

BOOK REVIEWS

WATER LAW, by D E Fisher, (LBC Information Services, 2000)

(Statement of the law current to 30 June 1999)

Alex Gardner*

Water law should be of vital interest to the mining industry. Water is used extensively in mining operations¹ and may be crucial to the viability of a mining project. As is evident from Professor Fisher's book, mining operations have featured frequently in the development of the case law and, in the nineteenth century, the early development of the statutory law. It may be doubted that mining is having such a significant effect on the development of water law in recent decades, as 70% of all developed water use in Australia is for irrigation. Nevertheless, the ongoing concern of mining lawyers with the interaction of mining and water law is evident from a number of publications.² Mining lawyers may, therefore, initially approach this new text by Professor Fisher with some enthusiasm.

The scope of the book is quite broad. It covers topics relating both to the management of water resources and the delivery of water services – the provision of water supply, sewerage and drainage. The book is neatly packaged in ten chapters:

1. Water in the Australian Environment – which includes an overview of the development and structure of water law in Australia;
2. The International Law Framework;
3. The Constitutional Framework;
4. The Common Law – an historical account of the principles of the English common law relating to water in defined watercourses (riparian rights), ground water and water flowing unconfined across the surface of the land;
5. The Australian Approach to Rights and Liabilities – an account of the vesting of the right to the use and flow and to the control of water in watercourses and wetlands in the Crown, the remnant common law rights and liabilities and the statutory rights and liabilities, especially in Victoria;
6. The Structure of the Water Industry – an account of the public agencies involved in the management and development of water resources and delivery of water services;

* Review by Alex Gardner, Law School, University of Western Australia, Perth.

1 M Gerus, "Mining and Water Resources", in R Bartlett, A Gardner & B Humphries (eds), *Water Resources Law and Management in Western Australia*, The Centre for Commercial and Resources Law, The University of Western Australia, Perth, 1996, 307, 310.

2 K Morgan, "Water and Mining: The occurrence of groundwater in Australia" [1989] *AMPLA Yearbook* 248; M Crommelin & R Hunter, "Water and Mining: Controls in Conflict", [1989] *AMPLA Yearbook* 201; K Winterbourne, "Obtaining Access to Water for Mining Purposes in Western Australia", (1997) 16 *AMPLA Journal* 166; and, most recently at the AMPLA 24th Annual Conference July 2000, Olivia O'Hagan, "A Tidal Wave of Change: Recent Developments in Water Law" (to be published in [2000] *AMPLA Yearbook*). Specialist texts on mining law understandably lack any real discussion of water law.

7. The Directions of Water Resource Management – the framework for water resources planning;
8. Access to Water and Water Rights – an account of the means of vesting bulk entitlements in public agencies, vesting of individual rights directly by statute, and the vesting of individual rights by administrative discretion, principally licensing;
9. The Delivery of Water Services to the Community; and
10. The Conservation and Protection of Water Resources.

The book is generally quite a readable digest of the plethora of statutory provisions across all Australian jurisdictions. Only chapters 4 and 5 contain significant discussion of cases and judicial interpretation. There is little case law pertinent to the other chapters. The book is not entirely comprehensive in its summation of legislation from each jurisdiction, but it is admirable in its breadth and general explanation. The book rarely descends to discussing subsidiary legislation, which is not surprising as the task of dealing with pertinent statutes is large enough. Professor Fisher endeavours to put the legislative material into an interesting and comparative framework by characterising the approach of the different jurisdictions in relation to the various topics. As he explains in the Preface, the objectives of the book are to explain the structure of Australian water law and to provide the information about that law in ways that illustrate and justify that structure. For the practitioner, whether a legal or other professional, the book will give a thorough insight into the sometimes-turbid depths of water law; a starting point for understanding that law.

It is doubtful, however, for a number of reasons whether the book will often provide more than a starting point for the resolution of particular questions about specific sets of circumstances. Even Professor Fisher acknowledges in the Preface that “to do that it will be necessary, as it always is, to go to the detail and the precise terms of the relevant legislation”. However, there are three other reasons that mark the shortcomings of this book. First, there are many situations where the neat summation of the statutory text does not tell the true story of how legislation actually works. Although the book is accurate (I found only two notable errors in relation to the law of Western Australia), it does lack some critical insight that practical experience with legislation brings to the task of statutory interpretation. This is not surprising given the significant variation of the legislation among the jurisdictions.

Secondly, although there are useful theoretical insights, the book lacks a sustained theoretical and practical critique of the law. This may not normally concern many practitioners. However, Australian water law has just undergone a significant transition in the last six years with the implementation of the National Water Law Reform Framework agreed by the Council of Australian Governments in February 1994, which was tied to the National Competition Policy in April 1995.³ I found the discussion of this Framework inadequate, not only for its simple one page summary of the Framework agreement⁴ but also for the lack of reference to the principles of the Framework in the analysis of the legislation on certain topics that feature in the reforms.

This second reason leads to the third reason. In last four years there has been a tidal wave of water legislation surging through the Australian Parliaments to implement the reform policy. Because Professor

3 A Gardner, “Water Resources Law Reform”, (1998) 15 *Environmental and Planning Law Journal* 377.

4 At 50-51.

Fisher's book is current to 30 June 1999, it has not been able to include most of the statutory reforms undertaken in New South Wales, Queensland, Tasmania and Western Australia, not to mention some supplementary reforms in South Australia and the Northern Territory.⁵ These reforms relate significantly to the principles of ecologically sustainable use of water, water resources planning, environmental water allocations, and the creation of tradeable entitlements to water. Substantial portions of chapters 5, 7 and 8 already need revision.

Professor Fisher has always been a pioneer in his scholarship of Australian environmental and natural resources law. This book is perched near the top of the watershed in a new era of Australian water law. Readers of the book with a special interest in water law will thirst for the second edition, soon.

For the specialist mining professionals, legal and non-legal, you may not rush out to buy this book. Whilst it does discuss integrated natural resources management, there is no mention of the contemporary intersection of mining and water law. The table of statutes contains no reference to any mining Act and the index does not refer at all to "mining". If you have a water law question, the value of this book to you, even as a starting point, will depend on your jurisdiction and the date on which your problem arose.

5 The recent enactments include: *Water Resources Act 1997* (SA) as amended by the *Water Resources (Water Allocations) Amendment Act 2000* (SA); *Water Management Act 1999* (Tas); *Water Amendment Act 2000* (NT); *Water Act 2000* (Qld); *Rights in Water and Irrigation Amendment Bill 2000* (WA) (which passed the Parliament of Western Australia in October); and three amendments to the water legislation of NSW, including the *Water Management Bill 2000* which is, apparently, yet to pass. These legislative amendments are reviewed by Olivia O'Hagan, *op cit*, n 2.