THE RIVER MURRAY QUESTION: PART II— FEDERATION, AGREEMENT AND FUTURE ALTERNATIVES

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Having previously examined the vexed history of the River Murray prior to Federation, Mr Clark in this article considers contemporary legal opinion as to the rights of the respective States, events leading up to the creation of the River Murray Commission and its capacity to establish a rational regime for the management and administration of the Murray and its tributaries.

THE INTER-STATE ROYAL COMMISSION ON MURRAY WATERS

As a result of the Corowa conference, New South Wales, Victoria and South Australia respectively appointed Royal Commissioners to take evidence in the several States and to report on the future of the river. They reported in December 1902.

The most significant conclusions of the majority were that, first, a permanent agreement should be entered into for the administration of the river and, second, that:

> although existing vested interests demand certain substantial concessions in favour of maintaining the navigable condition of the rivers, the extension of navigation, except by the construction of locks is not to be looked for. It is further evident that, in the event of circumstances at any time causing a conflict of interests, the demands of navigation must yield to those of general supply to settlers and for the irrigation of land.[1]

This conclusion was, perhaps, unavoidable. Even Glynn, who had been one of the most vocal defenders of South Australia's rights, anticipated as much.[2] Yet public opinion was strong in South Australia. Commissioner Burchell filed a minority report which was keenly supported in the local press. Davis and Murray, it was alleged, had not only deliberately led witnesses away from navigation but had set out, 'not merely to belittle, but practically to ignore navigation altogether'.[3] It was lamented

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1 Inter-State Royal Commission on the River Murray (1902), *Report*, 36.

2 South Australian *Register*, 15 December 1902.

3 *Ibid.* A similar allegation of bias and of deliberately omitting portions of his evidence was subsequently made by Captain Ritchie M.P.; South Australian *Register*, 6 February 1903.

that the proposals concerning locking did not cover the full length of the river, that South Australia would be left to bear the major financial burden of the locks and that no strong stand had been taken against the aggressive diversion policies of the other States.[4] To some, there was a bitter analogy with 1886 when New South Wales and Victoria had agreed to divide the waters between them, without reference to the wishes of South Australia.[5]

The Commission did, however, seek to plumb the divergent opinions as to the legal situation of the States and Commonwealth. A most comprehensive questionnaire was prepared and evidence in response was given by such luminaries as Pitt Cobbett, Challis Professor at Sydney, Salmond, Bonython Professor at Adelaide, Dr Cullen, Oliver, of the New South Wales Land Appeal Court, Mills, a New South Wales barrister, Glynn and Carruthers.

The majority opinion seemed to be that New South Wales enjoyed supreme legislative power over the Murray above the South Australian border,[6] although Glynn doubted the extent to which such power could be exercised.[7] There was, however, a division of opinion as to Victoria's rights. The private law rule was that riparian rights adhered to land either in vertical or lateral contact with the stream.[8] Arguments from the private law analogy thus hinged on the issue whether the statutory declaration that the whole watercourse was within the territory of New South Wales effectively deprived Victoria of riparian ownership. There was a complete division on this question.[9] Some argued that the Pental Island award, coming after the statute of 1855, was evidence that Victoria possessed riparian rights.[10] Against this conclusion is the fact that the award was apparently based on the geographic knowledge of 1842 when it was not known that the island existed,[11] and the River Murray as then understood related only to the northern channel. Another view was that, although New South Wales owned both banks, Victoria possessed 'rights over the southern bank'[12] or that her residents had an easement almost tantamount

[4] South Australian *Register,* 15 December 1902.

[5] South Australian *Advertiser,* 15 December 1902 and see *supra* p. 27.

[6] Inter-State Royal Commission on the River Murray (1902), *Minutes of Evidence,* 242 *per* Pitt Cobbett, 229 *per* Cullen, 223 *per* Oliver, 238 *per* Carruthers.

[7] Inter-State Royal Commission on the River Murray (1902), *Minutes of Evidence,* 9, 200, 202.

[8] *Lyon v. Fishmongers' Company* (1876) 1 App. Cas. 662, 683; *Lord v. Commissioners for the City of Sydney* (1859) 12 Moo. P.C. 473, 496.

[9] Glynn, Salmond, Ogier and Carruthers maintained that Victoria had riparian status: Inter-State Royal Commission on the River Murray (1902), *Minutes of Evidence,* 205; 208; 216; 237; Oliver, Pitt Cobbett and Mills held the opposite view: 224; 243; 147, 270-1.

[10] Inter-State Royal Commission on the River Murray (1902), *Minutes of Evidence,* 225 *per* Oliver; 216 *per* Ogier.

[11] *Supra* p. 19. See also Moore, 'The River Murray Boundary' (1904) 1 *Commonwealth Law Review* 157, 162 and, generally, Moore, 'The Case of Pental Island' (1904) 20 *Law Quarterly Review* 236.

[12] Inter-State Royal Commission on the River Murray (1902), *Minutes of Evidence,* 230-1 *per* Cullen.

to a right of property in the water.[13] Although contrary views were expressed, the general opinion was to deny that New South Wales had absolute authority over, and ownership of, the waters. Some felt the Imperial Act of 1855 was confined to giving New South Wales residual criminal jurisdiction[14] but the opposite view was that Victoria, in purporting to grant a right to the Chaffeys to take water, had been acting completely *ultra vires*[15] and that Victoria's rights to use the water were, at most, founded on comity.[16] If she in any way diminished the flow of the Murray, New South Wales could act legislatively to put a stop to her activities.[17]

The same type of division appeared in opinions as to South Australia's rights, both in the Murray and in its tributaries. Salmond argued that riparian principles applied[18] and Glynn stated that, in this respect, the Australian governments were not independent States.[19] Again, he emphasized that the practical importance of quibbles over legal rights was doubtful,[20] and obtained Carruthers' support for the view that, as was the case before Federation, the only way of solving the dispute was for the States to agree and legislate concurrently.[21] Oliver stated that the need for treaty proved that there was no applicable law,[22] and even Salmond was forced to give his qualified assent to this view.[23] Pitt Cobbett was of the firm opinion that principles of comity rather than law governed the case.[24]

The submissions on the effect of Federation and the meaning of sections 98 and 100 of the Constitution, however, perhaps demonstrated the greatest confusion. Salmond, pursuing his argument that common law riparian rights applied between the States, suggested that 'reasonable' in section 100 must be given the same meaning as in private law cases. There was common law authority that the use by an upper riparian must be 'reasonable', and any use which interfered with the customary flow was necessarily 'unreasonable'.[25] On this argument, any interference by the upstream States with the natural flow for navigation would be an 'unreasonable' use and therefore unconstitutional.[26] To those who asserted

[13] *Ibid.* 224 *per* Oliver.
[14] *Ibid.* 202 *per* Glynn; 208 *per* Salmond; 223 *per* Oliver; 229 *per* Cullen.
[15] *Ibid.* 233 *per* Cullen; 246 *per* Pitt Cobbett.
[16] *Ibid.* 243 *per* Pitt Cobbett.
[17] *Ibid.* 237 *per* Carruthers; 230 *per* Cullen.
[18] *Ibid.* 207-9.
[19] *Ibid.* 202.
[20] *Ibid.* 201. *Supra* p. 30.
[21] *Ibid.* 6 *per* Glynn; 238 *per* Carruthers.
[22] *Ibid.* 226.
[23] *Ibid.* 208.
[24] *Ibid.* 243.
[25] Citing *Earl of Sandwich v. Great Northern Railway Co.* (1878) 10 Ch.D. 707.
[26] Inter-State Royal Commission on the River Murray (1902), *Minutes of Evidence,* 209. The same argument was forcefully put by Gordon, South Australian Acting-Premier, in a public letter to the Victorian Premier; South Australian *Register*, 16 February 1903.

that comity was the only restraint on New South Wales taking all the water, section 100 was quoted as limiting the amount which could be taken under the Constitution; but the word 'reasonable' could be interpreted in such a way as to lead to a result precisely opposite to Salmond's. Thus it was suggested that it referred to the manner of use rather than the volume of water used. Provided due regard was had to 'proper methods of conservation or irrigation known at the time' and there was no wastage of water, a State might take as much as she liked.

> If the reasonable necessities of conservation and irrigation demand it, the waters of all rivers may be used to any extent for this purpose, notwithstanding that the rivers may thus be rendered non-navigable; in other words, irrigation is paramount to navigation.[27]

Surprisingly, it was only Cullen who saw through the emotional rhetoric about 'rights' to the significant fact that both sections 98 and 100 primarily relate to Commonwealth legislative power. It was misleading to speak of 'constitutional guarantees' for either navigation or conservation and irrigation when considering the relationships between the States themselves. He pointed out that the only restraints on individuals or State governments were positive laws applying within the States. A legislature was, in addition, subject to the terms of the Imperial Act which created it. After Federation, there were two new possible claims between States which might be heard before federal courts. An individual or a government might complain that riparian rights had been interfered with by acts undertaken on tributary rivers. In the case of an inter-State claim, its outcome would depend on whether there were pre-existing legal principles which established riparian rights between different States: the Constitution did nothing to create such rights. The second claim, which arose by virtue of section 98, would be that a Commonwealth statute concerning navigation had been violated.

> But no act done to the tributaries of the Murray either in New South Wales or Victorian territory under the authority of an enactment by the local State Legislature, would be unlawful, however much it damaged riparian rights[28] or navigation in South Australia, unless such enactment conflicted with some valid Federal statute respecting navigation.[29]

Pitt Cobbett, too, grappled with the problems raised by sections 98 and 100. He began from the premise that there had been no law between the colonies, for private law analogies were inapplicable. But

[27] Letter from the Victorian Premier to the South Australian Premier, 28 January 1903; South Australian *Register*, 31 January 1903. A good analysis of the conflicting interpretations of 'reasonable' is found in a series of articles by Bavin, commencing in the South Australian *Advertiser*, 13 June 1904.

[28] Presumably the phrase 'riparian rights' meant the use accorded to riparian proprietors by South Australian law, and did not infer the existence of inter-State rights.

