

# THE CONSTITUTIONALISATION OF WATER RIGHTS: SOLUTION OR LEVEE?

Water is life. It is the briny broth of our origins, the pounding circulatory system of the world. We stake our civilisations on the coasts and might rivers. Our deepest dread is the threat of having too little – or too much.<sup>1</sup>

## Introduction<sup>2</sup>

1. Australia is the driest inhabited continent on the planet. It has the lowest average and most variable rainfall, the lowest level of river discharge and the most variable stream flow, the lowest amount of run-off and the smallest area of permanent wetlands in the world.<sup>3</sup>
2. The need to ensure the sustainable use of Australia's scarce water resources critical to our current and future development is, in these circumstances, a truism. To note the complexity of the management challenge is no less trite.
3. Against these inviolable facts is the inevitability of ever increasing water consumption occasioned by a commensurately increasing population. Development generates a demand for water. Agricultural development is particularly thirsty. In 2000-2001 over two thirds of water consumed in Australia was used in agricultural irrigation.<sup>4</sup>
4. Tragically, however, public maladministration since federation has resulted in flagrant misuse and over allocation of water resources to such an extent that entire river systems are on the verge of collapse.
5. How has this lamentable state of affairs arisen? In large measure, blame may be attributed to the constitutional arrangements governing the use of water within Australia which have promoted self-interest, as opposed to national interest, to flourish.
6. Driven, no doubt, by the increasingly urgent need for remedial action, the Commonwealth has sought to intervene in both the interstate and intrastate arrangements with respect to the access and allocation of water. This intervention has caused tension, particularly in circumstances where the result has been a diminution of the rights held by individuals.<sup>5</sup> The consequence has been that these arrangements, hitherto largely ignored by constitutional

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<sup>1</sup> Barbara Kingsolver, *National Geographic, The Water Issue*, April 2010, Vol 217(4), p 38.

<sup>2</sup> I am grateful for the assistance my tipstaff, Ms Michelle Bradley, provided me in the preparation of this paper. All mistakes are, of course, my own.

<sup>3</sup> Preston CJ of the New South Wales Land and Environment Court in "Water and Ecologically Sustainable Development in the Courts" (2009) 6 *MqJICEL* 129, p 129.

<sup>4</sup> Preston, above n 3, p 140.

<sup>5</sup> This tension was dramatically illustrated by the hostility surrounding the release of the Guide to the proposed Murray-Darling Basin Plan in 2010.

lawyers, have been subjected to closer scrutiny. Water rights have become hot constitutional property.

7. But can recourse to the Constitution provide a solution to the crisis facing our inland waters? If not, why not?
8. It is in this context that a discussion of the triumvirate of cases commencing with *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 (“*ICM*”), continuing with *Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242 (“*Arnold*”) and concluding with *Spencer v Commonwealth* (2010) 269 ALR 233 (“*Spencer*”), takes place.

## Ownership of Water in Australia

### Colonial Ownership

9. In order to understand how water rights have become constitutionalised, a brief foray into the history of Antipodean ownership of water is necessary.<sup>6</sup>
10. Upon first settlement of Australia the title to all waters was vested in the British Crown. This was because, so the pre-*Mabo*<sup>7</sup> fiction went, all private rights to land, which included rights of access to water resources, could only be obtained by a grant from the Crown. Initially, governors granted rights to the Crown of ‘waste’, or unsettled, lands (including the waters upon them) upon permission from the Imperial Government. As the colonies obtained powers of responsible self-government they sought control of the unsettled lands. This was achieved by Imperial legislation conferring self-government on the various colonial legislatures that included the management and control of waste lands and waters. Concomitant with this conferral was the power to regulate and acquire the lucrative revenue arising from these waste lands. It was these colonial arrangements that governed access to water upon federation.

### Federation

11. Who should have power to regulate access to water – or more specifically rivers, and in particular the Murray River – transformed into a “monstrously long and tangled debate” in the Convention Debates.<sup>8</sup>

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<sup>6</sup> A useful summary of colonial history is found in *Wik Peoples v Queensland* (1996) 187 CLR 1 at 171-177 per Gummow J, *ICM Agriculture v The Commonwealth* (2009) 240 CLR 140 at [50]–[57] and [109]–[129], Gardener A, Bartlett R and Gray J, *Water Resources Law* (LexisNexis, 2009), Ch 5.

<sup>7</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 66 and Clark S, “The River Murray Question: Part I – Colonial Days” (1971) 8 *MULR* 11.

<sup>8</sup> La Nauze J A, *The Making of the Australian Constitution* (Melbourne University Press, 1972) p 153. For a detailed exposition of the substance of the Conventional Debates on this issue see: Clark S, “The River Murray Question: Part II – Federation, Agreement and Future Alternatives” (1971) 8 *MULR* 215, Kelly N, “A Bridge? The Troubled History of Inter-State Water Resources and Constitutional Limitations on State Water Use” (2007) 30 *UNSWLJ* 639, pp 641-645, Williams J and Webster A, “Section 100 and State Water Rights” (2010) 21(4) *PLR* 267, pp 267-274, Connell D, “Section 100 – A Barrier to Environmental Reform?” (2003) 8(2) *The Australasian Journal of Natural Resources Law and Policy* 83, pp 85-95. See also Quick J and Garran R R, *The Annotated Constitution of the*

12. Prior to the Constitutional Conventions, tension centred around the respective positions of South Australia, Victoria and New South Wales. For South Australia, the concern was navigation: to ensure freight transportation routes were not curtailed to trade in the east. For Victoria and New South Wales, the right to divert and harvest water for the purposes of irrigation was paramount. The position of New South Wales, for example, is best summarised by the declaration from the delegate of New South Wales, Joseph Carruthers, that<sup>9</sup>:

If the day is to come when the Darling and the Murrumbidgee are to be drained dry for irrigation purposes, Australia will be all the happier and all the better for that day having arrived.

