NEW GOVERNANCE AND LEGAL REGULATION
When Does Collaboration Work?

Cameron Holley
Legal Governance CoRE
Macquarie Law School, Macquarie University

Outline

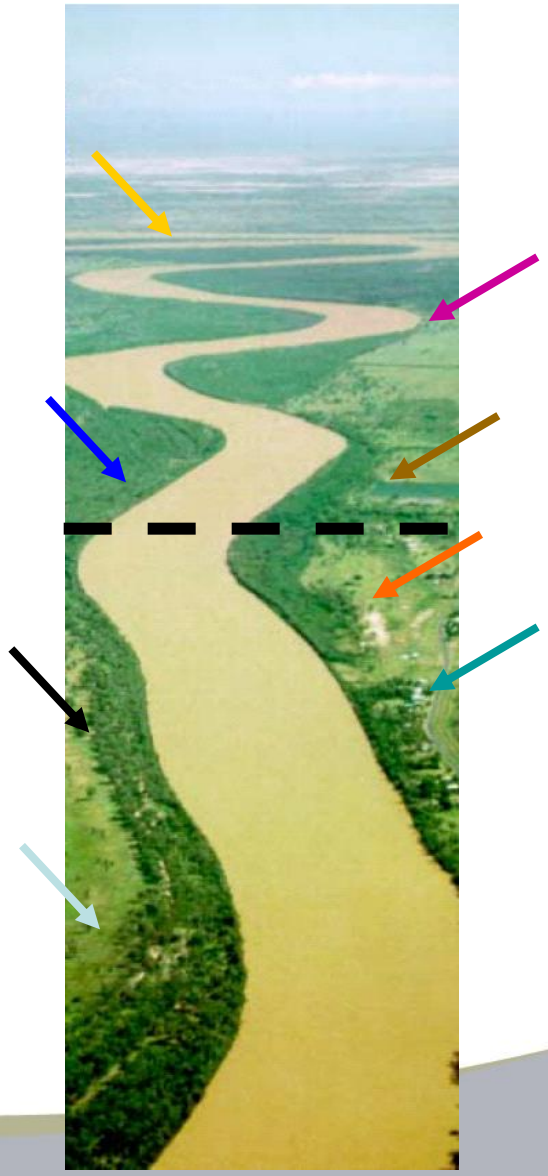
- Recap – New Environmental Governance
- The Question of Collaboration
- Methods
- Insights from Practice
- Lessons
  - Collaboration
  - Legal Regulation – gaps and hybridity

New Environmental Governance (NEG)

- a broad family of innovative modes of public governance defined by a set of principles - decentralised, collaborative, participatory, deliberative, adaptive
- brings public, private and community actors together to collaborate
- creates and governs through a “regional” jurisdiction (eg ecosystem)
- power is diffuse – decision making and implementation devolved to regional level, but government maintains overarching steering role through a framework of procedural and performance standards (De Burca 2010; Trubek & Trubek 2010; Karkkainen, 2004; Stewart and Jones, 2003)
- non binding agreements and ‘soft law’ instruments such (e.g. memorandums of understanding and guidelines) as opposed to ‘hard’ law (e.g. statutes)

Why do we need NEG?

- ‘Wicked’ environmental problems
  - crosses traditional jurisdictional boundaries
  - non-point source
  - involves multiple stakeholders
    - e.g. water runoff in rural and urban areas (Kettl, 2002)



Examples

- Global governance and earth system governance (Castells, 2008; Biermann, 2008; Biermann and Pattberg 2008)
- NEG
  - Water Framework Directive in the European Union (Scott and Holder 2006; Trubek & Trubek 2007; Sabel & Zeitlin 2008)
  - Great Lakes in USA/Canada (Karkkainen 2006)
  - Chesapeake Bay, CALFED Bay Delta and Habitat Conservation Plans in USA (Wiersema 2008; Orts and Coglianese 2008; Wilhere 2009)
  - Partnership for Development of Environmental Law in Africa (Kimani 2010)

Questions - Collaboration

- Under what conditions can we achieve successful collaboration?
  - the extent to which government intervention, law or incentives are needed and what forms these should take? (Menkell-Meadow 2008; Karkkainen 2006, 2008; Margerum 2007; Orts and Coglianese 2007; Head 2004,2009; Ostrom 1990; Fung & Wright 2003)

Law and New Governance

"There is more that needs to be done to work through the nature, role and significance of the new governance practices and its implications for law, regulation and public policy" (Trubek and Trubek, 2010; De Burca and Scott, 2006)

Law and New Governance

- Hybridity - default hybridity
  - induce people to “contract” out of standard regulatory frameworks and into new governance (Ayres and Gertner 1989; Ayres and Braithwaite 1992; Karkkainen 2006)

