL THEORY
AND POLICY ANALYSIS
513 NORTH PARK
INDIANA UNIVERSITY
BLOOMINGTON, IN 47408-3895 U.S.A.
RF

LEGAL INSTRUMENTS AND REGULATORY MODELS IN PRIVATISATION OF WATER UTILITIES IN AUSTRALIA.

ABSTRACT

The paper will describe the past water resources management processes and the recent water reform process in Australia. The recent changes have seen the transition from publically owned bodies to semi privatised bodies or corporatised bodies. This transition is in line with trends on the world stage.

In Australia the transformation from public to semi private has taken place in each State but has been nationally driven by reforms known as the Council of Australian Government (COAG) reforms. In Australia, a federation the powers over water are with the lower tier of government, the States, however the Commonwealth has always had and used its fiscal powers to drive law reforms in other areas and is doing so now with water reform.

The overall regulatory Models chosen are broadly similar in each State and so NSW will be examined in detail. However, within the package of reforms there are various legal instruments used in each of the seven states and mini case studies of twelve of these will be provided. Finally, two detailed case studies of the legal instruments and regulatory model from the States of Victoria and South Australia will be concluded giving the detail of some of the vexing issues for the future.

1. THE WATER PRIVATISATION MODELS A BRIEF WORLD VIEW

Privatisation of water utilities is part of a world wide process in developed countries and countries in transition.¹ Many regulatory models have been chosen. Some models emphase promotion of rivalry by splitting up the water sector into small parts, others focus on integration. So tradeoffs occur between promoting rivalry which may give the regulator better information against integration of major parts of the system which may minimise management costs.

The world system in relation to water companies has seen major changes in the past 12 years and Australia has also had major changes since late 1994.

¹ Director, Water Policy and Law Group. Division of Business and Enterprise University of South Australia, Adelaide; Phone: 088302-0887; Fax: 0883020512; McKay@unisa.edu.au

¹ Guislain P 1997 The Privatisation Challenge; A Strategic, Legal and Institutional Analysis of International Experience, World Bank.

2. THE LEGAL CONTEXT FOR WATER REFORM IN FEDERAL AUSTRALIA

The federation of Australia in 1901 was a contested issue and the eventual political compromises resulted in water remaining with the underlying States.

The Commonwealth did not have direct power over the water in the Territories but the list of enumerated powers in section 51 did not mention the environment or water at all. The powers in section 51 are broad and include power over trade and Commerce. It was because of this power that Section 100 was inserted to protect the rights of the residents of the States to the reasonable use of rivers for conservation or irrigation. Section 100 was inserted because New South Wales, Victoria and South Australia feared the Commonwealth trade or commerce laws might affect their common interest in River Murray Waters² Section 100 states that '*The Commonwealth shall not by any law or regulation of trade or commerce, abridge the right of the State or of the residents therein to the reasonable use of the waters of the State for conservation or irrigation.*'

Each State evolved from a set of colonies who has spent near to 100 years developing their own ways of operating. Water was no exception and the operating models will be described in the next section.

