

The Constitution and the management of water in Australia's rivers

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Abstract

The management of water in Australia's rivers has become one of the most urgent public policy problems facing governments at every tier of the Australian federation. This article examines the ways in which water management has been shaped and constrained by the Constitution and, in particular, by the federal design of the constitutional system. It examines the competing priorities that gave rise to the original constitutional settlement on water, which left river management largely in the hands of the states. It then looks at contemporary constitutional arrangements, noting how judicial interpretation has significantly expanded Commonwealth legislative powers in this area. It argues that, despite recent intergovernmental agreements on water, there is a real possibility that relations between governments in this area will become further strained and that regulation and management will increasingly be supplemented by litigation. It concludes by arguing that the only effective, long-term solution may require a wholesale reassessment of how the constitutional framework can more effectively support the management of Australia's water resources in the 21st century.

I Introduction

The management of water in Australia's rivers has become, within little more than a decade, one of the most urgent public policy problems facing governments at every tier of the Australian Federation. The legion of challenges surrounding water conservation are now familiar, and include water scarcity, increasing salinity, impairment of river wildlife and habitat, and the degradation of ecological assets.¹ The challenges facing the Murray-Darling Basin are perhaps the best known, but these problems apply to river systems across Australia.² They have also been made more urgent due to the effects of drought and climate change.³ Indeed, the Chair and CEO of the National Water Commission, Ken Matthews, remarked recently that, '[w]e have known for years that water reform in Australia was

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¹ William Blomquist et al, 'Institutional and Policy Analysis of River Basin Management: The Murray Darling River Basin, Australia' (Working Paper No 3527, World Bank, 2005) 5–8.

² National Water Commission, *Australian Water Reform 2009: Second Biennial Assessment of Progress in Implementation of the National Water Initiative* (2009) v.

³ Ibid 4.

important, pressing and difficult. Now that climate change is with us, important becomes vital, pressing becomes urgent, and difficult becomes downright tough'.⁴

The challenge of managing Australia's water resources has given rise to a number of agreements and institutions, including the recent National Water Initiative and Intergovernmental Agreement on Murray-Darling Basin Reform. Like their predecessors, these initiatives were both shaped and constrained by the *Australian Constitution* and, in particular, by the federal design of the constitutional system. The constitutional framework has, for good or ill, determined the extent of state and Commonwealth influence over river management. It has had a bearing on whether management initiatives have served local or national interests and on whether they have been cooperative or imposed by the federal government.

The challenges that the constitutional framework poses for the successful governance of Australia's inter-jurisdictional rivers is attracting increasing attention. Since the announcement of the Howard government's \$10 billion plan to address water management in the Murray-Darling Basin in 2007, the successes and failures of governments in this area have featured prominently in news coverage and commentary. In recent years, the Senate Rural and Regional Affairs and Transport Committee completed inquiries into the sustainable management and governance of both the Coorong and Lower Lakes and the Murray-Darling Basin.⁵ More recently, the release of reports by the National Water Commission⁶ and the Productivity Commission⁷ on such as issues as water trading and river health has prompted a variety of commentary on whether the Commonwealth should take over management of rivers. The legality of certain water governance initiatives have also been challenged in the High Court, and it seems certain that the court will hear other significant cases in the near future. Most recently, Opposition Leader Tony Abbott announced prior to the 2010 federal election that the Coalition supported a Commonwealth takeover of the Murray-Darling basin.⁸ He proposed that this occur either by the states referring their power or, if they refused to do so, by the people voting in 2013 at a referendum to change the *Constitution*.

Surprisingly, given its importance, there has been little academic scholarship on the role of the *Constitution* in river management. There have been detailed treatments of the negotiations over water issues in the decades prior to Federation,⁹ and the question of Commonwealth power with respect to the environment in general has been a subject of analysis.¹⁰ By contrast, the division of federal powers and responsibilities with respect to water

⁴ Ken Matthews, 'Australian water reform in 2009' (Speech delivered at Committee for Economic Development in Australia, Canberra, 9 October 2009) [8].

⁵ Rural and Regional Affairs and Transport References Committee, Senate, Parliament of the Commonwealth of Australia, *Water Management in the Coorong and Lower Lakes* (2008); Rural and Regional Affairs and Transport References Committee, Senate, Parliament of the Commonwealth of Australia, *Implications for Long-Term Sustainable Management of the Murray Darling Basin System* (2009).

⁶ National Water Commission, above n 2.

⁷ Productivity Commission, *Market Mechanisms for Recovering Water in the Murray-Darling Basin: Draft Research Report* (2009).

⁸ Tony Abbott, 'Address to the Sydney Institute' (Sydney Institute, Sydney, 14 January 2010).

⁹ Eg, Sandford Clark, 'The River Murray Question: Part I — Colonial Days' (1971) 8 *Melbourne University Law Review* 11; Sandford Clark, 'The River Murray Question: Part II — Federation, Agreement and Future Alternatives' (1971) 8 *Melbourne University Law Review* 215.

¹⁰ James Crawford, 'The Constitution and the Environment' (1991) 13 *Sydney Law Review* 11; Peter Johnston, 'The Constitution and the Environment' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent* (2009) 79; George Williams, 'Commonwealth Power and the Environment' (1991) 16 *Legal Service Bulletin* 217.

has been subject to less analysis.¹¹ Importantly, there has been little detailed examination of water issues and the *Constitution* since the High Court's 2006 decision in the *Work Choices* case,¹² which recognised a very broad scope for the Commonwealth's legislative power over certain corporations under s 51(xx) of the *Constitution*. When placed alongside recent political and other debate over the future management of water in the Murray-Darling Basin and elsewhere, it is clear that this lack of attention needs to be remedied.

In this article we address the adequacy of the Australian constitutional settlement for the regulation of the water in the nation's rivers. In doing so, we restrict our analysis to questions of public law and do not seek to contribute to ongoing debates about the effectiveness of existing arrangements for the management of the nation's water resources. In Part II we give a brief overview of the policy and institutional context of water management in Australia. We then outline in Part III the original constitutional settlement with respect to water, as determined by the framers of the *Constitution* prior to Federation. In Part IV, we look at the contemporary constitutional arrangements and assess how they have evolved since Federation, with a particular focus on the extent of Commonwealth legislative power in this area. In Part V, we reach conclusions on the adequacy of the existing *Constitution* with respect to water management, and query whether a new constitutional settlement is required to better face the water challenges of the future.

II The policy and institutional context

The federal nature of Australia's system of government has presented a challenging environment in which to devise policy responses to the nation's water challenges. While it is the nature of a federal system to divide territory according to 'artificial' political borders, river systems are hydrologically interdependent and holistic.¹³ This is not to say that the management of Australia's rivers would be straightforward under a unitary system of government, but the existence of states and Territories undoubtedly serves to complicate management of the Murray-Darling Basin and other inter-jurisdictional river systems. If a tension already exists between economic and environmental uses of water on the Australian continent, the federal system introduces jurisdictional interests with the potential to undermine a 'holistic' approach to river management. As one commentator has remarked, '[t]here can be little doubt that a system of federal government... not only fragments the management of water resources, but also renders their management a complex exercise'.¹⁴

¹¹ Notable exceptions in this regard are a recent analysis by Gerard Carney and Alex Gardner, and several contributions by Jennifer McKay. See Gerard Carney and Alex Gardner, 'The Constitutional Framework for Water Resources Management' in Alex Gardner, Richard Bartlett and Janice Gray (eds), *Water Resources Law* (2009) 81–105; Jennifer McKay, 'The Legal Frameworks of Australian Water: Progression from Common Law Rights to Sustainable Shares' in Lin Crase (ed), *Water Policy in Australia: The Impact of Change and Uncertainty* (2008) 44; Jennifer McKay, 'Water Law in the Australian Federation: The Move Towards Centralism' (Paper presented at Water Management in Federal and Federal-Type Systems, Zaragoza, Spain, 7–9 July 2008); Jennifer McKay, 'The Quest for Environmentally Sustainable Water Use: Constitutional Issues for Federal, State and Local Governments' (2007) *Reform* 22; Jennifer McKay, 'Water Institutional Reforms in Australia' (2005) 7 *Water Policy* 35.