- Gap hypothesis
  - legal regulation resists (either tacitly or directly) the practice and processes of NEG
  - impedes developments which do not conform to traditional legal structures (Wilkinson 2010; De Burca and Scott 2006; Scott and Trubek 2002)

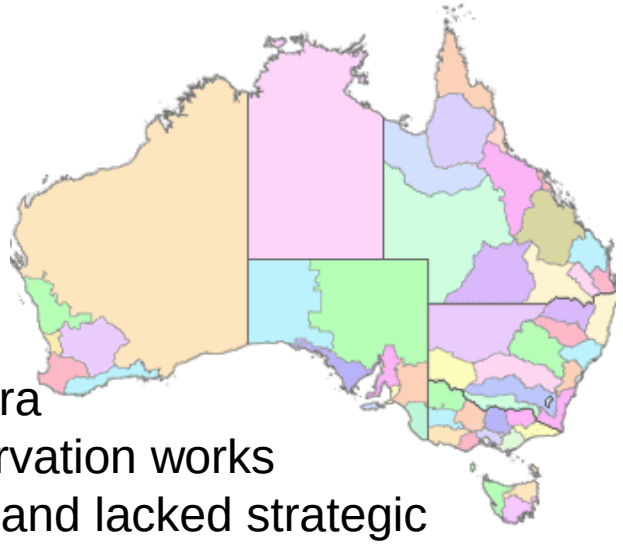
Methods

- Semi structured interviews and a document analysis
  - capture main interests involved or connected to these programs

- Programs
  - Regional Natural Resource Management in Queensland, Australia – 57 interviews
  - 2 collaborative natural resource initiatives in Canterbury, New Zealand
    - Living Streams Program (LSP) – 15 interviews
    - Collaborative Catchment Management (CCM) – 17 interviews

- Replications – 2 RNRM, 2 CCM, 3 LSP

Regional Natural Resource Management



- Natural Heritage Trust (“NHT”) (1997 to 2001)
  - $1.25 billion from the partial privatisation of Telstra
  - competitive grants program for on-ground conservation works
  - audit of NHT found that program was piecemeal and lacked strategic direction

- National Action Plan for Salinity and Water Quality (“NAP”) (2001–2008)
  - federal/state shared funding on a 50:50 basis ($1.4 billion).
  - catchment/regional outcomes targeting 21 priority regions

- Second phase of NHT (“NHT 2”) (2001 - 2008)
  - revised and extended the NHT initiative – biodiversity, sustainable agriculture and coastal environments
  - additional state/federal funding ($1.5 billion – state in-kind)
  - delivered through approx. 56 bioregions/catchments

Regional NRM

- National Action Plan for Salinity and Water Quality and Natural Heritage Trust 2 (2001 – 2008)
  - 14 regions in Queensland (some 100 000s km^2)
  - community based multi-stakeholder regional bodies
  - responsible for planning and implementation to improve regional natural resources
  - framework of national objectives and accountability controls

- Caring for our Country (2008-2013)
  - $2 billion funding
  - national priorities delivered through a competitive grant system

Findings - Regional NRM

- **Some success**

- bodies formed and sustained, plans developed, outputs achieved and limited environmental outcomes (e.g. NRM plans, property management plans, some protection of native riparian vegetation, building fences and clearing weeds)

- **Why?**

- severe natural resource problems
- operational funding/in-kind support
- economic incentives
- nested regional structures

  - large *regional* collaboration was relatively successful because body had worked simultaneously at comparatively 'easier' smaller scales. It did so by dividing the large region into small areas, at which level collaborative processes faced fewer transaction costs and were more closely connected to local actors

Findings - Regional NRM

- **BUT -** lack of significant environmental outcomes

  "This is going to sound a bit unkind, but I'd be hard pressed to say here's something the body did that's really good, that's made a really significant difference to the environment".

  "our budget is a few million a year. Now what we are expected to do with a few million dollars is make sustainable land use, protect all the biodiversity and fix the water quality out to the reef, all within 10 years. That's a pretty big ask".

- Gaps in engagement, including marine tourism, mining, and on one regional body, environmental NGOs

Findings - Regional NRM

•**No incentive to cooperate and share power**

•"[the federal government] think they've so much money to run this thing that the state will click and dance. Well it started to click and dance and then it decided well no, get nicked …there's not enough money…so you had a failed system to start off with".