3. THE LEGAL AND REGULATORY MODEL IN EACH AUSTRALIAN STATE PRIOR TO 1995.

Each State developed its own style of water resources management with unique acts and unique institutions which evolved from a complex history of partisan political negotiations.³ In the 1990's there were more than 800 State Authorities, metropolitan water Boards, local government Councils, irrigation bodies and some companies and individuals involved in water resources management.⁴ Despite the large number of bodies the era was characterised by co-operation between these bodies intra State and the bodies were persistent. However, the State bodies were extremely internally focussed and heavily constructionalist. In 1900 to 1909 19 % of present dam capacity was built and in the 1970's to 1980's 44% of Australia large dam capacity was built.⁵ The dam capacity as at 1990 is 78.92 km² of which one third is in New South Wales and one third in Tasmania and one sixth in Victoria. Despite this construction it has been reported that an overall understanding of Australia's water resources was vague until 1962. Different States collected stream-flow data differently therefore making data compilation difficult and even within one State, different agencies did not collect data in a way that made it able to be used with data collected from other agencies. This was true particularly for water quality data which has to date been very poorly reported.⁶ All the water allocation policies were introspective⁷ as each State looked only at its own rivers and New South Wales considered the Murray to belong to it only.⁸ It took til 1915 to draw up an Agreement over the River Murray between three States and until 1992 to add Queensland. In 1917, River Murray Commission was set up but was limited to dealing with the main branch of the River. This powers and scope of the Commission have been steadily expanded since the 1970's and now the Commission embraces many powers with the objective of co-ordinating and promoting the effective planning and management for the equitable, efficient and sustainable use of the water, land and other environmental resources of the Murray- Darling Basin.

² Lane. P.H (1986) Lane's Commentary on the Australian Constitution, The Law Book Company.

³ McKay 2001 in Dovers and Wild River (EDS) in press Australian Marketisation modles in rural water and urban water and fisheries., Centre for Resources and Environmental studies, Australian National University. and Hallows P.J and D G Thompson (1999) The History of Irrigation in Australia, Australian National Committee on Irrigation and Drainage, Canberra

⁴ Broughton, W (1999) A Century of Water Resources Development in Australia 1900-1999, Institute of Engineers Australia.

⁵ Broughton, W (1999) P.ii

⁶ McKay JM and A Moeller 2000 Is it time for a new model of Water Quality Laws? Environment , Planning and Law Journal, vol 17, no 3, pp 165-175.

⁷ Bjornlund H and J M McKay(1996) Overcoming the Introspective Legacy of tradeable water entitlement policies in South Eastern Australia., in Just R and S. Netanyahu eds Conflict and Co-operation on Trans Boundary Water Resources, Kluwer Academic Publishers, Boston, pp 315-332.

⁸ Broughton W at p 205

4 INTRA STATE AGREEMENTS - MURRAY DARLING Snowy - ^{Allegable} ^{Trust}

The Federal government Commissioned a series of reports and reviews of Australian water resources in 1963, 1975, 1983 and 1987. The pinnacle report was published in 1983 called Water 2000. This report had thirteen specialist reports covering issues such as ground water resources, urban, industrial, agricultural water use, hydro-power, water quality, salinity and environmental issues and water reuse. This report is detailed and provided a starting point for the enunciation of the problems of introspective Australian water management.

Up to the 1970's water resources laws of each State promoted irrigation developments in inland Australia to develop and populate the land. Water supply was heavily subsidised. The settlers were either soldiers from both world wars or immigrants from Britain. Hence the State Governments had to provide water which it did out of its own resources and in co-operation with the Commonwealth for example through the Snowy Mountains Scheme in 1940's. Hence, State Governments were given funding in the early days to divert rivers and go far afield to ensure water supply. New South Wales was the best at this and today Sydney stores more water per capita than any other major city in the world sufficient to continue supply through an eight year drought.⁹ The impact of all these developments and especially the unfettered spread of irrigation was to create large scale salinity problems. These were noted on the National Arena by the Senate¹⁰ in the 1970's and salinity on the Murray River was then reported as 'one of our biggest water pollution problems'¹¹

Hence in the 1978 agreements for the Commonwealth to fund water resources developments under the National Water Resources Financial Assistance Act, funds were provided on broader heads than ever before. Funds were provided to conserve water, manage water quality, desalination and flood mitigation. The 1992 Act¹² widened the range of eligible activities to include and integrated approach to management of land, water, soil and vegetation.¹³

The development of Australian water resources has never been a steady process but one marked by failures and successes of a physical, environmental, technological, institutional or political kind¹⁴

The water industry in the 1990's was one of Australia's largest with assets valued at over \$90 billion in replacement costs with about half of this in rural areas¹⁵. However the Productivity Commission went on to say that water has often been poorly managed and that environmental degradation and associated economic and social costs are particular problems in the water sector.