[29] Inter-State Royal Commission on the River Murray (1902), *Minutes of Evidence*, 232.

he concluded that once the federal Parliament acted to preserve navigability, then every State and resident would be able to divert water to such an extent as is reasonable for irrigation and conservation. Reasonableness would be a question of fact, and the Commonwealth would have full power to control navigability, subject only to section 100.[30] It was apparently his view that there was 'still no common law of the Commonwealth on this subject' except that contained in the Constitution.[31] He inferred, however, that a legislative act by the Commonwealth relating to navigation would, of itself, create rights between the States relating to irrigation and conservation. Yet, somewhat inconsistently, he asserted that, even if the governments deputed the matter to some central authority for legislative action, the States or residents therein could still invoke section 100 to prevent interference with reasonable use for conservation or irrigation. Insofar as there was such interference, the compact or reference would be *ultra vires.*

It was subsequently argued that, until the federal Parliament exercised its legislative power to control navigation, the powers of the States remained precisely as they were before Federation[32] and the South Australian *Advertiser* was quick to warn that 'a legislative power the exercise of which is not expressly commanded, and which might never be employed, is evidently, in no real sense of the words, a constitutional guarantee'.[33] One might have expected, in answer to the searching questions the Commission posed, more than one of the witnesses to point out that the proviso in section 100 was clearly a brake on Commonwealth legislative power and that the so-called 'right' could only be invoked against Commonwealth legislation, or activities under Commonwealth legislation, which, in purporting to control navigation, unduly impinged on irrigation and conservation. The contention by Pitt Cobbett that joint reference by the States of their powers to control conservation and irrigation would be subject to the overriding proviso of section 100 is doubtful, but may well be understood in the prevailing spirit of the time.[34]

The evidence before the Commission, including the legal evidence, was largely a justification of pre-conceived political positions. The 'rights' of the States were bandied about without much attempt at disinterested analysis and it is interesting to note that the super-analytical mind of Salmond was sufficiently overawed by his temporary capacity as advocate

[30] *Ibid.* 246.
[31] *Ibid.* 244.
[32] Bavin in South Australian *Advertiser,* 13 June 1904.
[33] 25 December 1902.
[34] In the context of modern constitutional interpretation, it may well be that the view that section 100 operates only in relation to federal legislative power and does not confer independent rights on States or individuals is too restrictive. In the difficult search for an inter-State law, it may be that section 100 will be permitted a more creative role. See Renard, 'Australian Inter-State Common Law' (1970) 4 *Federal Law Review* 87. This matter will be further considered in a subsequent article.

for South Australia that he could, in one breath, assert that the private law of riparian rights applied by analogy between the States and in the next, concede that the need for treaty meant that there was no law to apply to the case. Glynn was, as usual, perhaps the most honest about the whole affair.

> All the States apparently desire to treat the rivers from a Federal point of view; unfortunately, however, with politicians, other considerations take weight—we, perhaps, play too much to the galleries at times.[35]

COURTS AND CONFERENCES

The evidence before the Inter-State Royal Commission, whilst concentrating much on supposed legal rights at common law and under the Constitution, could only speculate as to the future powers of the High Court. Glynn had pointed out that the scope of the judicial power was far broader than the Commonwealth legislative functions.[36] Carruthers agreed that, undoubtedly, the High Court would be the appropriate forum for a dispute, whether between residents of different States, the States themselves or the Commonwealth and States.[37] Just as there had been little thought addressed to the true effect of section 100, so there was no opinion expressed that perhaps the Commonwealth would need to act legislatively to control navigation before the High Court would assume jurisdiction. Yet there was some appreciation of the problems involved.

> Whether the Federal Parliament will pass a law adequately protecting navigation against unreasonable diversions for irrigation; what will be the judicial criterion of reasonableness to which federal legislation may have to be adapted; whether we can hope that the High Court will undertake to enforce riparian rights in the absence of any federal law concerning river navigation; whether State laws will operate in barring redress—all these questions are involved in doubt.[38]

If the States were forced to fall back on their alleged riparian rights at common law[39] there was no telling what the future High Court might do. 'For a time lawyers would taste paradise.'[40]

Legislation was passed to constitute the High Court in 1903, but there were no early indications whether it would accept jurisdiction in a case,

[35] Inter-State Royal Commission on the River Murray (1902), *Minutes of Evidence*, 8. It is worthy of note that Glynn in fact advocated the use of the reference power to have the Commonwealth pass legislation of general application: Inter-State Royal Commission, *op. cit.* 206. In the event, the Commission suggested national steps to change the riparian rights doctrine along the lines of the Water Rights Act 1896 (N.S.W.): Inter-State Royal Commission on the River Murray (1902), *Report*, 57.

[36] Inter-State Royal Commission on the River Murray (1902), *Minutes of Evidence*, 202.

[37] *Ibid.* 239.

[38] South Australian *Advertiser*, 17 December 1902.

[39] *Ibid.* 25 December 1902.

[40] *Ibid.* 17 December 1902.

not arising under Commonwealth legislation, where the States asserted their supposed relative riparian rights. Bavin adverted to the difficulty that might arise in the absence of legislation, but asserted that, under section 75 of the Constitution the High Court enjoyed ample original jurisdiction. The real problem would be to define the applicable law.[41] Other opinion did not see how proceedings could be instituted until the Commonwealth Parliament conferred jurisdiction by an Act relating to navigation.[42] This doubt remained to plague South Australia in her frequent resolutions to pursue a remedy at law.

She was vitally interested in the pending dispute between Kansas and Colorado and wrote to both Governors requesting copies of all decisions as they were handed down.[43] The initial ruling of Fuller C.J., accepting jurisdiction, was invaluable to Glynn in his advocacy of the South Australian cause. Not only was it stated that the federal tribunals were free to apply federal, State or international law, as the case demanded, but the very nature of a Federation required the solution of such inter-State conflicts by federal courts.

> If, then, independent nations on entering into a union subject themselves to what might be called the interstate common law in these matters, the case is much stronger for the existence of equal rights between the members of a federation previously subject to the same Crown.

If statesmanship were not equal to the task of solving the river question, the time had come appeal to the judiciary.[44]

Indeed, there was considerable pressure in South Australia to resort to some test of rights and several schemes were mooted. One was to have Royal Assent denied Bills authorizing works detrimental to South Australia.[45] Others urged a petition to the King to order the cessation of works—on the strange grounds that an appeal to the federal government would embarrass Victoria—pending a decision by the Privy Council.[46] In the event special officers were appointed to gather details of diversions in the upstream States to aid in stating a case to whichever forum was decided upon.[47]

Statesmen were, however, not entirely idle. In April 1903, South Australia proposed a scheme to the Premiers' conference, whereby the Commonwealth would finance the locking of the Murray and the States would remain responsible for their conservation projects. When this failed, a motion was introduced which recited the need to maintain navigability

[41] *Ibid.* 14 June 1904.
[42] *Australasian,* 10 December 1904.
[43] South Australian *Advertiser,* 28 September 1903.
[44] South Australian *Register,* 9 May 1904.
[45] Public letter from the South Australian Acting-Premier to the Victorian Premier; South Australian *Register,* 16 February 1903.
[46] South Australian *Register,* 6 March 1903.
[47] *Ibid.* 7 March 1903, 28 May 1904; South Australian *Advertiser,* 28 May 1904.

and prohibited further diversion works until either the Commonwealth or States moved to preserve navigation. This, and a motion by Gordon for twelve months' notice of new diversions, failed.[48] Victoria and New South Wales then got together and brought forward a proposal to constitute a commission to administer the Murray, which was adopted.

Under the agreement, the upstream States undertook to limit their offtake from the Murray to a specified figure for a period of five years. Diversion would be permissible from a number of rivers which made no effective contribution to the Murray except in times of flood. No new offtakes would be placed on the Murray without written notice to the commission, which would determine the amount of compensation water to be allowed to flow for South Australia's benefit. Any dispute which arose concerning the meaning of the agreement would be referred to the Chief Justice of Queensland for arbitration and the agreement expressly recited that it was not to be construed as having any effect on any existing or accrued rights of the States. During the currency of the compact they agreed to take no action to enforce their rights.[49]

The agreement provoked stringent criticism. The time limit of five years was condemned as following the line of least resistance when permanent agreement was inevitable. It merely postponed the issue, whilst tying the hands of the upstream States. A permanent agreement along the lines recommended by the Inter-State Royal Commission would have been preferable.[50] In Victoria and New South Wales the concessions made to South Australia were viewed as dangerous, for the temporary distribution might become 'a sort of vested interest to the unduly favoured State, which it may be difficult to replace by a more equitable distribution'.[51] Victoria saw the other side of the coin as well. Rather than entering into litigation immediately, the Premier sought the advantages of a five-year amnesty in which Victoria might consolidate her position and adduce concrete evidence of the practical primacy of irrigation over navigation.[52]

There were stronger and more emotional attacks against the sharing provisions of the agreement. New South Wales was castigated for giving away her birth-right[53] and a deputation from the Victorian Waterworks and Irrigation Trusts Association protested to the Victorian Premier, urging that 'no agreement be entered into which might be deemed to give riparian rights to any State that does not now possess them'.[54] A deluge of protests followed from the Murray and Goulburn Water Supply

[48] South Australian *Advertiser*, 27 April 1903.
[49] Agreement dated 22 April 1903.
[50] Victorian *Age*, 29 June 1903.
[51] *Sydney Daily Telegraph*, quoted in South Australian *Register*, 29 April 1903, where the similar opinion of the Victorian *Argus* is also cited.
[52] Victorian *Age*, 25 June 1903.
[53] South Australian *Register*, 8 May 1903.
[54] Victorian *Age*, 25 June 1903.

League,[55] the Echuca Borough Council,[56] and water-users' associations at Berrigan, Finley, Strathmerton, Cobram, Katunga, Numurkah, Nathalia and Yarrawonga.[57] McColl, long a champion of irrigation in Victoria, was perhaps the most acid critic. He objected to the agreement because internal State control of water was irrevocably abandoned; Victoria was restricted when it should be expanding; the proposed commission would be jointly responsible to no-one; and a 'fatal admission' of South Australia's interest in Victorian waters had been made which would inevitably prejudice future litigation. The undue preference given to navigation was not only lamentable but, in his interesting view, outside the joint power of the Premiers as 'concessions to navigation must be approved by the Federal Parliament or such bodies as it may appoint to take control'.[58]

None of the governments was quick to ratify the compact, and in June 1904, the federal government sought to intervene. Watson, the new Prime Minister, wrote to each of the States asking whether they would pass the necessary legislation to hand over control of the Murray to the federal Parliament. This renewed pressure for some form of settlement. No firm answers were given to the federal government, and the matter held over to the Premiers' conference in January 1905.

At a preliminary conference in Sydney, New South Wales was adamant that she would never enter into an agreement which preserved navigability at the expense of her own productivity.[59] Monash, an observer, declared himself appalled that everything said and done at the conference was in conflict with the rights of South Australia.[60] A decision was taken to repudiate the agreement of 1903 and there was apprehension about the meeting of Premiers.[61] The expected confrontation was by-passed, however, by deferring the issue in order to receive a report on the feasibility, costs and benefits of the locking scheme pressed by South Australia.

The year 1905 held considerable provocation for South Australia. No sooner was the conference over than the proposed sweeping legislation to establish the State Rivers and Water Supply Commission in Victoria was announced. This, combined with New South Wales proposals for the Barren Jack Dam, caused unrest in South Australia, and the government sought to initiate immediate consultations. An initial approach to Victoria to join in appointing an expert to study and report on the whole Murray

[55] South Australian *Register*, 17 June 1903.
[56] South Australian *Advertiser*, 18 June 1903.
[57] Victorian *Age*, 25 June 1903.
[58] Victorian *Age*, 1 July 1903.
[59] South Australian *Register*, 17 January 1905, and see Report of Proceedings, 16 January 1905.
[60] South Australian *Register*, 26 January 1905.
[61] South Australian *Advertiser*, 23 January 1905.

was politely rebuffed.[62] After Labbat, who had been appointed to carry out the analysis requested by the 1905 conference, had reported, New South Wales was approached. Carruthers could not see what a further conference of State engineers could add to the debate, and asked South Australia for concrete suggestions.[63] Swinburne, whose controversial Water Bill was pending, somewhat impudently suggested that the proposal to lock the Murray had been completely dropped at South Australia's request.[64] Her attempts to bring the States together for further consultations were unsuccessful and there was pressure for a judicial solution.[65]

COUNSEL AND COMMISSIONS

Whilst it was obvious after the Inter-State Royal Commission that all parties would prefer a political settlement, South Australia's threats of litigation had not been entirely empty. In 1904, £1,000 was appropriated to begin litigation and the *Register* applauded the subsequent decision to retain counsel, urging a 'fight to the finish'.[66] Glynn initially prepared an elaborate and lengthy statement of the case which, in two volumes, detailed the history of negotiations and the various proposals in which he had, of course, been intimately involved. The statement also exhaustively analysed English and American authority. Symons, too, was retained and subsequently, Isaacs.

