

## "Nationalization" of Water Use Rights by the Australian States

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Throughout most of Australia diversions of water from watercourses are authorized by state diversion licenses. The statutory provisions establishing the state diversion license systems are grounded in each state on statutory abrogation of common law riparian rights and vesting all water flow and use rights in the Crown. The state "nationalization" provisions were intended to abolish all common law riparian rights. Early decisions so held. Recently controversy has arisen concerning the degree to which those rights have been supplanted by the statutory diversion licensing systems. I am of the opinion that the statutes do abolish completely common law riparian rights and that all diversions must be authorized by or permitted under the diversion licensing statutes.

### 1. Historical Background

Victoria was the first common law jurisdiction in the world to declare water use rights to be state property. The Irrigation Act 1886 provided: "The right to the use of all water at any time in any ... water-course shall ... be deemed to be vested in the Crown."<sup>1</sup> Alfred Deakin, Minister of Water Supply and sponsor of the bill, declared that this provision was designed to prevent riparian owners from interfering with an upstream diverter's statutory or licensed right to divert

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1. Irrigation Act 1886, Act No. 898 (Vic.) §.4.

India, a mixed law jurisdiction, declared water use rights to be state property in 1873. Northern India Canal and Drainage Act 1873, Act No.8, preamble.

The Colorado Constitution of 1876, art. XVI, §.5, declares all streams within the state to be "the property of the public ... dedicated to the use of the people ...". However it is merely declarative of the common law *publici juris* concept and is used as a justification for rejecting ab initio the existence of common law riparian rights and for constitutional establishment of the prior appropriation doctrine which had developed in the western United States.

by insisting on the common law right to natural flow.<sup>2</sup> "Nationalization" of the waters of the state was to give to the Crown the power to allocate water freely and to diminish litigation between irrigators over rights to water.<sup>3</sup>

Common law water use rights also can be acquired by prescription contrary to the rights of other riparians.<sup>4</sup> To prevent such prescriptive rights from interfering with state control of diversions, the Act provided that prescriptive rights could not be acquired after the date of its enactment.<sup>5</sup>

The water use right "nationalization" provision under-pinned the diversion licensing system established by the Irrigation Act 1886. The Act brought all major diversions under the state regulation, but granted certain statutory rights for small diversions to riparians. The licensing system was set up under three provisions. First, all riparians were given a statutory license to divert water for domestic and stock watering purposes.<sup>6</sup> The statutory rights were designed to permit diversions for purposes recognized by the common law as "ordinary" or "natural" uses.<sup>7</sup> Furthermore, because counsel had suggested that the common law right of riparians to divert water for "ordinary" uses was equivalent to "the general right of the public in the water of streams, to which there [is] access by a public road or reserve,"<sup>8</sup> the public was given a right to withdraw water for domestic and stock watering purposes at such places.<sup>9</sup> Second, all other diversions were prohibited except as authorized by the licensing provisions of the Act.<sup>10</sup> This provision had the effect of requiring licenses for all diversions recognized at common law as "extraordinary" or "artificial", including dams for millponds and diversions for manufacturing and irrigation.<sup>11</sup> Third, a diver-

2. Remarks by A. Deakin, (1886) 51 *Vic. Parl. Deb.*, Legislative Assembly, June 24, 1886, at 440-41. See A. Deakin, *First Progress Report of Royal Commission on Water Supply—Irrigation in Western Australia*, [1885] 2 *V.P.P.* 731, 789-90.

The riparian doctrine was held by the Privy Council to apply to the British colonies in *Miner v. Gilmour* (1858) 12 Moo. P.C. 131, 14 E.R. 861 (Low. Can.), and specifically to New South Wales, and presumably to all of Australia by implication, in *Lord v. Commissioners of the City of Sydney* (1859) 12 Moo. P.C. 473, 14 E.R. 991 (N.S.W.). See also *Cooper v. Corporation of Sydney* (1843) 1 Legge 765; *Lomax v. Jarvis* (1885) 6 L.R. (N.S.W.) L. 237, 2 W.N. (N.S.W.) 33. The existence of riparian rights was recognized in South Australia in *Dunn v. Collins* (1867) 1 S.A.L.R. 126. There were no decisions in point in Victoria or elsewhere in Australia at that time.

3. Remarks by A. Deakin, (1886) 51 *Vic. Parl. Deb.*, Legislative Assembly June 24, 1886, at 441.

4. One Australian case of the time followed the existing English common law in holding that a diversion right can be acquired by prescription in derogation of the rights of affected riparians. *White v. Taylor* (1874) 8 S.A.L.R. 1. See also dicta in *Hood v. Corporation of Sydney* (1860) 2 Legge 1294; *Lomax v. Jarvis* (1885) 6 L.R. (N.S.W.) L. 237, 2 W.N. (N.S.W.) 33.

5. Irrigation Act 1886, Act. No. 898 (Vic.) §.5 provided:

"After the passing of this Act no right to the permanent diversion or to the exclusive use of the water in any ... watercourse ... shall be acquired by any riparian owner or any other person by length of use or otherwise ..."

6. Irrigation Act 1886, Act. No.898 (Vic.) §.4.

7. Under the common law, "ordinary" or "natural" uses are those necessary to sustain life and are restricted to diversions for domestic, household, and livestock watering purposes. *Miner v. Gilmour* (1858) 12 Moo. P.C. 131, 14 E.R. 861 (Low. Can.); *Dunn v. Collins* (1867) 1 S.A.L.R. 126; *Nagle v. Miller* (1904) 29 V.L.R. 765, 10 A.L.R. 119; *McCartney v. Londonderry & L.S. Ry.* [1904] A.C. 301 (Ir.); *O'Brien v. Hill* [1938] S.A.S.R. 61, *rev'd on other grounds* (1938) 61 C.L.R. 96; *H. Jones & Co. Pty. Ltd. v. Municipality of Kingborough* (1950) 82 C.L.R. 282.

8. Opinion of W.E. Hearn as summarized by George Swinburne in his remarks on the 1905 Water Bill, (1905,) 110 *Vic. Parl. Deb.*, Legislative Council, Aug. 20, 1905, at 1236.

The common law does not recognize a right in members of the public to use water for "ordinary" purposes. There are no cases affirming such a right. It does recognize a public right of access to navigable streams at public landing places for navigation purposes. See *Drinkwater v. Porter* (1835) 7 C. & P. 181, 173 E.R. 80 (N.P.); *Lee v. The Olympian* (1892) 2 B.C. 84. Perhaps Hearn confused the two ideas.

9. Irrigation Act 1886, Act No.898 (Vic.) §.4.

10. *Ibid.*

11. "Extraordinary" or "artificial" uses under the common law are those designed to enhance the

sion licensing system was established under which a license had to be obtained from a state agency for any diversion from any watercourse for any such nonexempted use.<sup>12</sup> Placing all major diversions under state regulation made it possible for the state to protect the water supplies needed for large-scale irrigation systems.

The Irrigation Act 1886 represented a breakthrough in thinking in Australia. Its water allocation concepts provided the pattern for statutes regulating water diversions in other states. New South Wales established a diversion licensing system substantially on the Victorian pattern under the Water Rights Act 1896.<sup>13</sup> It was the first statute to use the present formulation of water use right "nationalization" provision, which vests flow and control rights as well as the use rights which the Irrigation Act 1886 vested. That language is: "The right to the use and flow and to the control of water in all [watercourses] ... shall vest in the Crown."<sup>14</sup> Victoria adopted the New South Wales language when it rewrote and enlarged its "nationalization" provisions in the Water Act 1905.<sup>15</sup> The same language was adopted by most of the other states and territories in their statutes: Queensland in 1910,<sup>16</sup> Western Australia in 1914,<sup>17</sup> South Australia in 1919,<sup>18</sup> the Northern Territory in 1938,<sup>19</sup> and the Australian Capital Territory in 1965.<sup>20</sup> In each statute except Queensland's, the "nationalization" provision underpinned the diversion licensing system created. In each of those statutes, the diversion licensing system is structured in the same manner: creation of statutory diversion rights in riparians for "ordinary" uses,<sup>21</sup> prohibition of all other

convenience of living but are not necessary for the maintenance of life. The following uses have been so classified. *Irrigation: Embry v. Owen* (1851) 6 Ex. 353, 155 E.R. 579; *Dunn v. Collins* (1867) 1 S.A.L.R. 126; *Lomax v. Jarvis* (1885) 6 L.R. (N.S.W.) L. 237, 2 W.N. (N.S.W.) 33; *Newstead v. Flannery* (1887) 8 A.L.T. 178 (Cty. Ct.); *Nagle v. Miller* (1904) 29 V.L.R. 765, 10 A.L.R. 119; *Wright v. Glenorchy Municipality* (1914) 10 Tas. L.R. 84; *O'Brien v. Hill* [1938] S.A.S.R. 61 rev'd on other grounds (1938) 61 C.L.R. 96; *Rugby Joint Water Bd v. Walters* [1967] Ch. 397 (1966). *Manufacturing and water power: Dakin v. Cornish* (1845) cited at 6 Ex. 360, 155 E.R. 582; *Belfast Ropewords v. Boyd* (1887) L.R. 21 Ir. 560 (V.C.).

12. Irrigation Act 1886, Act No. 898 (Vic.) §.4.

13. 60 Vic. No.20 (N.S.W.).

14. Water Rights Act 1896, 60 Vic. No.20 (N.S.W.) §.1 (I).

15. Water Act 1905, Act No. 2016 (Vic.) §.4. To that language was added a provision allowing a landowner to impound surface runoff provided the flow of a watercourse was not sensibly diminished. That provision is a restriction on the common law rule. Three cases have held that diffused surface water can be impounded before reaching a watercourse because it was not yet part of the watercourse even though the flow the watercourse is diminished. *Rawston v. Taylor* (1855) 11 Ex. 369, 156 E.R. 873; *Broadbent v. Ramsbottom* (1856) 11 Ex. 602, 156 E.R. 971; *Taylor v. St Helens Corp.* (1877) 6 Ch. D. 264. Once diffused surface reaches a watercourse it no longer can be diverted under that rule. *Rugby Joint Water Bd. v. Walters* [1967] Ch. 397 (1966).

16. Rights in Water and Water Conservation and Utilization Act 1910, 1 Geo. V No. 25 (Qld.) §.5.

17. Rights in Water and Irrigation Act 1914, Act. No. 19 (W.A.) §.4 (I).

18. Control of Waters Act 1919, Act No. 1359 (S.A.) §.4 (I).

19. Control of Waters Ordinance 1938, Ordinance No. 16 (N.T.) §.3 (I).

20. Lake Burley Griffin Ordinance 1965, Ordinance No. 1 (A.C.T.) §.11 (I). See also Lake Ginninderra (Temporary Control) Ordinance 1973, Ordinance No. 37 (A.C.T.) §.3.

The ordinances of the Australian Capital Territory do not establish a diversion licensing system. However, the New South Wales statute in force on the day the Territory was created remains in force until such time as it is replaced by other legislation. Seat of Government Acceptance Act 1909-1955 (Cth) §.6. No general diversion licensing ordinance concerning water use has been promulgated by the Governor-General for the Territory. See Water Act 1902-1906 (N.S.W.) §.4 (I) for the applicable "nationalization" provision outside the watersheds of Lake Burley Griffin and Lake Ginninderra.

21. Water Rights Act 1896, 60 Vic. No. 20 (N.S.W.) §.2; Control of Water Act 1919, Act No. 1359 (S.A.) §.7; Rights in Water and Irrigation Act 1914, Act No. 19 (W.A.) §.14; Control of Waters Ordinance 1938, Ordinance No. 17 (N.T.) §.7. See Water Act 1902-1906 (N.S.W.) §.5 (for A.C.T.).

diversions,<sup>22</sup> and discretionary granting of diversion licenses for nonexempted uses.<sup>23</sup>

The Queensland "nationalization" provision was adopted in 1910 to freeze vesting of common law riparian diversion rights. Pre-existing diversion rights were recognized and preserved and a statutory riparian right was created for pre-1910 landowners. However, a licensing system for large diversions was not established. This meant that no large diversions could be initiated after 1910. The statute had the effect of creating a water monopoly in the large diverters existing in 1910.<sup>24</sup> Diversion licensing provisions were added and the statutory diversion right was made applicable to all landholders in the re-enactment of 1926, the Water Act 1926.<sup>25</sup> That act converted the Queensland provisions to a typical diversion licensing system.