MURRAY

4. THE REASONS FOR THE WATER REFORM PROCESS IN AUSTRALIA

The reform process was driven by the appreciation that the subsidised water prices for households and irrigation had led to over-consumption of subsidised water which has led to environmental problems. Furthermore there were examples of water being used to win votes in 1989 in Queensland by major allocations of licences. In addition the communities in the rural regions recognised the problems and with National funding were able to be mobilised into Land-care Groups, up to 4200 exist today¹⁶ to do works such as fencing to protect natural resources from further degradation. However the spread of these groups is uneven and the groups have rarely challenged the status quo of the existing land use. What was needed is a fundamental shift in Australian agricultural policy to encourage the growers to select more appropriate crops.

⁹ Broughton at page 30. Sydney has a population of 4.5 million people.

¹⁰ The upper house on the Federal system, which has equal numbers of Senators from each State.

¹¹ Senate Select Committee on Water Pollution 1970, Water Pollution in Australia, Commonwealth Government Printer, Canberra

¹² National Resources Management (Financial Assistance) Act 1992

¹³ Tan, Poh- lin (2000) Conflict over Water resources in Queensland; ALL EYES ON THE Lower Balonne, Environment and Planning Law Journal, Vol 17, NO 6 pp545-557

¹⁴ Johnson M and S Rix Eds (1993) Water in Australia- Managing, Economic, Environmental and Community Reforms, Pluto Press.

¹⁵ Productivity Commission 1999 at p 131

¹⁶ Managing Natural Resources in rural Australia for a sustainable Future a Discussion paper for developing National Policy (1999), AFFA, Canberra

The National Competition Reform process was driven by the 1990 and 1992 Inquiries by the Federal Government Industry Commission. The 1990 report found a low rate of return on capital invested as low as 1.5% in 1987-88¹⁷. In 1992, the Industry Commission called for major institutional change and pricing reform. In 1997 the Industry Commission also produced a report on Ecologically Sustainable Development and engaged the community through a series of hearings in each State.¹⁸

5. THE LEGAL INSTRUMENTS AND REGULATORY MODELS OF THE COAG WATER REFORM PROCESS

The reforms were set against this background of concern over water resources management in particular environmental problems and the need to reform water pricing, water rights to encourage future economic development. At a meeting in June 1993 COAG concluded that there were still significant economic and environmental benefits to encourage future reform. An independent Committee was set up and the strategic framework generated provided the background to these three agreements set out below.

The National Competition reform process is set out in three intergovernmental agreements (States and Federal) signed in April 1995 .These are the Competition Reform Act, Competition Principles Agreement and Agreement to implement the National Competition Policy and related reforms. These are discussed below.

Legal instrument to adopt the water reform process Competition Policy Reform Act 1995

The reforms of former government owned enterprises were enacted into law by the States. There was constitutional uncertainty as to whether the Federal Trade Practices Act 1974 could be extended to cover State government businesses as these generally operated in one state as seen above. Hence the legal mechanism used to achieve the extension of the Anti competitive conduct regime of the Trade Practices Act was for each State to enact a modified version of Part IV called the Competition Code in each jurisdiction in 1996. These were template laws, all copies of each, other a legal mechanism used before to enact the Corporations Law. In that situation there was a case which held that the Federal constitution did not give power to the Commonwealth to form corporations.¹⁹

The new Part IV of the Trade Practices Act prohibits a range of anti- competitive conduct including:

- Anti competitive agreements
- Misuse of market power
- Exclusive dealing
- Resale price maintenance; and
- Mergers which have the effect, or likely effect, of substantially lessening competition.