The appointment of the latter two gentlemen raised an interesting conflict of interests. Both held their retainers from South Australia whilst acting as Commonwealth Attorney-General. Prior to Federation, Barton and O'Connor had been involved in litigation against the New South Wales Railway Commissioners whilst holding cabinet posts in the colonial government. They were censured by the legislature and had to retire from the government to prevent it falling. Symons, however, held his retainer through the period of federal office unscathed. The appointment of Isaacs created a furore in the federal House which degenerated into a motion of censure against the government. The motion was lost, and Isaacs retained his brief.[67]

Late in 1905 the three counsel met, reportedly to arrange to state a case to the High Court, although the opinion was again expressed that 'there is greater reason for proceeding direct to the Privy Council in the matter'.[68] In fact, counsel decided to prepare opinions for submission to

[62] South Australian *Register*, 5 July 1905.
[63] South Australian *Advertiser*, 17 September 1905.
[64] South Australian *Register*, 19 September 1905; 22 September 1905; Victorian *Argus* and *Sydney Morning Herald*, 22 December 1905.
[65] South Australian *Register*, 30 November 1905.
[66] 6 October 1904.
[67] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 23 August 1905, 1329-79.
[68] South Australian *Register*, 11 September 1905.

the South Australian government. Symons and Glynn wrote a joint opinion[69] and Isaacs another.[70] They were tabled in the South Australian House of Assembly in July 1906, and are worthy of detailed examination, not merely because all three were intimately involved in the federal movement, the Conventions and early federal politics, but because they also are instructive both as to the law and to the attitudes of the day.

Isaacs, it will be remembered, had expressed firm opinions during the Convention Debates. He had denied that there was any law governing the relations between the colonies over the Murray,[71] and doubted whether the Australian High Court would be guided by the United States Supreme Court on issues of navigation.[72]

> I must say also that if it became necessary to decide the point, I could not agree with Mr Gordon and some others of my honourable friends from South Australia who rest the claim upon international law. Treating it as a matter between utterly independent States, I am not able to satisfy myself that there is any such thing as a right in the question. I can find no analogy.

At most, there was 'an increasing and more enlightened policy of permission' by riparian countries to allow navigation through their territory, but '[s]o far as this claim is based upon international law or natural right it has never been admitted'.[73] From this position, he moved on to consider at length the emergence of the prior appropriation doctrine in the United States and to applaud it—particularly the new rule as to reasonable beneficial use. In his view, irrigation should be paramount to navigation. Although he did not overtly advocate the adoption of prior appropriation as a domestic doctrine in Australia, he clearly favoured it. 'I do not want to dwell any longer on this point than is necessary, but I want to urge that the new law has been recognized, and that its reasonable exercise has been recognized.'[74]

In the light of these remarks, it is interesting that his opinion entirely rested upon the assumption that the States must be 'looked upon in this regard for all practical purposes as riparian proprietors'. The legislative competence of the State Parliaments was limited to laws 'in and for' or for 'the peace, order and good government' of the States concerned and State legislation which resulted in injury to the property of another State would be illegal.

> State constitutions both by their terms and their intendment when read in relation to each other and in the circumstances of their application are

[69] Dated 6 March 1906.
[70] Dated 22 March 1906.
[71] National Australasian Convention, *Debates,* Melbourne Session, 2 February 1898, 419.
[72] *Ibid.* 416.
[73] *Ibid.* 419.
[74] *Ibid.* 423.

> plainly to be used as beneficial instruments of government mutually assisting to develop the same Continent improving its capabilities and making the most of its natural opportunities but certainly not by any means as weapons of antagonism or as engines of destruction of great natural features.

In seeking a law to harmonise their relationships with respect to the Murray none could 'be found so applicable, so self-suggestive, or so inherently fair, as the well-known rule of riparian proprietorship'. It is an interesting quirk that a common argument in moving from private law to public law is that what is just between persons must be just between nations. In this case, however, New South Wales in 1896[75] and Victoria only the previous year[76] had, with great fanfare, endeavoured to be rid of the riparian doctrine as manifestly inapplicable to govern private rights in Australia. In *Hanson v. Grassy Gully Gold Mining Co.*[77] the New South Wales Supreme Court had noted 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.[78]

They concluded that New South Wales had effectively abolished the doctrine and two other decisions had concurred in this view.[79] It is therefore interesting that Isaacs made no reference to the expressions of executive and judicial distaste for the riparian doctrine in its private law context. He proceeded, rather, to assume the doctrine's applicability on alternative grounds.

> Whether a State is to be deemed in strict law a riparian proprietor qua another Riverine State or whether internationally the same rule is to be applied by analogy is I think immaterial—the result is the same.

An extensive examination of the English private law authorities led him to the conclusion that the upper States might use water, provided they do not go beyond what an ordinary riparian owner may do. If they exceed these limits 'they are doing a legal wrong to the State of South Australia and to any individual there whose property sustains or will probably sustain actual damage thereby'. He found himself supported in this conclusion by American authority.

To determine the extent to which the upper States might use water, he again had recourse to the riparian doctrine and the distinction between ordinary and extraordinary user. He relied on Theobold in his *Law of Land* to demonstrate that the unlimited right of a riparian to exhaust the

[75] Water Rights Act 1896 (N.S.W.).
[76] Water Act 1905.
[77] (1900) 21 N.S.W.L.R. 271.
[78] *Ibid.* 275.
[79] *Dougherty v. Ah Lee* (1902) 19 W.N. (N.S.W.) 8; *Attorney-General v. Bradney* (1903) 20 W.N. (N.S.W.) 247. As to the correctness of these decisions, see the discussion in Clark and Renard, 'The Riparian Doctrine and Australian Legislation' (1970) 7 *M.U.L.R.* 475.

stream for ordinary purposes was, perhaps, questionable. Cases like *Nagle v. Miller*[80] may be incorrect insofar as they imply that the right to use water for ordinary purposes is not qualified by a requirement of reasonableness. This conclusion, however, did not advance his argument as to the right of an upstream State to use water for irrigation or urban supply, both of which were extraordinary uses at common law. One can sympathize with his view that the right to use water for irrigation *ought* to be limited only by the likelihood of actual material damage to the downstream owner and that the right of a downstream owner to have the flow undiminished in quantity and quality *should* be subject to the reasonable use of upstream owners for extraordinary purposes. Yet it is difficult to agree that 'later ideas on the subject are trending in the direction of reasonable mutual consideration', at least insofar as this purported to report a trend in judicial opinion.

This was certainly true of American authority, but those developments had been specifically rebuffed by the English courts.[81] All contemporary English decisions undoubtedly would have prevented upstream diversion which caused actual damage to legitimate downstream uses. But they went much further. They positively forbade any interference with the customary flow of a stream for extraordinary purposes which resulted in 'perceptible',[82] 'sensible',[83] 'substantial'[84] or 'material'[85] diminution, whether or not actual damage was caused. Both his exposition of the common law and his prediction of its future development in the Australian context were questionable.

Isaacs was not troubled by the fact that both parties might be States. He stated that private law riparian principles would apply between the States.

> I do not however say that those principles apply with exactly the same effect to identical facts. I think some allowance must also be made for the fact that the riparian owner is a State: but at the same time corresponding allowance must be made for the lower riparian owner being likewise a State: and inasmuch as in my opinion the respective rights depend upon proprietorship and not on limited territorial jurisdiction I do not think that in the end, the difference, if any, in application of the principles would amount to much.

Unfortunately he did not develop his argument any further than this. It would seem that the touchstone of his argument was State 'proprietary' interests rather than legislative, executive or judicial power. He rejected the contention that an upstream State in its capacity as a riparian owner

[80] (1904) 29 V.L.R. 765.
[81] *Wood v. Waud* (1849) 3 Ex. 748; 154 E.R. 1047.
[82] *Embrey v. Owen* (1851) 6 Ex. 353; 155 E.R. 579.
[83] *John Young & Co. v. Bankier Distillery Co.* [1893] A.C. 691.
[84] *McCartney v. Londonderry and Lough Swilly Railway Co.* [1904] A.C. 301.
[85] *Stollmeyer v. Trinidad Lake Petroleum Co. Ltd* [1918] A.C. 485.

could divert all the water as a necessary incident to the general development of its riparian territory for that 'would be to confuse the two legal notions of sovereignty and ownership'. Yet while the distinction between the two concepts was apparent to him, he did not explain why he chose to rely on doctrines of ownership. Perhaps, in his view, it was harder to argue for any implicit *legal* restrictions to sovereignty—rather than mere obligations of comity—than it was to extend the riparian doctrine to inter-State relations and, at the same time, correct any improper emphases which the riparian doctrine may have acquired in the private law context.

Perhaps he merely sought to invoke the American experience which, presumably to his mind, relied on riparian principles. The fact that the United States Supreme Court had accepted jurisdiction in *Kansas v. Colorado* 'must mean substantially that similar principles are to prevail between States under the Federation as between individuals in a unitary State'. The final decision in that case did not entirely bear his substantive conclusions out, yet his principle was correct. Both Kansas and Colorado had, by domestic legislation, qualified the riparian doctrine with some elements of prior appropriation and it can be argued that the final decision took cognizance of their domestic departure from the common law. Yet if this is correct, his predicted result would still be doubtful, as two of the Australian States concerned had deliberately abolished the riparian doctrine in favour of a principle of maximum distribution for irrigation.

He again relied on American authority for the proposition that the State could sue as *parens patriae*. Difficulties of adducing factual evidence of present damage ruled out an action for damages, and an injunction might be difficult to obtain in the absence of existing legislation by Victoria and New South Wales or executive action under such legislation which showed that damage was imminent. He concluded that if laws in the upper States 'would probably result' in an invasion of South Australia's rights, the High Court might use its discretion to make a declaratory judgment. This conclusion is not free from difficulty, in the light of the authority of the time, and Glynn and Symons were so uncertain that they recommended it only as a second string to their proposals. His final advice was that, although South Australia had her legal rights, there was no necessity for 'transferring the consideration of the great question—how best to utilise our river water, from the executive to the judiciary' and urged South Australia to persist in seeking a political settlement. In light of his participation in the Convention Debates and his subsequent career, it is a great pity that he expressed no views as to the proper role or powers of the Commonwealth government in the matter. In keeping his retainer, he had given his assurance that he would not consider the matter from any standpoint which concerned the Commonwealth.

This constraint was not placed on Glynn and Symons. They, too, asserted that lack of navigable capacity in tributary rivers did not remove

them from the regime which applied to the Murray. Instead of relying on the applicability of the common law riparian doctrine, however, they chose to emphasize the 'public right' of navigation and the trust committed to the Commonwealth to protect this right. They regarded the legislation passed by the upper States and the steps they had already taken to implement diversion schemes as sufficient evidence of their belief that they were entitled to divert without restriction and of an intention to take it irrespective of South Australia's rights.