"Nationalization" of water use rights is not universal in Australia. Common law riparian rights still exist in South Australia outside the River Murray basin.<sup>26</sup> Although Tasmania now requires registration of all diversions, including common law diversions under riparian rights, its registration system is not based on "nationalization" of water use rights.<sup>27</sup>

In 1905 Victoria "nationalized" title to the beds and banks of watercourses and it clarified and expanded the provisions concerning "nationalization" of prescriptive rights. Those additions to the 1886 "nationalization" provisions were a response to two legal questions which had haunted the administrators of the Victorian diversion licensing system since enactment of the Irrigation Act.<sup>28</sup>

22. Water Rights Act 1896, 60 Vic. 20 (N.S.W.) §.5; Control of Waters Act 1919, Act No. 1359 (S.A.) §.8 (I); Rights in Water and Irrigation Act 1914, Act No. 19 (W.A.) §.6; Control of Waters Ordinance 1938, Ordinance No. 17 (N.T.) §.5 (I); Lake Burley Griffin Ordinance 1965-1968 (A.C.T.) §.11A. See Water Act 1902-1906 (N.S.W.) §.7 (fr A.C.T.).

23. Water Rights Act 1896, 60 Vic. No. 20 (N.S.W.) §.7; Control of Waters Act 1919, Act No. 1359 (S.A.) §.15 (I); Rights in Water and Irrigation Act 1914, Act No. 19 (W.A.) §.16; Control of Waters Ordinance 1938, Ordinance No. 17 (N.T.) §.13 (I). See Water Act 1902-1906 (N.S.W.) §.10 (for A.C.T.).

24. This interpretation of the statutory history of the Water Act 1926-1973 (Qld.) is discussed extensively in *Shooter v. Commissioner of Irrigation & Water Supply* (1972) 39 Q.C.L.L.R. 11, 14-17.

The water use right "nationalization" provisions is Rights in Water and Water Conservation and Utilization Act 1910, 1 Geo. V No. 25 (Qld.) §.5. The statutory diversion right is conferred by *id.* §.11. Pre-existing diversions are permitted to continue for 10 years, subject to common law riparian obligations to other riparians, by *id.* §.10 (irrigation works and plant) and §.12 (I) (diversions by owners of land alienated by the Crown). The statutory diversion right applied only to lands alienated by the Crown. That diversion right did not exist for any lands alienated after 1910. *Id.* §.11.

25. Water Act 1926, 17 Geo. V No. 12 (Qld.). This act re-enacted the water use right "nationalization" provision, *id.* §.4 (I), and prohibition against unauthorized diversions, *id.* §.6. It revived and extended the statutory diversion right to all abutting lands, *id.* §.9, and established a general diversion licensing system, *id.* §.11.

26. The Control of Waters Act applies only to the Rivery Murray watershed upstream from Mannum to the New South Wales-Victoria boundary and to such other watercourses or parts of the state which are proclaimed by the Governor-in-Council. Control of Waters Act 1919-1925 (S.A.) §.3 (I). At tee present time only the River Murray watershed downstream from Mannum to the ocean has been so proclaimed. Throughout the remainder of the state common law riparian rights prevail.

27. See Water Act 1957-1970 (Tas.) §.83, 90-100P, 115-116B.

28. See A.S. Kenyon, 'Stuart Murray and Irrigation in Victoria', (1925) 10 *Victorian History Magazine* 112, 129. Probably they were concerned by a series of dicta in Victorian decisions which discussed riparian rights as if they still existed. See *Daws v. M'Donald* (1887) 13 V.L.R. 698; *Newstead v. Flannery* (1887) 8 A.L.T. 178 (Cty. Ct.); *Lyons v. Winter* (1889) 25 V.L.R. 464, 6 A.L.R. 122; *Vinnecombe v. MacGregor* (1902) 28 V.L.R. 144, 8 A.L.R. 141, *rev'd on other grounds* (1904) 29 V.L.R. 765, 10 A.L.R. 199. None of these cases discussed the effect of the "nationalization" provisions.

The power of the state to license diversions was presumed to be grounded upon Crown ownership of the lands on which watercourses were situated or which bounded them.<sup>29</sup> The Irrigation Act 1886 had vested water use rights in the Crown, but not bed ownership.<sup>30</sup> The Water Act 1905 resolved any uncertainty about the basis for the licensing of diversions by providing that the beds and banks of watercourses forming the boundaries of Crown grants shall not have been alienated with the grants.<sup>31</sup> This provision converted the previous Government policy concerning boundary descriptions<sup>32</sup> into an irrebuttable presumption and effectively nationalized the beds and banks of watercourses.

The Irrigation Act 1886 had prevented persons granted land by the Crown after 1886 from acquiring prescriptive water use rights.<sup>33</sup> But the Government feared that persons who had acquired land before 1886 could acquire prescriptive rights by 20 years long user.<sup>34</sup> Furthermore, the Government had been given advice, probably erroneously, that the riparian right to divert water for "extraordinary" uses was derived from long user rather than as an incident to ownership of riparian land.<sup>35</sup> Those anticipated loopholes were plugged by the Water Act

29. See Irrigation Act 1886, Act No. 898 (Vic.) §.122.

30. *Id.*, §.4.

31. Water Act 1905, Act No. 2016 (Vic.) §.5.

32. Government policy adopted on May 23, 1881, made it impossible to acquire riparian land by Crown grant. On that date frontages still held by the Crown along 280 rivers and streams, including all the important ones, were reserved to the Crown by Order-in-Council of that date. The frontage strips were one to two chains wide along each side of the designated streams. The frontages were reserved under authority of Crown Lands Act 1869, Act No. 360 (Vic.) §.6. The affected streams are listed in 77 *Victorian Year Book* 1963, at 36-38.

Prior to that date, very few frontages had been conveyed to private ownership since, as a matter of policy, the Crown had retained a strip of land along each side of a stream when making grants. If a grantee had been conveyed land on both sides of a stream, he was given two grants, one for each side. Furthermore, a Crown grant never designated a stream as a boundary, but used a survey line instead. Under the common law, abutting lands have riparian status only if they touch the stream. *Wright v. Howard*, (1849) 1 Sim. & St. 190, 57 E.R. 1047; *Stockport Waterworks Co. v. Potter* (1864) H. 3 H. & C. 300, 159 E.R. 545; *Mason v. Shrewsbury & H.Ry.* (1871) L.R. 6 Q.B. 578; *Holder v. Poritt* (1873) L.R. 8 Ex. 107; *Lyon v. Fishmongers' Co.* (1876) 1 App. Cas. 662 (per Lord Selbourne); *Attwood v. Llay Main Collieries Ltd.* [1926] Ch. 444; *Richardson v. Browning* (1936) 31 Tas. L.R. 78; *Moor v. Corrigan* [1949] Tas. S.R. 34. Where the land is bounded by a "stream", the bed of the stream *ad medium filum aquae* is presumed to be included in the grant. *Lord v. Commissioners of the City of Sydney* (1859) 12 Moo. P.C. 473, 14 E.R. 991 (N.S.W.); *Bristow v. Cormican* (1878) 3 App. Cas. 641; *Attorney-General v. White* (1925) 26 S.R. (N.S.W.) 216, 43 W.N. (N.S.W.) 10; *Lanyon Pty. Ltd. v. Canberra Washed Sand Pty. Ltd.* (1966) 115 C.L.R. 342. Such lands would be riparian. The presumption that the bed is conveyed with the abutting land is rebuttable. A survey line is presumed to be descriptive of the stream as a boundary only when that is the intention of the grantor. When a contrary intention is expressed, the boundary is located where the survey places it, regardless of the location of the stream, and the abutting land does not acquire riparian status. This rule operated with respect to Crown grants as well as to private conveyances. *Venkata Lashminarasamma v. Secretary of State for India* (1917) Indian L.R. 41 Madras 840; *Kingdon v. Hutt River Bd.* (1905) 25 N.Z.L.R. 145; *Attorney-General v. White*, *supra*. The Victoria court has questioned this rule. *Nagle v. Miller* (1904) 29 V.L.R. 765, 10 A.L.R. 119.

The consistent practice of the Government to give Crown grants with all boundaries described as survey lines probably destroys any common law presumption that the boundaries of abutting lands extends to the edge or to the centre of a stream. The boundary description practices of the Commissioner of Titles in issuing Crown grants are discussed at length in a 1905 memorandum: Decision of Commissioner of Titles (Vic.), 1905, *re*: Allotments abutting Salt Creek, (1905) 110 *Vic. Parl. Deb.* 364, 365.

33. Irrigation Act 1886, Act No. 898 (Vic.) §.5.

34. See Opinion of Sir John Madden, Crown Solicitor, in Remarks of George Swinburne, (1905) 100 *Vic. Parl. Deb.*, Legislative Council, Aug. 30, 1905, at 1236. But there was disagreement. See Opinion of Mr Rodgers, *ibid*.

35. See both opinions cited, *ibid*.

Where this idea came from is not known, since the idea that prescription is the basis for

1905 which declared that no riparian could acquire any prescriptive water use right after 1886.<sup>36</sup>

The provisions in the Water Act 1905 nationalizing beds and banks and clarifying the extent of nationalization of prescriptive water use rights represent an abundance of caution. Most of the other states nationalizing water use rights adopted its provisions.<sup>37</sup> The only exceptions are New South Wales and the Australian Capital Territory.<sup>38</sup>

The typical Australian diversion licensing statute has three nationalization provisions. They vest title in the Crown to (1) water use rights based on riparian ownership, (2) the beds and banks of watercourses, and (3) water use rights based on prescription or long user. That statutory structure was established between 1886 and 1905 in Victoria and New South Wales. It has been adopted by all of the states and territories establishing diversion licensing systems.

## 2. Typical "Nationalization" Provisions (Queensland)

The provisions of the water use right "nationalization" statutes in the several Australian states are very similar in language and structure. The Queensland Water Act 1926-1973 contains typical provisions. The Act "nationalizes" water use rights by Section 4(1) which provides:

"The right to the use and flow, and to the control of the water at any time in—  
(a) All watercourses which flow through or past the land of two or more occupiers and all lakes and springs which are situated within the land of two or more occupiers ...

shall, subject only to the restrictions hereinafter provided, or until appropriated under the sanction of this Act or of some other Act, vest in the Crown."<sup>39</sup>

diversion rights had been superceded by other concepts by the time of Blackstone. See T.E. Lauer, 28 *Missouri Law Review* 60. No English or Australian decision since the modern formulation of the riparian rights doctrine in *Tyler v. Wilkinson* (1827) 4 Mason 397, 24 Fed. Cas. 472 (No. 14,312) (C.C.D.R.I.), had used prescription as the basis for riparian rights.

There are two possible sources for the misconception. First, water use rights adverse to riparian rights could be acquired by prescription. But adverse use for 20 years, not mere long user, was required, *Saunders v. Newman* (1818) 1 B & Ad. 258, 106 E.R. 95; *Wood v. Waud* (1849) 3 Ex. 748, 154 E.R. 1047; *Hood v. Corporation of Sydney* (1860) 2 Legge 1294; *White v. Taylor* (1874) 8 S.A.L.R.11; *McCartney v. Londonderry & L.S. Ry.* [1904] A.C. 301 (Ir.). Second, there was a special exception which permitted mills to acquire prescriptive rights by mere 20 years long user. See *Saunders v. Newman*, *supra*; *Wood v. Waud*, *supra*; 2 W Blackstone, Commentaries (Am. 1st ed. 1771) 403. That special exception did not apply to any other types of extraordinary use.