Competition Principles Agreement

The National Competition Reforms have been stated to be²⁰ a direct response to the need to halt the degradation of water resources and the seek to address economic viability and ecological sustainability of the nation' s water supply through the following measures:

- Pricing reform based on the principles of consumption- based pricing, full cost recovery (urban by 1998 rural by 2001)and removal of cross subsidies, with remaining subsidies made

¹⁷ Industry Commission report 1990, Measuring the Performance of Selected Government Enterprises

¹⁸ Industry Commission 1997 A full Repairing Lease: Inquiry into Ecologically Sustainable Land Management Draft Report, Canberra

¹⁹ NSW v Commonwealth

²⁰ National Competition Council, 1999, National Competition Policy -Some impacts on Society and the Economy.

transparent- encouraging people to use water more wisely by basing their consumption decisions on prices reflecting the actual value of the water they use;

- Water allocations or entitlements, including allocations for the environment, coupled with trading in water entitlements- allowing water to flow to those activities bringing maximum benefit to the community,²¹
- improved water quality monitoring and catchment management policies and a renewed focus on landcare practices to protect rivers with high environmental value,
- future investment in dams and other water infrastructure being undertaken only after appraisal indicates that it is economically viable and ecologically sustainable- addressing the need for cost efficient investment with due regard to environmental concerns; and
- structural separation of the roles of service provision from water resources management, standard setting and regulatory enforcement.

Agreement to implement the National Competition Policy and related reforms

This incorporates COAG agendas for electricity, gas, water and road transport industries into the NCP framework. The agreement also sets out conditions for financial assistance (under section 96 of the Constitution) from the Commonwealth to those States which implement the NCP reforms and the timetable for implementing reform. The total financial incentives between 2000 and 2006 amount to \$16 billion. The timeframe for reform in the water sector was set at 5 to 7 years from 1994 because of the sheer size and complexity of the package.²²

Performance monitoring and benchmarking

This has evolved to the extent that eighteen²³ of the major urban providers in all jurisdictions actively participate in performance monitoring through reporting to their industry lobby group the Water Services Association of Australia. (WSSA). WSSA was formed in 1995 to provide a forum for debate on issues of importance to the urban water industry and to be a focal point for presenting for communicating the industry's views.²⁴ WSSA had 21 members in 1999 drawn from businesses that provide water to 50,000 people or more either directly as retailers or indirectly as wholesalers.

In addition 64 Non Major urban water Utilities as compared against 74 performance indicators on water and sewage services and irrigation benchmarking reports are in progress. These are all voluntary, and it is stated that this competition by comparison approach will lead all water service providers progressively to adopt best practice.²⁵

Regulatory framework

At the 30 June 1999 the Second Tranche Assessment of Governments' ²⁶progress revealed this picture:
Institutional Reform

²¹ Bjornlund and McKay have found in various studies that water trading had moved water to higher value uses. Bjornlund H. and JM McKay (2000) Do water Markets promote a socially equitable re-allocation of Water?; A Case Study of a rural Water Market in Victoria, Australia, Rivers, vol 7, no2, pp141-154. This work is on rural water of the GMID which is the subject of the case study later in this paper on all aspects of its operations and the mechanisms adopted to conform with NCP.

²² Ibid at p 34.

²³ In 1999 see Report at p 23

²⁴ Water Services Association of Australia Annual Report 1999 foreward.

²⁵ Report at p 23

²⁶ National Competition Council 1999 Second Tranche Assessment of Governments' Progress with implementing National Competition Policy and Related reforms Vol 2 Water Reform, June 1999, Melbourne

The functions of regulation, standard setting and resource management have been removed from service providers however significant work remains to be done in this area in June 1999.

Sydney water is a good model of the regulatory scheme and NSW is in the process of changing the scheme because of flaws detected in the recent Sydney water crisis.²⁷

The elements of the regulatory framework are set out in the Sydney Water Act to protect public health by supplying safe drinking water to the public. The elements of the system were an operating licence²⁸ which sets the operating and customer standards met by the Corporation, a license regulator created by the Act to monitor the Operating License and a Memorandum of Understanding is required between Sydney water and NSW Health. This last agreement has been subject to change after the Sydney Water crisis and one result of the confusion over the issue²⁹ was the recommendation that an independent Laboratory be set up and that the monitoring program needs to have clear linkages between public health and operational decisions.

