

## A BRIDGE? THE TROUBLED HISTORY OF INTER-STATE WATER RESOURCES AND CONSTITUTIONAL LIMITATIONS ON STATE WATER USE

NICHOLAS KELLY\*

[T]his is probably the most complex – I might almost say the most obscure – part of the whole Constitution; and it will be extremely difficult to determine – first, what are our rights and powers; and next, the most tactful and effective way of asserting them.

-- Alfred Deakin<sup>1</sup>

### I INTRODUCTION

During the development of the *Australian Constitution*, water was of major concern to many of those participating in the Constitutional Convention Debates. The portions of those debates devoted to the Murray River and its tributaries, and the right to use the waters therein, were some of the most heated and protracted. The records are rich with veiled insults, rhetoric about resorting to arms and threats to derail Federation. The result of these debates is found in two sections of the *Australian Constitution*:

*98 Trade and commerce includes navigation and State railways*

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.

*100 Nor abridge right to use water*

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.

Section 98 explicitly enlarges the trade and commerce power in section 51(i) to cover navigation and shipping while section 100 limits the same power.<sup>2</sup> The

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1 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 October 1902, 16 677 (Alfred Deakin, Prime Minister) referring to the diversion of Murray waters.

2 The limitation on Commonwealth power does not extend beyond legislation made using ss 51(i) and 98: *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'), 153–5 (Mason J), 182 (Murphy J), 248–9 (Brennan J), 251 (Deane J); *Morgan v Commonwealth* (1947) 74 CLR 421, 455, 458–9.

brevity and apparent simplicity of the operation of these clauses belie their controversial history. In particular, while the focus of these sections is Commonwealth powers, the history of the use of river water in Australia has been more to do with inter-State disagreements – an issue on which sections 98 and 100, for reasons explored in this article, are silent.

To date the Murray-Darling States (and Territory)<sup>3</sup> have managed their differences politically through inter-governmental agreements, beginning with the River Murray Waters Agreement in 1914 and culminating in the National Water Initiative in 2004. Recent years have seen an increase in conflict over freshwater resources both domestically<sup>4</sup> and internationally.<sup>5</sup> If the pressure created by changes in climate and population continues to grow,<sup>6</sup> so too will the pressure to manage shared water resources equitably. There may come a time where the High Court is asked to review the constitutionality of water management strategies and determine disputes between States and/or the Commonwealth. That time may be sooner rather than later, given recent developments in the Murray-Darling Basin.<sup>7</sup>

The focus of this article is the historical development of the constitutional provisions dealing with water, and its influence on the law applicable to an inter-State dispute. This history is traced through the Convention Debates and the writings of influential contemporaneous commentators in Part II. These sources demonstrate that inter-State water disputes were one of the primary concerns of the founders. Agreement was not reached on a constitutional mechanism to deal with such disputes, and by default it was agreed that the High Court would determine any rights of, or limitations on, States inter se in the course of future disputes. Analysis of the historical material also shows that international law and the law of the United States were particularly influential in discussions about water sharing and the eventual formulation of sections 98 and 100.

Part III explores one way in which this history may be relevant to an inter-State water dispute today. The existence of relevant law is central to the exercise of the High Court's jurisdiction in suits between States, as well as to the settlement of the substantive dispute. This law could be found in existing inter-governmental agreements, the common law or the *Constitution*.

The enforceability at law of inter-governmental agreements is questionable. A State seeking to bring such a suit in the High Court would best be served by

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3 Queensland, New South Wales, Victoria, South Australia and the Australian Capital Territory.

4 For a description of disputes between graziers and irrigators in South East Queensland see Poh-Ling Tan, 'Conflict Over Water Resources in Queensland: All Eyes on the Lower Balonne' (2000) 17 *Environmental and Planning Law Journal* 545.

5 In 2006, there was widely reported armed conflict in Sri Lanka over control of a river: Samanthi Dissanayake, *Water and War in Sri Lanka* (2006) BBC News <[http://news.bbc.co.uk/2/hi/south\\_asia/5239570.stm](http://news.bbc.co.uk/2/hi/south_asia/5239570.stm)> at 4 October 2007; see also World Water Assessment Program, *Water – A Shared Responsibility: The United Nations World Water Development Report 2* (2006) <<http://unesdoc.unesco.org/images/0014/001454/145405E.pdf>> at 5 October 2007.

6 See comments regarding the Murray-Darling Basin in ABC News Online, *Aust in Grip of Worst Drought Ever: Scientists* (2006) <<http://www.abc.net.au/news/newsitems/200610/s1763768.htm>> at 5 October 2007.

7 See, for example, George Williams, 'Both Sides Looking for a Case That Holds Water', *Sydney Morning Herald* (Sydney), 26 July 2007, 13.

identifying a constitutional basis for inter-State water rights. Section 100 may contain an implied limitation on State water use. This is supported by some historical material, which may be considered as an interpretive aid because of ambiguity in the text of section 100 with respect to States' rights inter se. Alternatively, the federal system requires equality of right between States, one outcome of which is an implied limitation on State legislative powers inter se that could operate as a protection of State water rights. This limitation finds support in international law and the law of the US and other federations. The historical influence of US and international law on the water issue, demonstrated in the material examined below, suggests that an implication along the above lines might be appropriate.

## II THE HISTORY OF WATER AND FEDERATION

The issue of the rights of States to water resources was one of the most contentious in Australia's constitutional history, and the historical material on which to draw is vast. The Convention Debates and contemporary material from before and after Federation are examined below.