### 36. Water Act 1905, Act No. 2016 (Vic.) §.8.

Prescriptive rights acquired prior to enactment of the Irrigation Act 1886 were abolished implicitly by giving holders of such rights the right to obtain a single 15 year diversion license free of charge in substitution for the prescriptive rights. Water Act 1905, Act No. 2016 (Vic.) §.15. No applications for licensing pre-1886 prescriptive rights were ever filed. L.R. East, *Victorian Water Law-Riparian Rights* (State Rivers & Water Supply Commission (Vic.) 1950). 15-16. Presumably that means no such prescriptive rights had ever matured.

### 37. Rights in Water and Water Conservation and Utilization Act 1910, 1 Geo. V No. 25 (Qld.) .9; Control of Waters Act 1919, Act No. 1359 (S.A.) §.9; Rights in Water and Irrigation Act 1914, Act No. 19 (W.A.) §.8; Control of Waters Ordinance 1938, Ordinance No. 17 (N.T.) §.8.

Only Queensland and Western Australia provided for substituting a special license for pre-existing prescriptive diversion rights. Rights in Water and Water Conservation and Utilization Act 1910, 1 Geo. V No. 25 (Qld.) §.12 (I); Rights in Water and Irrigation Act 1914, Act No. 19 (W.A.) §.15 (I). The same Queensland provision also provided for special licensing of all other pre-existing diversions. Cf. note 24, *supra*.

### 38. But in the Lake Burley Griffin watershed of the Australian Capital Territory prescriptive diversion rights based on 20 years long user are expressly recognized and excepted from "nationalization" of water use rights. Lake Burley Griffin Ordinance, Ordinance No. 1 (A.C.T.) §.11 (2).

### 39. This language is fashioned after the New South Wales Act, *infra*.

Further, to make sure that there will be no abutting landowners who might obtain riparian rights as incidents of shoreline ownership, Section 5 "nationalizes" the beds and banks of watercourses:

"(1) Where a watercourse or lake forms the boundary wholly or in part of a parcel of land alienated by the Crown:—

- (a) Before the passing of the Act, the bed and banks thereof shall be deemed to have remained and shall be and remain the property of the Crown, and shall be deemed not to have passed with the land so alienated, and shall vest in the Commissioner [of Irrigation and Water Supply];
- (b) After the passing of this Act, the bed and banks thereof shall, notwithstanding such alienation, be and remain the property of the Crown, and shall not pass with the land so alienated, and shall vest in the Commissioner.

"(2) The provisions of this section shall apply notwithstanding that one and the same person at any time has been or is the owner of all the lands adjoining to the bed or banks of any watercourse or lake."<sup>40</sup>

In addition, Section 8 of the Act makes impossible the acquisition of prescriptive rights to divert water:

"No right to take and divert water from any watercourse or lake for use on any land adjacent to the banks thereof shall be acquired by any owner or occupier of such land, by length of use or otherwise excepting as herein provided; and no right to the permanent diversion or to the exclusive use of such water shall be acquired by any person whomsoever by length of use or otherwise excepting as herein provided."<sup>41</sup>

On their faces, the "nationalization" statutes purport to deprive land owners and occupiers of the common law water use rights based on riparian law or prescription and of title to or occupancy of the beds and banks of watercourses.

### 3. Court Interpretation of the "Nationalization" Statutes

Decisions in Queensland, New South Wales and Victoria have directly held that the "nationalization" acts in those states did abolish common law riparian rights. A South Australian case has implied the same result. A recent decision in Western Australia holds to the contrary, that the "nationalization" provision does not abolish common law riparian rights but merely superimposed superior Crown regulatory rights upon them. There are no decisions in other states. Certain recent High Court of Australia and New South Wales cases apparently

The water use right "nationalization" provisions in other states are: Water Act 1912-1973 (N.S.W.) §.4A(1); Control of Waters Act 1919-1975 (S.A.) §.4(1); Water Act 1958, Act No. 6413 (Vic.) §.4(1); Rights in water and Irrigation Act 1914-1974 (W.A.) §.4(1); Control of Waters Ordinance 1938-1971 (N.T.) §.3(1); Lake Burley Griffin Ordinance 1965-1968 (A.C.T.) §.11(1). See Water Act 1902-1906 (N.S.W.) §.4(1) (for A.C.T.).

40. Water Act 1926-1973 (Qld.) §.5. This language is fashioned after the Victorian Act, *infra*.

The stream bed and banks "nationalization" provisions in other states are: Control of Waters Act 1919-1975 (S.A.) §.5; Water Act 1958, Act No. 6413 (Vic.) §.5; Rights in Water and Irrigation Act 1914-1974 (W.A.) §.5; Control of Waters Ordinance 1938-1971 (N.T.) §.4. There are no such provisions applicable in New South Wales or the Australian Capital Territory.

41. Water Act 1926-1973 (Qld.) §.8. This language is fashioned after the Victorian Act, *infra*.

The prescriptive rights "nationalization" provisions in other states are: Control of Waters Act 1919-1975 (S.A.) §.9; Water Act 1958, Act No. 6413 (Vic.) §.8; Rights in Water and Irrigation Act 1914-1974 (W.A.) §.8; Control of Waters Ordinance 1938-1971 (N.T.) §.8. There is no such provision in New South Wales.

The Australian Capital Territory expressly recognizes prescriptive rights based on 20 years long user attached to Crown leaseholds located on waters tributary to Lake Burley Griffin. Lake Burley Griffin Ordinance 1965-1968 (A.C.T.) §.11(2). There are no provisions concerning prescriptive rights applicable to the remainder of the Territory.

imply that there is a limitation on the extent to which the common law rights related to water have been abolished.

### a. Queensland

A recent decision of the Queensland Land Court makes clear that the Rights in Water and Water Conservation and Utilization Act 1910,<sup>42</sup> abolish common law riparian rights. In *Shooter v. Commissioner of Irrigation & Water Supply*<sup>43</sup> the Commissioner had refused to grant eight diversion licences because those diversions might make the flow of water to downstream licensees inadequate for their licensed diversions. The court found the factual grounds for the Commissioner's decision to be substantially unsupported. It also found the legal basis for his action to be inadequate and overruled his refusal to grant the licences.

The Land Court interpreted the 1910 Act as vesting water use, flow and control rights in the Crown and substituting statutory diversion rights for unexercised common law riparian rights.<sup>44</sup> In discussing the rights of owners of abutting lands alienated by the Crown who were not eligible for a special licence extending preexisting diversions,<sup>45</sup> the court interpreted the effect of the Act on common law diversion rights:

"For under the [1910 Act], while the riparian owner had a right incident to ownership to irrigate five acres of his riparian land for any purposes, it seems he could never get a licence to irrigate more than this, unless he belonged to that privileged group of owners who prior to the passing of the 1910 Act had been in fact irrigating more than five acres. Furthermore, unless the land of a riparian owner or occupier had been alienated from the Crown before the passing of the 1915 [*sic.*] Act ... it would appear he could not get even the ordinary [statutory diversion] rights under Section 11, let alone extraordinary [specially licensed] rights [extending preexisting common law diversion rights] under Section 12. In effect a privileged class of water barons was being created."<sup>46</sup>

The court obviously was interpreting the 1910 Act as abolishing common law riparian rights completely. How else could the Act create a virtual water monopoly; since no statutory or licensed right to make large diversions existed after enactment of the 1910 Act,<sup>47</sup> a monopoly of already established diversion rights could exist only if the common law diversion rights had also been abolished.

The Water Act 1926 reenacted the 1910 water use rights "nationalization" provision.<sup>48</sup> There is nothing in the 1926 Act to suggest the substantially identical language should be interpreted differently. The court in *Shooter* not only assumes that the Commissioner of Irrigation and Water Supply has exclusive authority over diversions, but also holds that he cannot adopt a policy of absolutely protecting existing licensed diverters from possible overappropriation of

42. 1 Geo. V No. 25 (Qld.).

43. (1972) 39 Q.C.L.L.R. 11.

44. *Id.* at 14, interpreting Rights in Water and Water Conservation and Utilization Act 1910, 1 Geo. v No. 25 (Qld.) §.5, 11.

45. Under Rights in Water and Water Conservation and Utilization Act 1910, Geo. v No. 25 (Qld.) §.12(1).

46. *Shooter v. Commissioner of Irrigation and Water Supply* (1972) 39 Q.C.L.L.R. 11, 16.

Rights in Water and Water Conservation and Utilization Act 1915, 6 Geo. V No. 15 (Qld.) contains no provisions amending Section 11 of the 1910 Act. Therefore the cutoff date for acquiring the statutory diversion right is 1910, not 1915 as the opinion indicates.

47. Rights in Water and Water Conservation and Utilization Act 1910, 1 Geo. v No. 25 (Qld.) .11, 12(1).

48. Water Act 1926, 17 Geo. V No. 12 (Qld.) §.4(1).



water flow.<sup>49</sup> Such an interpretation of the 1926 Act presupposes complete abolition of common law riparian rights because (1) it denies any right of abutting landholders to divert except under license or the statutory diversion right and (2) it places complete authority in the Commissioner to allocate water between competitive diverters. The court made clear licensees had no absolute right under the Act to be free from interfering diversions.<sup>50</sup>

The High Court of Australia previously had interpreted the Queensland Water Act 1926-1962 in the same way, that a licensee was not entitled to quiet enjoyment to the flow of water to the diversion intake site.<sup>51</sup> The Court also held that the Act did not confer a common law riparian right to maintenance of flow, but instead that the Act destroyed any such right.<sup>52</sup> The common law rights related to water which the Court held were retained by a riparian landholder are discussed below.<sup>53</sup>

### b. New South Wales

Three New South Wales Supreme Court cases have directly held that Section 1(I) of the Water Rights Act 1896<sup>54</sup> abolished common law riparian rights. In all three cases, actions based on riparian rights were dismissed. *Hanson v. Grassy Gully Gold Mining Co.*, decided in 1900, was the first and most important of the three.<sup>55</sup> Defendant, a downstream riparian, had constructed a dam across an intermittent stream. That dam, which had been licensed under the Act, penned water back onto plaintiff's land in the vicinity of the natural channel. Plaintiff brought an action to recover damages. Defendant demurred to plaintiff's complaint, alleging that the Act had abolished plaintiff's common law rights. The New South Wales Supreme Court agreed, stating:

"It is plain that the plaintiff in this case relies upon his right to have the water flow past his land ... Has the plaintiff, since the passing of the *Water Rights Act* any right to bring this action? It cannot be denied that for years and years past the question of the rights of riparian owners in this country, where the conditions are so totally different from the condition of things in England, has been a source of almost insuperable difficulty. There has been a great deal of expensive litigation, and I suppose, for that reason, the Legislature passed this Act, in order to prevent riparian owners above and below from bringing actions against one another. If this Act does not aim to take the old common law rights from the riparian owners and vest them in the Crown, then I do not know what it was passed for nor what it means. It was passed in the public interest to prevent litigation and to determine rights which up to the time of the passing of the Act it was almost impossible for the best lawyer to determine. ... I do not think the language of the Act could be clearer, and plainly the rights of the riparian owners were divested and vested in the Crown."<sup>56</sup>

The Court found further evidence in the Act that common law riparian rights

49. *Shooter v. Commissioner of Irrigation and Water Supply* (1972) 29 Q.C.L.L.R. 11, 17-20.

50. *Id.* at 18-19. But see a decision of the same court handed down the same day which apparently upheld the power of the Commissioner to protect licensees from actual interference with flow by proposed upstream diversions. *Dimes v. Commissioners of Irrigation and Water Supply* (1972) 39 Q.C.L.L.R. 29. It is beyond the scope of this article to explore to what extent the Water Act 1926-1973 (Qld.) §.4(2) (c) permits the Commissioner to protect licensees from interfering diversions sought to be licensed under the Act.

51. *Beaudesert Shire Council v. Smith* (1966) 120 C.L.R. 145, 151, [1966] A.L.R. 1175, 1177 (Cth.) (per Taylor, Menzies & Owen, JJ.).

52. *Ibid.*

53. See text accompanying notes 91-100, *infra*.

54. Water Rights Act 1896, 60 Vic. No. 20 (N.S.W.) §.1(I). See text accompanying note 14, *supra*.

55. (1900) 21 L.R. (N.S.W.) L. 271, 17W.N.(N.S.W.) 187.