¹² *New South Wales v Commonwealth* (2006) 229 CLR 1. Carney and Gardner briefly address the impact of *Work Choices* on water management issues in 'The Constitutional Framework for Water Resources Management', above n 11, 94.

¹³ Sandford Clark, 'Working paper on Inter-Jurisdictional Water Resources' (Working Paper, Constitutional Commission, 1987) 1.

¹⁴ DE Fisher, *Water Law* (2000) 61.

The need to address transboundary issues in water management has long been a 'major challenge',¹⁵ and it has most commonly been met by the negotiation of intergovernmental agreements. Such agreements, typically implemented by legislation in each jurisdiction, are sometimes formed between states, but the most significant have involved both the Commonwealth and the states.¹⁶ The Murray-Darling Basin has been the main focus of such schemes. An important early development in this regard was the River Murray Waters Agreement (RMWA) of 1914, negotiated by the Commonwealth, New South Wales, South Australia and Victoria, and implemented by legislation in each jurisdiction in 1915. The RMWA established an agreement between the parties on water sharing to help ensure security of supply, as well as an arrangement for sharing costs associated with maintenance and the building of infrastructure such as storage, weirs and locks.¹⁷ It also established the River Murray Commission to oversee its implementation. Although a significant development, the RMWA was confined in its scope to water in the main course of the River Murray, and the Commission's independence was weakened by the fact that individual commissioners often felt accountable to the state governments that had appointed them.¹⁸

From mid-century, several other intergovernmental agreements on water management followed. The Snowy Mountains Scheme was initially established by legislation enacted in reliance on the Commonwealth's defence power,¹⁹ but was eventually the subject of a cooperative legislative scheme between the Commonwealth, New South Wales and Victoria. This scheme, implemented by complementary state legislation in 1958, dealt with such matters as the protection of catchment areas, and the control, diversion and storage of waters.²⁰ Around the same time, New South Wales and Queensland formed the Border Rivers Agreement (1946) to establish joint management of the Severn, Dumaresq, Macintyre and Barwon Rivers. This latter initiative was noteworthy for the fact that the Commonwealth was not a party to it; a similar arrangement was reached between South Australia and Victoria in the 1985 Groundwater Border Agreement.

From the 1970s, however, the declining health of the Murray-Darling Basin, in particular, became a serious concern. The development of various intergovernmental arrangements had not prevented the emergence of problems such as salinity, over-allocation of water resources and environmental degradation. To address these issues, the Commonwealth, New South Wales, Victoria and South Australia formed the Murray-Darling Basin Agreement in 1987.²¹ Later amended in 1992, this Agreement 'established the cooperative and institutional basis for managing the quantity and quality of water resources

¹⁵ Alex Gardner, Richard Bartlett and Janice Gray (eds), *Water Resources Law* (2009) 126.

¹⁶ *Ibid* 126. Another potential mechanism for resolving transboundary disputes is the common law doctrine of riparian rights. It is uncertain whether the common law recognises such a doctrine in its application to States (as opposed to private individuals) but, if it did, then it might be interpreted to mean that each state has a right to 'reasonable or equitable use' of shared water resources; conceivably, this would have an impact on such issues as river flow, diversions and pollution. The status of this doctrine has never arisen for judicial determination in Australia and, in any event, would be subject to displacement by intergovernmental agreements implemented by statute. See *ibid* 126–7; DE Fisher, above n 14, 53; and, Nicholas Kelly, 'A Bridge? The Troubled History of Inter-State Water Resources and Constitutional Limitations on State Water Use' (2007) 30 *UNSW Law Journal* 639.

¹⁷ McKay, 'Water Law in the Australian Federation: The Move towards Centralism', above n 11, 9; Daniel Connell, *Water Politics in the Murray-Darling Basin* (2007) 15, 92–9.

¹⁸ Gardner, Bartlett and Gray, above n 15, 36–7.

¹⁹ *Snowy Mountains Hydro-Electric Power Act 1949* (Cth). There is some doubt as to whether the Commonwealth possessed sufficient legislative power to enact this legislation: Clark, above n 13, 5.

²⁰ Gardner, Bartlett and Gray, above n 15, 140–1; DE Fisher, above n 14, 56–7.

²¹ Queensland and the ACT became parties to the Agreement in 1996 and 1998 respectively.

in the whole catchment, the authorization for the construction, operation and maintenance of works, and the sharing of waters between the states, including water accounting'.²² Subsequent amendments provided for the interstate transfer of water entitlements, and caps on water allocations.²³ The 1992 Agreement also established new institutions, including the Murray-Darling Basin Ministerial Council and the Murray-Darling Basin Commission.

The most significant reforms, however, were still to come. In 1994, the Council of Australian Governments (COAG) agreed to a Water Reform Framework Agreement which recognised 'that action needs to be taken to arrest widespread natural resource degradation in all jurisdictions', and which sought to 'implement a strategic framework to achieve an efficient and sustainable water industry'.²⁴ A central reform was the conversion of existing water access rights into a property right of their own, separate from land title; this, in turn, formed the foundation for the creation of water markets in each jurisdiction.²⁵ Other initiatives included water pricing reform and the allocation of sufficient water for environmental purposes. The incorporation of the COAG reforms into the national competition framework gave the states and Territories a financial incentive to meet these national policy goals, and by 2000 most jurisdictions had implemented major legislative reform in the area.²⁶

A second phase of reforms began with the negotiation of the National Water Initiative (NWI) in 2004.²⁷ The NWI aims to set down a blueprint for national water reform; its broad purpose being to achieve a 'nationally-compatible, market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that optimises economic, social and environmental outcomes'.²⁸ The NWI also seeks to 'complement and extend' the reform agenda put in place in 1994, and to provide 'greater certainty for investment and the environment'.²⁹ The task of overseeing the implementation of the NWI is given to the Natural Resource Management Ministerial Council, while the new National Water Commission is responsible for providing advice to COAG on its implementation.³⁰ Taken together, the 1994 and 2004 reforms have been called 'the most significant water law reform for a century'.³¹

In 2007 the Commonwealth Parliament passed the *Water Act 2007* (Cth). The Act set down a detailed regime for the use and management of Australia's water resources, most significantly through requiring the development of a 'Basin Plan'. The purpose of the Plan, which is due to be released in 2011, is to provide for the integrated management of water resources in the Murray-Darling Basin. It is to do so in a manner that is consistent with the objects of the Act, which include enabling the Commonwealth and the Basin States to manage Basin water resources in the national interest, and giving effect to relevant international agreements in a way that optimises economic, social and environmental outcomes.³² Certain matters must be included in the Plan, including sustainable diversion

²² Gardner, Bartlett and Gray, above n 15, 37.

²³ Ibid.

²⁴ COAG, *Communique*, Attachment A, Hobart, 25 February 1994

²⁵ Gardner, Bartlett and Gray, above n 15, 26–7.

²⁶ Ibid 40; Michael McKenzie, 'Water Rights in NSW: Properly Property?' (2009) 31 *Sydney Law Review* 443, 446.

²⁷ The Intergovernmental Agreement on a National Water Initiative was signed at the June 2004 meeting of the Council of Australian Governments, with Tasmania and Western Australia joining the agreement in 2005 and 2006 respectively.

²⁸ Intergovernmental Agreement on a National Water Initiative, cl 23.

²⁹ Ibid [4], [5].

³⁰ Ibid [18], [19].

³¹ Gardner, Bartlett and Gray, above n 15, 26.

³² *Water Act 2007* (Cth) ss 3, 20.

limits, a management plan as to water quality and salinity, and specific Basin-wide water trading rules to secure a uniform approach to the trading of water rights.³³ Although the Plan envisages an integrated approach across jurisdictions, much of its implementation will take place through state water resource plans. Existing state plans will continue until their expiry dates—generally 2014 for New South Wales, Queensland and South Australia, and 2019 for Victoria—after which time the states will develop new plans that are consistent with the requirements of the Basin Plan.