13. It was this context that informed the delegates at the Conventions considering the vexed question of who should have constitutional control of State waters. The result was that s 100 is the only provision that refers to water in the Constitution. This was no accident.

14. In one of its earliest incarnations, s 100 was fashioned to give positive legislative authority to the Commonwealth Parliament in respect of<sup>10</sup>:

The control and regulation of navigable streams and their tributaries within the Commonwealth; and the use of the waters thereof.

15. The present version, by contrast, states:

The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

16. How did this drafting change come about? Ultimately it was the price to be paid for the birth of federation; the compromise to preserve the separate interests of New South Wales, Victoria and South Australia.

17. It was in the last days of the 1898 Convention that the provision evolved from being a positive expression of, to an express limitation on, Commonwealth power. The evolution represented the success of the vested political and economic interests of individual States, some of which, such as New South Wales, had, by this time, not only abolished rights to water at common law,<sup>11</sup> but had also issued a great number of water licenses and had invested considerable funds in agricultural development.<sup>12</sup>

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*Australian Commonwealth* (1901, Legal Books, 1995 reprint), pp 879-880 and the discussion in *Arnold v The Minister* (2010) 240 CLR 242 at [18]–[22].

<sup>9</sup> Williams and Webster, above n 8, p 272.

<sup>10</sup> As initially proposed during the Adelaide Convention in 1897: Williams and Webster, above n 8, p 270.

<sup>11</sup> *Water Rights Act 1896* (NSW).

<sup>12</sup> Williams and Webster, above n 8, p 272.

18. An initial step in resolving the impasse between the three States was proposed by Edmund Barton, who persuaded his fellow delegates that South Australia's interests could be protected by extending a general Commonwealth power to legislate with respect to trade and commerce to include navigation and shipping (now s 98).<sup>13</sup>
19. However, this proposal caused concern, particularly amongst some of the New South Wales delegates, who wished to preserve that State's ability to control all access to water within their borders.
20. Unable to reach agreement on what remained of State riparian rights, that is to say, who should regulate the ability to harvest inland waters, and recognising that the States' rights to legislate with respect to the improvement of their domestic economies by the use of water were not equivalent with the power of the Commonwealth, the States turned their attention to specifically limiting the Commonwealth's ability to legislatively interfere with "the rights of the state or its citizens to the use of waters of rivers for conservation and irrigation".<sup>14</sup> It was George Reid who suggested a clause stating that:<sup>15</sup>

The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

21. The response of South Australia was, understandably in light of Carruthers' earlier expressed sentiment, that this would permit New South Wales to drain the Murray River to the point of death and that, therefore, it could not agree to the clause.<sup>16</sup>
22. The resulting debate led Sir John Downer, from South Australia, to propose the insertion of the word "reasonable" before the word "use" in an attempt to reflect the English common law principle of riparian ownership that provided for the reasonable use of water.<sup>17</sup> Although initially opposed by Reid and other delegates from New South Wales, because the amendment was ultimately not viewed as capable of altering the rights as between the States, it was assented to. The reasonableness was to be measured not between the intentions of two competing States, but between "the necessities of water conservation and irrigation and...navigation".<sup>18</sup>

23. Accordingly, the Convention agreed on the following clause (cl 52(viii):

Navigation and shipping, the powers contained in this sub-section, and those relating to trade and commerce, under this *Constitution* shall not

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<sup>13</sup> Connell, above n 8, p 90.

<sup>14</sup> New South Wales Premier George Reid, quoted in Williams and Webster, above n 8, p 273.

<sup>15</sup> Connell, above n 8, p 91.

<sup>16</sup> Connell, above n 8, p 91.

<sup>17</sup> Williams and Webster, above n 8, p 273. Both Isaac Isaacs and George Reid were of the opinion that the qualifier added little to the clause.

<sup>18</sup> Isaac Isaacs quoted in Williams and Webster, above n 8, p 274.

abridge the rights of a State or its citizens to the reasonable use of the water of the rivers for conservation and irrigation.

24. After several revisions by the Drafting Committee,<sup>19</sup> the clause was split into two and what is now recognised as ss 98 and 100 were created.

25. The regulation of access to water rights, or more specifically, access to river water rights, occupied almost a fifth of the Convention Debates in Melbourne, that is to say, 428 of the 2521 transcribed pages.<sup>20</sup> While agreement was accommodated between the Commonwealth and the States in this regard, it is fair to say that the interstate dispute about water rights was never settled. It is a dispute that has endured from colonial times to present day.

## The Present Constitutional Water Arrangements

26. Other than that found in s 100 of the Constitution, in relation to the present day constitutional arrangements over State waters, sovereignty over the internal waters of Australia, the territorial sea of Australia, the continental shelf and the exclusive economic zone of Australia, is vested in, and is exercisable by, the Crown in right of the Commonwealth.<sup>21</sup> The internal waters of Australia are defined as the waters of the sea on the landward side of the baseline of the territorial sea.<sup>22</sup> Thus the sovereignty of the Commonwealth is limited to the waters of the sea that are otherwise part of the internal waters.