The Australian Consumer and competition Council has found the ability of regulators to watch the activities of utilities closely to be 'patchy'³⁰ The 1998 Sydney Water Board 'essential wrote its own licence' and there was no legislative requirement for public consultation or accountability in licence drafting or amending.³¹ The Sydney water inquiry suggested that the role of the regulator be strengthened and any new operating licence clearly outline the obligations of Sydney Water and the role of a water auditor.³²

6. OUTLINE OF THE LEGAL INSTRUMENTS AND REGULATORY MODELS IN EACH STATE

As apparent from above there will be many instruments used to achieve these multiple aims and the instrument chosen will depend on the past history of the State. The scope and pace of reform has differed in each State but the key aspect has been seen to be institutional and legislative reform.³³ NSW and Victoria had advanced the most in the first four years. In this section a selection of the key aims of the COAG reforms will be illustrated and the approach and instruments used by the particular state will be outlined.

TABWE

NSW Legal instruments and regulatory models

1 Aim- target explicit sharing of water between the environment and consumption

The government identified a number of stressed rivers, and for seven key rivers announced that up to 10 % of the annual diversions would be reserved for the environment. The NSW government classified all rivers and low, medium and high stress and created a Healthy Rivers Commission for coastal rivers to balance the environmental, social and commercial goals for each river. Targets have been set for 1998-99 to increase native fish breeding and migration, improve bird breeding in wetland areas, suppress algal blooms and provide greater long term certainty. The package involves the community in water management.

²⁷ Second Tranche Assessment 1999 at p.275

²⁸ See McKay JM and A Moeller 2000 Is it time for a new model of water quality laws? , Environment and Planning Law Journal, vol 17, no 4 165-175.

²⁹ P Hawkins 2000 The Sydney Water crisis an alternative point of view, Water p37

³⁰ Asher, A 1999 Privatisation of Public Enterprises and Utilities and Establishment of Regulatory Framework, Australian Consumer and Competition Council, International Conference on Competition Policy and economic adjustment, Bangkok 27- 28 MAY 1999, ACCC P24.

³¹ Sydney water Inquiry, 1998, Final Report, Ch10, p6.

³² Ibid Ch 2 p 10 and Ch 10 p.6

³³ Progress in implementation of the COAG Water Reform Agenda(1999) Report to COAG, June Report prepared by the Ministerial Councils(Ministers from each State) responsible for natural resource management and the environment.

2 Aim- structural adjustment in rural communities

The NSW Government adopted a \$ 33 Million structural adjustment package to assist irrigation farmers to adjust to the new water management arrangements. The package targets farm businesses planning, irrigation skills training ,financial assistance for water effective techniques and technologies and re- establishment assistance where required.

3 Aim-Land and water management plans

A sum of \$200 million has been committed to support land and water management plans to provide sustainable future for key agricultural areas. The adjustment package will be refined in conjunction with socio-economic analysis to be conducted as part of the Water reform implementation package.

4 Aim pricing reform with independent prices Authority

NSW has set up IPART Independent Pricing and Regulatory Tribunal which releases a determination for bulk water charges. IPART made an attempt at estimating full efficient cost recovery levels by region, consistent with guidelines set by the Federal Government¹⁴. The Federal Government has set up a national project to help jurisdictions to develop a methodology that permits the identification of water related costs and guidelines for sharing the costs between government and private users to avoid environmental costs being borne by the community. Explicit guidelines have been recently sent out for public comment.

Queensland-

5 Aim- bring water pricing into closer alignment with consumption and cost of supply

The new 'pay for use' pricing and metering in the Brisbane area reduced overall consumption of water by 20%.¹⁵ In rural areas a three staged process has begun since 1999 with five year price paths.