To support the contention that South Australia had a right to have navigability maintained, they cited a good deal of English authority pointing to a public right of navigation which was superior even to the property rights of the Crown.[86]

> It is not necessary therefore to say more than that the rights which South Australia possesses in respect of a navigable Murray are in our opinion incontrovertible and rest upon very clear principles . . .

It was, however, necessary to say a great deal more to substantiate this, the lynch-pin of their argument, as Glynn well knew. The English public right of navigation had only ever been acknowledged to the extent of the tidal reach in a river. There were exceptions to this rule for such as the Thames, the Severn and the Medway, but these were special rivers governed by particular legislation. So restrictive was the rule that the United States Supreme Court had expressly adopted a different test to determine whether a river was navigable for the purposes of the federal trade and commerce power. Navigation in that sense meant 'navigable-in-fact', not 'navigable-at-law'. Yet there was absolutely no reference in the opinion to the fact that, under the English test, South Australia's vaunted right to navigate would only extend through the Murray mouth (which was impassable) and some way upstream from the lakes, where there was precious little trade to be won.

The omission to acknowledge this difficulty and argue for the application of American authority is all the more startling when Glynn's position during the Convention Debates is recalled. It was he who, when Isaacs expressed doubts whether the High Court would follow the American authority would regard it as navigable. Consequently, he his view, the flow of the Darling was so intermittent that not even liberal American authority would regard it as navigable. Consequently, he endeavoured to have a specific clause inserted into the Constitution which defined navigability to include waters intermittently susceptible to, or contributing to, navigation.[87]

[86] Quoting *Colchester Corporation v. Brooke* (1845) 7 Q.B. 339; 115 E.R. 518; *Williams v. Wilcox* (1838) 8 Ad. & El. 314; 112 E.R. 857; *R. v. Clark* (1702) 12 Mod. 615; 88 E.R. 1558; *Simpson v. Attorney-General* [1904] A.C. 476, 487.

[87] National Australasian Convention, *Debates,* Melbourne Session, 2 February 1898, 48.

On the tenuous and unargued premise which they had stated to be incontestible, they built an argument for federal intervention; it was the 'clear duty' of the Commonwealth to maintain navigation. 'For the Commonwealth authorities to stand aloof and to treat the question as a mere interstate controversy is, it appears to us, to abdicate one of the most conspicuous and important functions of the Commonwealth.' It was unreasonable to expect South Australia to vindicate 'the entire rights of the whole Commonwealth' when federal legislation could solve the whole problem.

In view of *United States v. Rio Grande Dam and Irrigation Co.*[88] they advised that the Commonwealth had 'the right to take all needed measures' to preserve navigability. It had *locus standi,* through the Attorney-General, to proceed against any State, or preferably, against a particular diversion scheme. Admittedly, there was a problem whether the Commonwealth could sue before it had legislated on the subject. They were disposed to think it could but gave no argument to support their view. If it could not, this was all the more reason for federal intervention. Thus far, the opinion appeared to be an argument for Commonwealth intervention, rather than an attempt to advise South Australia as to her position in law as a prospective plaintiff.

The right of States and residents referred to in section 100 of the federal Constitution was a right which pre-existed Federation. This, they said, was conceded. Thus the contention that the words 'reasonable use' enlarged the right to take water to the extent necessary to support properly conducted irrigation was invalid: the Constitution could have no enlarging effect on pre-existing rights. In logic, this was correct, but the conclusion rests on the assumption that the meaning of the word 'right' was conceded, and that the upstream States concurred in their view of the rights existing prior to Federation. The vexed history of the problem speaks against this likelihood. In truth, the only argument they could adduce to demonstrate that 'reasonable' placed limitations on the amount of water which could be taken, was that the opposite view would be 'opposed to the spirit and true meaning of the Constitution and the general interests of the Commonwealth'. Inferentially, they viewed section 100 as being primarily a constitutional guarantee which might be invoked by one State against another, or by the Commonwealth against a State, and only incidentally as placing limitations on the legislative competence of the federal Parliament.

In the event that the Commonwealth refused to intervene, South Australia, on American authority, could sue for an injunction to protect her threatened navigation rights, pending a trial of the issue. They were wary of claiming a declaration, as they doubted the High Court's ability

[88] (1899) 174 U.S. 690.

to order declaratory relief where no substantive injury were shown. Nonetheless they did 'not hesitate to advise proceedings at once, if necessary, upon the facts submitted', for they felt that 'a decision upon the navigability will lead to a general adjustment of all the river difficulties'.

As a second and, in their opinion, less preferable line of attack, they recommended reliance on the riparian doctrine. In less than a page, citing only *Ellis v. Duke of Bedford*[89] in support, they concluded that South Australia 'as riparian owner, for itself as well as all other riparian owners whose rights are invaded, may sue another State or the residents of another State for or to prevent injurious interference'.

The opinion is, on the whole, disappointing in its lack of tight analysis and its obvious deficiencies in argument. Both counsel had written extensively on the problem and had participated in the Convention Debates. Symon had served as Commonwealth Attorney-General. Glynn had led the debate for South Australia in evidence before the Inter-State Royal Commission, in State and federal politics and in the press. His statement of the case for opinion in two volumes was a masterpiece of elaborate legal research and exposition of the issues involved. Yet the opinion chose to make assumptions and to neglect, or take as conceded, points which were far from certain. Perhaps it is fair to conclude that either they sought to concentrate on issues which Isaacs had deliberately excluded himself from considering or that they were motivated by a desire to protect navigation, not by legal action, but by provoking a political solution, preferably through Commonwealth intervention.

THE VICTORIAN ROYAL COMMISSION ON MURRAY WATERS 1910

The Premiers' conference of 1906 temporarily stayed South Australia's hand. Agreement was reached on a detailed scheme for locking and administering the Murray, and costs apportioned among the parties. Commonwealth legislation would be sought to sanction and secure the agreement. The parties actually drafted ratifying legislation before the unaccustomed strain of co-operation proved too great.[90] A wrangle developed over tolls for river haulage and the minimum depth to be maintained in the system.[91] This was settled in June 1907, but New South Wales again proved truculent. South Australia had imposed restrictions on fruit coming from New South Wales, and the Premier indicated that ratification would not take place until South Australia showed a more conciliatory spirit on the fruit question.[92]

[89] [1899] 1 Ch. 494.
[90] Victorian *Argus*, 13 June 1906.
[91] Victorian *Argus*, 19 March 1907; *Sydney Morning Herald*, 18 February 1907.
[92] *Sydney Morning Herald*, 1 November 1907.

No sooner was New South Wales placated than Victoria backed off. Swinburne had studied the final awards of the United States Supreme Court in *Kansas v. Colorado*[93] where diversions by Colorado, although causing damage to Kansas, were held not to be unreasonable, as they conferred great benefit on Colorado.[94] He consequently suggested that an amendment of the agreement was necessary, in view of this new statement of the rights between federal States,[95] rejecting the argument that the analogy with *Kansas v. Colorado* was inapposite as South Australia claimed water for navigation, not for irrigation.[96] Consequently, the Victorian Premier announced that he would 'throw the agreement under the table' and proceed on the basis that 'precious small cognisance' need be taken of South Australia's navigation interests.[97] The Bill was thus referred to a parliamentary committee to examine the new legal rights of the States and to allow Elwood Mead, the first Chairman of the Victorian State Rivers and Water Supply Commission, who had just arrived from America, to examine the proposals.[98]

New South Wales endeavoured to mediate. South Australia flatly rejected calls for yet another conference, but her Premier met with the Victorian cabinet and presented a memorandum by Glynn refuting Swinburne's arguments on the law.[99] A meeting between New South Wales and Victoria ensued, at which compromise proposals concerning the allowances for South Australia, both before and after locking, were worked out and forwarded to South Australia.[1]

Yet even this concession was insufficient for Victoria, and although a Bill was introduced to ratify the amended proposals, she decided to refer the matter to a Royal Commission, whose terms of reference were to enquire into, and report upon:

(a) the total flow of the River Murray and the contributions thereto by each State;

(b) the considerations which should determine the allotted share of each State;

(c) the manner of determining shares and the authority to control diversions by, and secure allotted volumes to, each State;

(d) measures to regulate flow in order to secure the full use of the river for all purposes.

93 (1907) 206 U.S. 406.
94 Victorian *Argus*, 15 July 1908.
95 *Ibid.* 27 July 1908; *Sydney Morning Herald*, 11 August 1908.
96 Victorian *Argus*, 15 July 1908.
97 *Sydney Morning Herald*, 20 August 1908.
98 Victorian *Argus*, 30 July 1908.
99 *Ibid.* 27 August 1908.
1 *Sydney Morning Herald*, 29 September 1908.

In its report, the Commission reviewed the history of the dispute and pointed to salient differences between prevailing conditions and those of 1902 when the Inter-State Royal Commission had reported. There had been an increase in dry-land wheat farming, due to improved methods of agriculture and to superphosphate. At the same time, Victoria had encountered financial difficulties in sparsely populated and unprofitable irrigation areas. Railways had extended further into the Murray basin and the Barren Jack and North Murrumbidgee schemes were under way. With a prophetic tone, markedly different from the confidence of the preceding thirty years, they observed the general Australian experience that 'irrigation is not a financial success' and expressed doubt as to its future.[2]

Reviewing the legal principles governing State relations, they disapproved of the South Australian contention that riparian rights applied. without pursuing the applicable law, they regarded litigation as a last resort and expressed a preference for an amicable agreement. When elucidating the considerations which should determine the shares to be allotted to the States, they first paid heed to the contributions to total flow made by tributaries in the various States. The second criterion should be on the basis of State need from the point of view of irrigable area and suitability of land for irrigation. The third test should be the 'use and enjoyment or vested interest in the water, as far as irrigation and navigation are concerned'. Finally, regard must be had to the promptness with which a particular State was likely to put its allocation of water to beneficial use and the extent of works which would be constructed within a reasonable time. Manifestly, these suggested criteria were extremely favourable to Victoria. It was an important contributing State; it had a far greater area of irrigable land commanded by gravity than South Australia; as the first State to press forward with irrigation, it had a substantial vested interest and was in a financial position to continue expansion.

To make the necessary allocations, the Commission adopted the suggestion of the Inter-State Royal Commission 1902 and subsequent Premiers' conferences for a joint board. They looked to the newly-formed United States-Canada Joint Commission to administer the St Lawrence and the Great Lakes and concluded that the Australian body should have powers, *inter alia,* to control river gauging, collect statistics, administer and control diversions under the agreement, control snagging operations, register river traffic, control joint works on the river and report on measures fully to utilize the waters.

Not surprisingly, the Commission viewed navigation with disfavour. Although they conceded river transport to be cheaper than rail, they

[2] Victoria, Royal Commission on Murray Waters (1910), *Report,* x.

anticipated that river trade would decline still further. They viewed the recommendations of 1902 concerning locking as a product of that particularly bad year and interpreted the Inter-State Royal Commission as giving only half-hearted support to the locking proposals.