27. However, because the colonies exercised legislative rights over their internal waters prior to federation, s 14 of the *Seas and Submerged Lands Act 1973* (Cth) preserved, at least if read literally, State control over the waters of the sea that are waters within “any bay, gulf, estuary, river, creek, inlet, port or harbour” which were, upon federation, within the limits of the State. While the Act was held to be constitutionally valid in 1975 in *New South Wales v Commonwealth* (1975) 135 CLR 331 (“the *Seas and Submerged Lands case*”),<sup>23</sup> the ambit of s 14 was not authoritatively determined, and therefore, the precise waters falling within the limits of the colonies as at 1 January 1901, and thus the legislative power of the States today with respect to these waters, remains uncertain.<sup>24</sup>

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<sup>19</sup> Constituted by Edmund Barton, Richard O’Connor and Sir John Downer, with assistance from Robert Garran: Williams and Webster, above n 8, p 274.

<sup>20</sup> Kelly, above n 8, p 644.

<sup>21</sup> Section 10 of the *Seas and Submerged Lands Act 1973* (Cth).

<sup>22</sup> See above, s 10.

<sup>23</sup> Relevantly, the Court held (Barwick CJ, McTiernan, Mason, Jacobs and Murphy JJ, Gibbs and Stephen JJ dissenting) that the provisions of the Act relating to the continental shelf were within the legislative power of the Commonwealth under s 51(xxix) on the ground that they gave effect to the Convention on the Territorial Sea and Contiguous Zone.

<sup>24</sup> For the sake of completeness, it should be noted that the States also have legislative power over their coastal waters, that is to say, up to three nautical miles: *Coastal Waters (State Powers) Act 1980* (Cth), ss 3(1) and 5(a).

## **The Power of the Commonwealth to Regulate the Waters of the States**

28. Turning to the power of the Commonwealth to regulate State water, there is no direct constitutional power over State water. But this does not mean that there is a complete Federal legislative lacuna in this regard.

29. It is basic constitutional law that the Commonwealth can legislate with respect to matters within its capacity, even if the subject matter of the legislation is not specifically within any of the areas of legislative authority conferred on Parliament by the Constitution.<sup>25</sup> Thus there are a number of potential heads of power that permit the Commonwealth to enact legislation to manage this resource:

- a. s 51(i) – the power to regulate trade and commerce with other countries, and among the States;
- b. s 51(ii) – the taxation power;
- c. s 51(xx) – the corporations power;
- d. s 51(xxix) – the external affairs power;
- e. s 51(xxxix) – the incidental power;
- f. s 61 – the executive power;
- g. an implied nationhood power;
- h. s 81 - the appropriations power;
- i. s 96 – the power to provide grants and financial assistance; and
- j. s 122 – the Territories power.

30. This paper shall ignore the Territories power, alight briefly upon the taxation power, the external affairs power, the corporation power and the joint and several effect of the executive, incidental and implied nationhood powers, and instead focus on the more fiscal aspects of the constitutional regulation of internal water.

## **Appropriations and the Provision of Grants and Financial Assistance**

31. No doubt because of the absence of any direct power over internal water at a Commonwealth level and due to uncertainties as to the ambit of other heads of power to regulate this resource, overwhelmingly access to, and use of, water within Australia is managed by the Commonwealth with the

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<sup>25</sup> *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1.

constitutional carrot and stick of tied grants and the provision of financial assistance to the States on terms.<sup>26</sup> In his seminal work *Water Law*, Professor D E Fisher describes the provision of financial assistance on terms to be one of the most significant mechanisms for the regulation of the internal waters of Australia.<sup>27</sup> It is certainly the most prevalent.

32. The Commonwealth is empowered by s 96 of the Constitution to grant financial assistance to the States on such conditions as it thinks fit. It also has the ability to make grants through its appropriations power in s 81.

33. This financial assistance has included:<sup>28</sup>

- a. direct grants by the Commonwealth to a State for specific projects within a State.<sup>29</sup> Typically the grants legislation deals with the financial assistance, while authority for the implementation of the project is a matter for State law;
- b. Ministerially approved financial assistance for specified projects<sup>30</sup>; and
- c. statutory approval of assistance pursuant to an agreement between the Commonwealth and the State in relation to a particular project.<sup>31</sup>

34. The orthodox view, until recently, had been that the Commonwealth's discretion to exercise its funding powers was broad. After *Combet v The Commonwealth* (2005) 224 CLR 494 ("*Combet*") and *Pape v Federal Commissioner for Taxation* (2009) 238 CLR 1 ("*Pape*"), this can no longer be maintained with confidence.

35. In *Combet*, at issue was whether the withdrawal of money from the Commonwealth Treasury could be authorised pursuant to the *Appropriations Act (No 1) 2005-2006* (Cth) to pay for Government advertising promoting its workplace relations reform package. By majority,<sup>32</sup> the High Court held that it could because the appropriations were made for the purposes of the Act, namely, the purpose of appropriating a sum of money for the departmental expenditure of one of its departments, which included the Department of Employment and Workplace Relations. However, the Court emphasised that to the extent that the Act distinguished between amounts issued for

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<sup>26</sup> Stated in his seminal work *Water Law*, (LBC Information Services, 2000), p 42.

<sup>27</sup> Fisher D E, *Water Law* (LBC Information Services, 2000), p 42.

<sup>28</sup> Lucy J, *Water Regulation, The Laws of Australia* (Thomson Reuters, 2008), p 31-32.

<sup>29</sup> For example, the *Queensland Grant (Dawson River Weirs) Act 1973* (Cth).

<sup>30</sup> For example, the *National Water Resources (Financial Assistance) Act 1978* (Cth) and its successor the *Natural Management (Financial Assistance) Act 1992* (Cth), which provided project assistance in the form of an agreement between the Commonwealth and a State. The details are contained in the agreement that is not part of the legislation. The *National Water Commission Act 2004* (Cth), establishing the Australian Water Fund Account, is not dissimilar.