6 Aim- Water allocation and Management plans(WAMP)

This has started using priority catchments involving a thorough assessment of water resources on a catchment basis. The WAMP is designed to provide a framework for clearly establishing environmental flows, water allocations and the resource management conditions under which trading of water allocations can occur. The WAMP will create a water entitlement consisting of two elements a water allocation volume and a set of access conditions. No one will lose their entitlements at the initial implementation of the WAMP no compensation will be payable. This is because the Government has said that the old system is being replaced by a better system of more secure, tradeable and on going rights. Compensation will be payable at the instance of a change to a WAMP in the future. The legislation has been enacted in September 2000 after substantial periods of public comment.

South Australia-

7 Aim- review of water legislation for anti competitive provisions.

The NCP process requires a regulatory review of each Act. In SA the Water Resources Act was reviewed in relation to whether it was anti competitive. It was found that whilst some aspects are anti competitive, these same provisions generate net benefits by minimising the risk of environmental degradation and disputes over water usage. Therefore they were retained.

¹⁴ There are known as ARMCANZ Guidelines Agriculture and Resource Management Council of Australia and New Zealand

¹⁵ National Competition Council Second Tranche assessment Report 1999.

8 Aim- full cost recovery pricing

Implemented through a levy but SA has decided against full cost recovery pricing and instead has deemed it a Community Service Obligation to provide water and so will cross subsidize, however such subsidies will be transparent. Costs of Natural resource use are being recovered through a levy on water allocations and /or use in certain prescribed resources such as the River Murray.

9 Aim- privatisation of Irrigation Districts

On 1 July 1987, the SA Government transferred all of the Government Highland Irrigation Districts to 8 self managed irrigation trusts. These bodies created the Central Irrigation Trust to employ staff and provide day to day management and operational services for all of the trusts. The legislative base was the Irrigation Act 1994 which was substantially amended. The head-works of all irrigation districts have been rehabilitated involving complete replacement of the old open channels with fully piped, computerised water on order system. The rehabilitation process resulted in more than 43% of properties being retired from irrigation on a land suitability basis. The trading regime allowed water and land owners to realise the value of either or both. The water savings from these properties form efficiency gains and the water delivery system have been used for high value development and maintenance of river health.

Victoria

10 Aim to oversee performance of water and sewage companies

Victoria has set up the Office of the Regulator General and each body must provide a performance report. For Melbourne the major city with a population of 3.5 million, the Performance Report covers these issues,¹⁶ quality of drinking water supply, sewage effluent, water supply reliability, interruptions and restoration times, sewage service reliability, emergency telephone call response, licensee performance such as account debt, and customer service compliance with customer contracts.

11 Aim water allocation and entitlements including Environmental Allocations

The Water Act 1989 as amended provided a legislative basis for property rights in water. The process of conversion to bulk entitlements has reached a stage where 70% of the diversion sites across the State have been negotiated and agreed with stakeholders. The bulk entitlements program enables the provision of water for the environment and a range of negotiations has achieved improvements in environmental allocations. Victoria instigated a community consultation program under the banner *Sharing the Murray* in 1997. The committee of 35 members set out to clarify and define existing entitlements to water, and to show how the CAP on water use implemented by the Murray Darling Basin Committee would be implemented. The long consultation process with 8 water user members, 13 from irrigation authorities, 7 from environment and catchment groups and 7 from Government worked carefully to reconcile the interests of these competing groups.¹⁷

Key points in *Sharing the Murray* were;

- water rights, licences and urban entitlements to be kept very secure
- if severe drought occurs all basis entitlements to be cut back evenly
- no cancellation of unused licences
- some fall in the availability of lower security sales allocations but still some will be provided in line with past assurances, and
- improved environmental provisions to ensure adequate watering of important forests and wetlands.

¹⁶ Office of Regulator General Victoria(1998) Melbourne's Retail Water and Sewage Companies- Performance Report Sewage

¹⁷ Progress Report says this did reconcile competing interests.