According to Sandford Clark, the respective positions of the Murray States were in place as early as 1881 (if not earlier).<sup>8</sup> Clark summarises the positions taken by the colonies prior to the Constitutional Conventions as based on three contentions:

- a) South Australia's claim to maintain navigability in the Murray itself and major tributaries in New South Wales, and to that end to prevent diversion by Victoria of non-navigable tributaries ...;
- b) Victoria's claim, as the first colony to realise and exploit the advantages of irrigation, to a right to divert water from the upper Murray and tributaries within its territory; and
- c) New South Wales' claim, based on territorial rights declared by the Imperial Parliament, to the exclusive use of waters in the Murray above the South Australian border and in its territorial tributaries, with no regard to the claims of Victoria and South Australia.<sup>9</sup>

South Australia made several unsuccessful overtures to the other colonies over many years to attempt to reach some agreement on water sharing.<sup>10</sup> The push for Federation allowed South Australia to pursue this goal vigorously in the forum of the Convention Debates.

### A The Convention Debates

The draft submitted for debate at the first Convention in Sydney included a sub-clause which gave power to the federal Parliament for 'river navigation with respect to the common purposes of two or more states or parts of the

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8 Sandford Clark, 'The River Murray Question: Part I – Colonial Days' (1971) 8(1) *Melbourne University Law Review* 11, 26.

9 Ibid.

10 Ibid 26–30.

Commonwealth'.<sup>11</sup> This demonstrates that, right from the start, the debate about rivers was substantively about transboundary rivers. The topic was contentious from the beginning: '[t]here was not a single line in this clause which gave the committee so much trouble as this did, and the result of all our trouble, which was very great, is the phrase before the Committee.'<sup>12</sup>

There is also no doubt that the debate about rivers was related to the control and use of the waters of the Murray and its tributaries, evidenced by the final form of the sub-section agreed to in Adelaide, giving the federal Parliament: '[t]he control and regulation of the navigation of the River Murray, and the use of the waters thereof from where it first forms part of the boundary between Victoria and New South Wales to the sea'.<sup>13</sup> There was a great deal of discussion at the Adelaide and Melbourne Conventions about the existence of the rights asserted by each State and their legal basis. Whether or not there were any rights existing at the time and what those rights may be were highly controversial topics. Two of the most contentious topics of the Debates were the nature of existing rights to water, and the method for resolving future disputes over water.

### 1 *The South Australian Position*

In 1887, South Australia appointed a River Murray Waters Commission 'to deal with the question of navigation and riparian rights<sup>14</sup> of the River Murray'.<sup>15</sup> In a progress report by Patrick Glynn subsequent to the original Commission report, the pragmatic approach of South Australia to their 'rights' in this debate was clearly summarised. As quoted at the Adelaide Convention by John Gordon, Glynn wrote:

The water rights of the province to be preserved depend a good deal upon the extent of their recognition by the other colonies. What they are according to the principle of international and private law – the analogy of which should guide us in defining them – may be clearly stated, but the mere statement of the colonies' respective rights in the river, unless made the basis of an agreement for the mutual exercise and respect of them, would be of little use. There is no tribunal to which a colony, on breach of its water rights, can appeal for a remedy, so that the rights are legally ineffective.<sup>16</sup>

Maintaining their earlier position, the South Australians at the Conventions asserted existing rights,<sup>17</sup> and wanted some recognition within the *Constitution* that the same riparian rights existed between States as existed between

11 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 3 April 1891, 689.

12 *Ibid* 691 (Sir Samuel Griffith).

13 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide ('Adelaide Debates'), 17 April 1897, 820 ff.

14 Riparian rights essentially require a user higher up a stream not to use the stream's water to such an extent that those lower down are deprived of its use: William Howarth, *Wisdom's Law of Watercourses* (5<sup>th</sup> ed, 1992) 66–7.

15 Adelaide Debates, 17 April 1897, 795 (John Gordon).

16 *Ibid* 799 (John Gordon).

17 *Ibid* 10 February 1898, 814 (Sir John Downer), 822 (Henry Dobson), 824–5 (Charles Kingston).

individuals.<sup>18</sup> The primary concern of South Australia was preserving a level of water for navigation (for example, four feet)<sup>19</sup>. However, the South Australians also wanted this water for other uses.<sup>20</sup> In fact, by getting a guaranteed level of water for navigation, they were guaranteed an amount of water which could be used for any purpose.<sup>21</sup>

## 2 *The New South Wales Position*

The delegates from New South Wales (supported by Victoria)<sup>22</sup> were adamant that there were no inter-State riparian rights in Australia.<sup>23</sup> In rejecting this South Australian assertion, the delegates from NSW were influenced by Western US water law and the doctrine of prior appropriation which had developed there as a customary rule, eventually recognised in statute and judicial decision.<sup>24</sup> The doctrine evolved from the practices of early settlers, predominantly miners, and essentially enshrined a 'first in time is first in right' form of water sharing.<sup>25</sup> The rejection of English riparian law on the perceived basis of climatic differences between the US and England was used to support NSW's assertion of an absolute right to the waters of the Murray and its tributaries, as Australia was seen as more similar in climate to the arid states of the US.<sup>26</sup> Most of the delegates from NSW asserted the right to take all the water of the Murray and its tributaries if they so chose.<sup>27</sup>

New South Wales agreed early on that federal power over navigation of the Murray (and its tributaries) should be allowed.<sup>28</sup> The sticking point was 'use of waters' and the scope within the navigation power for interference with irrigation and conservation. There seems to have been agreement that if there were any rights on either side, there was no way these rights could have been enforced, at that time. Similarly there was agreement that the absolute water rights asserted by NSW were based on power (as in might) rather than any written law:

18 See Dobson's 'Fable of the Spud and Stream', *Official Record of the Debates of the Australasian Federal Convention*, Melbourne ('Melbourne Debates'), 25 January 1898, 146–7 (Henry Dobson); see also 24 January 1898, 74 (Josiah Symon); 1 February 1898, 407–8 (Frederick Holder).