<sup>31</sup> For example, the *Lake Eyre Basin Intergovernmental Agreement Act 2001* (Cth), which implements an agreement between the Commonwealth, Queensland and South Australia, whereby the governments share funding responsibilities for the management of natural resources, including water, in the Lake Eyre Basin.

<sup>32</sup> Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, McHugh and Kirby JJ in dissent.

departmental items and amounts issued for administered items, amounts issued for departmental items could only be applied for departmental expenditure, and amounts issued for an administered item for an outcome could only be applied for expenditure for the purpose of carrying out activities achieving that outcome.<sup>33</sup>

36. Accordingly, if an appropriation is made for investing in water infrastructure, for example, the building of a new sewage system for the purposes of generating recycled water, Commonwealth expenditure on a water infrastructure project that did not achieve this outcome, such as the building of a new dam, could be invalid.

37. In *Pape* the plaintiff sued the Commissioner of Taxation and the Commonwealth claiming that the tax bonus under Commonwealth legislation known as the 'Tax Bonus Act' was invalid because it was a gift, was not a law with respect to taxation under s 51(ii) or any other source of legislative power of the Commonwealth, and that it did not comply with ss 81 and 83 because it did not lawfully appropriate money for the purposes of the Commonwealth. The Court relevantly held that ss 81 and 83 did not confer a substantive spending power in respect of anything that the Parliament designated as a purpose of the Commonwealth. Accordingly, the Act could not be supported by this power.<sup>34</sup>

38. The Act was, however, supported by ss 61 and 51(xxxix) of the Constitution as a law that was incidental to an exercise of executive power. This was because of the extraordinary circumstances in which the legislation was passed, namely, in the midst of the global financial crisis requiring immediate fiscal stimulus to the national economy. This was a matter that plainly concerned Australia as a nation.<sup>35</sup>

## **Section 51(xxxi) as a Limitation on the Provision of Commonwealth Grants and Financial Assistance to the States**

39. A potential fetter on the distribution of Commonwealth monies to fund projects designed to manage water resources within Australia is s 51(xxxi), which prohibits the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.<sup>36</sup> States, by contrast, may, subject to the laws of the State, acquire property on any terms. Section 51(xxxi), therefore, has no application to a State. Or does it?

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<sup>33</sup> At [123]–[135].

<sup>34</sup> At [112]–[113] per French CJ and [174]–[205] per Gummow, Crennan and Bell JJ.

<sup>35</sup> At [231].

<sup>36</sup> In the context of water rights, see the discussion with respect to s 51(xxxi) of the Constitution contained in Fisher D E, "Water law, the High Court and techniques of judicial reasoning" (2010) 27 *EPLJ* 85, Hepburn S, "Statutory verification of water rights: the 'insuperable' difficulties of propertising water entitlement" (2010) 19 *Australian Property Law Journal* 1 and McKenzie M, "Water Rights in NSW: Properly Property?" (2009) 31 *Sydney Law Review* 443.

## ICM

40. In *ICM* the plaintiffs, who were farmers, held licences to extract groundwater, or 'bore licences' as they were commonly known, under the *Water Act 1912* (NSW). These licences were replaced by a new system of aquifer access licences under the *Water Management Act 2000* (NSW). These new licences substantially reduced (by up to 70%) the amount of water the plaintiffs were permitted to draw. The plaintiffs received some *ex-gratia* structural adjustment payments for the reduction under a 2005 Funding Agreement between the Commonwealth and New South Wales which established the new licences. But, as agreed by the parties, the payments were inadequate and did not constitute compensation on just terms. Because the Commonwealth was a party to the Funding Agreement, the plaintiffs argued that their reduction in entitlements was a Commonwealth acquisition of their property contrary to s 51(xxxi).<sup>37</sup>
41. The parties to the Funding Agreement were the Commonwealth, acting through the National Water Commission, and the State of New South Wales, acting through the Department of Natural Resources. The payments were to be shared equally by the Commonwealth and the State. The National Water Commission was established by the *National Water Commission Act 2004* (Cth) ("*the Commission Act*"), assisted with the implementation of a 2004 intergovernmental agreement, known as the National Water Initiative. One of the key features of the Initiative was to return currently overallocated and overused water systems to environmentally sustainable levels.
42. Section 40 of the *Commission Act* established the Australian Water Fund Account ("*the Account*"), which was a special account to, amongst other things, pay costs or obligations incurred by the Commonwealth in the performance of the Commission's function under the *Commission Act*. The Account was funded by a standing appropriation from the Consolidated Revenue Fund pursuant to ss 81 and 83 of the Constitution, for expenditure for the purposes of the Account.
43. It was, however, the New South Wales Minister Administering the *Water Management Act 2000* (NSW) who ordered that the water entitlements be reduced.
44. French CJ, Gummow and Crennan JJ held that the legislative power of the Commonwealth conferred by s 96, together with s 51(xxxvi), did not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property other than on just terms contrary to s 51(xxxi).<sup>38</sup> Similarly, to the extent that s 96 was qualified by s 51(xxxi), an agreement to grant financial assistance that could not be authorised by s 96 could equally not be supported by s 61 of the Constitution. To this extent they accepted the plaintiffs' case. So too did Heydon J, in his dissent.<sup>39</sup>

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<sup>37</sup> For a detailed analysis of this decision, see Hepburn, above n 36.

<sup>38</sup> At [46].

<sup>39</sup> At [174].