> The spirit of compromise and the disposition to be overborne by legal considerations which were the natural outcome of the environment are marked in connexion with the [1902] Commission's attitude towards locking.[3]

Elwood Mead, in evidence, had pointed out that the Murray, requiring trans-shipment at its mouth, lacked the essential feature for cheap, successful navigation. He also suggested that locking would be of little benefit to irrigation.[4] The Commission consequently recommended that, except for domestic and stock supply, irrigation should be regarded as the paramount use of the Murray, even though they had expressed doubts as to the economic potential of irrigation.

> We venture to think that the prophecy of the 1902 Commission, that portions of the river would 'eventually be locked' must rank with some of the utterances that Greek history associates with the oracle of Delphi.[5]

Consequently, the Commission recommended that an agreement should be reached and a controlling board appointed. Irrigation should be deemed the paramount use and locks and weirs should not be built, although further storages should be constructed when closer settlement was assured. Finally, they asserted that the Murrumbidgee and Goulburn should remain entirely under State control.

These recommendations were discussed at the Premiers' conference in January 1911. The likely results of the Victorian recommendations had been anticipated nine months earlier. The *Sydney Morning Herald* had lamented that the conclusions of the Commission would doubtless delay settlement and that, although an agreement along the lines suggested by the Commission would benefit New South Wales,

> this State would not be justified in cynically ignoring the legitimate claims of South Australia. It is a just grievance with South Australia that every time this question has been re-opened her interests have suffered . . .[6]

The recommendations of the Commission concerning locking and the primacy of irrigation produced the anticipated dispute. In Victoria's opinion an 'irrigation supply for South Australia could be arranged for, but the demand for navigation persisted in by that State constitutes the obstacle in the way of settlement'.[7] The Victorian *Argus* predicted that 'it is probable that in the end, though not at this conference, South Australia

[3] *Ibid.* lix.
[4] Victoria, Royal Commission on Murray Waters (1910), *Minutes of Evidence*, 8-9.
[5] Victoria, Royal Commission on Murray Waters (1910), *Report*, lxii.
[6] 17 March 1910.
[7] Victorian *Argus*, 21 January 1911; interview with the Victorian Premier.

will give up the position she is still fighting to maintain'.[8] The *Sydney Morning Herald* was again objective in its assessment of the situation. Two facts emerged from the conference.

> The first is that there is no common point between the interests of the parties, and the second is that every year the magnitude of the stake for each of them increases. Each party is more and more likely to insist on better terms for itself than the others are likely to grant. More particularly is this the case since the equities of the matter are by no means easy to determine. A point now raised is that irrigation must take precedence of navigation. That no doubt is sound; but South Australia has changed face, and now bases her claims as much on her irrigation requirements as on those for navigation.[9]

No permanent basis for an agreement was reached by the Premiers. The issue was again postponed and the conference called for further information from the various State engineers who were to report by December 1911.[10] Something was done, however, to facilitate South Australia's unilateral decision to lock her part of the river and to increase available water through storage. New South Wales and Victoria agreed to permit South Australia 'to construct, use and enjoy the storage works at Lake Victoria (with and including two locks on the Murray River)' and to use the Murray to convey water from the lake, which was in New South Wales, to the South Australian border. Riparian rights were preserved to adjoining land and a disclaimer which, by now was customary, was inserted to annul any presumption that the parties, by entering into an agreement, were agreed.

THE INTER-STATE COMMISSION

The Constitution in sections 73(3), 101-104 had made provision for the creation of an Inter-State Commission. On several occasions, the legislation to create such a body had been promised in answer to pressure for Commonwealth intervention in the Murray dispute,[11] and Bills were introduced by both Barton and Deakin. In 1910 when an *impasse* had been reached on the river question, a motion was introduced into the House of Representatives to amend the Constitution by placing the Murray and its tributaries under federal control.[12] It was re-introduced again in 1912[13] but withdrawn after the Bill to establish an Inter-State Commission had passed the lower House on the express assumption that the Commission would be able to settle any outstanding disputes.[14]

[8] *Ibid.*
[9] *Sydney Morning Herald*, 23 January 1911.
[10] Victorian *Argus*, 21 January 1911.
[11] *E.g.* Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 10 September 1902, 15897 *per* Lyne; *supra* p. 39.
[12] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 22 September 1910, 3584.
[13] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 8 August 1912, 1903.
[14] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 20 December 1912, 7691.

There is ample evidence that the delegates to the Australasian Convention contemplated a body exercising a blend of judicial and administrative powers. Barton, for example, stated:

> Then, in order that the trade and commerce provisions, including the intercolonial free-trade provision, may fairly be carried out, we have provided for an impartial judicial body, with powers of administration as well as of adjudication, to maintain and execute the clauses. It is not the chance vote of a Legislature, but the deliberate determination of the court—from which there may be an appeal on matters of law.[15]

When the Bill was presented in 1912, Hughes, then Attorney-General, adequately summarized the government's hopes for the Commission.

> It will be a standing Commission of Inquiry, with power to investigate on reference by Parliament, or of its own motion, practically all matters knowledge of which is directly necessary to Parliament and the public. It will be a Board of Trade—an independent critic, not only of social, industrial, and commercial events and tendencies, but of the operation and administration of laws. . . . It will be an active guardian of the Constitution, with power to reach out and deal with violations of the Constitution with respect to trade and commerce.[16]

Although the Constitution eventually omitted a specific reference to rivers in empowering the Commonwealth to create the Commission, the Inter-State Commission Act 1912 (Cth), section 17 makes its rôle quite clear.

17(1) The Commission may investigate all matters affecting—

(a) the extent of diversions or proposed diversions, or works or proposed works for diversions, from any river and its tributaries, and their effect or probable effect on the navigability of rivers that by themselves or by their connexion with other waters constitute highways for inter-state trade and commerce;

(b) the maintenance and the improvement of the navigability of such rivers;

(c) the abridgement by the Commonwealth by any law or regulation of trade and commerce of the rights of any State or the residents therein to the reasonable use of the waters of rivers for conservation or irrigation;

(d) the violation by any State, or by the people of any State, of the rights of any other State, or the people of any other State, with respect to the waters of rivers.

17(2) In this section 'diversions' includes obstructions, impounding, and appropriations of water that diminish or retard the volume of flow of a river.

[15] National Australasian Convention, *Debates,* Melbourne Session, 17 March 1898, 2473. See also for a contemporary opinion of the functions of the proposed Commission, Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 900 ff.

[16] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 13 December 1912, 7070.

Part V of the Act gave the Commission power to enforce its conclusions. The Commission was declared to be a court of record[17] which would grant relief 'on such terms and conditions as may be just'.[18] It could award damages[19] and grant injunctions.[20] To all intents and purposes, then, the Commission would seem to have been granted ample investigatory, arbitrative and judicial powers to lay the Murray question.

Piddington, Lockyer and Swinburne—the former Victorian Minister for Public Works and Agriculture, who had been responsible for the Water Act 1905 and subsequent negotiations over the Murray—began their work as Commissioners with a tariff inquiry in January 1914. Shortly afterwards, two cases were referred to the Commission: *Chambers v. Post Master General,* which concerned an allegation of discrimination in postal charges, and *Commonwealth v. New South Wales.* The latter matter, which was heard first, was an application for a declaration by the Commonwealth that the New South Wales Wheat Acquisition Act was invalid. Wheat, which had been sold in New South Wales to Victorian buyers, had been seized under the Act. The Commonwealth claimed that the Act contravened section 92 and sought an injunction against similar activities. New South Wales contended that the Commission had no power to grant declaratory or injunctive relief, on the grounds that Part V of the Inter-State Commission Act 1912 (Cth) was *ultra vires* the federal Parliament. The Commission dismissed the objection but stated a case to the High Court.

Griffith C.J., Isaacs, Powers and Rich JJ. (Barton and Gavan Duffy JJ. dissenting) endorsed the contention of New South Wales.[21] The judicial power of the Commonwealth could, under section 72(2), only be exercised by judges holding office *quamdiu se bene gesserint.* This was in apparent conflict with section 103(2) which expressly stated that Commissioners should hold office only for seven years. As the doctrine of separation of powers was firmly embedded in the Constitution, it was impossible that the Commission should have both executive and judicial powers and the word 'adjudication' in section 101 must consequently be read down. It could not confer plenary judicial power; merely those adjudicative functions which were ancillary to the exercise of administrative powers.

The result was to emasculate the Commission which, in its Second Annual Report led the subsequent criticism of the High Court. It viewed the decision as a prime example of the intention of the Convention draftsmen being thwarted by ineffective wording and stringent judicial

[17] Inter-State Commission Act 1912 (Cth), s. 23.
[18] *Ibid.* s. 29.
[19] *Ibid.* s. 30.
[20] *Ibid.* s. 31.
[21] *New South Wales v. Commonwealth* (1915) 20 C.L.R. 54.

interpretation.[22] The Commission thenceforth regarded itself as having powers analogous to a Royal Commission or parliamentary committee with no power at all to control, regulate, execute or maintain the commerce provisions of the Constitution.[23] The possibility that it might intervene to solve the river question had therefore disappeared. Subsequent attempts to revive the Commission were unsuccessful, although a constitutional amendment was mooted and a court of commerce considered.[24] When the term of Piddington ran out, the Commission ceased to exist.

It is interesting that, although early opinion had looked to the Commission as the proper venue to solve the River Murray dispute, in its seven years it never addressed itself to river problems. Apart from its 'Opening Statement' in 1914, no mention was ever made of its concern with diversions from inter-State rivers, despite the wide powers conferred by section 17 of the Inter-State Commission Act 1912 (Cth). One reason may have been that, although the Commission had the right to investigate matters on its own motion, this, in fact, was never done. No dispute concerning rivers was ever referred to it. It is strange, however, that, in view of section 17, no mention of the Murray crisis was made in either the report of 1914 or of 1915 at a time when the Murray had in fact ceased to flow. One can only speculate whether Swinburne, as joint engineer of the various agreements made between 1903 and 1911 and architect of the Victorian campaign for greater sharing in the waters, was instrumental in discouraging intervention.[25] Perhaps the real reason for its failure to notice the river problem is the fact that, within eight months of the commencement of activities by the Inter-State Commission, the River Murray Waters Agreement, under which the River Murray Commission was established, was finally signed.

It is to this Agreement and its subsequent history that we must now turn.

THE RIVER MURRAY WATERS AGREEMENT 1914

Agreement was finally reached on 9 September 1914 and supplanted the various compacts made, but not ratified, since 1908. Each of the parties was to nominate a member to the River Murray Commission, who

[22] Inter-State Commission, *Second Annual Report* (1915), 10; Commonwealth of Australia, II *Parliamentary Papers—General,* Sessions 1914-17, 1193, 1202.

[23] *Ibid.*

[24] This proposal emanated from a suggestion by Powers J. in the *Wheat* case, *New South Wales v. Commonwealth* (1915) 20 C.L.R. 54. A Bill to create such a Court, introduced in 1918, did not get past the first reading: Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 4 November 1920, 6165-74. See, too, Sawer, *Australian Federal Politics and Law* (1956) i. 204.