56. *Hanson v. Grassy Gully Gold Mining Co.* (1900) 21 L.R.(N.S.W.) L. 271, 275 (per Stephen, J.).

were to be considered abolished. Section 2 of the Act<sup>57</sup> gave riparian owners a statutory right to divert water from domestic and livestock purposes and for watering a five acre home garden. It was clear that those statutory rights were in substitution for the common law rights and that "it was the intention of the Legislature to do away with the old rights of the riparian owners ..."<sup>58</sup>

Two cases in the next few years confirmed the *Hanson* decision. In *Dougherty v. Ah Lee*,<sup>59</sup> the court refused to issue a writ of mandamus requiring the Small Debts Court to hear a flow obstruction case based on riparian rights, because those rights had been abolished by the Water Rights Act 1896. In *Attorney-General v. Bradney*,<sup>60</sup> the state Attorney-General brought an information proceeding at the relation of a riparian owner seeking an injunction to restrain an obstruction. In argument, counsel for the Attorney-General mentioned that he thought it was necessary to proceed by way of an information proceeding because common law rights had been abolished. Apparently the court agreed, because it granted the injunction sought by the Attorney-General.

### c. Victoria

A decision of a Victorian County Court in 1887 appears to have held that the "nationalization" provisions of the Irrigation Act 1886 did abolish common law riparian rights. In *Newstead v. Flannery*,<sup>61</sup> the county court had to consider the effect of the provision in the Victorian Water Conservation Act 1883 giving exclusive control and management of streams within a Waterworks or Irrigation Trust to the Trust.<sup>62</sup> The defendant, an upstream diverter, had cut a channel through the 1½ chain Crown reservation along Pyramid Creek to irrigate his land. Because of the diversion, plaintiff downstream failed to receive the usual flood overflows from the River Murray which had previously flowed down the creek. In holding that it could entertain the action, the county court noted that the Swan Hill Shire Waterworks Trust had not obtained jurisdiction over Pyramid Creek because the Government had not issued an order to that effect, as required by Section 88 of the Act. Therefore, the Act did not apply and common law riparian rights remained in force. The implication of that ruling is that if the Trust had assumed management and control of the creek under the Act, common law riparian rights would have been abolished.

Although the language of Section 88 of the Victorian Water Conservation Act 1883<sup>63</sup> is significantly different from Section 4 of the Irrigation Act 1886,<sup>64</sup> the latter is far more explicit about abolition of common law riparian rights than the former. Therefore, since the county court apparently held that the 1883 Act would abolish riparian rights, the 1886 Act ought to do so as well.

Apparently one justice on the High Court of Australia assumed in 1950 that

57. Water Rights Act 1896, 60 Vic. No. 20 (N.S.W.) §.2.

58. *Hanson v. Grassy Gully Gold Mining Co.* (1900) 21 L.R.(N.S.W.)L 271, 276 (*per* Stephen, J.).

59. (1902) 19 W.N.(N.S.W.) 8.

60. (1903) 20 W.N.(N.S.W.) 247.

61. (1887) 8 A.L.T. 178 (Cty. Ct.).

62. Victorian Water Conservation Act 1883, Act No. 778 (Vic.) §.88, provided:

"The Governor in Council may from time to time order that all or any of the lakes lagoons swamps marshes rivers creeks and water-courses situated within the district of any Waterworks or Irrigation Trust shall be under the exclusive control and management of such Waterworks or Irrigation Trust ... ." [commas omitted in original]

63. That provision referred to the "exclusive control and management" of watercourses by the Trusts. Victorian Water Conservation Act 1883, Act No. 778 (Vic.) §.88, quoted in note 62, *supra*.

64. That provision referred to "vesting" of "the right to the use of all water" in watercourses. Irrigation Act 1886, Act No. 898 (Vic.) §.4. See text accompanying note 1, *supra*.

Victoria had abolished all common law riparian rights. In an appeal from a Tasmanian water case, Fullagar, J., said in passing, "the rights of riparian owners in Tasmania in respect of water flowing through or past their lands are not governed by statute as they have been in Victoria since the passing of the Water Act 1905."<sup>65</sup>

*d. South Australia*

In 1962, the High Court of Australia commented on the scope of the application of the South Australian Control of Waters Act 1919-1925. It stated in a dictum that a common law action based on water rights had been properly entertained. In *Gartner v. Kidman*,<sup>66</sup> involving obstruction of an "artificial" watercourse, the Court stated that the Control of Waters Act 1919-1925 did not apply to the watercourse in question and that, therefore, the common law rules would apply. In my opinion, that decision does not determine which rights to water are abolished by the Act. Because riparian rights do not exist in water in "artificial" watercourses under the common law, because the Control of Waters Act 1919-1925 applies only to "watercourses" which are "natural" under the common law<sup>67</sup> and because the Court expressly held that the particular watercourse was "artificial" to which riparian rights did not attach,<sup>68</sup> the Court's statement can be read only to say that the Act does not apply to water outside "natural" watercourses.

*e. Western Australia*

The Western Australia Supreme Court has held recently that the Rights in Water and Irrigation Act 1914<sup>69</sup> did not abolish common law riparian rights. Instead it merely created superior Crown regulatory rights which are superimposed on those common law rights. In *Rapoff v. Velios*<sup>70</sup> a downstream irrigator brought an action to enforce his common law riparian rights against an upstream irrigator who had constructed a dam across the stream and whose diversion allegedly diminished the flow in the stream sensibly. Although the court found that defendant had not sensibly diminished the flow in the stream, it held that plaintiff did have a cause of action. Although the parties did not argue the question at bar, Virtue, S.P.J., observed that the existence of plaintiff's cause of action depended upon the effect of Section 4(1) of the Rights in Water and Irrigation Act 1914-1974 on the continued existence of common law riparian rights.<sup>71</sup> In resolving that question the court noted that New South Wales had held that its "nationalization" provision had abolished common law riparian rights in *Hanson* and *Dougherty* previously discussed, at the turn of the century.<sup>72</sup> It then noted that the correctness of those decisions had been doubted by Fullagar, J., in his High Court opinion in *Thorpes Ltd. v. Grant Pastoral Co. Pty. Ltd.*,<sup>73</sup> discussed in the next section. His remarks were quoted at length. He had concluded in a dictum that the New South Wales "nationalization" provision<sup>74</sup> did not directly affect any common law riparian rights but gave the Crown new and superior rights which it could exercise in derogation of common

65. *H. Jones & Co. Pty. Ltd. v. Municipality of Kingborough* (1950) 82 C.L.R. 282, 342.

66. (1962) 108 C.L.R. 12, [1962] A.L.R. 620, reversing [1961] S.A.S.R. 370.

67. See Control of Waters Act 1919-1925 (S.A.) §.2.

68. *Gartner v. Kidman* (1962) 108 C.L.R. 12, 24-36, [1962] A.L.R. 620, 627-36 (per Windeyer, J.).

69. Act No. 19 (W.A.)

70. [1975] W.A.R. 27.

71. *Rapoff v. Velios* [1975] W.A.R. 27, 28.

72. *Id.* at 30.

73. (1954-55) 92 C.L.R. 317, 330-31.

74. Water Act 1912-1973 (N.S.W.) §.4A(1).

law riparian rights. But until those Crown rights are exercised, he had concluded, the common law rights can and do coexist with them.<sup>75</sup> Virtue, S.P.J., in his opinion in *Rapoff*, adopted Fullagar's J., reasoning as follows:

"... The question was not argued at the bar as fully as I would like it to have been. In the absence of such assistance but upon consideration of the questions in issue I have been with respect impressed by the force of the reasons in the judgment of Fullagar J. and have come to the conclusion that the Act has not in fact abrogated the common law rights of riparian owners which in fact continue to exist with the rights conferred on the Crown by virtue of the statute."<sup>76</sup>

Therefore, plaintiff had stated a cause of action, which the court ultimately found had not been proven.

The courts of the other Australian states have not interpreted their "nationalization" statutes in any reported decision.

#### f. Limitations on the Scope of the "Nationalization" Statutes

Two other cases decided since 1953 suggest that the "nationalization" statutes apply only to water use rights of riparian proprietors attached to their lands as an incident of shoreline ownership and do not apply to other rights incidentally related to water and derived from other common law doctrines, such as nuisance or negligence. In the first case, the New South Wales Water Act 1912-1946 was interpreted by the Supreme Court of that state and by the High Court of Australia on appeal. In the second case, the High Court of Australia interpreted the Queensland Water Act 1926-1962.

The first case involved construction of levees across a floodway. In *Grant Pastoral Co. Pty. Ltd. v. Thorpe's Ltd.*<sup>77</sup> plaintiff and defendant owned land on opposite banks of the Belubula River. A floodway crossed defendant's land parallel to the river. Emu Creek crossed the floodway. During floods on the main stream, defendant's land was inundated by water backing up the creek to the floodway. To prevent that flooding, defendant constructed levees along both banks of the creek. During the next flood on the river, water which usually flowed down the floodway backed upstream, breached the opposite river bank, and flooded plaintiff's land. When the flood receded, a blanket of sand was left on the flooded portion of plaintiff's land. He brought an action for damages, alleging (1) negligent construction and negligent maintenance of the defendant's levees and (2) nuisance resulting from the interference with the natural flow of the river. No part of his cause of action was based on riparian rights.

The New South Wales Supreme Court held that a shoreland owner may protect his land from the inroads of flood waters if he can do so without injuring the lands of others opposite him or above or below him.<sup>78</sup> But the general rule allowing a landowner to treat extraordinary floodwaters as "common enemy" diffused surface waters was held not applicable where there is a flood channel<sup>79</sup> or where the complainant "has acquired a right to have flood water maintain an ancient and rightful course."<sup>80</sup> The court summarized:

"The result of the cases appears to be that a riparian owner may make defenses

75. *Rapoff v. Velios* [19750 W.A.R. 27, 30-31, quoting *Thorpe's Ltd. v. Grant Pastoral Co. Pty. Ltd.* (1954-55) 92 C.L.R. 317, 330-31 (per Fullagar, J.).

76. *Rapoff v. Velios* [1975] W.A.R. 27, 31.

77. (1953) 54 S.R.(N.S.W.) 129, 71 W.N. (N.S.W.) 101, *aff'd* (1954-55) 92 C.L.R. 317.

78. *Grant Pastoral Co. Pty. Ltd. v. Thorpe's Ltd.* (1953) 54 S.R. (N.S.W.) 129, 134-3 (per Herron, J.), citing cases.

79. *Grant Pastoral Co. Pty. Ltd. v. Thorpe's Ltd.* (1953) 54 S.R. (N.S.W.) 129, 135 (per Herron, J.), citing *Menzies v. Breadalbane (Lord)* (1828) 3 Bli (n.s.) 414, 4 E.R. 1387 (Scot.).

80. *Grant Pastoral Co. Pty. Ltd. v. Thorpe's Ltd.* (1953) 54 S.R.(N.S.W.) 129, 135 (per Herron, J.), citing *Trafford v. The King* (1832) 8 Bing. 204, 131 ee.R. 379.

against floods anywhere on his own land provided he does not interfere with the alveus or recognized flood channel but if flood water comes on to his land he must not take active steps to turn it on to his neighbour's property."<sup>81</sup>

After examining the riparian doctrine at common law, the court concluded that riparian rights refer to the rights to the flow and use of water in water-courses and that they do not refer to those rights generally connected with land, such as trespass, nuisance, and negligence. The court concluded:

"The *Water Act* 1912 (N.S.W.) has, it is true, altered the common law. But this alteration is only to take away from riparian owners the right which they possessed at law to the use, flow and control of flowing water on rivers and lakes and of water conserved in artificial works. The Act does not interfere with common law rights to damages or other remedy based upon damage, brought about by wrongful or tortious conduct of a neighbouring occupier. These subjects stand outside the scope of the Act ... The Act itself does not suggest that it intended to take away any right to damage founded upon nuisance or negligence. Indeed the scheme of the Act, as its provisions show, indicate the contrary view. ... The Act is ... designed partly to prevent disputes between neighbouring occupiers or landowners as to the beneficial use of flowing water and partly to give effect to schemes for irrigation, drainage, etc by placing all such questions or matters under the jurisdiction of a body representing the Crown and divesting them from the ambit of private controversy."<sup>82</sup>

The *Hanson Case* was distinguished by observing that it involved an obstruction to a natural channel of a watercourse, not a floodway outside the natural channel.<sup>83</sup> Therefore, the court held that the *Water Act* 1912-1946 did not abolish the plaintiff's right of action under the common law and affirmed the granting of damages.