• **Conflict produced funding delays and erratic guidance that did little to reduce transaction costs**

•"I see the Queensland - Federal crunch as incredibly negative. It's stopped us getting funding when we needed our funding…and then that flows through to the community"

•"the regional bodies have been evolving at the same time as the [guidelines] and infrastructure …so we haven't necessarily provided them with the framework or the support to be able to achieve what we want them to achieve"

Findings - Regional NRM

- **Agency conflicts**
- "[its a] disintegrated government system....[its] a tragedy because…the whole of government solidarity sort of fell apart"

- **'Dubious' legitimacy of regional bodies produces gap between legal regulation and NEG**
- "these groups are made up of well meaning amateurs who have replaced the local tennis club with this regional group…so the state government is very equivocal about NRM bodies, I don't know that they want them really"

- "the tension lies in this issue of statutory delivery tools that government has their hands on and the outcome that the community through the regional bodies want to achieve...the partnership and the alliance between regions and legislation, well they haven't achieved it yet"
  - – regional plans identify a site for a new protective areas to save critical parts of the landscape
  - –"the state is missing in action"

New Zealand – The Law

- Resource Management Act 1991 (NZ)
  - the control and management of natural and physical resources devolved to elected regional councils
  - traditional regulation
- Local Government Act 2002 (NZ)
  - achieve sustainable development through government, industry and community collaboration

New Zealand – The Research Site

- Canterbury - Environment Canterbury (ECan)
- RMA framework is still the dominant mode of governance, but ECan use a spectrum of regulatory tools

"Environment Canterbury has been developing a model of collaborative community engagement to complement the adversarial effects-based statutory requirements. This model is being applied at a number of different geographical levels" (Jenkins 2008)

Based on principles of "decentralisation", "participatory processes" and "mutual learning and decision" (Jenkins 2007, 2009)

Living Streams Program (LSP), Environment Canterbury, New Zealand

•Collaborative non statutory program that aims to maintain and improve the heath of waterways

•30 LSP collaborations in practice

•10-15 collaborators (Ecan and non government stakeholders)

•10-15 km stream, 50 km^2 catchment

•10-20 dairy, cattle, crop and/or deer farms

•Issues: phosphorus, sedimentation, E. coli

Findings – Living Streams Program

Success

"we've had 100 per cent buy-in…there's been no one sort of saying, 'Oh, no, that's a load of bullshit, bugger off'…we got the worst of the fine sediment out…and for the first time since 1930 the bottom of it was seen…they can see the whitebait when they go baiting now"

- Severe environmental problems ("dirty, very unappealing, foul smelling black sludge")
- Government support for implementation (e.g. small grants, monitoring data)
- Small scale - keep costs down and available peer pressure
- Legal Regulation (*Resource Management Act 1991*)

- **Weakness**

"things will spring up along the banks of the creeks and someone is going to have to control them…but we're worn out…we're not attending anymore meetings…a better coordinated effort needs money"

Collaborative Catchment Management (CCM), Environment Canterbury, New Zealand

•Collaborative non statutory program that aims to address specific issues and guide the agency's work program

•5 CCM groups in practice

•10-15 non government stakeholders, multiple government agencies (ECan, district councils)

•Large urban/rural populations

•Large estuaries, lakes (200 – 2000 km^2 catchments)

•Animal faeces, industry, sewage outfalls, drains, run off from farms and roads

Findings – Collaborative Catchment Management

- **Some success**

"they've been getting out, educating the community on issues, doing planting projects…the [group] look for gaps and provide another coordination point…most of those gaps have probably been closed"

  - Severe environmental issues ("the community got seriously pissed off and went public")
  - In-kind government support and funding for "operational" costs (e.g. administration, hiring coordinator) - long term cooperation

- **Weaknesses**

  - Gaps in engagement
  - No "buy in" from key polluting industries and government stakeholders

"the [collaboration] is doing revegetation and the like, but I think it's just painting over the cracks….the fundamental questions are the big water quality and quantity questions…but to be honest the district councils that can do something about that don't want that to happen…they sit there and say nothing…they tinker around the edges. And even then they're hardly even tinkering"

Lessons - Collaboration

- Severe problems
- Funding
  - unless governments are prepared to spend substantially more on NEG, it is highly likely to suffer from gaps in engagement (e.g. CCM), short term success (e.g. LSP) and limited environmental outcomes (e.g. RNRM)
- Legal backing to agreements
- Designing effective incentives
  - peer pressure, legal and economic incentives (e.g. LSP, RNRM)
  - governments and agencies to share power and resources
- Nested institutions

Lessons – Gaps and Hybridity

- Regional NRM approximated “gap” hypothesis
- Detrimental to collaborative success
- Hybridity - legal backing

- LSP approximated “default hybridity”
- Default hybridity needed for success

Lessons - Hybridity

- Different forms of hybridity?
- To what extent can holding onto elements of older legal models solve the challenges and problems facing new governance?
- Abandon hybrid solutions?

END