Another important development followed in July 2008, with the decision of the Commonwealth and the Basin States³⁴ to sign the Intergovernmental Agreement on Murray-Darling Basin Reform. This Agreement is now set out in Schedule 1 to the *Water Act 2007* (Cth), and was implemented by the *Water (Amendment) Act 2008* (Cth) and corresponding state legislation. Its purpose is to ‘improve planning and management by addressing the Basin’s water and other natural resources as a whole, in the context of a Federal-state partnership’.³⁵ The 2008 amendments effected the abolition of the Murray-Darling Basin Commission and saw a Commonwealth agency, the Murray-Darling Basin Authority (created by the 2007 Act), assume responsibility for management of the water resources of the Basin. The Authority has a membership of six independent experts, and generally reports to the Commonwealth Minister for Water. Some of its key responsibilities include developing, implementing and monitoring the Basin Plan. Other institutional reforms brought about by the 2008 Agreement were the creation of the Murray-Darling Basin Ministerial Council (comprising the Commonwealth Minister as chair and one Minister from each Basin State) and the Basin Officials Committee.³⁶

As is apparent from this brief overview, the management of water in Australia’s rivers takes place within a complex institutional framework. The process for policy development and decision-making are equally complex, as is apparent from the following assessment from Connell:

Policy development in the [Murray-Darling Basin] now involves complicated interactions between a large number of individuals, groups, organizations and institutions including governments. The Commonwealth and state jurisdictions are focal points around which contending interests arrange themselves, moving from one to the other as their members make strategic decisions about alliances and how to best promote their goals or block those of others. In practice, decisions are not made through a top-down process but are the product of complex cycles of interaction in which the participants have varying degrees of influence but no single one is dominant.³⁷

The extent to which these arrangements have served the best interests of Australia’s river systems is a matter of debate. Whatever one’s view, the influence of the constitutional framework on the development of these arrangements has been profound. Each step has been marked by a ‘tension between the need for better coordination, and the requirement to preserve state autonomy’.³⁸ It is noteworthy, however, that each of the main agreements on water management have taken place against a constitutional setting that has continued to

³³ Ibid s 22.

³⁴ The Basin States are Queensland, NSW, Victoria, South Australia and the ACT.

³⁵ Intergovernmental Agreement on Murray-Darling Basin Reform, Preamble.

³⁶ For more on these institutions, see Gardner, Bartlett and Gray, above n 15, 134–9.

³⁷ Connell, above n 17, 180.

³⁸ Ibid 30, referring to the dynamics behind the negotiation of the NWI.

evolve. Just how much it has evolved will become apparent in Part IV, but first we turn to the original constitutional settlement on river water as set down in 1901.

III The original settlement

Water management was one of the most contentious issues in the drafting of the *Commonwealth Constitution*. It was the subject of weeks of often technical debate in which delegates sought to reach agreement on who should govern water and river use in the new federation.³⁹ It was critical that the framers succeed in reaching some sort of settlement on the issue—in the words of one commentator, if it ‘had not been settled there could have been no Constitution and no federation’.⁴⁰

The debates about water at the 1890s Constitutional Conventions reflected the competing water management objectives of the time. By the late nineteenth century, the southeastern colonies, and Victoria in particular, had become increasingly interested in irrigation as a technological solution to the shortage of arable land.⁴¹ Irrigation from the River Murray and its tributaries was seen as a way of developing land that was either arid or experienced low rainfall, and thus ensuring continued economic growth in those regions.⁴² South Australia viewed the activity of the upstream colonies with apprehension, for it was concerned with maintaining sufficient flows in the Murray-Darling system to protect its burgeoning river trade. Between the 1860s and 1890s, South Australian riverboats travelled thousands of miles upstream, transporting goods to remote towns and properties and returning with supplies of wool.⁴³

The influence of these competing objectives on the text of the *Constitution* is apparent from a reading of ss 98 and 100, the only two provisions that relate specifically to Australia’s rivers and water resources. Section 98 provides:

The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

This provision clarifies that the Commonwealth’s trade and commerce power in s 51(i) extends to river navigation and to state railways. Its inclusion in the *Constitution* reassured South Australia that the federal Parliament would have the capacity to step in and protect its interests in the river trade, both with respect to water flows and railways. New South Wales and Victoria, however, viewed s 98 as a potential threat to their growing interest in irrigation. They were concerned that Commonwealth action to ensure river navigability could potentially supersede their interests in using water for irrigation purposes. To appease their concerns, s 100 was inserted into the *Constitution*. It provides:

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

³⁹ La Nauze describes the water debates as ‘monstrously long and tangled’ and ‘the most exhausting’ of the entire Melbourne Convention’: JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 153, 210.

⁴⁰ Ibid 208.

⁴¹ Connell, above n 17, 12.

⁴² Ibid.

⁴³ Ibid 10.

This provision thus guaranteed that the Commonwealth's power under s 51(i), as elaborated by s 98, could not interfere with the right of states and their residents to make 'reasonable use' of river waters for irrigation purposes.

Aside from ss 98 and 100, the *Constitution* is silent on matters of water management. This reflects the framers' decision to leave the management of water resources largely in the hands of the states. This original constitutional settlement on water is neatly summarised by McKay: 'the general position is that the states have plenary legislative power over management of water resources, subject to any restrictions in the Constitution, including any inconsistent federal legislation on the matter'.⁴⁴ As part of this, the reach of state jurisdiction extends to a variety of matters connected with water, including land use, agriculture, forestry, town planning and flood plains.⁴⁵ As we discuss further below, this ensures that any unilateral legislative action by the Commonwealth in this area will necessarily be partial. Indeed, it was not until the enactment of the *Water Act 2007* (Cth) that the Commonwealth acted to assert its legislative powers to establish a national approach to water resources management. Significantly, under this new regime the states continue to hold responsibility for managing their own water access entitlement systems (as a consequence of their plenary legislative power over natural resources), albeit within limits set down by the Commonwealth.⁴⁶

Despite the amount of time spent debating water at the Constitutional Conventions, it was not long before changed economic and other circumstances and judicial interpretation significantly altered the original settlement. In the first two decades after Federation, the river trade declined as states increasingly relied on railways for the transportation of goods. Section 98, as a consequence, became less and less relevant—indeed, by 1914 'the navigation vs railways issue was dead and the immediate and apparent nexus between trade and commerce between the States and river management objectives had disappeared'.⁴⁷ The task of maximising the amount of water available for irrigation had superseded navigability and trade as the most pressing water concern. In terms of using its powers over water management in Australia's rivers, ss 51(i) and 98 had been used by the Commonwealth only to confer investigative power on the now defunct Interstate Commission regarding navigability, and to ratify the River Murray Waters Agreement in 1915.⁴⁸ The near obsolescence of s 98 so soon after Federation was in part the result of a phenomenon that had occurred before and that was to repeat itself during the twentieth century – that is, continuing changes in the use of water.⁴⁹

The seeds of future alteration to the original settlement were also sown with the High Court's expansive approach to the interpretation of Commonwealth legislative powers in the *Engineers' Case*.⁵⁰ The decision established the principle that the text of each Commonwealth legislative power was to be read in a full and plenary fashion, without regard to its impact upon state jurisdiction. This approach to interpretation was to prove influential in a series of landmark decisions that effected a significant centralisation of legislative authority. A good example is the 1983 decision of the High Court in the *Tasmanian Dam* case,⁵¹ which held that the Commonwealth's power over 'external affairs'

⁴⁴ McKay, 'Water Law in the Australian Federation — The Move Towards Centralism', above n 11, 5.

⁴⁵ Anne Twomey, 'Aspirational Nationalism or Opportunistic Federalism?' *Quadrant*, October 2007, 38–9.

⁴⁶ Carney and Gardner, above n 11, 104–5.

⁴⁷ Clark, 'Working paper on Inter-Jurisdictional Water Resources', above n 13, 4.

⁴⁸ *Ibid* 24.

⁴⁹ *Ibid* 3–7.

⁵⁰ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

⁵¹ (1983) 158 CLR 1.

in s 51(xxix) of the *Constitution* can be used generally to implement international legal obligations assumed by Australia. The court's broad readings of this and other Commonwealth heads of legislative power further altered the original constitutional settlement on water by greatly expanding the capacity of the federal government to act on matters that, at the time of Federation, were thought to be the sole concern of the states. The degree to which this original settlement was altered by these developments is the subject of the next section.