The High Court of Australia affirmed an appeal. In *Thorpe's Ltd. v. Grant Pastoral Co. Pty. Ltd.*<sup>84</sup> it approved of the New South Wales Supreme Court's rationale, holding:

"[T]he plaintiff here is not relying upon any special right vested in him by virtue of riparian ownership ... Here the plaintiff is not asserting any right to the use or flow or control of water, or any right dependent upon, or in any connection with, the fact that its land abuts upon a river. Its action is an ordinary action of nuisance. ... The cause of action is the alleged throwing on the plaintiff's land of water, silt and debris with resultant damage. The acts alleged are equally lawful, or equally wrongful, whether the plaintiff's land is riparian land or not. The plaintiff's position would be precisely the same if the nearest point of its land to the river were miles away from the rivers."<sup>85</sup>

The Court distinguished the *Hanson Case* in the same fashion as had the New South Wales Supreme Court.

But in a dictum in his opinion, Fullagar, J., made some comments which threw the accepted interpretation of the *Water Act* 1912-1946 into considerable confusion. He said:

"... I feel bound to say that I regard the correctness of [*the Hanson*] decision as open to grave question ...

"... [T]his intention to cure the disease by killing the patient is in itself a very curious intention to attribute to the legislature. I should have thought ... that the real object of the *Water Rights Act* 1896 ... was to enable the Crown, in a country in which water is a comparatively scarce and important commodity, to exercise full dominion

81. *Grant Pastoral Co. Pty. Ltd. v. Thorpe's Ltd.* (1953) 54 S.R.(N.S.W.) 129, 137 (per Herron, J.).

82. *Id.* at 142-43, 71 W.N.(N.S.W.) 101, 101-02 (per Herron, J.).

83. Owen, J., dissented on the ground that perennial streams with well-defined channels are the exception rather than the rule in New South Wales and that, therefore, the *Water Rights Act* 1896 was intended to apply to intermittent and ill-defined streams such as the floodway in question.

84. (1954-55) 92 C.L.R. 317.

85. *Thorpe's Ltd. v. Grant Pastoral Co. Pty. Ltd.* (1954-55) 92 C.L.R. 317, 329 (per Fullagar, J.).

over the waters of rivers and lakes and to undertake generally the conservation and distribution of water. For the attainment of that object it was not necessary to destroy anybody's rights, but it was necessary to give to the Crown ... overriding rights to which private rights must, if need arise, give way.

"The effect given to the statute in *Hanson's Case* means that a riparian proprietor has no remedy as of right if a river is damaged by an upper owner so that no water reaches him, or if it is polluted and poisoned by the refuse of a factory. ... The view which I am disposed to take is that the Act does not directly affect any private rights, but gives to the Crown new rights—not riparian rights—which are superior to, and may be exercised in derogation of, private riparian rights, but that, until those new and superior rights are exercised, private rights can and do co-exist with them."<sup>86</sup>

Although Fullagar, J., added that his remarks were not a concluded opinion,<sup>87</sup> Dixon, C.J., felt it necessary to strongly emphasize that any opinion on the correctness of the *Hanson* decision should be reserved until a proper case was brought before the Court.<sup>88</sup>

Just what Fullagar, J. meant is not clear, but it is evident to me that he did not understand the degree of control over sources of water that is required in an arid environment. Perhaps Fullagar, J. meant that riparian rights exist only where the Crown has not occupied the field by legislation and implementation of that legislation. If the Court would construe the diversion licensing statutes as comprehensive legislation occupying the field, then his dictum implies no change from the present situation. The diversion licensing statutes and the administrative control of sources of water built upon them will not have been placed in jeopardy. The decision in *Hanson* would be the correct one under an "occupation of the field" theory as well as under the "vesting" theory actually adopted in that case. But perhaps Fullagar, J. meant that the diversion licensing statutes have not supplanted common law riparian rights, but instead co-exist with them. Then the Australia states are faced with the horrible legal and administrative morass of residual riparian rights California has been trying to cope with since the landmark decision of *Lux v. Haggin* was handed down in 1886.<sup>89</sup> I strongly recommend against the latter interpretation, because it not only throws the meaning of the "nationalization" statutes into doubt, but it also raises the thorny question about the extent and effect of residual riparian rights.<sup>90</sup>

In 1966 the High Court of Australia decided a second case which clarifies somewhat the question of the scope of the "nationalization" statutes. In *Beaudesert Shire Council v. Smith*,<sup>91</sup> the Court relied on a different theory of action to give relief under the common law in a water rights situation. Under a Queensland diversion licence, plaintiff had pumped water from a natural pool in a riverbed to irrigate 20 acres of his land. Thirteen years after the licence was issued, the shire road authority, without obtaining the required permit, excavated a large quantity of gravel from the riverbed at that location and destroyed the natural pool. Plaintiff licensee was no longer able to obtain water from the river because water could not collect at his pump site under the new conditions and he brought an action for damages.

The Court found that the Queensland Water Act vests the bed and banks of watercourses and the right to its flow in the Commissioner of Irrigation and Water Supply.<sup>92</sup> It held that Section 14 of that Act<sup>93</sup> gave the licensee the right

86. *Id.* at 330-31.

87. *Id.* at 331, quoted in text accompanying note 131, *infra*.

88. *Id.* at 324.

89. (1886) 69 Cal. 255, 4 P. 919, 10 P. 674.

90. See note 149, *infra*.

91. (1966) 120 C.L.R. 145, [1966] A.L.R. 1175 (Cth.).

92. Water Act 1926-1962 (Qld.) §.4, 6-7.

93. Water Act 1926-1962 (Qld.) §.14.

to quiet enjoyment of his licensed work, the pump, but not to quiet enjoyment of either the natural pool from which water was pumped or the flow of the river to the pump intake.<sup>94</sup> It held that the Act did not confer any common law riparian rights that gave the licensee a right to preservation of the pool or to the flow.<sup>95</sup> In addition, the Court held that the scheme of the Act rebutted plaintiff's assertion that riparians retained any common law riparian rights including any of the maintenance of flow existing at the time the pump was installed.<sup>96</sup> Hence, plaintiff could not make out a case either under a riparian rights theory or under the Act.

Although it could find no case made out under theories of negligence, breach of statutory duty, public nuisance, or private nuisance, the Court did affirm the award of damages under another theory, action on the case.<sup>97</sup> Discussing a number of English cases cited in Kiralfy's historical study, *The Action on the Case*,<sup>98</sup> the Court concluded:

"[I]t appears that the authorities cited do justify a proposition that, independently of trespass, negligence or nuisance but by an action for damage upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another, is entitled to recover damages from that other. It may be that a wider proposition could be justified, but the proposition we have stated covers this case and leads us to the conclusion that the appellant is liable to the respondents for loss occasioned by its unlawful trespass in removing gravel from the riverbed."<sup>99</sup>

In adopting the theory of trespass on the case, the Court generated an argument about the present existence of that cause of action.<sup>100</sup> But, by doing so, it confirmed its earlier suggestions that not all common law rights incident to water were abolished by the "nationalization" statutes.

#### 4. Discussion

In my opinion, all of the cases discussed above, except *Rapoff* and Fullagar's, J. dictum in *Thorpes*, were for the most part correctly decided.<sup>101</sup> Together they hold that the "nationalization" statutes have abolished the common law riparian rights to the use and flow of water in watercourses based on ownership of land abutting on a watercourse, but have not abolished the other common law rights based on other theories of action which are grounded on land ownership regardless of location and are only incidentally related to water.

Clark, Myers, and Renard disagree. In their extensive analysis of the Victorian and New South Wales Water Acts, they argue that most of the cases discussed above have been incorrectly interpreted and that not all common law

94. *Beautesert Shire Council v. Smith* (1966) 120 C.L.R. 145, 151, [1966] A.L.R. 1175, 1177 (Cth.) (per Taylor, Menzies & Owen, JJ.).

95. *Ibid.*

96. *Ibid.* Dworkin and Harari disagree. Although common law riparian rights against the Crown may have been abolished, they see no reason why a licensee should not have a common law remedy against unauthorized diversions. G. Dworkin & A. Harari, 'The Beautesert Decision-Raising the Ghost of Action upon the Case,' (1967) 40 *Australian Law Journal* 296, 301.

97. *Beautesert Shire Council v. Smith* (1966) 120 C.L.R. 145, 151-52, [1966] A.L.R. 1175, 1177-78 (Cth.) (per Taylor, Menzies & Owen, JJ.).

98. K.R. Kiralfy, *The Action on the Case* (1951).

99. *Beautesert Shire Council v. Smith* (1966) 120 C.L.R. 145, 156, [1966] A.L.R. 1175, 1180 (Cth.) (per Taylor, Menzies & Owen, JJ.).

100. For a horrified reaction to the High Court's seeming creating of a new cause of action, see G. Dworkin & A. Harari, *supra* note 96 at 347.

101. My agreement does not extend to the rationale of the *Beautesert* decision, about which I express no opinion. Furthermore, I do not agree with the dictum of Fullagar, J. in *Thorpe's* about the meaning of the *Hanson* decision.

rights to the use and flow in watercourses have been abolished.<sup>102</sup> *Rapoff v. Velios*<sup>103</sup> gives weight to their position and relies heavily on the same authority they cite, Fullagar's, J. dictum in *Thorpes*. Although conceding that the parliamentary debates show that the Victorian "nationalization" provision was designed to make impossible "litigation of private rights in surface streams,"<sup>104</sup> they suggest that such a comprehensive purpose may not have been intended by the similar provision in New South Wales.<sup>105</sup> They interpret the English and Australian cases as stating that common law riparian rights are a "limited usufructuary right" vested in the owners of land abutting on watercourses which give them a right to the use of and the maintenance of flow of water in those watercourses.<sup>106</sup> After examining various possible interpretations of the scope of the "nationalization" provisions, they conclude that the holding of the *Hanson* case<sup>107</sup> that all riparian rights were abolished is incorrect. They interpret the dictum of Fullagar, J., in *Thorpe's*<sup>108</sup> as saying that private riparian rights are divested only to the extent necessary to permit the states to exercise their functions under the diversion licensing provisions.<sup>109</sup> They assert that common law riparian rights continue to exist unabated on streams in New South Wales where the Water Conservation and Irrigation Commission has failed to exercise its licensing powers<sup>110</sup> and in Victoria and other states under the same circumstances in the rare instances either where water frontages were not reserved from alienation by the Crown<sup>111</sup> or where the existence of riparian rights is not inconsistent with the exercise of the licensing agencies' powers.<sup>112</sup> The primary instance of retained private rights they pose is the right to maintenance of flow where an upper riparian has diverted or obstructed water without benefit of a licence or has diverted water in excess of the licensed diversion which interferes with the lower riparian's statutory right to divert water for domestic, livestock, and household garden purposes.<sup>113</sup> In addition, they point out that certain other common law rights in water have not been abolished.<sup>114</sup>

102. S.D. Clark & A.J. Myers, 'Vesting and Divesting: The Victorian Groundwater Act 1969,' (1969) 7 *Melbourne University Law Review* 237, 244-257; S.D. Clark & I.A. Renard, 'The Riparian Doctrine and Australian Legislation', (1970) 7 *Melbourne University Law Review* 475, 494-506.

103. [1975] W.A.R. 27.