19 Adelaide Debates, 17 April 1897, 811 (Patrick Glynn).

20 Ibid 801 (Josiah Symon and John Gordon), 814 (Sir John Downer), 822 (Henry Dobson); Melbourne Debates, 1 February 1898, 408 (Frederick Holder).

21 'If you secure the navigability of the river to South Australia, she will eventually be able to use the water to which she is entitled as she thinks fit': Melbourne Debates, 1 February 1898, 402 (Henry Higgins); 7 March 1898, 1971–2 (Alfred Deakin).

22 Melbourne Debates, 10 February 1898, 807 (Alfred Deakin).

23 For example, Melbourne Debates, 2 February 1898, 479 (Edmund Barton); see also 4 February 1898, 576 (Henry Higgins) who seemed to think there were no legal rights on this question either for NSW or SA.

24 Adelaide Debates 17 April 1897, 806 (Alfred Deakin); Melbourne Debates, 2 February 1898, 421–2 (Isaac Isaacs).

25 William Goldfarb, *Water Law* (2<sup>nd</sup> ed, 1988) 32.

26 See exchange between Zeal, Lyne and Isaacs, Melbourne Debates, 2 February 1898, 422.

27 NSW delegates believed the State had full property rights over the waters of the Murray because the bed of the Murray was conferred to NSW by Imperial Statute: see Adelaide Debates, 17 April 1897, 817–8 (George Reid), though according to Glynn this was in order to better prosecute customs offences and did not affect ownership of the water: at 812 (Patrick Glynn); see also Sandford D Clark, 'Case Note – *Hazlett v Presnell*' (1983) 14(1) *Melbourne University Law Review* 113.

28 Melbourne Debates, 1 February 1898, 379 (William Lyne).

DOWNER: So far as the law of the case is concerned, I agree with what Mr Deakin has said. I agree that New South Wales has the control of the river within its territory. I believe that legally she can use every drop of water that is there, and I do not know of any precedent by which any other colony could interfere with her.

DOBSON: Has the honorable member any authority for saying that?

DOWNER: It is the authority of power. They have got the river and they can use it, and every other state can do the same if the remaining states will endure it.<sup>29</sup>

Richard O'Connor gave a useful summary of the legal principles as understood by NSW early in the debate in Melbourne.<sup>30</sup> In carving out the colonies, the Imperial Government had the power to preserve rights over rivers in whatever ways it saw fit, for example, to expressly provide for the same riparian rights between states as exist between individuals. But it did not do this: instead it granted 'the full right of self-government', and hence absolute control over the waters of the rivers within the colonies. The NSW position with respect to existing rights was further summarised later by William Trenwith from Victoria:

that New South Wales has control over all the waters which are within her borders while they remain within her borders, and that she can, if she choose, cut off the flow of any river at the point where it is about to leave the borders of New South Wales.<sup>31</sup>

### 3 *The Final Outcome*

South Australia, NSW and Victoria could not reach any agreement on the question of rights.<sup>32</sup> Instead they confined the issue to the federal Parliament's trade and commerce power, on the understanding that any future disputes over rights would be sent to the High Court to determine the nature of the rights involved.

The debate on this topic in Melbourne was particularly long and heated. There are 2521 transcribed pages of the debates. Of these, 428 pages are devoted specifically to the rivers question – close to one fifth of the whole debate. A number of amendments were proposed by the South Australians before the entire sub-clause, agreed to in Adelaide, was removed.<sup>33</sup> The clause was withdrawn on the basis of Barton's assertion that any power over river navigation would be included in the trade and commerce power, on the understanding that this was the way the power had been interpreted by the Supreme Court of the United States. Five new subclauses were subsequently proposed, with the fifth (proposed by Glynn from South Australia) being agreed to.<sup>34</sup> This amendment was intended to

29 Ibid 21 January 1898, 56 (Sir John Downer); 21 January 1898, 43 (Alfred Deakin); 2 February 1898, 424 (Isaac Isaacs); 4 February 1898, 590–1 (William Trenwith).

30 Ibid 24 January 1898, 65–7 (Richard O'Connor).

31 Ibid 3 February 1898, 492–3 (William Trenwith).

32 The delegates from Tasmania and Western Australia were more sympathetic to the South Australian position: see Melbourne Debates 25 January 1898, 146, 2 February 1898, 461 (Henry Dobson); 1 February 1898, 399–400 (Sir John Forrest).

33 Ibid 3 February 1898, 480.

34 Ibid 4 February 1898, 564. The sub-clause reads '[f]or the purposes of sub-section (1) waters shall be deemed navigable for trade and commerce which, either by themselves or by their connexions with other waters, are in fact navigable permanently or intermittently for trade and commerce with other nations or among the several states.'

ensure that the High Court would interpret navigability in line with US, rather than English, authority. Following a further three proposed amendments, Glynn's amendment defining navigability was reconsidered and struck out.<sup>35</sup> Glynn then proposed to include his amendment within the trade and commerce power. Debate on this was postponed until after debate of the navigation and shipping power.