IV Evolution of the original settlement: water management today

The management of water in 2010 takes place within a political, institutional and constitutional framework that would be unrecognisable to Australians living in the early 20th century. The institutional developments described earlier in the paper, along with an increasing emphasis on environmental sustainability in management objectives, combine to form a policy context very different to that which existed in 1901. These changes have taken place against an evolving constitutional framework which, as outlined above, has opened the way for more direct Commonwealth intervention on water issues.

This evolution was recognised by a Senate Committee in 1999 when it concluded that 'the Commonwealth Government has the Constitutional power to regulate, including by legislation, most, if not all, matters of major environmental significance anywhere within the territory of Australia'. The Committee referred to the 'panoply' of Commonwealth legislative powers that, employed collectively, amounted to 'extensive legislative competence' on environmental matters.⁵² More recently, a constitutional commentator has described the Commonwealth's capacity to engage in environmental protection and conservation as 'extensive almost to the point of being plenary.'⁵³

We address below the various heads of power which confer this extensive legislative authority on the Commonwealth. First, we examine the non-coercive mechanisms by which the Commonwealth can influence water management: the spending powers and the referrals power. Next, we consider the various coercive powers by which the Commonwealth has potential legislative authority over water matters, as well as their respective limitations. We then discuss some recent cases on water management, and consider their significance for the design and implementation of water policy.

A *Non-coercive powers*

Since 1901, some of the most significant Commonwealth interventions into rivers management have been through the making of conditional grants under s 96 of the *Constitution*.⁵⁴ This provision enables the Commonwealth to grant financial assistance to any state 'on such terms and conditions as the Parliament thinks fit'. It was established early on that s 96 has a broad reach. For instance, the terms and conditions attached to a Commonwealth grant (known as a Specific Purpose Payment) need not relate to matters

⁵² Environment, Communications, Information Technology and the Arts References Committee, Senate, Parliament of the Commonwealth of Australia, *Commonwealth Environment Powers* (1999) 1.

⁵³ Johnston, above n 10, 102.

⁵⁴ Clark, 'Working paper on Inter-Jurisdictional Water Resources', above n 13, 26.

over which the federal Parliament otherwise has legislative power.⁵⁵ Thus, the federal government can employ such payments to induce states to agree to conditions on matters that would ordinarily be solely within the states' policy responsibilities.⁵⁶ Prior to the High Court's expansive reading of the external affairs power in the *Tasmanian Dam* case, s 96 was the primary means by which the Commonwealth could influence water policy. Even with wider legislative power, however, Commonwealth governments have continued to use conditional grants to persuade states to implement federal policy—recent examples include the negotiation of the 1994 COAG reforms, the National Action Plan on Salinity and Drainage (2000), and the NWI.⁵⁷

It is now less likely that the Commonwealth will use its grants power to set specific conditions upon or direct state regulation of river systems. In November 2008, the Commonwealth and the states adopted a new Intergovernmental Agreement on Federal Financial Relations. The Agreement came into effect on 1 January 2009. Appended to it were a series of 'National Agreements', relating to 'National Healthcare', 'National Schools', 'National Skills and Workforce Development', 'National Disability Services', 'National Affordable Housing' and 'National Indigenous Reform'. For the first five of these areas (but not the sixth) the Intergovernmental Agreement established Specific Purpose Payments, which were eventually to be distributed on a per capita basis (except for schools funding, which was to be distributed among states in proportion to full-time enrolments in government schools).

These five are now to be the *only* Specific Purpose Payments, whereas formerly there had been over 90. This significant rationalisation was intended to reduce the prescriptive conditions formerly imposed on such payments, and thus to allow the states increased flexibility in their delivery of services. On the other hand, the six 'National Agreements' set out a range of objectives, outcomes, outputs, 'performance indicators', 'performance benchmarks' and 'trajectories towards targets' against which all parties were said to be accountable. The Agreement also recognised a new form of grant, National Partnership Payments, designed to fund specific projects and to reward states that deliver nationally significant reforms.

The Commonwealth also has authority, under s 81 of the *Constitution*, to appropriate monies for expenditure on 'the purposes of the Commonwealth'. Until recently, it had been assumed that this provision enabled the Commonwealth to make direct payments for purposes outside of its executive and enumerated legislative responsibilities to persons and organisations in a way that bypassed the states. In 2009, however, the High Court's decision in *Pape v Commonwealth*⁵⁸ overturned the prevailing wisdom, ruling that all payments made under s 81 must be on matters falling within the Commonwealth's executive and legislative competence. This decision has implications for Commonwealth intervention in water management. As Johnston remarks:

It is not clear, for example, whether a legislative scheme under which the Commonwealth aimed at directly buying out irrigation operators in the Murray-Darling basin to reduce

⁵⁵ *Victoria v Commonwealth* (1926) 38 CLR 399.

⁵⁶ Anthony Moeller and Jennifer McKay, 'Is there power in the Australian Constitution to make federal laws for water quality?' (2000) 17(4) *Environmental and Planning Law Journal* 294, 305.

⁵⁷ McKay, 'Water Law in the Australian Federation: The Move towards Centralism', above n 11.

⁵⁸ *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

salinity, without entering into cooperative agreements involving s 96 grants with all three affected States, would be upheld by the present High Court.⁵⁹

Following *Pape*, the Commonwealth's main influence on river management through financial means may well be through s 96 grants which, by their nature, must involve the states.

Another avenue by which the Commonwealth can intervene in water management is by asking the states to refer their powers under s 51(xxxvii) of the *Constitution*. There remain considerable uncertainties as to the operation of this power, including with respect to the capacity of states to amend and terminate their referrals.⁶⁰ This power has nonetheless undergone a 'renaissance' in recent years as governments have relied on it to enact laws on various matters of national significance, including corporate regulation, terrorism and industrial relations.⁶¹ This resurgence extended to water management in July 2008 when the Basin States entered into the Intergovernmental Agreement on Murray-Darling Basin Reform, and agreed to refer sufficient powers to enable the Commonwealth to pass a number of amendments to the *Water Act 2007* (Cth). These amendments effected a transfer of powers and functions to the new governance bodies, strengthened the role of the Australian Competition and Consumer Commission within the Basin, and enabled the Basin Plan to provide for critical human water needs.⁶²

A year earlier, the Howard government had sought to rely on the referrals power to enact the *Water Act 2007* (Cth), but was forced to abandon this approach when Victoria refused to agree to the Commonwealth's proposals. It instead enacted the legislation in reliance on a combination of other powers. This 'hotch-potch'⁶³ of constitutional powers included trade and commerce, corporations, external affairs, and the Territories power, as well as powers relating to meteorological observations, statistics and weights and measures.⁶⁴ The enactment of this legislation was significant because it marked the first time that the Commonwealth had eschewed a cooperative approach to water management in favour of asserting its legislative powers in the area. The Commonwealth decision to go down this path reflected the longstanding view that its lawmaking powers in this area are considerable—and, certainly, we reach a similar conclusion in our review of these powers in the next section. It is noteworthy, however, that the Commonwealth was only prepared to go so far in its initial enactment of the *Water Act 2007* (Cth). As the 2008 amendments to this Act showed, the referral of state powers was ultimately necessary for the Commonwealth to establish 'its full legal capacity to define the environmental and economic limits' for the management of water resources in the Murray-Darling Basin.⁶⁵

B Coercive powers

Since 1901, the Commonwealth's legislative competence on water issues has expanded significantly. The four primary heads of power in this respect are the corporations power,

⁵⁹ Johnston, above n 10, 87.

⁶⁰ Andrew Lynch, 'After a Referral: The Amendment and Termination of Commonwealth Laws Relying on s 51(xxxvii)' (2010) 32(2) *Sydney Law Review* 363.

⁶¹ *Ibid.*

⁶² Intergovernmental Agreement on Murray-Darling Basin Reform, cl 2.4. The Agreement was implemented by the *Water Amendment Act 2008* (Cth), and each of the Basin States referred the relevant powers through passage of a *Water (Commonwealth Powers) Act 2008*.

⁶³ Twomey, above n 45, 40.

⁶⁴ *Water Act 2007* (Cth), s 9.