104. S.D. Clark & A.J. Myers, *supra* note 102, at 240; S.D. Clark & I.A. Renard, *supra* note 102, at 4487-89.

105. S.D. Clark & I.A. Renard, *supra* note 102, 489-90.

106. S.D. Clark & A.J. Myers, *supra* note 102, at 240-42, S.D. Clark & I.A. Renard, *supra* note 102, at 477-79. Subject to various interpretations about the extent to which upper riparians may make consumptive diversions without being subject to actions for diminution of flow to lower riparians, this is an accurate statement of riparian rights. The dichotomy between the concepts of the right to use and the right to maintenance of flow is a basic contradiction within the riparian doctrine and has been the source of a great deal of litigation. Each common law jurisdiction has had to decide which element to emphasize. That choice has led to the two major interpretations of riparian rights, the "natural flow" doctrine and the "reasonable use" doctrine. See note 136, *infra*, for discussions of the background to this problem and of the choices made by the English and Australian courts.

107. *Hanson v. Grassy Gully Gold Mining Co.* (1900) 21 L.R.(N.S.W.) L. 271, 17 W.N.(N.S.W.) 187.

108. *Thorpe's Ltd. v. Grant Pastoral Co. Pty. Ltd.* (1954-55) 92 C.L.R. 317, 330-31.

109. S.D. Clark & A.J. Myers, *supra* note 102 at 243-49; S.D. Clark & I.A. Renard, *supra* note 102 at 494-99. Helmore also interprets *Thorpe's* in this way. B.A. Helmore, *The Law of Real Property in New South Wales* (2d ed. 1966) 57.

110. S.D. Clark & I.A. Renard, *supra* note 102, at 497-98, 500, 505.

111. *Id.* at 505-06.

112. *Id.* at 498-99.

113. *Id.* at 500-01, 504-05.

114. *Id.* at 498; S.D. Clark & A.J. Myers, *supra* note 102, at 255-57.



Clark, Myers, and Renard are, in my opinion, incorrect in their conclusions. They rely heavily on several Australian cases for the proposition that all common law riparian rights are not divested by statutes creating a governmental water use regulatory power unless specific provisions divest those rights. They interpret those cases as stating that the water use and flow right "nationalization" provisions themselves do not vest in the states all common law riparian rights. Their reliance on those cases seems unwarranted because those cases either (1) involve statutes creating limited water regulatory powers rather than comprehensive ones or (2) do not involve statutory rights conflicting with common law rights.

In particular, Clark, Myers, and Renard rely on the *Jones and Thorpe's* cases<sup>115</sup> to support their view that not all common law riparian rights had been abolished by the water "nationalization" statutes.<sup>116</sup> First, they argue that although there is no generally recognized rule of statutory construction "the general words are incapable of interfering with private rights and that such rights can only be trespassed upon where express power is given to do so."<sup>117</sup> Nonetheless recent Australian and Canadian cases involving riparian rights do require "clear and explicit divesting provisions."<sup>118</sup>

For this proposition they rely first on *H. Jones & Co. Pty. Ltd. v. Municipality of Kingborough*.<sup>119</sup> That case involved a bill for an injunction against a proposed municipal diversion under statutory authority which would impair downstream riparian diversion rights. The municipality alleged that it had the right to divert the water under a section in the Local Government Act which conferred "the absolute control and regulation" of water supplies in rivers within its jurisdiction.<sup>120</sup> In holding that common law riparian rights had not been divested from riparian landowners, Dixon J. said:

"but riparian rights are incidents or property: there is no indication of any intention to destroy them and the bare vesting of the stream is not an apt or sufficient way of doing so."<sup>121</sup>

In relying on that passage and on that case, Clark and Renard infer more from the case than it will yield. *Jones* does not involve comprehensive vesting provisions such as are found in the Queensland, New South Wales and Victorian acts. While the latter appear to encompass all watercourses in those states, the Tasmanian Local Government Act expressly makes a municipality's vested rights in watercourses "subject to the previously existing rights of any riparian proprietors to the use of the water flowing in any such ... watercourse."<sup>122</sup> Because plaintiff's riparian rights antedated the municipality's statutory rights, the municipality was not entitled to divert water to the injury of plaintiff and the High Court reversed the decision of the Tasmanian Supreme Court denying the injunction requested.<sup>123</sup> Dixon, J.'s. comment, therefore, is declarative of the law

115. *H. Jones & Co. Pty. Ltd. v. Municipality of Kingborough* (1950) 82 C.L.R. 282; *Thorpe's Ltd. v. Grant Pastoral Co. Pty. Ltd.* (1954-55) 92 C.L.R. 317.

116. S.D. Clark & A.J. Myers, *supra* note 102, at 249-50; S.D. Clark & I.A. Renard, *supra* note 102, at 494-505.

117. S.D. Clark & I.A. Renard, *supra* note 102, at 496, quoting *Attorney-General (Canada) v. Hallet & Carey Ltd.* [1952] A.C. 427, 450-51 (Can.).

118. S.D. Clark & I.A. Renard, *supra* note 102, at 496.

119. (1950) 82 C.L.R. 282.

120. Local Government Act 1906-1947 (Tas.) §.209.

121. *H. Jones & Co. Pty. Ltd. v. Municipality of Kingborough* (1950) 82 C.L.R. 282, 322, quoted by S.D. Clark & I.A. Renard, *supra* note 102, at 496, and in part by S.D. Clark & A.J. Myers, *supra* note 102, at 249.

122. Local Government Act 1906-1947 (Tas.) §.209.

123. *Per* Latham, C.J.: *H. Jones & Co. Pty. Ltd. v. Municipality of Kingborough* (1950) 82 C.L.R.

where a water regulatory statute does not purport to divest riparians of their common law water use rights.

Clark and Renard also rely on *Upper Ottawa Imp. Co. v. Hydro-Electric Power Comm'n*<sup>124</sup> for the proposition that divesting of common law riparian rights occurs only if the statute explicitly divests those rights. The case involved a claim for damages for injuries to plaintiff's right to float logs in a large river. Relying on a series of statutes which required the construction of log chutes in dams on rivers used for floating logs, plaintiff claimed that its floatage right had been impaired by the construction of several large power dams. Although log chutes of adequate size were provided at each dam, plaintiff claimed it was injured because the reservoirs behind the dams so reduced the strength of the current that logs could no longer be floated freely down the river but had to be towed in rafts on the reservoirs for a total distance of 90 miles. Plaintiff asserted that enactment of the statutes requiring installation of log chutes at dams impliedly divested riparians of their unfettered right to construct dams. The statute, therefore, gave loggers a right to utilize the natural current of the river to propel logs.

The Canadian Supreme Court rejected that argument. Instead it held the log chute statute regulated the relationship between riparians each of whom was exercising his common law water rights. In holding that the floatage right of loggers co-exists with private riparian rights, the Court said:

"We are asked to say in the present matter that these ancient rights of the riparian owner, so long embedded in the common law, have been taken away by inference, a conclusion which I find impossible to reach. Had the legislature intended that these rights should be restricted to any greater extent than has been done by the statute, it would, no doubt, have said so in clear terms."<sup>125</sup>

In relying on that language and on that case, Clark and Renard fail to recognize that floatage rights of members of the public on large rivers in North America long have been recognized as common law rights and that they have always co-existed with common law rights of riparians to use water and to construct dams. The common law in most riparians law jurisdictions in North America states that persons exercising the public floatage right and riparians exercising their right to construct dams are required to share the common resource. Neither of them can assert a right to exercise their right without any interference by the other.<sup>126</sup> Log chute statutes were enacted in many North American

282, 298, 307; per Fullagar, J.: *id.* at 341-42, 345. Dixon J., dissented on the factual ground that there was enough water in the river for both plaintiff's and the municipality's diversions and that, therefore, plaintiff had not stated a cause of action.

124. [1961] Can. S.C.R. 486, 28 D.L.R. 2d 276, *affirming* [1959] Ont. 473, 19 D.L.R. 2d 111, *which affirmed* (1958) 16 D.L.R. 2d 752 (Ont. H. Ct.)

125. *Upper Ottawa Imp. Co. v. Hydro-Electric Power Comm'n* [1961] Can. S.C.R. 486, 501, 28 D.L.R.2d 276, 289, quoted by S.D. Clark & I.A. Renard, *supra* note 102, at 496.

126. *Davis v. Hayden* (1864) Stevens' Dig. 786; *McLaren v. Buck* (1876) 26 Up. Can. C.P. 539; *Ward v. Township of Grenville* (1902) 32 Can. S.C.R. 510; *Watson v. Patterson* (1903) s N.B. Eq. 488; *James Richardson & Co. v. Paradis* (1915) 24 Que. K.B. 16, 23 D.L.R. 720; *Wade v. Nashwaak Pulp & Paper Co.* (1918) 46 N.B. 11, 43 D.L.R. 141; *Quyon Milling Co. v. E.B. Eddy Co.* [1926] Can. S.C.R. 194 [1926] 1 D.L.R. 1143, *affirming* (1925) 39 Que. K.B. 341; *Hugh W. Simmons Ltd. v. Foster* [1955] Can. S.C.R. 324, [1955] 2 D.L.R. 433, *varying on other grounds* (1953) 32 Mar. Prov. 243, [1954] 3 D.L.R. 425 (Newf.); *Davis v. Winslow* (1863) 51 Me. 264; *Burke County v. Catawba Lumber Co.* (1895) 117 N.C. 731, 21 S.E. 941; *Haines v. Welch* (1886) 14 Ord. 319, 12 P. 502; *Miller v. State* (1911) 124 Tenn. 293, 137 S.W. 760; *Gaston v. Mace* (1889) 33 W. Va. 14, 10 S.E. 60; *A.C. Conn. Co. v. Little Suamico Lumber Mfg. Co.* (1889) 74 Wis. 652, 43 N.W. 660. See J.W. Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin 1836-1915*, at 161-62 nn. 35, 39 and at 538-39 nn 6, 7, 9, 14.

jurisdictions, not to create a new right inconsistent with common law riparian rights, but to make explicit the pre-existing common law right of members of the public to float logs.<sup>127</sup>

*Upper Ottawa* cannot be said to declare that common law rights are not divested unless there is explicit statutory divesting language; it holds only that private riparian rights are not destroyed by inference because other co-existing common law water rights are specially protected by statute. In that case, the Court found that plaintiff's assertion of divesting by implication was grounded on an unwarranted interpretation of the relationship between water use and floatage rights.

Clark, Myers, and Renard have cited no case holding that a statute which comprehensively vests water rights in a governmental agency does not divest private water rights in the absence of explicit language specifically divesting those private rights. The *Jones* and *Upper Ottawa* cases are weak reeds on which to support an assertion that the Australian and Canadian courts recently have been requiring such divesting provisions. The first case involved a statute specifically preserving pre-existing private riparian rights and the second case involved a statutory definition of a pre-existing common law relationship between riparians and members of the public.

Clark, Myers, and Renard make a second argument. Relying on the previously quoted dictum by Fullagar, J., in *Thorpe's Ltd. v. Grant Pastoral Co. Pty. Ltd.*,<sup>128</sup> they argue that continued existence of common law riparian rights is consistent with the diversion licensing powers granted to the states. Arguing that property rights are vested in a governmental body only to the extent necessary to make possible the statutory purpose, Clark and Renard assert that the New South Wales Water Act restricted the state's right to the use and flow of water in watercourse to the exercise of its powers to construction facilities, distribute water, and license structure and water uses.<sup>129</sup> From this they conclude:

"On this view, the riparian right to enjoin interference with the flow of a stream would only abate in circumstances where the Crown or Commission exercised its powers in a manner inconsistent with the continued existence of the riparian's right. Thus, if the Commission granted a licence to divert water, a lower riparian would not be able to invoke his common law right to enjoin that use. If, however, the diverter took water

It should be remembered that most North American jurisdictions have abandoned the English tidal test of navigability and have substituted more expansive tests reflecting the existence of the panoply of inland rivers and lakes suitable for inland navigation. Many jurisdictions have adopted a test requiring capacity for commercial navigation. See, e.g. *Rowe v. Titus* (1849) 6 N.B.R. 326; *R. v. Robertson* (1882) 6 S.C.R. 52; *Attorney-General (Que.) v. Fraser* (1906) 37 S.C.R. 577, *aff'd sub. nom. Wyatt v. Attorney-General (Que.)* [1911] A.C. 489; *Lakeside Park Co. v. Forsmark* (1959) 396 Pa. 398, 153 A.2d 486; *The Daniel Ball* (1870) 77 U.S. (10 Wall.) 557. Other jurisdictions have adopted a test for navigability or floatability specifically related to the needs of the logging industry which calls for capability of floating sawlogs. See, e.g., *Watson v. Patterson*, *supra*; *Thomson v. Halifax Power Co.* (1914) 47 N.S.R. 536, 16 D.L.R. 424; *Wade v. Nashwaak Pulp & Paper Co.*, *supra*; *Davis v. Winslow*, *supra*; *Olson v. City of Merrill* (1877) 42 Wis. 203; *Lamprey v. Metcalf* (1893) 52 Minn. 181, 53 N.W. 1139. American "saw log" test decisions in 10 jurisdictions are listed at A.W. Stone, 'Public Rights in Water Uses and Private Rights in Land Adjacent to Water', in 1 *Water and Water Rights* (R.E. Clark, ed., 1967) 177, 216 n. 69. It is the application of such an expanded test of navigability that results in the common law public right to float logs coexisting with the common law riparian right to construct a dam in *Upper Ottawa*.