The proposed bill of 1897 contained an additional head of Commonwealth power over navigation and shipping (clause 52(viii)). This was amended and agreed to in Melbourne. Following later amendments, clause 52(viii) became sections 98 and 100 of the *Constitution*. The amendments in Melbourne were all proposed by NSW and Victoria and were intended to ensure that control over conservation and irrigation by the States was not subordinate to the Commonwealth's power over navigation. A requirement of reasonableness was proposed by Sir John Downer from South Australia<sup>36</sup> and, although opposed by Reid and others from NSW, was agreed to, making the final clause almost identical to section 100 of the *Constitution*.

This makes it difficult to interpret section 100 in any way other than as a limitation on Commonwealth power. The amendments were proposed some time after the delegates had decided to rely on the trade and commerce power and were clearly an attempt by NSW and Victoria to ensure that water for irrigation and conservation was quarantined from Commonwealth control. Nevertheless, some contemporary commentators believed that section 100 also operated as a guarantee of rights between States inter se (discussed below).

#### 4 *Future Disputes in the High Court*

Over the course of the debates, the South Australian argument evolved from one asserting the existence of a pre-existing right, to one which advocated giving the power to determine those rights to a federal body (Parliament<sup>37</sup> or the High Court<sup>38</sup> or Inter-State Commission<sup>39</sup>). Other delegates also focused on the prospect of future disputes, and many considered the High Court the best forum for settling these disputes.<sup>40</sup> The following comment from Barton is particularly instructive on this point:

[Removing the sub-section and relying on the trade and commerce power] sends the matter to the best arbiter, the best tribunal we have – our own High Court, which we have decided is the best – and is it not better that, instead of having conflicts between states, instead of having discourteous correspondence, there should be a means created whereby, if you adopt this course, there will be a constitutional mode of settling such questions beyond all doubt, and for all time?<sup>41</sup>

35 Ibid 7 February 1898, 635.

36 Ibid 7 March 1898, 1989.

37 Ibid 3 February 1898, 510 (Symon and Higgins); 7 February 1898, 614–5 (Sir George Turner).

38 Ibid 3 February 1898, 518; 7 February 1898, 614 (George Reid); 530 (Henry Dobson); 3 February 1898 605 (Bernhard Wise); 606 (Sir John Forrest).

39 Ibid 7 March 1898, 1984 (Edmund Barton); 1986 (Isaac Isaacs).

40 Ibid 1 February 1898, 414, 415 (Edmund Barton) on the best forum for determining whether a stream was 'navigable' and hence subject to federal control; 3 February 1898, 493–5, 4 February 1898, 590-1 (William Trenwith).

41 Ibid 1 February 1898, 416–7 (Edmund Barton).

Barton's reference to 'conflicts between states' demonstrates that although the subject of the debate was a federal power, inter-State disputes over shared waters were of primary concern to the delegates. The role that the High Court would play if there was no reference to water in the final draft was explained by O'Connor:

O'CONNOR: Therefore, my suggestion is that we can best settle this question by leaving out subsection (31) altogether, and relying upon the broad fixed principle which is embodied in subsection (1) of clause 52, leaving it to the federal courts to decide the question of the conflicting rights, which, under all the circumstances we find ourselves unable to agree on.

HOLDER: Will you expressly say that by putting in here 'inter-state riparian rights'?

O'CONNOR: No, because that would introduce an element of great doubt and difficulty. We say there are no inter-state riparian rights at the present time.

HOLDER: You say that the federal courts should decide. Give them the power to decide.

O'CONNOR: But it might be construed that, by using an expression of that kind, we were giving riparian rights that did not exist before, by the very provision the honourable member would propose.<sup>42</sup>

This exchange also demonstrates the extent to which the debate was concerned with inter-State disputes, and not just with the powers of the federal Parliament. There was some suggestion that perhaps it should be left to the federal Parliament to determine what the rights were between the States:<sup>43</sup> Higgins, for instance, suggested a clause which allowed Parliament to 'adjust' riparian rights as between States.<sup>44</sup> Turner objected to this amendment on the basis that it would replicate their present problems, with conflicting rights being asserted by both sides.<sup>45</sup>

Part of the disagreement about the proper forum for settling disputes was over whether the *Constitution* would protect an existing right (the scope of which would be interpreted by the High Court) or give the power to create riparian rights (which only the Parliament can do).<sup>46</sup> An amendment giving such power to Parliament was agreed upon (though later withdrawn),<sup>47</sup> which led to a statement by Reid to the effect that removing the power to settle such a dispute from the impartiality of the Court to the partisan forum of Parliament was 'sinister', and he referred specifically to the inclusion of controversies between States within the original jurisdiction of the High Court as another reason for leaving a dispute over water rights to the High Court.<sup>48</sup>

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42 Ibid 1 February 1898, 388 (Richard O'Connor); see also the rousing speech of support for the High Court: 25 January 1898, 147–8 (Henry Dobson). The subsection referred to was 51(xxxi) which gave the Commonwealth power over '[t]he control and regulation of navigable streams and their tributaries within the Commonwealth and the use of the waters thereof'.

43 Ibid 3 February 1898, 513–16.

44 Ibid 513 (Sir George Turner).

45 Ibid (Henry Higgins).

46 Ibid 519–22: see especially Barton 521–2.

47 Ibid 523.

48 Ibid 525 (George Reid).



## 5 *International Law*

The discussion above shows the influence of US law on the founders. The South Australians were also particularly reliant on international law to support their contention that inter-State riparian rights existed,<sup>49</sup> though this assertion was hotly disputed.<sup>50</sup> According to Gordon '[t]he conventions of all civilised nations show that a mutuality of property exists with regard to rivers which flow through more countries than one.'<sup>51</sup> Gordon cited existing conventions, and the work of scholars such as Professor Pitt Cobbett to support his arguments.