⁶⁵ Gardner, Bartlett and Gray, above n 15, 105.

the external affairs power, the trade and commerce power and the power to acquire property on just terms.

The scope of the corporations power (s 51(xx)) has been the subject of intense discussion over the past decade and, as in many other policy areas, presents a potentially significant source of power with respect to the management of water resources. By granting authority to the federal Parliament to make laws with respect to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’ (known collectively as ‘constitutional corporations’), the power presents the Commonwealth with an opportunity to regulate water in so far as it interacts with such corporations.

The modern incarnation of the corporations power began with the *Concrete Pipes* case,⁶⁶ in which the High Court recognised that s 51(xx) at least gives the Commonwealth the power to regulate the trading and financial activities of corporations formed under Australian law, as well as all the activities within Australia of foreign corporations. A series of broad, but inconclusive, readings of this head of power followed, culminating in the High Court’s decision in the *Work Choices* case. In that decision, the court endorsed the view that the power conferred by s 51(xx) extends to:

the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.⁶⁷

This decision confirmed that the power could be used to regulate generally industrial matters insofar as they are related to constitutional corporations. There is nothing special about industrial relations that limits the wide ambit of the corporations power to that context. The wide scope of the power could equally be applied to regulate constitutional corporations in regard to water issues, such as where those corporations engage in irrigation or other forms of water use or water-related businesses. The power could be used, for example, to prevent such corporations from building dams or weirs, or from planting certain crops.⁶⁸

The Commonwealth might also be able to use this power to regulate some state government water authorities on the basis that they would be classified as trading corporations (the Tasmanian Hydro-Electric Commission was so classified in the *Tasmanian Dam* case). The implementation of the National Competition Policy in the 1990s saw the restructuring of many state monopoly agencies, with responsibility for water resources management given to regulatory agencies, and responsibility for waters services delivery given to newly corporatized government enterprises. The latter would be considered constitutional corporations, and thus be subject to Commonwealth regulation. Justice Kirby referred to the trend towards corporatisation in his dissenting judgment in the *Work Choices* case, where he singled out land and water conservation as areas that might now fall under federal control.⁶⁹ Some of the entities potentially subject to Commonwealth regulation include the Sydney Water Board, Melbourne Water and the SA Water Corporation.

⁶⁶ *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

⁶⁷ *New South Wales v Commonwealth* (2006) 229 CLR 1, 114–15, quoting *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 375 (Gaudron J).

⁶⁸ John Williams, in evidence given to the Rural and Regional Affairs and Transport References Committee, *Implications for Long-Term Sustainable Management of the Murray Darling Basin System*, above n 5, 48.

⁶⁹ *New South Wales v Commonwealth* (2006) 229 CLR 1, 224 (Kirby J).

The greatest area of uncertainty surrounding s 51(xx) relates to the meaning of the term ‘trading or financial corporation’.⁷⁰ Currently, courts decide this issue by looking at the activities in which a corporation engages. If they engage in trading or financial activities to a significant or substantial extent, the corporation will fall within the scope of the power.⁷¹ In the past, many not-for-profit corporations have been found to qualify as trading corporations by lower courts, including universities, private schools, local councils, public hospitals and utilities, childcare centres, community service providers and benevolent or charitable bodies such as the Red Cross or the RSPCA.⁷² This might suggest, for example, that the water supply activities of local councils might be regulated by the Commonwealth under the corporations power. However, the status of local councils under s 51(xx) has recently been called into question,⁷³ and it seems that certainty in this area can only follow a definitive statement by the High Court.

Even if such certainty is achieved, it will only mean that the power extends to bodies that are incorporated. It will remain possible for businesses and other bodies to escape the reach of this power by changing their legal status. For example, in order to escape the coverage of the federal industrial law as amended during the life of the Howard government, the Queensland Parliament removed the corporate status of local government bodies in Queensland (with the exception of the Brisbane City Council) by enacting the *Local Government and Industrial Relations Act 2008* (Qld).

Nonetheless, the significance of s 51(xx) with respect to water was demonstrated by the Commonwealth’s enactment of the *Water Act 2007* (Cth). In reliance on this power, this Act requires constitutional corporations to comply with the Basin Plan and a water resource plan, to observe the water charge rules and the water market rules, to provide water information, and to permit officials of the Murray-Darling Basin Authority to access their premises.⁷⁴

Another source of Commonwealth power, the external affairs power (s 51(xxix)), has been used on numerous occasions to enact legislation dealing with environmental matters.⁷⁵ This head of power gives the Commonwealth authority to legislate to give effect within Australia to international obligations to which it has acceded under international treaties and other instruments. The primary constraint on the exercise of this power is that the provisions of the domestic law must be proportionate to the terms of the obligation—that is, they must be ‘reasonably capable of being considered appropriate and adapted to implementing the treaty’.⁷⁶ As early as 1991, Crawford recognised that the acceleration of international activity on matters such as global warming and deforestation suggested that s 51(xxix) would continue to be a major source of power with respect to environmental issues.⁷⁷ This is no less true today, and the global concern with water conservation underlines its relevance to water management within Australia. Recent examples of the Commonwealth using the external affairs power to implement international obligations on rivers and other waterways include the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Water Act 2007* (Cth). In

⁷⁰ See Nicholas Gouliaditis, ‘The Meaning of “Trading and Financial Corporations”: Future Directions’ (2008) 19 *Public Law Review* 110.

⁷¹ *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282.

⁷² See, eg, *Quickenden v O’Connor* (2001) 184 ALR 260; *E v Australian Red Cross* (1991) 99 ALR 601.

⁷³ *Australian Workers’ Union of Employees, Queensland v Etheridge Shire Council* (2008) 250 ALR 485.

⁷⁴ Carney and Gardner, above n 11, 94.

⁷⁵ Eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

⁷⁶ *Victoria v Commonwealth (Industrial Relations Case)* (1996) 187 CLR 416, 486-88; *Tasmanian Dam Case* (1983) 158 CLR 1.

⁷⁷ Crawford, above n 10, 24.

both cases, the Commonwealth employed s 51(xxix) to give domestic effect to certain provisions in the *Convention on Wetlands of International Importance, especially as Waterfowl Habitat*, also known as the ‘Ramsar Convention’.

The trade and commerce power (s 51(i)) is another potential avenue for Commonwealth laws to be enacted for water management. It enables the Commonwealth to make laws on interstate trade, but does not extend to the regulation of trade occurring only within state borders. A number of constitutional constraints operate upon the exercise of this power. First, no Commonwealth law—of trade or commerce or otherwise—may interfere with the directive in s 92 of the *Constitution* that ‘trade, commerce, and intercourse among the States ... shall be absolutely free’ (interpreted so as to strike down laws that are discriminatory in a protectionist sense⁷⁸). Second, the Commonwealth may not under s 99 pass a law of trade or commerce that gives preference to one state over another. And thirdly, as has already been noted, no law of trade or commerce may abridge the right of a state or its residents to the reasonable use of waters of rivers for conservation or irrigation.⁷⁹ The limitation enshrined in s 100 is the most significant in terms of water management. Without that limitation, it could be said with confidence that s 51(i) enables the Commonwealth to regulate interstate water supply businesses and water markets and to override state caps that affect the trading of water interstate. However, the validity of such action (where enacted under s 51(i)) will be questionable where it interferes with the ‘reasonable use’ of rivers for irrigation purposes. Thus, unlike s 98, whose relevance to contemporary water challenges is slight, s 100 retains scope to affect Commonwealth interventions with respect to water management, at least where made under s 51(i). Its ongoing significance is discussed further below. Also relevant here is the incidental scope of s 51(i), which might authorise Commonwealth regulation of water resources where there is a sufficient connection with interstate or overseas trade and commerce. For example, the Commonwealth may be able to ‘regulate the flow of interstate rivers where that flow is needed, for instance, for agricultural production destined for interstate or overseas commerce’.⁸⁰

A fourth head of power relevant to water management is that relating to the acquisition of property (s 51(xxxi)). This provides that Commonwealth laws may only provide for the acquisition of property on the payment of ‘just terms’. This provision is unlikely to have any bearing on the federal government’s ‘buyback’ scheme, given that it involves the voluntary sale of water entitlements at market value. However, s 51(xxxi) has potential application to the various intergovernmental agreements that require the reduction of the existing water entitlements of license holders. Indeed, the High Court was recently asked to rule on whether s 51(xxxi) applies to Commonwealth laws that reduce a license holder’s entitlements to extract groundwater—this will be discussed further below.