Western Australia

12 Aim- pricing reform

Full cost recovery is being implemented through customers paying the full cost of water distribution and a transparent Community Service Obligation(CSO) being paid to the water Corporation for costs not recovered from bulk water charges to irrigation service providers. In rural areas , transparent CSO's where the cost is higher than the cost to the major capital city Perth³⁸. The uniform pricing policy reflects the State Government's strong commitment to regional development.

7. CASE STUDY GOULBURN MURRAY WATER RURAL AND URBAN SUPPLIER VICTORIA

Goulburn- Murray water is a statutory Authority with powers defined and limited by the Water Act 1989 (VIC) and empowered by Ministerial Order under the Water Act. ³⁹. The Water Act imposes a duty on all bodies in Victoria to perform functions in an environmentally sound way as it plans for State and local community use of water , for future water needs and to educate the public. GMW was one of the earliest bodies created under the COAG reforms in 1994 when it took over most of the irrigation, water, urban supply and flood protection districts formerly managed by the former Rural Water Corporation. The Water Act creates GMW at a body corporate. GMW is responsible to the Minister administering the Water Act and Parliament for the proper, efficient and effective performance of its statutory functions and its objects are to deliver to its customers in the most efficient and cost effective way the services which the Water Act requires it to supply.

I doing the above GMW has nevertheless adopted commercial approaches at governance derived from the Australian Corporations Law as it " strives to manage its business in a way which is consistent with best practice in the private corporate sector"⁴⁰ The GMW has adopted directors instead of the term members as in the Water Act and uses Board instead of Authority in order to reinforce the above. This may be confusing to the customers as the whole concept of corporate governance is hardly clear in Australia as to if it involves only shareholders and managers or all stakeholders.⁴¹ There is a fundamental confusion in Australia at the moment as to whether Corporate Governance should be concerned with managerial accountability or with enhancing corporate efficiency. The GMW Manual seems to want both with a heavy lean toward the first because of the restrictions placed on this enterprise by Section 40. Most non Government businesses would focus on the second aspect and rely on *AWA v Daniels* ⁴² case to ensure that outside directors and executive directors were diligent because of the threat of liability.

The Minister had delegated significant Ministerial powers to GMW such as

- To construct , operate or alter works on waterways and bores, and
- To take and use water from waterways and bores.

The Murray Darling Basin Act 1993 is the Victorian version of the River Murray Agreement Act ⁴³ and this nominated the GMW as the constructing authority for the Agreement in Victoria. This is a significant delegation bringing with it a need to maintain capacity in construction and maintenance of

³⁸ has 80% of the population

³⁹ Goulburn Murray water Corporate Governance Manual, (2000) Sept, P 1.

⁴⁰ Ibid p.1

⁴¹ Hill J (1999) Deconstructing Sunbeam- Contemporary issues in Corporate Governance, Company and Security Law Journal, Vol 17,p 288-302.

⁴² *AWA v Daniels* trading as Deloitte Haskins and sells(1992) 7 ACSR 759. In that case AWA sued its former auditors for a loss of \$49 million in speculative hedging by a young and inexperienced foreign exchange manager in the firm. Prior to the losses the exchange manager gave the impression of success and maintained the illusion. The company has no internal controls that the Audotors reported to management who did not act on it and did not report it to the Board. The CEO of the auditors who was Chair of AWA Board, was found to be negligent in not passing on the Auditor's warnings to the outside Directors.

⁴³ Each state has template legislation implementing the same words but into their own jurisdiction.

major dams. In respect to these delegation GMW is obliged to be in the first place answerable to and must observe directions given by the Murray Darling Basin Commission.⁴⁴ To address the issue of conflict between requirements of the Water Act and this delegation, the Corporate Governance Manual is not very helpful. It says 'The Board needs to be aware of the possibility of such conflict and to deal with such conflict with great care'⁴⁵

Corporate planning is governed by the Water Act which requires an plan for the next year to be submitted by 30 April this plan sets out charges and tariffs. The Board has established Committees and delegated power to them by a series of administrative authorisations. This feature is very similar to the old structure prior to COAG except there is a Code of Conduct in place borrowed from the Corporate Sector.⁴⁶ This imposes all the duties of due diligence good faith, improper use of information and conflicts of interest. It is questionable how meaningful this is in the corporate sector⁴⁷ with many Codes not being looked at by Directors and many directors being unsure of the limits in such general words. Section 90 does provide a civil immunity for acts done in good faith.