45. Their Honours accepted that limitations on Commonwealth legislative power could indicate whether the Funding Agreement was consistent with the Constitution. In so doing, they refused leave to re-open *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 (“*Magennis*”) and affirmed the reasoning of Latham CJ, who rejected the proposition that a federal statute giving financial assistance to the States could not be a law with respect to the acquisition of property for the purpose of s 51(xxxi). In this respect, there was no inconsistency between the reasoning in *Magennis* and the reasoning in *Pye v Renshaw* (1951) 84 CLR 58 (“*Pye*”).<sup>40</sup> In *Pye* the Court had rejected the argument that the exercise of the power to grant financial assistance under s 96 would be vitiated if shown to be for the *purpose* of inducing the State to exercise its powers of acquisition other than on just terms. Because s 96 was silent as to purpose,<sup>41</sup> their Honours were able to reconcile the apparent inconsistency in reasoning in *Pye* with the reasoning in *Magennis*.
46. Significantly, their Honours deliberately left open the question of whether grants of financial assistance pursuant to s 96 of the Constitution supported by informal arrangements between governments – such as an exchange of letters<sup>42</sup>, negotiations or email communications – setting out conditions to be observed by a State in securing financial assistance, which included an acquisition by the State of property other than on just terms, was valid pursuant to s 51(xxxi).<sup>43</sup>
47. Their Honours went on to hold that the character of the bore licences precluded the application of s 51(xxxi). This was because, while noting that “water is a finite and fluctuating natural resource”,<sup>44</sup> first, the plaintiffs had no common law rights with respect to the extraction from the land of groundwater, the effect of the *Water Act 1912* (NSW) having been to extinguish whatever common law rights the plaintiffs had to appropriate this water.<sup>45</sup> Second, while their Honours did not decide whether the bore licences were of such an insubstantial character so as to be no more than an interest defeasible by operation of the legislation that called them into existence, and therefore, not proprietary,<sup>46</sup> they applied *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155, and held that there was no acquisition of property, merely an extinguishment, modification or deprivation of rights, which did not confer a measurable benefit or advantage on the State. This was because the plaintiffs did not enjoy private rights over the natural resource extracted. These rights had accrued in the State, and the State could exercise its power to prohibit their access or use.<sup>47</sup>

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<sup>40</sup> At [33]-[40].

<sup>41</sup> At [36]. Further, their Honours noted that in *Pye*, *Magennis* was distinguished on the basis that changes in the intervening period meant that all references to any agreement with the Commonwealth or to any direct or indirect participation of the Commonwealth in any state scheme had been deleted (or “decoupled”) from all relevant State legislation: at [39].

<sup>42</sup> Referred to in *Gilbert v Western Australia* (1962) 107 CLR 494 at 505.

<sup>43</sup> At [37]-[38].

<sup>44</sup> At [50].

<sup>45</sup> At [72].

<sup>46</sup> At [80].

<sup>47</sup> At [82]-[84].

48. Hayne, Kiefel and Bell JJ did not consider any of the issues concerning the intersection of ss 96 and 51(xxxi) of the Constitution.<sup>48</sup> Instead, their Honours held that while the statutory basis of the “fragile” bore licences, particularly given their ability to be traded and used as security, did not necessarily preclude them from being a species of property for the purpose of s 51(xxxi) (the water itself was not property given its “replaceable but fugitive source”<sup>49</sup>), the plaintiffs’ entitlement was more in the form of a statutory dispensation from a general prohibition against the taking of groundwater, rather than conferring any positive right to do so.<sup>50</sup> Hence there was no acquisition of property because no party had, as was required, derived an identifiable and measurable advantage or benefit by the reduction in the water allocation.<sup>51</sup>
49. This conclusion was contrasted with the acquisition of Newcrest’s mining tenements in *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513. In that case, title to the land in question was, as a consequence of the impugned legislation, vested directly in the Director of the National Parks and Wildlife. The legislation also prohibited recovery of all minerals. Moreover, the property that Newcrest held was, the Court reasoned, significantly more tangible than the statutory privilege conferred by the licensing system in *ICM*. Moreover, in *ICM* the rights to the water were vested in the State. While this did not mean that the State owned property in the water given its intangible characteristics, the cancellation and replacement of the bore licences and the concomitant increase in the groundwater did not give the State any new, larger or enhanced interest in property unlike *Newcrest*, where an acquisition was found to have taken place.<sup>52</sup>
50. In dissent, Heydon J agreed that the plaintiffs had no common law right to take the groundwater. But his Honour found that the bore licences did amount to ‘property’ in the constitutional sense: landowners had paid money for them, the licences were transferable, security interests could be given over them and they were included in assessing land values.<sup>53</sup> Heydon J’s reasons in this respect are compelling.
51. In relation to the question of whether there had been an acquisition, his Honour held that there had because the State received an advantage upon the reduction in the plaintiffs’ proprietary rights, in that it was relieved of its obligation under the bore licences to ensure that the plaintiffs received their allocated share of groundwater.<sup>54</sup> Accordingly, Heydon J found that there had been an acquisition of property other than on just terms in breach of the Constitution, and that therefore, the *Commission Act* and the *Funding Agreement* were invalid.

52. In summary what emerges from *ICM* is that:

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<sup>48</sup> At [141].

<sup>49</sup> At [145].

<sup>50</sup> At [144].

<sup>51</sup> At [107].

<sup>52</sup> At [151]-[154].

<sup>53</sup> At [194]-[215].

<sup>54</sup> At [216]-[245].

- a. first, the provision of tied financial assistance by the Commonwealth to the States attracts the operation of s 51(xxxi) and cannot be used as a device to circumvent the operation of the Constitution;
- b. second, that whether statutorily created licences permitting the extraction of a natural resource are a species of constitutional property is an open question and depends on their legislative characteristics;
- c. third, there will be no acquisition absent any identifiable or measurable benefit or advantage conferred by the intergovernmental funding arrangement; and
- d. fourth, funding pursuant to s 96 of the Constitution supported by informal arrangements between governments setting out the conditions to be observed securing financial assistance which include the acquisition by the State of property rights other than on just terms may be invalid pursuant to s 51(xxxi).