[25] Discussions with Mr Hugh Brain, secretary to Swinburne at this time, have thrown no light on the matter. The only reference to the river question in the Commission papers is a letter acknowledging receipt of a copy of the resolutions of the 1914 Premiers' conference dated 29 April 1914. The Minute Book of the Commission contains no reference whatsoever to the Murray problem.

would hold office for five years and be eligible for reappointment. The Commission was charged with:

(i) establishing and maintaining a gauging system to determine the flow of the Murray and its tributaries, and of diversions therefrom;
(ii) declaring the quantities of, times for, and means of verifying deliveries of water provided for in the Agreement;
(iii) approving designs for, and issuing directions to ensure the proper construction and maintenance of, works authorized under the Agreement;
(iv) the fixing of tolls to be collected by the State governments.

The compact also specified that certain works would be carried out by the contracting States immediately upon the coming into effect of the Agreement. They included an Upper Murray Storage (subsequently Hume Reservoir), a storage at Lake Victoria, locks and weirs between Echuca and the Murray mouth and a system of locks either on the Murrumbidgee or the Darling. Wherever locks or weirs were to be constructed, the Commission, in approving plans would 'have regard to the suitability of the sites for the purpose also of affording convenient offtakes for irrigation requirements'.[26] The various governments were deputed to carry out these works, to operate and maintain them, and to carry out dredging and snagging operations. Sufficient water was to be maintained in the system for vessels drawing five feet of water. Where any government refused or neglected to construct, maintain or operate the works specified or contribute its share of the cost, the Commission was empowered to step in and carry out the necessary works and to recover the cost from the defaulting government.

The Agreement also made plans for distribution of the waters which were to come into effect on the completion of the Lake Victoria and Upper Murray works or after seven years, whichever was sooner.[27] These arrangements were not to be 'taken as an admission prejudicial to the rights of' the contracting States in the meantime. The scheme for sharing water embodied the following principles which are still largely retained in the Agreement, despite substantial amendment of detail:

(i) the flow of the Murray at Albury was to be shared equally between Victoria and New South Wales, subject to a deduction corresponding to any diversions above that point;
(ii) they would also be entitled to use the whole flow of their respective tributaries below Albury or to take an amount equivalent to their contribution from the Murray itself;

[26] River Murray Waters Agreement 1914, cl. 23.
[27] Cl. 44. Because of delays in implementing works, the period was amended to twelve years. See Amending Agreement 1923, cl. 9.

(iii) both these rights were subject to the proportionate contribution o each to the flow to be maintained for South Australia. Thei proportionate contributions were to be 'that which the mean natura flow of the tributaries of each State below Albury . . . with hal the mean flow at Albury added in each case bear to each other';[28]

(iv) South Australia was to receive sufficient water to fill Lake Victori once in each year plus such additional water necessary to maintai certain specified flows for four different periods of the year, such quantities being the provisions for irrigation equivalent to a regulate supply of 67,000 acre feet per month for nine months of the year making allowance for losses due to domestic and stock consumptior and evaporation;

(v) the Commission had power to allot surplus water above certair guaranteed amounts;

(vi) in a period of unusual drought—1902-3 was specifically referred tc —the Commission could vary the entitlements of the States and the depth to be maintained for navigation; but reductions in entitlemen should be in the same proportion as the amounts to which the respective States would normally be entitled.

Provision was also made in the agreement to resolve by arbitration any difference of opinion between the Commission on questions other than questions of law or prescribed formal business. In the absence o agreement as to a suitable arbitrator, the Chief Justice of Tasmania would make an appointment and his award would stand as a decision of the Commission.

Certain other interesting provisions occur in the ratifying legislation. The Commission was given power to make regulations which would have the force of law, but the only substantive regulatory powers were tc prescribe the mode of making and executing contracts of the Commission and tolls for river traffic.

Amending agreements were signed in 1923, 1934, 1948, 1950, 1954, 1958, 1963 and 1970. The latest amendment at the time of writing still awaits full ratification by South Australia. Most of the amendments have dealt with either the works to be constructed, resulting amendments to the proportionate shares of the States or the mode of implementing restrictions in times of drought. Thus the amendment of 1963 was largely concerned with implementing the proposal for Chowilla and consequent reallocations which would flow from its completion. The 1970 amendment undoes the doings of 1963 and puts Dartmouth in its place, postponing the question of Chowilla.

[28] Cl. 48.

It was over the ratification of this amendment that the South Australian government fell. This was not the first time that shades of the first decade of Federation had been seen in the functioning of the agreement. Earlier, Sir Thomas Playford had again threatened litigation to upset the proposed division of waters resulting from the Snowy Mountains Scheme and embodied in the Agreements of 1957 between Victoria, New South Wales and the Commonwealth.[29] As a result, the 1958 amendment superseded the provisions of the Snowy Mountains Agreement relating to the sharing of water and declared:

> To the extent to which any provision of this Agreement conferring rights on the State of South Australia to the use of water are inconsistent with the provisions of the Snowy Mountains Agreement, the first mentioned provision shall prevail, and the provisions of the Snowy Mountains Agreement shall be modified accordingly.[30]

The amendment of 1958 also introduced elaborate provisions concerning the division of waters during drought years. The Commission was empowered to declare periods of restriction and to fix

(i) the amount of water to be allowed to flow to compensate for losses due to evaporation, percolation and lockages;

(ii) the amount of water to be allowed to flow for dilution of saline water in South Australia;

(iii) the quantity of water to be made available each month to the contracting States.

The 1970 amendment, as it presently stands, makes more specific provision for salinity control, by allowing dilution flows at Torrumbarry and Euston weirs to keep salinity at Swan Hill and Merbein below 300 parts per million of total dissolved solids.

THE POWERS OF THE RIVER MURRAY COMMISSION

It is readily apparent that the various governments which conceived the Commission were not breeding a Frankenstein monster. Whilst the Chairman is the Commonwealth Minister for National Development and the other members are senior members of State water authorities, they are supported by a staff of only two professional and two clerical officers. The Commission's nominal powers are few and those which it chooses to exercise are even fewer. Thus it has not established its own gauging stations to measure flow and diversions, but accepts State figures instead. In practice, it leaves the design and execution of works solely in the hands of the constructing State, and does not invoke its power

[29] These agreements appear as schedules to the Snowy Mountains Hydro-electric Power Act 1949-1958 (Cth).

[30] Amending Agreement 1958, cl. 9.

to give directions. It has had no occasion to make regulations and the fixing of navigation tolls is of minimal significance as it has been ironically, ever since the river was locked.

What, then, does the Commission do? Its official rôle is confined to the matter of water availability; of ensuring a flow of water within the Murray system which accords, not with its own discretion, but with formulae laid down in the Agreement. Its terms of reference are clearly and specifically limited to turning taps, with the exception that the amendment of 1948 permitted the Commission to 'initiate proposals for the better conservation and regulation of the River Murray waters and flows', and to undertake preliminary investigations for presentation to the contracting governments. Under this power, the Commission through its Technical Committee and the State agencies it represents, has established elaborate simulation models and conducted numerous computer studies on the Murray system under different conditions which, *inter alia,* resulted in the recommendation that priority be given to Dartmouth rather than Chowilla. But it is almost devoid of independent planning, executive, regulatory and financial powers.

Lacking formal coercive power, the future of the Commission must be both legally and politically uncertain. The Commission, to date, has been effective purely through the co-operation of its members. The actual use and distribution of waters within the Murray itself and its tributaries is not controlled in any way by the Commission. State legislation licenses diversions and imposes conditions of use and drainage. State laws regulate boating, pollution, the building of levies, flood protection, fishing and wildlife. And, in relation to all these matters, actual or potential conflict exists between the States which the River Murray Commission is in no position to solve. So far, the apportionment powers of the Commission in relation to water availability have, in fact, been of theoretical rather than practical importance. Although the Commission has, until recently, gone through the motions of fixing the mean flow at Albury and of tributaries below that point, in order to determine the proportionate contribution of New South Wales and Victoria to South Australia's entitlement, there has generally been a surplus of water available. Only twice in recent years has it been necessary to declare restrictions and to account precisely for each State's share. To date, the States have chosen to abide by the Commission's directives. But the real test is yet to come. It is likely that increased demand for water (especially if Dartmouth is not built), both for diversion and for the dilution of saline drainage, will require the enforcement of sharing provisions in normal years as well as times of shortage. The legal and political powers of the Commission to make its directions stand is doubtful.

In the legislation ratifying the 1914 Agreement each of the contracting governments provided:

> Subject to this Act and the Agreement, the orders, determinations, decisions, and declarations of the Commission made in the exercise of its powers and discharge of its duties, shall bind the Government and all persons and corporations; and may be made a rule or order of the Supreme Court and shall be enforceable accordingly.[31]

In the case of the Commonwealth, the Act refers to the High Court, rather than the Supreme Court.[32]

The latter part of the section, at least in the case of the Commonwealth and the High Court, must be of questionable validity. The provision was drafted prior to the emergence of modern notions as to the scope and nature of the judicial power,[33] and the conjunction of 'rule' and 'order' seems to indicate an intention on the part of the draftsman to instigate a formal registration procedure for Commission decisions, pursuant to High Court Rules, which would then have effect as an order of the Court. If this is the proper reading of the section it must be invalid as transgressing the principles of separation of powers and the nature of the judicial power which have been held to inhere in the Constitution.[34] If, on the other hand, the section is to be read as investing the Court with jurisdiction to determine whether a direction of the Commission is a valid exercise of powers conferred upon it by the Act and the Agreement, the provision would seem to be redundant, as a dispute between the parties as to the meaning of the Agreement or its ratifying legislation would doubtless fall within the original jurisdiction of the High Court. The interesting point, however, is that the same arguments which point towards invalidity of the Commonwealth provision do not apply to the equivalent provisions of the respective States. Despite some authority to the contrary,[35] it is

[31] River Murray Waters Act 1915 (N.S.W.), s. 11; River Murray Waters Act 1915 (S.A.), s. 13; River Murray Waters Act 1915, s. 11.

[32] River Murray Waters Act 1915 (Cth), s. 12.

[33] *Alexander's* case, the first full examination of the scope of the judicial power was not heard until 1918: *Waterside Workers' Federation of Australia v. J. W. Alexander Ltd* (1918) 25 C.L.R. 434.

[34] This result would seem to follow neccessarily from *R. v. Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254; (1957) 95 C.L.R. 529.

[35] *Liyanage v. The Queen* [1967] 1 A.C. 259 dealt with retrospective legislation passed to punish participants in an abortive *coup d'état* against the Ceylonese government in 1962. The Privy Council held that constitutional powers to make laws for the 'peace, order and good government' whilst not in express terms vesting judicial powers solely in the judiciary, manifested an intention to secure freedom of the judiciary from political, legislative or executive control. Regarded as 'possibly the most imaginative decision ever given' by the Privy Council on a constitutional case and as a 'reminder that the twilight years are not neccessarily characterised by pusillanimity or decrepitude' (*Annual Survey of Commonwealth Law* (1964) 4), the decision probably does not apply to the Australian States because of the emphasis placed on the Ceylon Charter of Justice of 1833 and the difference between 'controlled' and 'uncontrolled' constitutions which emerged from *McCawley v. R.* [1920] A.C. 691. See Nettheim, 'Legislative Interference with the Judiciary' (1966) 40 *Australian Law Journal* 221; Comment, (1966) 40 *Australian Law Journal* 2; *Clyne v. East (No. 1)* (1967) 86 W.N. (N.S.W.) 102.

generally assumed that the constitutional powers of the States to mak laws 'in and for', or for the 'peace, order and good government' of, th State are unfettered by the same stringent separation of powers. The resul may well be that decisions or orders of the Commission are more readil enforceable against the States than against the Commonwealth.