The delegates of NSW and Victoria did not accept that inter-State rivers in Australia should be governed by the principles of international law.<sup>52</sup> There were two reasons for this. First, they asserted that the Australian position was unique due to its climate and the character of the rivers.<sup>53</sup> Second, they asserted that there was no tribunal which the States could complain to in respect of breaches of international law. Nevertheless, the delegates from NSW did not deny absolutely that international law should have some bearing on the decision to be made. In Adelaide, George Reid quoted the work of Professor Cobbett to support the NSW contention that South Australia had no right to the tributaries.<sup>54</sup> Later in Melbourne, Reid firmly asserted international law as the primary authority for the existing rights of NSW:

I am not going to put our rights on the basis of mere assertion. I wish, and it is the first time I have quoted an authority in the Convention, to read just a few words. The matter is so important, and there is so much confusion as to what the rights of the respective colonies are, that, while I apologise to the Convention, I feel it to be absolutely necessary to endeavour to show what is the legal basis of these rights. In *Boyd's* edition of *Wheaton's International Law*, page 256, the following statement is made:—

The territory of the state includes the lakes, seas, and rivers entirely enclosed within its limits.<sup>55</sup>

## 6 *Conclusions from the Convention Debates*

While agreement was reached about the relationship between the Commonwealth and the States in this area, the dispute about rights between States was never settled. Instead the agreement to rely on the bare trade and commerce power was essentially an agreement to leave any future disputes about State rights inter se to the High Court to determine.

The importance of international and American authorities in the debate over such disputes cannot be denied. Both sides relied on international law to support their assertions, and the American experience was particularly influential in the final resolve to rely on the bare trade and commerce power.

49 Adelaide Debates, 17 April 1897, 795 (John Gordon); Melbourne Debates, 21 January 1898, 34–8 (John Gordon).

50 Melbourne Debates, 2 February 1898, 419 (Isaac Isaacs).

51 Adelaide Debates, 17 April 1897, 800 (John Gordon).

52 Ibid 802–3 (Joseph Carruthers); 806 (Alfred Deakin).

53 Ibid 802–3 (Joseph Carruthers).

54 Ibid 818 (George Reid).

55 Melbourne Debates, 2 February 1898, 439 (George Reid).

## B Other Historical Material

Historical material from before and after Federation echoes the arguments in the Debates, demonstrating that the divide in legal opinion along State lines continued well into the early 20<sup>th</sup> century. Historical material which emerged after Federation sheds some light on the effect that Federation had on the rivers question. The opinions of these early commentators on the role of section 100 are particularly instructive.

### 1 *Inglis Clark*

Andrew Inglis Clark gave his opinion on the legal position of inter-State water disputes in a note provided to the delegates of the Melbourne Debates.<sup>56</sup> He quoted from the Debates and agreed that the correct position, prior to Federation, was that NSW had ‘the power ... to legislate for the use of the waters of the River Murray within her own borders in a manner that might seriously interfere with the supply of water from the same river to the people of South Australia’.<sup>57</sup> Further, Inglis Clark highlighted that there was no tribunal before which South Australia could assert injury to its interest in the Murray. However, Inglis Clark was of the opinion that this would change with Federation.

In his opinion the act of Federation meant that all disputes between States would be a matter for the ‘Supreme Court of the Commonwealth’.<sup>58</sup> Further, Inglis Clark wrote that, in such a dispute, the federal judiciary was ‘required to adjudicate by the known and settled principles of international law or municipal jurisprudence as the particular case may demand’.<sup>59</sup>

Inglis Clark also devoted an entire chapter to federal control of the rivers of the Commonwealth in his *Studies in Australian Constitutional Law*, published post-Federation.<sup>60</sup> This chapter deals mainly with the precise restriction placed on the federal government by section 100, however Inglis Clark considered that the question of inter-State riparian rights was central to any consideration of section 100.<sup>61</sup> According to Inglis Clark, the *Constitution* does not contain any ‘directly and expressly imposed’ restrictions on the States in respect of their use of the waters of rivers for conservation and irrigation.<sup>62</sup> However, he convincingly suggests that it would be something of an anomaly for one State to be able to use water to the detriment of another, when the Commonwealth is prevented from doing the same thing.<sup>63</sup> Inglis Clark seems to suggest that the limitation on Commonwealth power contained in section 100 creates a corresponding implied limitation on State power.

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56 Melbourne Debates, 7 March 1898, 1955 (Joseph Carruthers).

57 Inglis Clark’s *Notes*, 7 February 1898, in John Williams, *The Australian Constitution: A Documentary History* (2005) 843.

58 *Ibid* 844.

59 *Ibid*.

60 Andrew Inglis Clark, *Studies in Australian Constitutional Law* (1901).

61 *Ibid* 109.

62 *Ibid*.

63 *Ibid*.

## 2 *Quick and Garran*

In response to the South Australian assertion of riparian rights between colonies (prior to Federation), based upon common law, international law or international comity, John Quick and Robert Garran wrote:

So far, however, as these claims rest upon any suggestion of a legal right, they fail, not only ... for want of a tribunal, but for want of a law which such tribunal should administer.