GMW ensures that its directors perform to best practice by;

- Induction of directors,
- giving them a copy of all relevant documents,
- encouraging them to visit the web site,
- Informing directors the obligation is placed on GMW to seek to provide directors with ' all information which is necessary or desirable for the director to perform the director's functions'⁴⁸ This leaves many defences possible.
- Training the Director by paying for the Director to undergo training or attending conferences allowing a limited facility for GMW to pay for the director to obtain independent advice, and
- requiring the Director who receives representations from a customer to deal with those in a formal way

GMW is audited under the State Government Audit act (this also is identical to the old regime.)

GMW has little autonomy so it is strange the insistence on following rules for Corporate Directors which evolved in a very different circumstances. GMW must exercise its functions within the framework of Government policy as set out in section 40 of the Water Act. This means the conservation policy of the Government and the government policies concerning the preferred allocation or use of water. Government policy is ascertained through the use of the Corporate Plan, Policy Discussions and Ministerial Direction.

8. CASE STUDY SA WATER ADELAIDE, SOUTH AUSTRALIA

SA Water was corporatised in 1995 and is subject to the Public Corporations Act 1993 which provides a framework for the commercial focus. SA Water's objective is to achieve commercial rates of return on assets after allowing for community service obligations. The EPA is the external regulator on water quality and was established the year before. SA Water provides services to metropolitan and country areas for water and sewage.

SA Water has a long term contract ⁴⁹with United Water for United Water to provide service delivery and maintenance of SA Water's metropolitan water systems under a fee for service. SA Water retains ownership of the assets and maintains overall management responsibility for the water supply

⁴⁴ Ibid note 30 at 3

⁴⁵ ibid note 30 at 3

⁴⁶ Corporate Governance Manual p 8. See McKay 1994

⁴⁷ McKay JM (1992) Classification of Australian Corporate and Industry based Codes of Conduct, International Business Lawyer, Vol22. No 11, pp 507-514.

⁴⁸ Corporate Governance Manual p.11

⁴⁹ it was proposed to enable the public to buy shares but the terms of the contract have not been made public and no shares have been offered.

including the approval of all capital investment. SA Water also has the responsibility for facilitating the development of a viable export focussed water industry in SA. The target for net exports in 1996 of \$9.5 million was exceeded.⁵⁰ In 1999 SA Water contributed \$ 197 million to SA and United Water achieved a net export of \$50 million against a contract requirement of \$ 34 million.⁵¹

9. SUMMARY AND CONCLUSIONS

The legal instruments and regulatory models chosen in Australia are widely diverse as a function of inherited water regimes and insistent State autonomy. The Federal Government is still driving the direction of reform by financial incentives but each state has selected different mechanisms. This diversity is a strength as once more pressures are put on the various systems, it will be easier to compare to select a best model. At present the legal instruments used are delegation of powers under acts of parliament with private sector bodies being able to accept these delegation. There is then a regulatory monitoring scheme in place. The National regulator has been reported as describing regulatory monitoring scheme as patchy and the Sydney Water crisis also revealed inadequate links between components of the system. Nevertheless, the system has strengths and has been transformed very quickly. As yet more time and experience is needed to determine the best approach on the multiple issue in the present scope of water reforms in Australia.

⁵⁰ Government Trading Enterprises performance indicators 1992-2 to 1996-7.(1998) Steering Committee on National Performance Monitoring of Government Trading Enterprises.

⁵¹ SA Water 1999 Annual report at p. 11.