127. See *Thomson v. Halifax Power Co.* (1914) 47 N.S.R. 536, 16 D.L.R. 424, 429, quoting from *MacLaren v. Attorney-General (Quebec)* [1914] A.C. 258, 274 (Que.).

128. (1955) 92 C.L.R. 317, 331, quoted by S.D. Clark & I.A. Renard, *supra* note 102, at 497, and in part by S.D. Clark & A.J. Myers, *supra* note 102, at 249. See the quotation and the facts in *Thorpe's* at text accompanying note 87, *supra*.

129. S.D. Clark & I.A. Renard, *supra* note 102, at 497.

without Commission approval, or in excess of the amount approved by his licence, there would have been no attempt by the Crown to exercise its superior rights and the common law right would survive."<sup>130</sup>

The dictum of Fullagar, J. deserves careful consideration, but it is dictum nonetheless. A conflict between common law riparian rights and the powers and rights of the Water Conservation and Irrigation Commission under the Water Act 1912-1946 was not before the Court. The case involved an action for damages based on nuisance or negligence. Previously unflooded land had been flooded by waters penned back by a levee constructed across a floodway. Actions arising from blockage of floodways are not considered to be encompassed by the scope of common law riparian rights, but instead by other common law rights, as Fullagar, J. himself pointed out:

"[T]he plaintiff here is not relying upon any special right vested in him by virtue of riparian ownership ... Here the plaintiff is not asserting any right to the use or flow or control of water, or any right dependent upon, or in any way connected with, the fact that its land abuts upon a river. Its action is an ordinary action of nuisance."<sup>131</sup>

In view of the fact that Dixon, C.J. chided Fullagar, J. for speculating on matters not before the Court,<sup>132</sup> one should not rely too heavily on the dictum by Fullagar, J., that the Water Act did not abolish all common law riparian rights. While that dictum may indicate an inclination of the High Court to limit the scope of the water "nationalization" and diversion licensing provisions, I would be reluctant to place very much confidence in a gratuitous statement in a case not involving any riparian rights.

Although Fullagar J's comments on the effect of the New South Wales water use rights "nationalization provision was dictum, nonetheless it was used verbatim as decisive authority in *Rapoff v. Velios*.<sup>133</sup> That case recently held that a similar "nationalization" provision in Western Australia did not abrogate common law riparian rights but did as Fullagar, J. suggested, merely created superior Crown regulatory rights which replaced common law rights only to the extent the Crown rights were exercised inconsistently.<sup>134</sup> *Rapoff* established a direct conflict of authority with *Hanson* and the other earlier cases and takes a legal position which I think is unsound and inappropriate to Australian climatic and hydrologic conditions.

Clark and Renard go further. Jumping off from the dictum of Fullagar, J., they suggest without analysis that the diversion licensing statutes in New South Wales and Victoria are not comprehensive in their application to the watercourses in those states and do not constitute comprehensive regulatory schemes. The language in the "nationalization" statutes does not permit that interpretation. By their very terms, the "nationalization" statutes "vest" in the states "the right to the use and flow and to the control" of water in watercourses.<sup>135</sup> Com-

130. *Ibid.*

131. *Thorpe's Ltd. v. Grant Pastoral Co. Pty. Ltd.* (1955) 92 C.L.R. 317, 329.

132. Dixon, C.J., said:

"... I think that the question whether the decision in *Hanson v. Grassy Gully Gold Mining Co.* can be supported should be reserved for further consideration, that is to say until a case comes before us in which its correctness is directly in issue and it is fully argued."

132 (a) *Id.* at 324.

133. [1975] W.A.R. 27.

134. *Rapoff v. Velios* [1975] W.A.R. 27, 30-31.

135. Water Act 1912-1973 (N.S.W.) §.4A(1); Water Act 1926-1973 (Qld.) §.4(1); Control of Waters Act 1919-1975 (S.A.) §.4(1); Water Act 1958, Act No. 6413 (Vic.) §.4(1); Rights in Water and Irrigation Act 1914-1974 (W.A.) §.4(1); Control of Waters Ordinance 1938-1971 (N.T.) §.3(1); Lake Burley Griffin Ordinance 1965-1968 (A.C.T.) §.11(1); Lake Ginninderra (Temporary Control) Ordinance 1973, Ordinance No. 37 (A.C.T.) §.3(1). See Water Act 1902-1906

mon law riparian rights, which the "nationalization" statutes were intended to abolish, also are defined in terms of rights to the use and flow of water. They involve two elements: (1) a right to make reasonable uses of water in watercourses, and (2) a right to have the flow of water in such watercourses maintained subject only to the reasonable uses made by upstream riparians.<sup>136</sup> Hence, rights which are classified by the common law as riparian rights and the rights vested in the states by the "nationalization" statutes are coextensive. That means there can be no residuum of private riparian rights.

(N.S.W.) §.4(1) (for A.C.T.). The South Australian Act and the Northern Territory Ordinance also vest "the property in" such water. *Ibid.*

136. Those ideas were first expressed in 1827 in an American case, *Tyler v. Wilkinson* (1827) 4 Mason 397, 24 Fed. Cas. 472 (No. 14,312) (C.C.D.R.I.). They were adopted in England in 1851 by *Embrey v. Owen* (1851) 6 Ex. 353, 369, 155 E.R. 579, 585-86. They became the law throughout the British Empire in 1858 as a result of the Privy Council decision in *Miner v. Gilmour* (1858) 12 Moo. P.C. 131, 156, 14 E.R. 861, 870 (Low. Can.).

Riparian rights, containing the same two elements, were recognized in Australia by several later cases: *Lord v. Commissioners of the City of Sydney* (1859) 12 Moo. P.C. 473, 14 E.R. 991 (N.S.W.); *Hood v. Corporation of Sydney* (1860) 2 Legge 1294; *Pring v. Marina* (1866) 5 S.C.R. (N.S.W.) 390; *Dunn v. Collins* (1867) 1 S.A.L.R. 126; *Howell v. Prince* (1869) 8 L.R. (N.S.W.) L. 316; *Lomax v. Jarvis* (1885) 6 L.R. (N.S.W.) L. 237, 2 W.N.(N.S.W.) 33; *Macnamara v. Minister for Works* (1894) 15 L.R.(N.S.W.)Eq. 173; *H. Jones & Co. Pty. Ltd. v. Municipality of Kingborough* (1950) 82 C.L.R. 282; *Rapoff v. Velios* [1975] W.A.R. 27 See also, *Swindon Waterworks Co. v. Wilts & Berks Canal Nav. Co.* (1875) L.R. 7 H.L. 697; *McCartney v. Londonderry & L.S. Ry.* [1904] A.C. 301 (Ir.).

American courts generally have come to recognize that a riparian may make reasonable uses of water in watercourses even though there may be some diminution in flow. See, e.g., *Tyler v. Wilkinson* (1827) 4 Mason 397, 24 Fed. Cas. 472 (No. 14, 312) (C.C.D.R.I.); *Bliss v. Kennedy* (1867) 43 Ill. 67; *Red River Roller Mills v. Wright* (1883) 30 Minn. 29, 15 N.W. 167; *Harris v. Brooks* (1955) 225 Ark. 436, 283 S.W. 2d 129. However, the English courts apparently have been much more divided on the issue. Some decisions have emphasized the right to reasonable use even though there is a sensible diminution in flow unless the lower riparian is injuriously affected. See, e.g., *Swindon Waterworks Co. v. Wilts & Berks Canal Nav. Co.* (1875) L.R. 7 H.L. 697, 704; *Nuttall v. Bracewell* (1866) L.R.2 Ex. 1, 9-10. But other decisions have emphasized a doctrine that the flow cannot be sensibly diminished as a result of any extraordinary use. See, e.g., *Young & Co. v. Bankier Distillery Co.* [1893] A.C. 691, 696, 698 (Scot.); *Stollmeyer v. Trinidad Lake Petroleum Co.* [1918] A.C. 485, 491-92 (Trinidad & T.). Even today the commentators are at variance whether to emphasize the natural flow or the reasonable use element of riparian rights. Compare A.S. Wisdom, *The Law of Rivers and Watercourses* (1962) 70-71, 76-78, with H.J.W. Coulson & U.A. Forbes, *The Law of Waters* (6th ed. 1952) 144-50.

In the days when common law riparian rights were still in force in Australia, the Australian courts seemed to prefer to emphasize the right of reasonable use. *Cooper v. Corporation of Sydney* (1853) 1 Legge 765, 772, *Dunn v. Collins* (1867) 1 S.A.L.R. 126, 136-37; *Lomax v. Jarvis* (1885) 6 L.R.(N.S.W.)L. 237, 242-44, 2 W.N.(N.S.W.) 33, 33. However, a recent High Court of Australia decision involving the extent of riparian rights emphasized the right to natural flow. *H. Jones & Co. Pty. Ltd. v. Municipality of Kingborough* (1950) 82 C.L.R. 282, 299-300. But that decision involved a proposed municipal diversion of 128,000 to 253,000 gallons per day from a total flow in the river of 1,600,000 to 3,000,000 gallons per day. Plaintiff irrigator used 900,000 gallons per day when irrigating and could be affected by the upstream migration of salt water to his intakes if the river flow were reduced too much. The High Court found that the proposed diversion would cause a sensible diminution in flow and proposed diversion would cause a sensible diminution in flow and granted an injunction to plaintiff. Although the High Court adopted "natural flow" language from English decisions, it can be argued that implicitly the Court was following the "reasonable use" interpretation which declares that what is considered to be reasonable depends upon the relationship of a particular use at a particular place with downstream uses. Hence, the same result could have been reached under "reasonable use". Dixon J. dissented on a more conventional interpretation of "reasonable use", that the proposed diversion would not normally interfere with plaintiff's irrigation diversions. The Western Australian Supreme Court also has examined the nature of common law riparian rights recently. After quoting language of Fullagar, J., in *Jones*, the court utilized "natural flow" language in holding that plaintiff was not entitled to relief since he had not suffered any sensible diminution in flow. *Rapoff v. Velios* [1975] W.A.R. 27, 28-19, 31-32.

Furthermore, contrary to what Clark, Myers and Renard imply, the "nationalization" and diversion licensing provisions together are comprehensive in nature and do not leave room for a residuum of private water use and flow rights. The Queensland Water Act "nationalizes" water use, flow and control rights in "the water . . . in all watercourses" which flow through or between the lands of two or more occupiers.<sup>137</sup> The New South Wales Water Act uses virtually identical language and in addition "nationalizes" "the water contained in or conserved by" and "works connected with or affecting the quantity or use of water in any" such body of water.<sup>138</sup> The Acts in South Australia, Victoria, Western Australia, the Northern Territory and the Australian Capital Territory "nationalize" water use, flow and control rights in any watercourse.<sup>139</sup> The language is those provisions would not seem to leave any watercourses unaffected. The acts in all states and territories except New South Wales prohibit all diversions except those provided for under the act.<sup>140</sup> They permit diversions or obstructions only under the licensing provisions or under the statutory riparian right.<sup>141</sup> The New South Wales Water Act does not contain a clause prohibiting diversions other than those which are licensed or which are authorized by the act under the statutory riparian right.<sup>142</sup> It does provide that the right of any occupier of the site of work connected with or affecting the quantity or use of water in a "nationalized" watercourse (1) to construct or use that work for the purposes of water conservation, irrigation, water supply drainage, flood control, or river relocation or (2) to take, use or dispose of the water contained, conserved, or obtained by the work is subject to the act.<sup>143</sup> The act provides for diversions or obstructions only under the licensing provisions or the statutory riparian rights.<sup>144</sup> The prohibition against unauthorized diversions employed in most acts and the New South Wales definition of statute application do not seem to leave for any unlicensed use, obstruction, diversion, or work except under the statutory riparian right.