C Section 100

The greatest uncertainty with respect to the current constitutional settlement on water is the potential effect of s 100. As we have seen, s 100 imposes a restriction on the exercise of Commonwealth legislative power ‘by any law or regulation of trade or commerce’. The nature of that restriction is still in doubt because, more than a century after its inclusion in the *Constitution*, the High Court has not yet been required to consider it in any detail.

⁷⁸ *Cole v Whitfield* (1988) 165 CLR 360.

⁷⁹ Section 100.

⁸⁰ Carney and Gardner, above n 11, 89.

The court's most extensive statement on s 100 appears in the majority judgments in the *Tasmanian Dam* case.⁸¹ As is well known, this case concerned the validity of Commonwealth laws which sought to prohibit the construction of a dam on Tasmania's Franklin River. The operative parts of the legislation relied on the external affairs power, the corporations power and the races power (in s 51(xxvi)) for their validity. The legislation was challenged by Tasmania on a number of grounds, one being that those provisions which would prevent the construction of the dam violated s 100 because they abridged the right of Tasmania and its residents to the reasonable use of the waters of its rivers for conservation or irrigation.

Four judges dismissed this argument⁸² and, in doing so, remarked upon the operation of s 100. Mason, Murphy and Brennan JJ applied the reasoning adopted in *Morgan v Commonwealth*,⁸³ in which the court held that ss 98 to 102 'should be read as applying only to laws which can be made under the power conferred upon the Commonwealth Parliament by s 51(i)'.⁸⁴ In that case, an argument that s 99 applied to the impugned laws was dismissed on the basis that those laws were made under the defence power, and were not supported by the trade and commerce power. In the *Tasmanian Dam* case, the three judges applied this reasoning to find that s 100 only applies where the laws in question were made under ss 51(i) and 98, and that the laws precluding the construction of the dam did not fall into this category.⁸⁵ Mason J proposed a slightly broader scope for s 100 in suggesting that the words 'law or regulation of trade or commerce' in the section might also signify laws 'capable of being made' under these provisions.⁸⁶ The fourth judge, Deane J, while not endorsing explicitly the reasoning in *Morgan*,⁸⁷ agreed that the laws concerning dam construction were not laws of trade or commerce.⁸⁷

Mason J acknowledged that confining the operation of s 100 in this manner 'may seem somewhat artificial' given that laws made under other heads of power might similarly affect the use of waters of rivers by a state or its residents for conservation and irrigation.⁸⁸ He noted that the framers' decision to so confine s 100 'probably lies in the importance of the Murray River to New South Wales, Victoria and South Australia and the residents of those states and the apprehensions entertained by them as to the impact of the Commonwealth's legislative powers under ss. 51(i) and 98'.⁸⁹ The historical overview given at the beginning of this paper supports such a conclusion. Indeed, the framers viewed ss 51(i) and 98 as the only possible sources of Commonwealth power over the rivers; they did not contemplate that the external affairs power or the corporations power might also confer Commonwealth power in this area.⁹⁰ It seems then that whatever bite s 100 was thought to have had has now been largely circumvented by the general expansion of a number of Commonwealth powers.

The High Court has yet to address a number of other questions which remain open about the scope of s 100. One unresolved question concerns whether this provision confers a right of access to the states and their residents (and thus a personal right akin to that

⁸¹ *Commonwealth v Tasmania* (1983) 158 CLR 1.

⁸² The other three judges — Gibbs CJ, Wilson and Dawson JJ — found it unnecessary to consider this component of Tasmania's case.

⁸³ (1947) 74 CLR 421.

⁸⁴ *Ibid* 455.

⁸⁵ *Commonwealth v Tasmania* (1983) 158 CLR 1, 153–5 (Mason J); 182 (Murphy J); 248–9 (Brennan J).

⁸⁶ *Ibid* 153.

⁸⁷ *Ibid* 251.

⁸⁸ *Ibid* 154.

⁸⁹ *Ibid*.

⁹⁰ Twomey, above n 45, 39.

conferred by s 117 of the *Constitution*), or merely operates as a constraint on Commonwealth legislative power. Mason J made reference to this uncertainty in his judgment in the *Tasmanian Dam* case when he noted that it was unnecessary to determine ‘whether s 100 guarantees to riparian States and their residents access to the use of the waters for the purposes mentioned or whether it merely imposes a restriction on the power of the Commonwealth when legislating under ss 51(i) and 98’.⁹¹ A second question concerns the meaning of the term ‘reasonable use’ – it is uncertain, for example, precisely what level of water diversion would exceed the bounds of reasonableness. Another question is whether the legislative restriction contained in s 100 ceases to apply in the event of *unreasonable* use of river waters by the states or their residents. As McKay notes, the words ‘reasonable use’ ‘may provide some power to the Commonwealth on proof of unreasonable use’, although she suggests that ‘this is only likely to apply to one part of any state at any one time’.⁹² Finally, a question arises with respect to the meaning of ‘conservation’ in s 100. At Federation, this word referred to the ‘impounding of water’, but it seems arguable that it should be given a broader construction consistent with its contemporary meaning.⁹³

D *Recent case law*

In the past 18 months, two cases on water issues were heard by the High Court, and at least one other seems certain to be argued in the near future. They suggest that, after more than a century of water management being determined almost exclusively by agreement between the federal and state governments, the High Court will now have a major role to play.

In *ICM Agriculture v Commonwealth*,⁹⁴ the plaintiffs, a large agribusiness company, brought an action concerning the replacement of their groundwater bore licenses, granted under the *Water Act 1912* (NSW), with aquifer access licenses. The NSW government had issued the new licenses in implementation of a funding agreement (‘Achieving Sustainable Groundwater Entitlements’) that it had entered into with the Commonwealth. Under the new licenses, issued under the *Water Management Act 2000* (NSW), the plaintiffs’ access to groundwater entitlements was reduced by up to 70 per cent. The plaintiffs argued that the reduction of their access to groundwater amounted to an acquisition of property otherwise than on just terms, and thus contravened s 51(xxxi). As part of this, they contended that the scope of s 96 (under which the funding agreement had been entered into) was subject to the ‘just terms’ restriction in s 51(xxxi).

A majority of the High Court found that there had been no acquisition of property. The new arrangements were found to have ‘simply modified a statutory right ... [with] no basis in the general law ... which was inherently susceptible to that course’.⁹⁵ The plaintiffs had sought to avoid that assessment by arguing that the statutory licensing schemes were merely ‘a particular form of regulation’ of antecedent common law rights,⁹⁶ but the majority rejected that argument. It was clear from cases like *Embrey v Owen*⁹⁷ that at common law, as in Roman law, ‘water, like light and air, is common property not especially amenable to

⁹¹ *Commonwealth v Tasmania* (1983) 158 CLR 1, 153.

⁹² McKay, ‘The Quest for Environmentally Sustainable Water Use: Constitutional Issues for Federal, State and Local Governments’, above n 11, 24.

⁹³ *Ibid.*

⁹⁴ (2009) 240 CLR 140.

⁹⁵ *Ibid* [211], quoting Gaudron J in *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, 38.

⁹⁶ *Ibid* [48].

⁹⁷ (1851) 6 Ex 353, 155 ER 579.

private ownership'.⁹⁸ The result was also due, in part, to the state, in decreasing the amount of water the plaintiffs could extract from the ground, not gaining any identifiable benefit. In a joint judgment, Chief Justice French and Justices Gummow and Crennan⁹⁹ cited the definition of 'acquisition' laid down by Justices Deane and Gaudron in *Mutual Pools v Commonwealth*:

The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property. For there to be an 'acquisition of property', there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property.¹⁰⁰

Similarly, Hayne, Kiefel and Bell JJ found that 'there can be no *acquisition* of property unless some identifiable and measurable advantage is derived by another from, or in consequence of, the replacement of the plaintiffs' licenses or reduction of entitlements'.¹⁰¹

With respect to the argument about the scope of s 96, four judges agreed with the plaintiff's contention, although this did not alter their ruling on the central question of acquisition of property. Following *Magennis*,¹⁰² French CJ, Gummow and Crennan JJ reached the following conclusion (with which Heydon J agreed):

[T]he legislative power of the Commonwealth conferred by s 96 and s 51 (xxxvi) does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms.¹⁰³

Effectively, this conclusion means that the Commonwealth cannot avoid its responsibilities to provide just terms compensation by inducing a state to acquire the property on its behalf through the mechanism of s 96.

