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Allocating Tradeable Rights in Water: Lessons from Australia's Recent Experience in Water Law Reform

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ABSTRACT

The end of the 1980s marked the start of an era which recognised scarcity of water resources, economic issues related to water supply for irrigation, and concerns over water use on the environment. Water needed to be reallocated from inefficient to "high-value" use, and degraded land needed to be retired from irrigation. To do so, policy-makers gave a key role to market mechanisms. Water needed to be specified as a commodity for markets to work properly. Following policy made by the Council of Australian Governments in the mid-1990s, state governments started the reform of legislation to implement this radical policy change. This paper examines that experience.

As a background to the reform measures, this paper describes the role irrigation plays in shaping water law in Australia, and outlines the fundamental flaws in the pre-reform regulatory framework that allocated water through administrative means. First, the adoption of English common law concepts of water was inappropriate. Second, water bureaucrats failed to use their powers to protect consumptive use. Third, provision of water for ecosystem needs was almost completely ignored. Finally, the law was poorly implemented partly because of a culture of non-enforcement engendered by the influence of powerful groups over water allocation and management.

The paper then critically analyses reform measures taken in the late 1990s to 2001. It finds that the concept of "property" has not been well understood by policy-makers. While other legal systems have emphasised public property in rivers, Australian policy does not expressly address the issue. Hence setting up a market in water entrenches the interests of consumptive users who already consider their administrative rights de facto private property rights. Legal provisions elevate the concept of private property while water for ecosystems are public rights which are vague and difficult to enforce. Other findings relate to inappropriate specifications of bulk water property rights and inadequate provisions for restoring aquatic ecosystems. In light of these findings the paper draws lesson from the Australian experience.