It is difficult to conceive of any water course on which common law riparian rights have not been supplanted by force of the acts except in Tasmania and South Australia outside the River Murray basin. This conclusion is reinforced by the fact that none of the acts in all but those two states come into operation on particular watercourses only after specific proclamation as is the case under the

137. Water Act 1926-1973 (Qld.) §.4(1).

138. Water Act 1912-1973 (N.S.W.) §.4A(1), (3).

139. The language in each act varies, but each comprehends all watercourses. Control of Waters Act 1919-1975 (S.A.) §.2, 4(1); Water Act 1958, Act No. 6413 (Vic.) §.4(1); Rights in Water and Irrigation Act 1914-1974 (W.A.) §.2, 4(1); Control of Waters Ordinance 1938-1971 (N.T.) §.2, 3(1); Lake Burley Griffin Ordinance 1965-1968 (A.C.T.) §.11(1); Lake Ginninderra (Temporary Control Ordinance 1973, Ordinance No. 37 (A.C.T.) §.3(1).

The area outside the Lake Burley Griffin and Lake Ginninderra watersheds is subject to provisions utilizing the New South Wales language. See Water Act 1902-1906 (N.S.W.) §.4(1). (for A.C.T.). See text accompanying note 138, *supra*.

140. Water Act 1926-1973 (Qld.) §.6; Control of Waters Act 1919-1975 (S.A.) §.8(1); Water Act 1958, Act No. 6413 (Vic.) §.6(1); Rights in Water and Irrigation Act 1914-1974 (W.A.) §.6; Control of Waters Ordinance 1938-1971 (N.T.) §.5(1); Lake Burley Griffin Ordinance 1965-1968 (A.C.T.) §.11A(1), (2); Lake Ginninderra (Temporary Control) Ordinance 1973, Ordinance No. 37 (A.C.T.) §.6.

141. Water Act 1926-1973 (Qld.) §.9, 11; Control of Waters Act 1919-1975 (S.A.) §.2, 7, 15(1); Water Act 1958, Act No. 6413 (Vic.) §.14(1), 204(1); Rights in Water and Irrigation Act 1914-1974 (W.A.) §.14, 16; Control of Waters Ordinance 1938-1971 (N.T.) §.2, 7, 13(1); Lake Burley Griffin Ordinance 1965-1968 (A.C.T.) §.11A(1), (2).

142. The statutory riparian right is defined by Water Act 1912-1973 (N.S.W.) §.7(1). See Water Act 1902-1906 (N.S.W.) §.5 (for A.C.T.).

143. Water Act 1912-1973 (N.S.W.) §.4A(3), 9. See Water Act 1902-1906 (N.S.W.) §.7 (for A.C.T.).

144. Water Act 1912-1973 (N.S.W.) §.7(1), 10(1). See Water Act 1902-1906 (N.S.W.) §.5, 10 (for A.C.T.).

South Australian act.<sup>145</sup> The language of the "nationalization" and diversion licensing acts does not support the conclusions of Clark, Myers, and Renard (1) that only the riparian right to divert was abolished, but not the right to maintenance of flow in certain circumstances, and (2) that the acts apply only to watercourses with respect to which the licensing agencies have exercised their statutory powers. The language of the acts makes clear that flow rights as well as use rights are subject to "nationalization" and that licenses are required for all diversions from all watercourses, except those authorized by the statutory riparian right. Furthermore, the licensing agencies assert such jurisdiction.<sup>146</sup> It is difficult to see how Clark and Renard can suggest that there are any watercourses to which the diversion licensing statutes have not been applied.

## 5. Conclusion

The questions about the extent of application of the Australian state water use rights "nationalization" and diversion licensing statutes cannot be laid to rest completely at this time. Although I am convinced that those statutes have completely abolished common law riparian rights and in their place have substituted comprehensive licensing systems, there remain the doubts raised by the dictum of Fullagar, J., in *Thorpe's* and its support in *Rapoff*. The arguments of Clark, Myers, and Renard seem to be very weak when the authority on which they rely is examined. But they are plausible and some possibility does exist that the High Court would follow the suggestion of Fullagar, J., if presented with a proper case. The decision in *Rapoff* supporting the dictum of Fullagar, J., should not be heavily relied upon since the question of the effect of the "nationalization" provision had not been argued at bar. It seems clear that the language and purpose of that provision and of the related diversion licensing provisions had not been subjected to rigorous analysis and argument. *Rapoff* is subject to the same infirmities as the dictum of Fullagar, J., on which it unquestioningly relied.

In my opinion, the decision in *Hanson v. rassy Gully Gold Mining Co.*<sup>147</sup> should be followed and the decision in *Rapoff v. Velios*<sup>148</sup> should not be accepted as appropriate authority. The water "nationalization" and diversion licensing statutes should be held to supplant completely common law riparian rights. The original purpose of the statutes was to eliminate private litigation over water use rights and the violence that was sometimes substituted for litigation. The principal virtue of the licensing systems was considered to be the requirement that all

145. The South Australian Act by its terms applies only to the River Murray above Mannum and to the remainder of the River Murray and to other watercourses in the state only if they are brought under the Act by proclamation. Control of Waters Act 1919-1975 (S.A.) §.3(1), (2). The Act is comprehensive within the areas subject to it.

146. *New South Wales*: Water Act Reg. 2(2) (N.S.W. Gov't Gaz. 128, Nov. 8, 1946); Water Conservatinn & Irrigation Commission (N.S.W.), *Enough Water?: Water Supplies for Rural Holdings* (July 1962) 13-14.

*South Australia*: Regulations of Oct. 25, 1934, under Control of Waters Acts, Reg. 2 (S.A. Gaz., Oct. 27, 1934); Interview with J.R. Dridan, Engineer-in-Chief, Engineering & Water Supply Dept., Adelaide, S.A., Nov. 7, 1963.

*Victoria*: J.R.C. Venables, 'Private Irrigation Schemes', (1967) 18 *Aqua* 192, 192-193 (*Aqua* is the house journal of the State Rivers & Water Supply Commission (Vic.)); J.R.C. Venables, 'Private Diversions for Irrigation', (1962) 13 *Aqua* 135, 135-36; N.G. Ferguson, *Handbook for the Guidance of Applicants for Licences or Permits* (State Rivers & Water Supply Commission (Vic.), rev. ed. 1954) 2.

*Northern Territory*: See Control of Waters Regulation 1962, No. 12(N.T.) §.4(1).

I have no information concerning assertion of licensing authority in Queensland, Western Australia, and the Australian Capital Territory.

147. (1900) 21 L.R. (N.S.W.) L. 271, 17 W.N. (N.S.W.) 187.

148. [1975] W.A.R. 27.

persons could obtain a right to divert, to construct headworks, and to receive flow for storage and diversion only by obtaining a license or under authority of the statutory riparian right. The state licensing agency was to be relied upon to allocate the scarce water resources among the various competing users. In particular, the ability of private landholders to monopolize water supplies by obtaining control of water frontages or by insisting upon maintenance of flow was to be eliminated. The original purposes of the "nationalization" and diversion licensing provisions are no less valid today. If lawsuits based on private riparian rights are to be permitted even under limited circumstances, the states' ability to completely control water allocations through a water use and flow right monopoly will be destroyed. Then the vexed question of the extent to which residual riparian rights have been preserved will be raised to plague both the licensing agencies and diverters alike.<sup>149</sup> It is better to deal exclusively with the statutory licensing systems.

Clark and Renard raised the question how the integrity of the licensing systems would be injured if downstream riparians were permitted to bring actions to enjoin unlicensed diversions or diversions in excess of licensed amount upstream.<sup>150</sup> There are two good reasons why such private riparian rights should not be recognized. First, unlicensed or excessive diversions are made contrary to the provisions of licensing statute. If a downstream riparian is to have any right of action to enjoin such diversions, they should be derived from the statute, not independently of it. Second, under common law riparian rights, every riparian has both a right to use water and to have flow maintained. They are contradictory rights. Generally the contradiction has been resolved to allow some use even though flow is reduced, although courts in various jurisdictions have adopted different formulations about the extent of flow reduction which will be permitted.<sup>151</sup> If a private right to maintenance of flow truly is grounded on common law riparian rights, then the riparian diverter should have a corollary right to use the water and to diminish the flow to some extent with respect to the private right of diversion of the complaining downstream riparian. To recognize such a private right flatly contradicts the purpose and language of the diversion licensing statutes. If the only right the downstream riparian has is the right to enjoin an unlicensed diversion, that right can hardly be said to be the riparian right recognized at common law. Instead it would be a right derived from the upstream diverter's violation of the diversion licensing statute.

In my view, the riparian rights of use and of flow maintenance cannot be severed. To abolish use rights while preserving certain flow rights in effect constitutes the creation of a new private right rather than the preservation of an old one. It would constitute a limited return to the strict "natural flow" theory of

149. I have discussed the residual riparian rights problem in my article, P.N. Davis, 'Australian and American Water Allocation Systems Compared', (1968) 9 *Boston College Industrial and Commercial Law Review* 647, 690-91. In the United States, the continued recognition of pre-existing vested riparian rights has rendered difficult effective and comprehensive state regulation of water diversions in the western states, in California in particular. See 1 W.A. Hutchins, *Water Rights Law in the Nineteen Western States* (U.S. Dept. of Agric. Misc. Pub. No. 1206, 1971) 200-06, 207-10; W. Hutchins, *Selected Problems in the Law of Water Rights in the West* (U.S. Dept. of Agric. Misc. Pub. No. 418, 1942) 30-34. In Mississippi, where regulation of diversions under prior appropriation was substituted for common law riparian rights in 1956, pre-existing vested riparian rights still constitute the basis of the vast bulk of diversion rights. Effective state regulation is virtually impossible there. See W.H. Champion, "Prior Appropriation in Mississippi—A Statutory Analysis", (1967) 39 *Mississippi Law Journal* 1, 16. Even when riparian diversion rights might constitute a low percentage of all diversion rights, the possibility of a riparian enforcing his rights at any time makes it impossible for a state agency to maintain effective control over 100 percent of a scarce water supply.

150. S.D. Clark & I.A. Renard, *supra* note 102, at 500-01.

151. See note 136, *supra*.



riparian rights which apparently prevailed in England between 1823<sup>152</sup> and the adoption of the modern "reasonable use" theory by *Embrey v. Owen* in 1851.<sup>153</sup> The better interpretation of the diversion licensing statutes would be to refuse to recognize any common law riparian rights, and if some private right of action is considered desirable, to recognize a right based on violation of the statutes.

The integrity of the state diversion licensing systems does not require that landowners be denied a private right to recover damages for injuries to their land, as distinguished from a private right to use water, to have it flow to their land, or to have its level maintained. That is the reason why the courts in their recent decisions have held that common law causes of action based on nuisance, negligence, trespass, and trespass on the case have not been affected by the water use rights "nationalization" statutes.

152. See e.g., *Wright v. Howard* (1823) 1 Sim. & St. 190, 57 E.R. 76; *Mason v. Hill* (1833) 5 B. & Ad. 1, 110 E.R. 692; *Acton v. Blundell* (1843) 12 M. & W. 324, 152 E.R. 1223.

The historical periods in which various water use doctrines were followed in England are analyzed in T.E. Lauer, 'Common Law Background of the Riparian Doctrine', (1963) 28 *Missouri Law Review* 60.

153. (1851) 6 Ex. 353, 369, 155 E.R. 579, 585-86.