As a matter of practical politics, it may be that all parties prefer th independence and authority of the Commission to be limited, and ar happy with the ambiguity which attends the present Agreement. Doubt a to the applicable law between the States led to the Agreement, which i ultimately a political one, and each party would wish to maintain as muc flexibility for negotiation concerning future development as is possible Some uncertainty as to legal rights existing under the Agreement ma thus be regarded by all parties as beneficial; it operates as an incentiv to future agreement, short of recourse to the courts and an open tria of rights. Yet, at the same time all parties have room to manoeuvre t their own advantage, should the opportunity arise.

The real issue to be faced in planning future institutional regimes fo the Murray system is whether the country as a whole can afford to allo such uncertainty to continue; whether the present administrative confusio on the Murray and the lack of an independent, autonomous planning an regulatory body is inimical to national welfare. These issues are considere below. For present purposes it is only necessary to remark that existin legislation is inadequate to allow the Commission properly to carry ou the limited functions entrusted to it. The Commission, for example, i not a body corporate. Thus it cannot hold property and does no formally own even its office furniture. More importantly, if the Commis sion negligently gave instructions for the release of water which caused actionable flooding there are problems concerning the personal liabilit of the Commissioners and their staff. At a lesser level, staff members ar neither Commonwealth nor State public servants and do not readily fal under existing workers' compensation or superannuation schemes. Som revision of the existing Agreement and legislation is thus manifestl necessary, even if it is not intended to increase the Commission's powers.

CURRENT MURRAY PROBLEMS

Perhaps the most pressing river-management problem in the Murra is that of salinity. Drainage from riparian land often brings with it salt leached from the soil, a process which can be intensified by irrigation. A certain concentrations, such salts can have a dramatically deleterious effect on irrigated crops—citrus orchards, for example—and may be highl unsuitable for domestic requirements. Saline discharge into the Murra occurs not only from land adjacent to the Murray, but from land alon its several tributaries. Although the States are genuinely concerned with

he danger and, to the limit of the financial resources available, are onstructing evaporation pans and other works to counter the threat, here is no independent, authoritative body to establish and enforce tandards of permissible discharge and to order private amelioration works. Victoria, it is true, has refused to grant diversion licences downstream of Nyah unless licensees make satisfactory provision for drainage away from he River. Yet its power to do this is tenuous, as is its power to license liversions from the Murray; the mouth of a pump will inevitably be in New South Wales territory.

Similar difficulties occur with policing animal and sewerage wastes lischarged into the river and the effluent from houseboats. The 1963 uling by Judge Rapke that he could not accept jurisdiction to hear llegations of sexual offences committed on Lock Island at Mildura[36] has ts daily and less bizarre equivalent in the prosecution of pleasure-craft offenders.

River improvement and works designed to mitigate flooding, such as evee banks, also create thorny problems. Co-operative State endeavours ave not always been fruitful. Thus the Inter-State Levee Committee, etween Victoria and New South Wales, has an important function to ulfill but is largely inactive. Legislation empowering the Victoria State Rivers and Water Supply Commission to implement levee-bank control as been in existence since 1946, but has never been promulgated, mainly or financial reasons.[37]

These are some of the urgent practical problems of river management on the Murray which are largely unattended because of existing jurisdic-ional doubts. The River Murray Commission is powerless to act for, with the exception of certain catchment-protection activities, it is con-cerned only with water availability. Yet, with the notable exception of he Delaware Basin Authority, institutions similar to the River Murray Commission have never been granted broad powers. The International Joint Commission between Canada and the United States is completely inadequate to cope with modern pollution problems and water-transfer proposals, and much thought is being given to its reorganization. In other federal systems, however, there is a cold awareness of the inability of separate States to accept supra-State or national interests as an essential part of their domestic planning. In the United States and Switzerland there is a long tradition of federal intervention to impose a national view. Canada, in 1970, took similar steps to break the deadlocks which often arise between intransigent Provinces. There is doubt whether such action would be either politically or legally feasible in Australia, but it is possible that new administrative structures could be found to permit

[36] *R. v. Di Dio* (unreported), Mildura General Sessions, 11 June 1963.
[37] Water (Levee Banks) Act 1946.

better co-ordination of Murray management. There is no shortage o suggestions and we turn to examine some of them.

(*a*) *A National Water Commission*

This, it will be recalled, was the suggestion of the Senate Select Com mittee on Water Pollution,[38] which envisaged a policy-making body witl supervening and coercive powers across the whole field of water manage ment. Interestingly, the federal Australian Labor Party Platform, Con stitution and Rules, 1969, similarly advocates a national authority t 'plan and co-ordinate' the development of water resources.

The Senate Select Committee concluded that the evidence before i 'tended to establish firmly'[39] that the Commonwealth could act unilaterall to impose such a commission on the States. It is beyond the scope o this paper to examine this contention in detail, for in the prevailing climate of federal-State relations such sweeping, coercive, unilatera action is unlikely in the extreme. Some observations as to the extent o federal power are, however, unavoidable.[40]

Federal intervention in the United States has been achieved in part by relying on the power of Congress to promote the general welfare.[41] Similarly, in Canada, the possibility of unilateral action by the Canadian government ultimately depends on the residual power to make laws fo peace, order and good government.[42] There are no corresponding powers in the Commonwealth, and although the matter has not been expressly decided, the Commonwealth spending power is probably of more limited scope than the general powers in Canada and the United States.[43] At present, dubious areas of Commonwealth spending go unchallenged by the States,[44] but an attempt to impose a national water commission on unwilling States could easily lead to successful confrontation.

It is evident that the Convention Debates on sections 51(1), 98 and 100 took place against a very clear understanding of the plenary inter pretation of the United States trade and commerce power.[45] There was argument against the riders contained in sections 98 and 100 on the

[38] Commonwealth of Australia, Senate Select Committee, *Report*: *Water Pollution in Australia* (1970), xv, 188; *supra* p. 12.

[39] *Ibid.* 142.

[40] These problems are dealt with in greater detail by Renard, *Australian Inter-State Rivers—Legal Rights and Administration* (1971), unpublished LL.M. thesis in the University of Melbourne. The following treatment is based upon his findings.

[41] *Arizona v. California* (1963) 373 U.S. 546, 587.

[42] British North America Act 1867 (U.K.), s. 91. See Gibson, 'The Constitutional Context of Canadian Water Planning' (1969) 7 *Alberta Law Review* 71, 85-6. *Cf.* Landis, 'Legal Controls of Pollution in the Great Lakes Basin' (1970) 48 *Canadian Bar Review* 66, 122-7.

[43] *Attorney-General for Victoria (ex. rel. Dale) v. The Commonwealth* (1945) 71 C.L.R. 237 (*The Pharmaceutical Benefits* case).

[44] Campbell, 'The Federal Spending Power' (1968) 8 *University of Western Australia Law Review* 443, 444.

[45] *Supra* pp. 33-4.

grounds that they may unintentionally limit the broad powers which the Convention intended the Commonwealth to enjoy.[46] But however apt the comparison between the two constitutional provisions may have been to the framers, the liberal interpretation of the American commerce power has been categorically rejected in Australia.[47] The High Court maintains a rigid distinction between inter-State and intra-State commerce,[48] whereas Congress may regulate 'purely local or intra-State commerce', if such action 'is "necessary and proper" to prevent injury to inter-State Commerce'.[49] The High Court has refused to allow the regulation of production processes or activities only indirectly related to the flow of trade.[50]

The only relevant direct coercive power in the trade and commerce provisions is thus the express power to make laws for navigation. Even if this power extends to regulating river levels for the maintenance of navigability, there is doubt as to the width of power. The United States Supreme Court has held that flood protection, watershed improvement and the sale of hydro-electric power are all within federal power.[51] It has refused to examine the motives of the legislature in empowering works ostensibly for navigation[52] or to enquire whether such works are reasonably necessary to improve navigation.[53] In Australia and Canada, however, the court is much more likely to enquire whether the pith and substance of legislation concerns navigation.[54] This, combined with the restraints of sections 92 and 100, indicate that the use of the navigation power to support broad Commonwealth involvement in national water management is unlikely to be successful.

Another source of coercive power may be that relating to defence. There are statements which indicate that the power extends 'to any law which may tend to the conservation or development of the resources of the

[46] *Supra* p. 33.
[47] *Airlines of New South Wales Pty Ltd v. New South Wales (No. 2)* (1965) 113 C.L.R. 54.
[48] *Wragg v. New South Wales* (1953) 88 C.L.R. 353, 385 *per* Dixon C.J.
[49] *Polish National Alliance v. National Labor Relations Board* (1944) 322 U.S. 643, 652; *United States v. Wrightwood Dairy Co.* (1942) 315 U.S. 110.
[50] *Grannall v. Marrickville Margarine Pty Ltd* (1955) 93 C.L.R. 55; *Beal v. Marrickville Margarine Pty Ltd* (1966) 114 C.L.R. 283. These cases primarily concerned s. 92 rather than s. 51(1). As to the implications to be drawn from this, see *Damjanovic and Sons Pty Ltd v. The Commonwealth* (1968) 117 C.L.R. 390, 410-1 *per* Windeyer J. As to the controls which may be placed on goods for export, see *O' Sullivan v. Noarlunga Meat Ltd* (1954) 92 C.L.R. 565.
[51] *United States v. Appalachian Electric Power Co.* (1940) 311 U.S. 377, 426.
[52] *McCray v. United States* (1903) 195 U.S. 27, 53-9; *Arizona v. California* (1931) 283 U.S. 423, 455.
[53] *Arizona v. California* (1931) 283 U.S. 423, 456.
[54] *R. v. Barger* (1908) 6 C.L.R. 41; *W. R. Moran Pty Ltd v. Deputy Federal Commissioner of Taxation* [1940] A.C. 838, 841; *Attorney-General of Canada v. Attorney-General of Ontario* [1937] A.C. 355, 367; *Shannon v. Lower Mainland Dairy Products Board* [1938] A.C. 708. See, too, Gibson, 'The Constitutional Context of Canadian Water Planning' (1969) 7 *Alberta Law Review* 71, 83; Laskin, 'Jurisdictional Framework for Water Management' in Resources for Tomorrow Conference, *Background Papers* (1961) i. 216-7.

Commonwealth so far as they can be directed to success in war'.[55] It is understood that the Senate Select Committee received evidence which favoured this head as an adequate peg for legislation, at least to control pollution. Sir Douglas Menzies, on the other hand, when advising South Australia as to the constitutionality of the Snowy Mountains Scheme in 1957, concluded that it could not be supported under the defence power. Even in the light of *Marcus Clark & Co. Ltd v. The Commonwealth*[56] he concluded that the activities of the Authority were too remote in relation to preparations for defence to render the Scheme constitutional. Whilst it is unlikely that pollution control can be said to be more relevant to defence preparedness than hydro-power or water availability, it is perhaps true that, in the context of modern, limited, undeclared warfare, the old analysis of a warm-up period must be rejected in favour of a doctrine of *semper paratus*. Nonetheless, the success of invoking the defence power would seem to depend very much on the precise water management activities which the Commonwealth seeks to undertake and, in no small part, on the skill of the draftsman.