### **Arnold**

53. The reasoning in *ICM* in relation to s 51(xxxi) was affirmed and adopted two months later in the almost factually identical decision of *Arnold* (which is discussed in greater detail below).

### **Spencer**

54. In *Spencer*, the Commonwealth brought a motion under s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) seeking dismissal of Mr Spencer's proceedings on the basis that he had no reasonable prospect of success. The facts in *Spencer* were similar to those in *ICM* and *Arnold*, but rather than restrictions on groundwater extraction, it was asserted by the applicant that by operation of a complement of Commonwealth enactments and intergovernmental agreements between the Commonwealth and the New South Wales, the resultant State legislation restricted his ability to clear native vegetation on his farm and constituted a constitutionally invalid acquisition of his property.

55. The judge at first instance upheld the motion.

56. In dismissing the appeal,<sup>55</sup> the Full Federal Court relied on the decision in *Pye* concerning the operation of s 51(xxxi) and 96; the decision of the New South Wales Court of Appeal in *Arnold v Minister Administering the Water Management Act 2000* (2008) 73 NSWLR 196, which was indistinguishable; and the applicant's acceptance of the validity of the State legislation, which meant that even if the Commonwealth legislation and intergovernmental agreements were invalid, the State legislation would continue in force as the source of the prohibitions and restrictions he complained of.

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<sup>55</sup> *Spencer v Commonwealth of Australia* (2009) 174 FCR 398.

57. It should be noted that the decision of the Full Court was handed down prior to the High Court deciding either *ICM* or *Arnold*.
58. In the High Court, French CJ and Gummow J, with whom the other judges agreed,<sup>56</sup> first discussed the history, scope and operation of s 31A of the *Federal Court of Australia Act 1976* (Cth).<sup>57</sup> Their Honours then went on to conclude that, because *ICM* had left open the question of whether an informal arrangement between the Commonwealth and the State conditioning any funding to be provided upon the acquisition of property other than on just terms could be valid under s 51(xxxi), and because the applicant's pleadings left open this possibility thereby requiring factual exploration and possible amendment, his case was not one which had no reasonable prospects of success and should not have been dismissed.<sup>58</sup>
59. Again, their Honours specifically reserved for future consideration the question of "whether a law of the Commonwealth, providing for grants to be made to a state under s 96 of the Constitution, or for agreements under which such grants could be made, might be characterised by reference to informal arrangements between the Commonwealth and the state as a law with respect to the acquisition of property."<sup>59</sup>

## **Regulating the Use of Water as an Incidence of Trade and Commerce**

60. Water is a commodity. It is priced and traded like any other commercial asset. To the extent that it is a utility, the service providers are trading corporations. Given this commercialisation, can the Commonwealth regulate the use of water under the trade and commerce power (s 51(i)) and/or the corporations power (s 51(xx))?

### **Section 51(i): the Trade and Commerce Power**

61. Turning to the trade and commerce power, the question of how far back beyond mere prescription of standards for export the Parliamentary power conferred by s 51(i) extends remains unanswered. In *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565, Fullagar J stated that s 51(i) can "enter the factory or the field or the mine".<sup>60</sup> If it can enter the mine, presumably it can wade into the river.
62. But perhaps not. In *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, the Court determined that the direct operation of the law in question was to prohibit the export of a commodity from Australia, and not, as it appeared, a law directed to halt sand-mining on Fraser Island. Thus its validity under s 51(i) was upheld. Mason J, however, explicitly opined that the

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<sup>56</sup> At [40] per Hayne, Crennan, Kiefel and Bell JJ and [61] per Heydon J.

<sup>57</sup> At [17]-[26].

<sup>58</sup> At [28]-[34].

<sup>59</sup> At [32].

<sup>60</sup> At 598.

Commonwealth law would have exceeded the powers of the Commonwealth if this had been its subject-matter.<sup>61</sup>

63. That the Commonwealth can use this head of power to regulate the interstate water market is an unremarkable proposition and one which supports the water trading rules of the Basin Plan under Pts 2 and 4 of the *Water Act 2007* (Cth).<sup>62</sup>
64. Less certain, however, is the extent to which s 51(i) may be used, even in an incidental capacity, to regulate the activities of intrastate trade. For example, could this head of power be used to control the quantity of water used to irrigate crops, only a limited proportion of which was ultimately to be consumed overseas or interstate?
65. The somewhat artificial quarantining of intrastate trade and commerce from this head of power, given the complexity of modern commercial transactions, has meant that it has had limited scope in the promulgation of national economic policies directed towards water preservation.

## Section 100

66. A further complication is the apparent restriction contained in s 100 of the Constitution. Until *Arnold*, s 100 had not been the subject of extensive judicial scrutiny.
67. Is the provision a limitation or a guarantee? Do the words “any law or regulation of trade or commerce” include not only s 51(i) but, for example, s 51(xx)?<sup>63</sup>
68. In *Morgan v The Commonwealth* (1947) 74 CLR 421 (“*Morgan*”) the High Court confined the reference to the laws of “trade and commerce” contained in ss 98-102 to s 51(i).<sup>64</sup> *Morgan* was followed in *Commonwealth v Tasmania* (1983) 158 CLR 1 (“the *Tasmanian Dams* case”). In that case, the High Court rejected the argument that sections of the *World Heritage Properties Conservation Act 1983* (Cth) prohibiting the construction of a dam across the Franklin River were impugned by reference to s 100.<sup>65</sup>
69. However, in *Morgan* Mason J expressly acknowledged the artificiality of this narrow approach, which effectively permitted the Commonwealth to achieve, by recourse to other legislative powers, that which was verboten under s 100.<sup>66</sup> The explanation his Honour gave was a historical one, namely, that s 100 was an expression of the economic importance of, in particular, the

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<sup>61</sup> At 22.