Section 51(xxxi) was also in issue in *Arnold v Minister Administering the Water Management Act 2000*, heard on appeal from the New South Wales Court of Appeal.¹⁰⁴ This case concerned a challenge by farmers to a NSW water sharing plan (the Water Sharing Plan for the Lower Murray Groundwater Source 2006—'the Plan'). The appellants had held groundwater extraction entitlements under the *Water Act 1912* (NSW) but, through the operation of the *Water Management Act 2000* (NSW) ('the NSW Act') and the Plan, they were replaced by aquifer access licenses and supplementary licenses that significantly reduced their entitlement to access groundwater. Both the NSW Act and the Plan had been implemented in the context of a national water sustainability arrangement involving Commonwealth legislation, including the *Natural Resources Management (Financial Assistance) Act 1994* and the *National Water Commission Act 2004*, and a COAG funding agreement. The appellants argued that the Commonwealth legislation authorised an acquisition of property on otherwise than just terms. For the reasons given in *ICM*, a majority of the High Court rejected this argument, finding that the replacement of the

⁹⁸ *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 [55].

⁹⁹ *Ibid* [82].

¹⁰⁰ *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 185.

¹⁰¹ *ICM Agriculture v Commonwealth* (2009) 240 CLR 140, [147], citing *Newcrest* (1997) 190 CLR 513 (emphasis in original).

¹⁰² *PJ Magennis v Commonwealth* (1949) 80 CLR 382.

¹⁰³ *ICM Agriculture v Commonwealth* (2009) 240 CLR 140, [46] (French CJ, Gummow and Crennan J); [174] (Heydon J). Hayne, Kiefel and Bell JJ thought it unnecessary to decide this issue: [141].

¹⁰⁴ [2010] HCA 3; (2008) 253 ALR 173.

groundwater extraction entitlements involved no acquisition of property within the meaning of s 51(xxxi).¹⁰⁵

The appellants also challenged the various agreements and legislation on the basis that they offended the prohibition in s 100. This ground of appeal also failed. The appellants argued that the decision in *Morgan*, which was followed in the *Tasmanian Dam* case, should be reconsidered. In particular, they contended that the words ‘law or regulation of trade or commerce’ in s 100 did not confine its operation to laws made under s 51(i). A majority of the court, however, determined that the rights and liberties which the appellants held under their licenses were with respect to groundwater and not ‘the waters of rivers’ within the meaning of s 100.¹⁰⁶ As such, no contravention of s 100 had occurred, and it was not necessary for the court to revisit the decision in *Morgan*.

Another case on water seems likely to be heard by the High Court in the near future. It concerns an action by South Australia, filed in December 2009, alleging that Victoria’s water trading rules breach the requirement in s 92 of the *Constitution* that interstate trade and commerce be absolutely free.¹⁰⁷ The provision in question is rule 25 of Victoria’s water trading rules, which was enacted under the *Water Act 1989* (Vic) as part of that state’s compliance with the National Water Initiative.¹⁰⁸ Rule 25 imposes a 4 per cent annual limit on the amount of water access entitlements that may be traded out of an irrigation district in northern Victoria. As part of its filings, South Australia argues that the trading cap was not introduced for a purpose ‘reasonably necessary or appropriate and adapted to’ an acceptable legislative object. Instead, it argues that the cap was introduced for the discriminatory, protectionist purpose of protecting local infrastructure and communities.¹⁰⁹

These decisions and the possibilities raised by ongoing and future litigation demonstrate some important themes in how the *Constitution* relates to the management of water in Australia’s rivers. The most important of which is that although there is significant potential for constitutional litigation around issues of water allocation and water scarcity, the *Constitution* actually says very little of direct assistance in these areas. There may be potential for s 100 to play a larger role, but it is not clear how much of a restriction on legislative power it could ever amount to. Instead, other aspects of the *Constitution* directed to matters such as federalism, interstate trade and the acquisition of property are more likely to remain significant.

Litigation around such provisions will tend to be decided according to constitutional doctrines that have nothing to do with the problems facing Australia’s river systems. Results will also tend to reflect long-standing principles and accommodations within the federal sphere rather than environmental and other concerns. *ICM* is a case in point. The plaintiffs lost on their primary argument, but did achieve an important victory when it came to the subjugation of the Commonwealth’s grants power to the requirement to provide just terms for the acquisition of property. This may well have important future implications for arrangements and agreements between the Commonwealth and the states, but it is hard to see how it will have much of an impact when it comes to issues of water. Certainly, the overall effect of *ICM* would seem to give governments greater flexibility to reduce water

¹⁰⁵ [2010] HCA 3, [11] per French CJ; [48] per Gummow and Crennan JJ; [72] per Hayne, Kiefel and Bell JJ.

¹⁰⁶ *Ibid* [26] per French CJ; [54]-[58] per Gummow and Crennan JJ; [75] per Hayne, Kiefel and Bell JJ.

¹⁰⁷ *Constitution* s 92.

¹⁰⁸ Trading Rules for Declared Water Systems (Vic), rules 25, 25A, 25B and 25C.

¹⁰⁹ Writ of Summons (1 December 2009) 66ff.

access rights without paying ‘just terms’ compensation, thus creating more uncertainty for license holders.

Ultimately, litigation would appear to offer little in the way of assistance for the better management of rivers in Australia. When the legal principles being litigated relate to a constitutional settlement now sadly out of date for contemporary water problems, this should come as no surprise. The answer of course is that cooperation, the long-standing way of dealing with such matters, offers a more effective means of dealing with such issues. Then again, it is not clear that cooperation has produced the results needed, and it is arguable that a significant part of the current problems relate to a failure of cooperative endeavours to produce the right policy settings and the right environmental outcomes. The decision by Victoria to impose a trading cap, and South Australia’s challenge, is an example of such a breakdown in the collaborative approach to water management. It also demonstrates that, even where there is cooperation, disagreements will inevitably arise that need to be resolved through litigation or like means. Where this occurs, a question arises as to whether revising the constitutional rules that govern this area would help ensure that legal outcomes are more closely aligned to the community and national interest when it comes to the best use of a precious resource like water.

V Conclusion

The original constitutional settlement on river and other water in Australia has evolved significantly since 1901, with the Commonwealth now having far greater legislative capacity to influence and regulate water management. Despite this, however, the Commonwealth has largely been unwilling to use its coercive powers to wrest control of rivers management from the states. Instead, it has generally preferred to rely on the issuing of conditional financial grants to the states, and the negotiation of collaborative measures. The passage of the *Water Act 2007* (Cth) was a break from this trend, most notably in its granting of authority to the Commonwealth Minister to approve the Basin Plan. For some,¹¹⁰ though, this state of affairs remains unsatisfactory, and there have been calls for more Commonwealth intervention in rivers management, with people including Opposition Leader Tony Abbott calling for a complete takeover of at least some parts of state responsibility.¹¹¹

Despite the various efforts made by all Australian governments in the last two decades to improve water management, there remain serious concerns about the health of Australia’s rivers and their capacity to provide enough water for towns, irrigators and the environment. One of the most comprehensive assessments of the state of river management in Australia was published in October 2009 when the National Water Commission released its second Biennial Assessment on water reform. The 280-page report concluded that, despite some progress, there remained significant problems in water management and that key objectives of the NWI were not being met.

Several of these problems and failures can be related, in whole or in part, to the federal framework in which the NWI was negotiated. For example:¹¹²

¹¹⁰ See, eg. Rural and Regional Affairs and Transport References Committee, Senate, Parliament of the Commonwealth of Australia, *Implications for Long-Term Sustainable Management of the Murray Darling Basin System*, above n 5, 14–15, 123; Editorial, ‘Time for Rudd to stop premiers’ water torture’, *The Australian* (Sydney), 9 January 2010, 13; Bernard Keane, ‘Remember the Murray-Darling? It’s still in deep trouble ...’, *Crikey*, 22 December 2009.