Nor does international law carry the matter further. ... [t]here is no principle of international law, and no conventional usage, which purports to apportion the rights of States to appropriate the waters of rivers.<sup>64</sup>

On rights after Federation, Quick and Garran wrote that

it seems quite clear that each State retains its own riparian law, and that no inter-state riparian law arises, nor – except as to navigation – can arise. ... Nor can there be any Federal common law regulating ... appropriation [of water for any purpose other than navigation]; for that would lead to the absurdity that there was a part of the common law which could not be altered either by Federal Parliament or by the State Parliament. There can be no federal common law on matters outside the legislative power of the Federal Parliament; so that after federation – as before – the claim to an undiminished flow, as between States or citizens of different States, would seem still to fall on the ground that there is no law applicable to the case.<sup>65</sup>

These opinions demonstrate that Quick and Garran fall squarely on the side of NSW and Victoria. Their arguments counter the concept of an inter-State common law (discussed briefly below). Quick and Garran also recognised the influence of Western US law in the progressive development of Australian water law.<sup>66</sup>

## 3 *The Inter-State Royal Commission*

An Inter-State Royal Commission was established just after Federation for NSW, Victoria and South Australia to determine a regime for the equitable sharing of Murray water. The three commissioners (one from each State) did not reach consensus on a number of the issues under consideration. The Commission looked at the legal position of the three States with respect to the waters of the Murray and took evidence from seven witnesses on this particular topic, of whom three were practising lawyers, two were professors of law and two were State officials.

The Commission stated during the summary of evidence that ‘[i]f any State were injured by the act of another in respect of the river or its tributaries, an appeal for redress would lie to the Federal High Court’.<sup>67</sup> In making its final recommendations the Commission adopted an approach which favoured the existence of inter-State riparian rights, without acknowledging their existence: ‘[f]urther, there must be recognition of, and concession to, what would be the

64 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 888.

65 *Ibid* 890.

66 *Ibid* 888.

67 Inter-state Royal Commission on the River Murray, NSW, Victoria and South Australia, *Final Report* (1902) 47.

riparian rights of the States, if they were private proprietors, or if the Common law of riparian rights could be held applicable to their case.<sup>68</sup>

However, the Commission also recommended '[t]hat, inasmuch as the conditions in Australia are such that the common law doctrine of riparian rights is unsuitable, steps be taken to legislate on the lines of the *Water Rights Act* of New South Wales, and to vest the ownership and control of all natural waters in the Crown'.<sup>69</sup> The South Australian member of the Commission explicitly 'dissented' on this recommendation, stating 'I believe the riparian rights existing as between individuals [are] the only equitable basis upon which to arrive at any decision in regard to the apportionment and distribution of the waters of the Murray River to the riparian States'.<sup>70</sup> This further demonstrates the intractable nature of the disagreement over legal rights on this topic, drawn along State lines. For the most part this division is also seen in the evidence given before the Commission.

The testimony from the witnesses is instructive as it contains legal opinions about the effect of the actual terms of the *Constitution* on the issue at hand. Like the Convention Debates, the witnesses (apart from WP Cullen)<sup>71</sup> appear to have agreed on one point: the influence and importance of the US experience and authorities. For example, Professor Pitt Cobbett based his opinions on

the express provisions of the *Constitution*, interpreted in the light of United States decisions which decision[s] the debates of the Convention [show] to have been fully appreciated, and to have been intended to apply to Australia, so far as relates to the control of the Federal Parliament over navigable waters, subject to the restrictions imposed by s 100.<sup>72</sup>

International law was also referred to by many of the witnesses. This supports one of the primary arguments of this article: that while the interpretation of authority was disputed, the importance of US and international authority was acknowledged by all sides of the debate.

The two South Australian witnesses did not deviate to any great extent from the position taken by delegates from that State in the Conventions. Some of the witnesses from NSW, however, did present opinions which ran contrary to the hardline position taken by their fellow New South Welshmen during the Convention Debates.

Patrick Glynn, from South Australia, at that time a Member of the federal House of Representatives, reasserted the position that he had held from the time of the South Australian Royal Commission in 1887: that there were riparian rights between States, but that these could not be enforced due to the lack of a tribunal.<sup>73</sup> According to Glynn, 'what section 100 of the Federal Constitution

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68 Ibid 48–9.

69 Ibid 57.

70 Ibid 60.

71 Evidence to Inter-state Royal Commission on the River Murray, Parliaments of NSW, Victoria and South Australia, Sydney, 29 September 1902, 231–2 (William Portus Cullen, Member of Legislative Council of NSW).

72 Ibid, Sydney, 1 October 1902, 244 (Professor Pitt Cobbett, Challis Professor of Law in the University of Sydney).

73 Ibid, Adelaide, 23 May 1902, 7 (Patrick McMahon Glynn, Member of the House of Representatives).

declared, subject to the trade and commerce clauses, was merely the reservation of the existing rights for purposes of water conservation and irrigation'.<sup>74</sup>

Professor Salmond, also of South Australia, agreed that actions between the States had not been possible until after Federation and the establishment of the High Court. According to Salmond, inter-State riparian law existed prior to Federation.<sup>75</sup> In his opinion, federation had not altered this

except to declare that these rights exist, and to protect them against Federal legislation. Section 100 of the Commonwealth Act declares, in so many words, that each State has a right to the reasonable use of the water of the river for irrigation and conservation, and further provides that these rights shall not be interfered with by the legislation of the Commonwealth. That declaration excludes the contention that a State has a right to make any use it likes of the water, but it has a right to make a reasonable use of it.<sup>76</sup>

Salmond clearly saw the right to a reasonable use of water for irrigation and conservation in section 100 as separate from the limitation on federal legislative power. He therefore took a position similar to that of Inglis Clark. This reading of Salmond's evidence is supported by his use of the term 'and further provides', suggesting something additional to the right referred to, as opposed to a limitation alone, expressed by reference to a right.