<sup>62</sup> Gardner, Bartlett and Gray, above n 6, para 5.24.

<sup>63</sup> See the discussion as to the history behind the drafting of s 100 and its possible scope in Kelly, above n 8, Connell, above n 8, Williams and Webster, above n 8, and Quick and Garran, above n 8.

<sup>64</sup> At 455 and 458.

<sup>65</sup> At 154.

<sup>66</sup> Although his Honour left this question open: at 153.

Murray River to New South Wales, Victoria and South Australia at the time of federation.

### **Arnold**

70. The *Commission Act* and the National Water Initiative were again the subject of scrutiny in the *Arnold* decision. Indeed the facts underpinning that decision were relevantly similar to those in *ICM*.
71. In *Arnold*, the appellants challenged the replacement licences on a number of grounds, including two constitutional grounds: first, that the replacement licences constituted an acquisition of property otherwise on just terms contrary to s 51(xxxi); and second, that the Funding Agreement was a regulation of trade or commerce that contravened s 100.
72. The first issue was quickly dispensed with by the majority (French CJ, Gummow and Crennan JJ, Hayne, Kiefel and Bell JJ, with Heydon J in dissent) by applying the reasoning in *ICM*.<sup>67</sup>
73. The challenge based on s 100 of the Constitution also failed. The majority held that it was clear from the drafting history of the Constitution that s 100 was directed to limiting the Commonwealth's power in respect of ss 51(i) and 98 of the Constitution.
74. The majority held, relying in particular on Quick and Garran's commentary on s 100, that the rights of the appellants said to have been abridged by the replacement of their bore licences did not relate to the use of the "water of rivers" in s 100, but related to underground water in aquifers.<sup>68</sup> Therefore, s 100 had no application.
75. *Arnold* arguably raised more questions than it answered in relation to the reach of s 100 of the Constitution. For example:
- a. first, while the Court refused to re-examine the correctness of *Morgan*, it also declined to endorse it. French CJ specifically noted that the artificiality of its consequences, adverted to by Mason J in the *Tasmanian Dams* case, remained ever present;<sup>69</sup>
  - b. second, French CJ also noted that it would be difficult to see how an agreement made between the executive governments of the Commonwealth and the States could, of itself, ever constitute a "law or regulation of trade or commerce";<sup>70</sup>
  - c. third, there was also "an interesting question" raised by French CJ<sup>71</sup> and Gummow and Crennan JJ,<sup>72</sup> whether the term "right of...the

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<sup>67</sup> At [48].

<sup>68</sup> At [26]–[29] per French CJ, [55] per Gummow and Crennan JJ, [75] per Hayne, Kiefel and Bell JJ

<sup>69</sup> At [23].

<sup>70</sup> At [24].

<sup>71</sup> At [24].

residents” in s 100 was used in a collective sense in an individual sense;

- d. fourth, Gummow and Crennan JJ left open the question of whether as between riparian States and their residents, s 100 guarantees access to the use of the waters for the purposes mentioned, or does no more than impose a restriction on the exercise of the power of the Commonwealth;<sup>73</sup> and
- e. fifth, their Honours queried whether the lakes and billabongs into which a river spreads in flood is part of a river and thus included in “the water of rivers”.<sup>74</sup>

76. To this can be added the question of whether the word “residents” in this section includes artificial persons, such as corporations, in addition to natural persons. In *Australian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290 at 299 and 321 the High Court expressed the view, albeit in *obiter*, that it did not.

77. One further issue that has not been tested to date is the extent to which the Commonwealth may pass a law, which promotes an environmentally sustainable use of rivers, on the basis that to do so would be to provide for the “reasonable” use of water. Put another way, can the Commonwealth pass a law that would, in effect, prohibit the unreasonable use of the waters of rivers for the purpose of conservation?

## **Section 51(xx): the Corporations Power**

78. Few, if any, of these limitations exist, however, with respect to the use of the corporations power. If, for example, a hydro-electric commission is a trading corporation whose activities are amenable to regulation under s 51(xx) because its substantial business is the sale of electricity, notwithstanding that it also has “wide semi-governmental powers and functions”<sup>75</sup> and notwithstanding that what is really being sought to be regulated is the construction of a dam and associated works, then a company engaged in the business of trading access rights to water ought to equally be amenable to restrictions on its activities under this head of power.

79. All lingering doubts to the contrary were swept away by the confirmation of the almost plenary nature of the power in *New South Wales v Commonwealth* (2006) 229 CLR 1 (“the *Work Choices* case”).<sup>76</sup>

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<sup>72</sup> At [53].

<sup>73</sup> At [53].

<sup>74</sup> At [58].

<sup>75</sup> The *Tasmanian Dams* case at 293 per Deane J.

<sup>76</sup> Although the majority (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, Kirby and Callinan JJ in dissent) in the *Work Choices* case were careful to eschew the use of term in relation to the power contained in s 51(xx): at [186].

80. But of course only trading corporations will engage the corporations power. It will have no application to individual irrigators, for example, that are not incorporated.

## Taxation

81. Another method by which the Commonwealth can manage access to water rights is by taxation under s 51(ii) of the Constitution. Provided any taxation measure introduced is non-discriminatory as between the States, the Commonwealth can impose an excise on the consumption of water by individual and corporate users alike. However, taxation as an instrument for protecting natural resources tends, generally, not only to be overly blunt but also highly political.