¹¹¹ Abbott, above n 8.

¹¹² National Water Commission, above n 2; Matthews, above n 4.

- over allocation of water entitlements remains a problem more than 15 years after state governments promised to address it—as part of this, there is a continued failure to reach shared national understandings of what constitutes ‘over allocation’, as well sustainable levels of extraction;
- despite state government commitments to have local water plans in place by 2009, forty per cent remain outstanding, and many existing plans have been suspended after failing to plan effectively for the impact of climate change;
- state governments continue to implement barriers to water trading, including trading caps;
- state governments are often in conflict with each, and are inadequately resourced; generally, intergovernmental processes move slowly and produce negotiated compromises.

Other problems cited in the report include: a failure to provide irrigators with sufficient information about buyback plans and other reform initiatives to enable them to plan for the future; uncertainty and stress among farming families and irrigation-dependent communities; and, a lack of clarity and transparency with respect to programs and decision-making about environmental water.

Recent developments demonstrate the challenges of meeting these problems by balancing the interests of inter-jurisdictional river systems with the local, vested interests of the states. The decision by South Australia to challenge the constitutional validity of Victoria’s trading cap on water entitlements is one such example of a federal collaborative venture coming off the rails and ending up in litigation. Another is the recent decision by New South Wales to impose its own trading cap,¹¹³ prompted, in part, by the existence of Victoria’s cap. South Australia, meanwhile, called on NSW to permit an early release of water captured during recent heavy rains and flooding,¹¹⁴ and NSW irrigators have threatened to sue the federal government over its new Basin plan.¹¹⁵ South Australia has also threatened more High Court litigation, this time to claim financial compensation from other Basin States for abusing its water rights.¹¹⁶ Ken Matthews, the Chair and CEO of the National Water Commission, was referring to developments like these when he acknowledged a perception that intergovernmental water reform processes were characterised by confusion, lack of clarity, and ‘state governments bickering, arguing, delaying, being parochial—even litigating’.¹¹⁷

There is a real possibility that relations between governments in this area will become further strained and that regulation and management will increasingly be supplemented by litigation. This is problematic not only because of the delay and expense involved in any litigation, but because it is not clear that litigation based upon the *Australian Constitution* is capable of producing outcomes consistent with the best management of Australia’s river systems. Wherever litigation does produce that outcome, it could only be described as fortuitous.

¹¹³ In September 2009, NSW agreed to lift a four-month embargo on water trades out of the State after establishing a Memorandum of Understanding with the Commonwealth that capped water purchases from NSW for the next four years. Siobhain Ryan, ‘Murray-Darling Boost as State Lifts Trading Ban’, *The Australian* (Sydney), 24 September 2009.

¹¹⁴ On 19 January 2010, NSW agreed to release 148 gigalitres of water to South Australia’s Lower Lakes. Ben Cubby, ‘Floodwater to Quench Lakes at Murray Mouth’, *Sydney Morning Herald* (Sydney), 20 January 2010.

¹¹⁵ Matthew Franklin and Asa Wahlquist, ‘Water blame game erupts’, *The Australian* (Sydney), 8 January 2010, 1.

¹¹⁶ Michael Owen, ‘Rann “woeful” on water policy’, *The Australian* (Sydney), 11 December 2009, 3.

¹¹⁷ Matthews, above n 4, 1.

It seems that there has always been the potential for the *Constitution* to play a decisive role in the management of Australian rivers. It seems also that this might now be realised. Unfortunately, this will not be based constitutional provisions drafted to deal specifically with such problems. Instead, the claims and counter claims of vested interests, states and the Commonwealth will be mediated through the technicalities and arcane byways that characterise Australia's federal system, and its guarantee of just terms for the acquisition of property under federal law.

The express and implied constitutional provisions that cover these areas are an inadequate basis from which to expect appropriate outcomes when it comes to the crisis afflicting areas like the Murray Darling basin. A very different constitutional settlement is required, one that is sensitive to a range of environmental and other problems not dreamed of at the time of the *Constitution's* drafting more than a century ago. Today, Australia has a *Constitution* that was drafted in light of what were the issues of the day in the 1890s, some of which, such as the desire to protect South Australia's river trade, have disappeared from view, while others have changed or taken on a new urgency due to climactic and technological developments and the increasing size of the population on the Australian continent.

Much of the debate on a new constitutional settlement has focused on the idea that the power of the states to manage Australia's rivers should be transferred to the Commonwealth, with the latter having almost complete control over the area. This has led to calls for a referendum to grant the Commonwealth this power, as well as suggestions that the Commonwealth should make greater use of its existing powers. Such proposals are often light on detail—they rarely specify precisely which powers should be transferred to the Commonwealth—but the general thrust of proposals is clear. A 2009 Senate inquiry addressed this very question with respect to the Murray-Darling Basin. It stopped short of recommending a referendum on a federal takeover, but it did find that the Commonwealth should 'work towards a full and unconditional referral of powers relevant to the management of the [Murray-Darling Basin] and, in the absence of such full referral, consider pursuing other options to provide for complete federal management'.¹¹⁸ The Committee was divided on this issue, however, with government senators rejecting this recommendation and instead calling for the new arrangements on the Basin to be 'given the chance to work'.¹¹⁹ Indeed, the idea of a Commonwealth takeover of river management remains the subject of intense debate, with some commentators arguing that the Commonwealth lacks expertise and experience, is no more likely than the states to make hard decisions that upset stakeholders and that any change through the referendum process is unlikely to succeed.¹²⁰ Further, any proposal for a federal takeover would need to confront the vexed question of whether the Commonwealth should assume responsibility for administering water resources entitlement regimes. A complete takeover might entail the

¹¹⁸ Rural and Regional Affairs and Transport References Committee, Senate, Parliament of the Commonwealth of Australia, *Implications for Long-Term Sustainable Management of the Murray Darling Basin System*, above n 5, 14–15.

¹¹⁹ *Ibid* 112.

¹²⁰ Twomey, above n 45, 39–40; Johnston, above n 10, 103–4. In October 2009, National Water Commission Chair and CEO, Ken Matthews, supported the continuation of the existing cooperative arrangements, and called on COAG to 'sponsor a new round of collective, concerted action to renew and reinvigorate national water reform': Matthews, above n 4, [44]. At its meeting on 7 December 2009, COAG pledged to 'redouble its efforts to accelerate the pace of reform under the National Water Initiative': Council of Australian Governments, *Communique*, Brisbane (7 December 2009).

Commonwealth assuming ownership of the states' titles to terrestrial water resources, a move that might require the payment of just terms compensation.¹²¹

Certainly, as we have demonstrated, the Commonwealth does have greater power to regulate this field than it is currently exercising. Modern interpretations of federal legislative powers, like that over constitutional corporations, offer the Commonwealth a means to enact laws in this field of the type not foreseen by the framers of the *Constitution*. However, despite their expanded width, these powers do not offer a means by which the Commonwealth can regulate all aspects of the Australian river systems. For example, despite the breadth of the corporations power, the use of river water by an unincorporated entity for non-business purposes remains beyond the scope of federal regulation. It is perhaps partly for this reason that the Commonwealth has been cautious in its use of such powers, recognising that any piecemeal takeover could cause more problems than it solves.

In the end, the only effective, long-term solution may well require revision of Australia's 1901 constitutional settlement. Such a revision should involve a wholesale reassessment of how the constitutional framework can more effectively support the management of Australia's water resources in the 21st century. A Commonwealth takeover of some or all aspects of Australia's river systems should be one of the possibilities put on the table, as should a review of how the *Constitution* can better support cooperative arrangements where they are necessary or desirable. The practical barriers to achieving such change are of course considerable, but the ongoing crises in Australia's river systems present a persuasive case for at least making the attempt.

¹²¹ Carney and Gardner, above n 11, 105. There would, however, be no need for fair compensation if State property were acquired by way of a referendum as s 51(xxxi) only applies to federal legislation.