Salmond thought that 'reasonable use' should have exactly the same meaning as it did under English riparian common law at that time. He characterised an unreasonable use as one which 'inflicts *substantial* injury upon other owners, ie no use is reasonable which materially diminishes the advantages which other riparian owners have been in the habit of deriving from the natural flow of the water.'<sup>77</sup>

Professor Pitt Cobbett from the University of Sydney was quoted extensively during the Convention Debates as an authority on international law.<sup>78</sup> In his evidence before the Commission, Cobbett stated that there was no common riparian law between the States prior to Federation, because they were independent colonies with no mutually binding law enforceable in any tribunal.<sup>79</sup> However, any violation of rights of comity may have been grounds to petition the Imperial authorities for a remedy.<sup>80</sup> It was also his opinion that there was no common riparian law between the colonies before, or between the States after, Federation.

Carruthers was extremely dismissive of the concept of an inter-State common law of riparian rights, and stated that he thought that 'the question of common law, as between the States, is petty, and brings down a question of empire building to a level with the rights of Dick, Tom, and Harry, and cannot be

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74 Ibid 203.

75 Ibid 208 (John Williams Salmond, Professor of Law, Adelaide University).

76 Ibid.

77 Ibid (emphasis added). This description of reasonableness is particularly noteworthy, given it accords so closely with the international legal principle of equitable utilisation, discussed below.

78 See, eg, Adelaide Debates, 17 April 1897, 794–5, 800 (John Gordon); 17 April 1897, 818 (George Reid).

79 Evidence to Inter-state Royal Commission on the River Murray, Parliaments of NSW, Victoria and South Australia, Sydney, 29 September 1902, 242.

80 Ibid.

done'.<sup>81</sup> Oliver seemed to admit that there could be inter-State riparian rights, and that the High Court, once established, would be the proper forum in which an injured State might find redress.<sup>82</sup> Finally, Mills<sup>83</sup> and Cullen<sup>84</sup> both denied that there were any riparian rights between States, either before or after Federation.

#### 4 *Proposed Litigation by South Australia*

In 1904 South Australia retained Symon, Isaacs and Glynn<sup>85</sup> as counsel for a possible High Court challenge to proposed irrigation projects in Victoria.<sup>86</sup> Counsel met in late 1905 to prepare submissions for the government of South Australia.<sup>87</sup> In his separate opinion, Isaacs stated that the States must be treated as 'riparian proprietors'.<sup>88</sup> He based this on the principle that one State could not legislate to injure another.<sup>89</sup>

He determined that riparian rights were the best way to maintain this principle with respect to shared water resources and hence South Australia would be able to complain if the upper States used more than an ordinary riparian owner may (which is not a great deal, and would exclude irrigation).<sup>90</sup> Isaacs argued that, even though English common law did not support use of irrigation and urban supply as ordinary riparian uses, 'later ideas on the subject are trending in the direction of reasonable mutual consideration'.<sup>91</sup> Sandford Clark does not agree with this assertion, on the basis that it had been rejected by English authority (though embraced in the US). However, the increasing prominence of the principle of equitable utilisation in international and national jurisprudence (discussed below) supports Isaacs' opinion.

Glynn and Symon produced a joint opinion, which dealt with both the obligations of the Commonwealth in such a dispute and the rights of the States. They argued that 'reasonable' placed limitations on the amount of water which a State could take, on the basis that the contrary view would be 'opposed to the spirit and true meaning of the *Constitution* and the general interests of the Commonwealth'.<sup>92</sup> In Clark's view, it can be inferred from Symon's and Glynn's opinion that 'they viewed section 100 as being primarily a constitutional guarantee which might be invoked by one State against another'.<sup>93</sup> Clark points out that this assumes agreement between the States as to what the right referred to in section 100 actually was, and that the 'vexed history of the problem speaks

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81 Ibid 265.

82 Ibid 225 (Alexander Oliver, President of the Land Appeal Court, Sydney).

83 Ibid 147-8 (Stephen Mills, Barrister and Engineer and Secretary to the City Improvement Advisory Board).

84 Ibid 231-2 (William Portus Cullen, Member of the Legislative Council of New South Wales).

85 All of whom were Attorneys-General of the Commonwealth at some point in their careers.

86 Sandford D Clark, 'The River Murray Question: Part II - Federation, Agreement and Future Alternatives' (1971) 8(2) *Melbourne University Law Review* 215, 224.

87 Ibid 224-5.

88 Ibid 225.

89 Ibid 225-6.

90 Ibid 226-7.

91 Ibid 227.

92 Ibid 230.

93 Ibid.

against this likelihood'.<sup>94</sup> This position may not be entirely correct, as the actual intention of the drafters with respect to the right reserved to the States is not necessarily relevant to the interpretation of section 100.

### C Conclusions from Historical Material

It is clear from the material cited that inter-State water disputes, particularly between the States of the Murray-Darling Basin, were of concern to the delegates to the Convention Debates. However, they did not reach agreement on how to settle such disputes, and instead decided to rely on the High Court to determine whether rights existed and, if so, the protection given by those rights. The final form of section 100 was proposed weeks after the delegates had agreed on leaving the whole question to the 'glorious uncertainty of the construction of the law' of the trade and commerce power.<sup>95</sup> It was proposed specifically as a protective measure to ensure that the States would be able to continue to engage in the uses listed, without fear of interference.

There was no agreement by the various parties to this particular debate about the nature of inter-State water rights, or even whether such rights existed. Similarly, there was no agreement regarding what constituted 'reasonable use'. Nevertheless, although most commentators agreed that the *Constitution* was silent on inter-State water rights, it would, as Inglis Clark wrote, seem absurd that section 100 would protect the States' reasonable use of water from interference from the Commonwealth alone, leaving it open for another State to interfere. A similar position was taken by Isaacs in his advice to South Australia, though based on the relationship of the States inter se.