## Implied Nationhood and the Incidental and Executive Power

82. As illustrated by *Pape*, when combined with the incidental power in s 51(xxxix), the executive power in s 61 can become a legislative power of the Commonwealth “to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation”.<sup>77</sup>

83. That the extent of this power is now uncertain – if it ever was certain – after *Pape* is an understatement. While the learned authors of the text *Water Resources Law* argue that there is potential to utilise this power given the pressing need to manage rivers and water basins across several States,<sup>78</sup> – indeed s 119(3) of the *Water Act 2007* (Cth) contains a specific reference to the “implied power of the Parliament to make laws with respect to nationhood”<sup>79</sup> – this optimism can only be cautiously embraced in light of the reasoning and remarks made in *Pape*, comparing the need for an immediate fiscal stimulus as analogous to determining “a state of emergency in circumstances of a natural disaster.”<sup>80</sup> The natural disaster that has befallen the Murray-Darling Basin, together with other morbidly compromised water systems in Australia, regrettably lack the immediate and decisive urgency required to engage the power. Reinforcing this view is the *Tasmanian Dams* case, where recourse to this head of power to support the Commonwealth legislation prohibiting the building of the dam was rejected by the High Court.<sup>81</sup>

## Section 51(xxix): the External Affairs Power

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<sup>77</sup> *Victoria v Commonwealth* (1975) 134 CLR 338 at 397. For an excellent discussion of *Pape* and the implied nationhood power, see Twomey A, “Pushing the Boundaries of Executive Power – *Pape*, the Prerogative and Nationhood Powers” (2010) 34 *MULR* 313.

<sup>78</sup> Gardner, Bartlett and Gray, above n 6, para 5.49.

<sup>79</sup> Gardner, Bartlett and Gray, above n 6, para 5.49.

<sup>80</sup> At [233].

<sup>81</sup> At 203 and 252.

84. To the detriment of the States, the considerable width of the Commonwealth's external affairs power in s 51(xxix)<sup>82</sup> was established in the *Tasmanian Dams* case, and later reinforced in *Victoria v Commonwealth* (1996) 187 CLR 416 ("the *Industrial Relations* case") and other decisions. Legislative competence under the external affairs power broadly includes: matters that occur outside Australia and are thus external, matters that are inherently of international concern, independent of any treaty or international agreement, and legislation implementing an international treaty or convention.
85. But the external affairs power demands that any Commonwealth legislation be faithful, and give effect, to the terms of the international instrument that Australia has agreed to implement. Parliament cannot, by recourse to s 51(xxix), legislate at will. The enacting statute must be reasonably appropriate and adapted to the achievement of the obligations under the convention or treaty.
86. Given that there are presently no international treaties that specifically cover the conservation of internal water resources, this legislative constraint may prove problematic.<sup>83</sup> This may explain why the *Water Act 2007* (Cth) relies, in part, on no less than eight international agreements for legitimacy.<sup>84</sup>
87. However, water resources are both an internal sovereign resource and an external global resource, the management of which has clear ramifications for desertification, climate change and biological diversity – all of which are the subject of recent conventions.<sup>85</sup> On this basis, the Federal government could conceivably enact domestic legislation curtailing the States' rights to access and use their water resources.

## Cooperative Federalism

88. Finally, and for the sake of completeness, pursuant to s 51(xxxvii), States may refer their powers to the Commonwealth to permit the passing of national legislation.<sup>86</sup> The most obvious limitation of this mechanism to regulate the use of State waters is that it requires the cooperation of the States for its implementation and cannot be used coercively by the Commonwealth.

## Conclusion

89. In his recent book, *The Water Dreamers*, Michael Cathcart made the following observation:<sup>87</sup>

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<sup>82</sup> "The colonies never were and the States are not international persons": the *Work Choices* case at 373.

<sup>83</sup> Gardner, Bartlett and Gray, above n 6, para 5.45.

<sup>84</sup> Gardner, Bartlett and Gray, above n 6, para 5.45.

<sup>85</sup> Lucy, above n 28, p 41.

<sup>86</sup> An example, again at least in part, is the *Water Act 2007* (Cth).

<sup>87</sup> Michael Cathcart, *The Water Dreamers: the Remarkable History of Our Dry Continent* (Griffin Press, 2009), p 2.

Water is the fundamental limit on how Australians live. It determines where we establish our cities, how we think about country, how we farm it, build on it, defend it and dream about it.... Though the country is dry, Australia has more water per person than any other continent. By that measure, we are not running short of water. Yet many rivers and catchments are in crisis.... We are still getting it wrong.

90. As has been examined above, a partial explanation of why “we are still getting it wrong” lies in the colonial hangover from which we still constitutionally suffer, namely, that control over water rights remain the exclusive preserve of the States. Self-interest, evident since before federation, together with only limited Commonwealth power to manage this essential resource and Australia’s extreme environment, has regrettably resulted in depletion and degradation of our internal waters. The Constitution provides only limited recourse to the Federal government to regulate and replenish this vital resource. This is further compromised by the constitutional uncertainty created by cases such as *Arnold*, *ICM* and *Spencer*, which collectively serve only to render the Constitution a less than satisfactory vehicle with which to administer an effective statutory solution to the current crisis. As Professor George Williams has put it, “once again, how we manage our scarce water resources is being held hostage by our 1901 constitution”.<sup>88</sup>

**24 February 2011**

**R A Pepper**

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<sup>88</sup> Williams G, “When water pours into legal minefields”, *The Sydney Morning Herald*, 26 October 2010, p 13.