Irrespective of the existence of coercive Commonwealth legislative power, it seems highly unlikely that the Senate Select Committee recommendations could be implemented in the existing climate of Commonwealth-State relations. Furthermore, the Committee's Report is open to attack on a number of grounds. It may be argued, for example, that the Committee overstepped both its terms of reference, and the framework of the evidence put to it, in recommending a national authority to have a planning and, to some extent, coercive role across the whole field of water management. Most of the enquiry was directed to the manifest lack of attention which has been given to problems of pollution; it was to these problems, specifically, that witnesses addressed themselves and to which the body and structure of the Report is responsive. Of course, problems of water use and problems of pollution are integrally related and there are good grounds for suggesting that they be treated as a whole. Yet there is little in the Report to suggest that the patent inadequacies in pollution control and administration reflect corresponding failings in State and Commonwealth administration and management of conservation, irrigation and supply. The two matters can, at least in theory, be partly separated administratively as the Victorian Environment Protection Act 1970 bears witness. To recommend an all-embracing national authority after an investigation merely of the administrative hiatus in pollution control is to wield the new broom a little too assiduously and enthusiastically.

[55] *Farey v. Burvett* (1916) 21 C.L.R. 433, 441 *per* Griffith C.J. See, too, *Stenhouse v. Coleman* (1944) 69 C.L.R. 457, 463, 464; *Jenkins v. The Commonwealth* (1947) 74 C.L.R. 400.

[56] (1953) 87 C.L.R. 177.

On more narrow grounds, the Report is open to question. It seems inconsistent to decry the lack of expert technical and administrative knowledge about the causes and control of water pollution in Australia and, in the next breath, to propose *ex cathedra* a quite detailed administrative structure, radically departing from existing patterns of responsibility over our natural resources, to meet largely undefined needs.

The States, quite justifiably in some cases, view their existing technical and administrative structures as having long and well-proven experience in matters of water supply. Political pressures will continue to drive them to redress the imbalance of their attention in favour of pollution control, an area in which most will concede that their existing standards are lacking in the light of recent world attention. They would also contest whether all water resources, although matters of national concern, are legitimately matters for federal rather than State initiative. They could also point to the possible duplication of skills and activities which the Senate Committee's recommendations would entail and question whether taking the co-ordinating role away from the States would necessarily enhance co-operation. Experience has shown that, even at a State level, it is desperately difficult to co-ordinate different branches of government and to educate industry and the public to combat pollution. The barriers of ignorance, prejudice and apathy would be correspondingly greater for a national body, and a State body might be more responsive to local needs.

The Senate Committee did not, of course, view its proposed commission as replacing State authorities. It would have to rely completely on the States for implementation and enforcement and this naturally raises the question whether a Commonwealth body with overriding powers would be an unnecessary departure from a tradition of co-operative State development through consultation. The latter technique, admittedly, has not always been successful, but in reality we shall probably settle for something less than the Senate Committee recommends. It has already been suggested that the Commonwealth could probably not act unilaterally to establish a regime for the nation's water resources, although the Committee thinks otherwise. It is doubtful whether the necessary State consent for joint legislation would be forthcoming in the foreseeable future. Indeed, any attempt to institute such a national commission, whether unilaterally or by parallel legislation would, at the present delicate stage of Commonwealth-State relationships, inevitably be attacked as yet another attempt at arrogant, high-handed federal intervention.

(*b*) *A National Water Policy Committee*

There are a number of Commonwealth powers, other than those already examined which, though less direct, could support more active intervention in the management of inland waters by the federal government.

The power to make tied grants to the States is interpreted broadly,[57] and provided an arrangement is made voluntarily[58] and the State has constitutional power to act as proposed,[59] section 96 would support an innovative use of conditional grants for water management activities. Similarly, the taxation power and the converse power to grant rebates could be highly influential in, say, pollution control. It is even possible to conceive of international conventions in relation to pollution control, in which case the external affairs power may directly support legislation to impose standards laid down in the compact. It is also apparent that the spending power and powers over territories, fisheries, quarantine and compulsory acquisition may assist greater Commonwealth participation.

There are areas in which greater co-operative national activity seems desirable. Increasing competition for a scarce resource and the present parlous state of the agricultural sector raises important problems of national planning. Pressures to permit changes in traditional water-uses to more highly-valued or more productive uses create grave problems of budgetary planning at a national level. These are, of course, exaggerated in the case of a river like the Murray which is not merely of regional or State-wide significance. There is every indication that the hey-day of irrigation is over; that an urban population will become increasingly opposed to the vast commitment of public monies to direct and indirect rural subsidies, which have so long under-pinned the myth that Australia can, in fact, turn water into gold. The pattern of demand for water is constantly changing and a re-evaluation of priorities may well be overdue. Furthermore, as easily exploited catchment sites are used up, additional water will become comparatively more expensive.[60] Investment in water management projects may need to be more carefully weighed against competing demands for government spending, both at a national and at a State level.

In 1967, Australians witnessed the phenomenon of a federal election promise of some fifty-two uncommitted millions for unspecified water development projects. This promise was not made in the light of specific proposals by the States, nor in response to any firm long-term development policy. The subsequent elevation of this promise to a National Water Resources Development Programme and the injection of a further 100 million dollars have not altered the basic difficulty with the scheme. State proposals are forwarded to the Commonwealth as they are formulated and are assessed on their individual merits. There is apparently no system for internal comparison of the various suggestions nor is there

[57] *Victoria v. The Commonwealth* (1957) 99 C.L.R. 575; *South Australia v. The Commonwealth* (1942) 65 C.L.R. 373.
[58] *Victoria v. The Commonwealth* (1957) 99 C.L.R. 575, 610.
[59] *Ibid.* 630, 656.
[60] Raggat, 'The National Outlook' in Australian Academy of Science, *Water Resources Use and Management* (1963) 8.

open competition between them. Nor, it seems, are there overt acknowledged criteria of appraisal which are uniformly adopted by all government departments, as the difference of opinion between the Treasury and the Department of National Development over the Ord Project bears witness.

To the planner, planning by purse-strings is planning by default. It is naive, of course, to assume that the political element in planning can ever be removed. Yet demand is growing for public justification of such developmental decisions and the formulation of agreed criteria of assessment, whilst not removing the possibility of an ultimately political decision, would at least permit that decision to be identified more clearly and evaluated in its true light.

Such thinking underlies the recommendation of the Senate Select Committee for clearer formulation of national water policies. It is to be hoped that political reaction to its other substantive recommendations will not obscure this basic question whether present techniques of long-term planning are adequate or whether a revised institutional structure for planning national priorities is necessary.

The indirect Commonwealth powers of taxation, spending and conditional grants to the States could be extremely useful in establishing a more open and perhaps more rational system for appraising water development priorities. In the light of State demands for greater participation in the allocation of federal monies, a joint consultative committee to establish criteria for determining development priorities may be a welcome innovation.

(*c*) *A More Powerful River Murray Commission*

It has already been demonstrated that jurisdictional problems have led to an administrative hiatus on important issues of river management on the Murray. One view is that successful river management is impossible unless there is one body which is the sole repository of administrative and regulatory power in relation to the Murray. There would doubtless be opposition to the suggestion that such a body be formed by the exercise of the reference power, yet there are no constitutional impediments to constituting such a body by compact and parallel legislation. The stumbling block would, of course, be the question of independent discretion and coercive power. Probably no party would wish to empower a completely autonomous body to formulate and implement long-term development plans without reference to the States for deliberation and approval. The spectre of political intransigence which has haunted the development of the Murray would thus remain, although this may be overcome if agreement could be reached on the suggestion of the Senate Select Committee—again coincident with present Labor Party policy—

to revive the Inter-State Commission to hear and determine disputes between governments.[61]

Within this compass, however, it would still be possible to increase the initiative of the River Murray Commission, to allow it to examine and suggest plans for integrated multi-purpose development and priorities, to empower it to sue and be sued, to own and manage installations and to make and police regulations concerning permissible diversions, waste discharge, pollution, drainage, navigation, flood mitigation, hydraulic structures and recreational activities. The Commission could become a disinterested forum for evaluating and reporting to the respective governments on long-range development plans for the Murray Basin. It could also act as a regulatory body to be responsible in those areas where there are presently doubts as to the legislative or administrative competence of the States.

(d) Regional Development Authorities

One of the most vexed questions concerning the Murray has been the problem of how far one State has a legitimate interest in the activities of another State in regard to its intra-State tributaries. Raised in another way, this is a problem of defining the extent of the River Murray Basin for the purpose of co-operative controls. There would be obvious difficulties in obtaining State assent to a supra-State administrative or planning organ with authority over the whole network of the Murray and its tributaries. Further, unless there is to be senseless duplication of staff and technical expertise, the existing State water authorities must inevitably be involved in planning, execution, licensing procedures and enforcement. In many ways, they would be better able to co-ordinate the activities of municipal and local government and are more directly responsive to the interests of particular areas.

These factors, combined with pressures for urban decentralization and the technical advantages which are seen to arise from planning and administration on a regional basis, have led to the suggestion that a more sensible regime for Murray control might be a series of regional authorities. Each body would be responsible for the integrated development of particular sections of the Murray-Murrumbidgee-Darling network. Except on border waters, such bodies could be established by independent State legislation. On border rivers, parallel legislation would be necessary. Both would presumably be established pursuant to an understanding between the States as to the nature, duties and functions of such authorities and as to the relationships between them. In most cases the scheme would involve a delegation of functions presently enjoyed by various State authorities to the regional body.

[61] *Supra* p. 12.

Some machinery would have to be found for co-ordinating the activities of such regional bodies. In the absence of a supra-State organization with coercive powers, some organization would have to be created effectively to co-ordinate and promote co-operation. Perhaps this should be the role of a renovated River Murray Commission.

The optimum system for future management of the Murray is to be culled from the accumulated wisdom of many disciplines. Yet their solutions, and considerations of techncial and administrative efficiency, will not be the only determining factors. The vexed history of the River Murray teaches that regional politics will inevitably continue to carry significant, perhaps disproportionate, weight. But the record of the River Murray Commission and of its Technical Committee holds an important lesson. Together, representatives of the various governments have worked on the collection and interpretation of data with co-operative professional integrity, unblemished by regional self-interest and prejudice. The decision to recommend Dartmouth in preference to Chowilla as the next storage, in the light of new studies, demonstrates that rational, co-operative, supra-State planning at the professional level is a real possibility. It is a matter of deep concern that recent events in South Australia should have been shaped by reflections on the integrity of the deliberations of such men.

The current pounding of ancient drums doubtless would not startle the shades of men like Patrick Glynn. One cannot help recalling his frank and frequent admissions of the failings of politicians as objective planners. Yet recent events, although they may provoke wry amusement, are nonetheless disquieting. The ultimate solution lies in sufficient public pressure being brought to bear on local, State and federal governments to pay more than verbal allegiance to the concept of national co-operation in our planning. Whilst there has been no notable genetic revolution in our political stock we are older and, hopefully, wiser as a country.