Finally, the influence of US and international law on the overwhelming majority of parties to the debate, both before and after Federation, is one of the most striking aspects of the historical material. This becomes particularly interesting for the purposes of contemporary interpretive exercises, given the development since Federation of this aspect of water law in the US and on the international stage.

## III THE ROLE OF HISTORY IN A SUIT BETWEEN GOVERNMENTS

The history discussed demonstrates a great deal of animosity between the States before and immediately after Federation. Since then there has been a long period of successful political management of shared water resources. This is reflected in the various inter-governmental agreements on water sharing.<sup>96</sup> The most recent outcome of this particular aspect of cooperative federalism is the

<sup>94</sup> Ibid.

<sup>95</sup> Melbourne Debates, 4 February 1898, 573 (Henry Higgins).

<sup>96</sup> See Clark, above n 86, 239; see also Council of Australian Governments, *Council of Australian Governments' Communique* (1994) <<http://www.coag.gov.au/meetings/250294/index.htm>> at 5 October 2007; Council of Australian Governments, *Intergovernmental Agreement on a National Water Initiative* (2004) Council of Australian Governments' Meeting, 25 June 2004 <<http://www.coag.gov.au/meetings/250604/index.htm>> at 5 October 2007.

*Water Act 2007* (Cth). The tensions surrounding the negotiations preceding the passing of this Act demonstrate that, notwithstanding the successful history of cooperation, environmental pressures and increases in population may lead to a return to greater discord between States;<sup>97</sup> one possible outcome of which could be litigation. There are three sources of law which may be applicable to an inter-State dispute over a shared water resource: existing inter-governmental agreements, the *Constitution* and the common law.

There are serious (and largely unanswered) questions about the enforceability of inter-governmental agreements.<sup>98</sup> A close examination of these questions, and the law contained in these agreements is beyond the scope of this article. On the subject of inter-State water disputes, it was Harrison Moore's opinion that

[a]s between the conflicting claims of States and their respective powers over the waters flowing through their territories, the constitution is silent; the States are left to their 'common law' rights, whatever they may be, with the fact that the constitution has provided a tribunal – the High Court – in which the respective powers and rights of States inter se may be ascertained and determined.<sup>99</sup>

It should be noted that Quick and Garran were particularly dismissive of the existence of an inter-State common law (see above). If there are such common law principles to be found in an Australian context, they would perhaps be akin to the inter-State common law recognised by the Supreme Court of the United States in the domain of inter-State water disputes.<sup>100</sup> Unfortunately, detailed discussion of common law doctrines which may govern States' relations inter se is also beyond the scope of this article.<sup>101</sup>

This section focuses on the law which may arise from the *Constitution* to govern an inter-State water dispute and explores the extent to which the historical material analysed above has a role to play (if any) in bridging the gap between the influential principles of times past and modern developments in the law of transboundary water sharing. It is suggested that there would be many parallels between the debates of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries and legal

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97 See, eg, ABC News Online, *SA Writes to Vic Premier on Water Emergency* (2007) <<http://www.abc.net.au/news/stories/2007/09/25/2042953.htm>> at 5 October 2007.

98 Nicholas Seddon, *Government Contracts* (3<sup>rd</sup> ed, 2004) 94; Enid Campbell, 'Suits Between Governments in a Federation' (1971) 6(3) *Sydney Law Review* 309, 318; William Harrison Moore, 'The Federations and Suits Between Governments' (1935) 17(4) *Journal of Comparative Legislation and International Law* (3<sup>rd</sup> Series) 163, 173.

99 Sir W Harrison Moore, 'The *Constitution* and Its Working' in J Holland Rose et al (eds) *The Cambridge History of the British Empire Volume VII Part I: Australia* (1933) 455, 460.

100 *Kansas v Colorado*, 206 US 46, 98 (1907): this term was coined by Brewer J in the case establishing equitable apportionment and appears at the end of the passage about federalism quoted above.

101 For further discussion of this issue see Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (Law and Policy Paper No 13, Centre for International and Public Law, Australian National University, 1999) 17; Moore, above n 98; Campbell, above n 98; Justice LJ Priestley, 'A Federal Common Law in Australia?' (1995) 6 *Public Law Review* 221; Ian Renard, 'Australian Inter-State Common Law' (1970) 4(1) *Federal Law Review* 87. This topic also raises issues related to choice of law and Crown immunity; see also James Stellios, 'Choice of Law and the Australian Constitution: Locating the Debate' (2005) 33(1) *Federal Law Review* 7; Adrienne Stone, 'Choice of Law Rules, the Constitution and the Common Law' (2001) 12 *Public Law Review* 9; Bradley Selway, 'Of Kings and Officers – the Judicial Development of Public Law' (2005) 33(2) *Federal Law Review* 187.



controversies which might arise in the near future, ranging from doubts about States' rights to water use to the influence of US and international law.

### A Jurisdiction

The High Court has exclusive original jurisdiction to hear disputes between States.<sup>102</sup> There have been very few cases between the States heard under this head of jurisdiction. The High Court has held that to determine a suit between States it must 'be such that a controversy of like nature could arise between individual persons, and must be such that it can be determined upon principles of law'.<sup>103</sup> The first of these requirements does not present a problem,<sup>104</sup> as suits between individual water users are common and have been the subject of legal doctrine since ancient times.<sup>105</sup> Rather, the problem lies in the second requirement: that such disputes should be determined using principles of law.<sup>106</sup> The existence of applicable law governing such a dispute is therefore central to jurisdiction and the settlement of the dispute itself. Nevertheless, the High Court could accept jurisdiction to determine preliminary questions of standing and justiciability.<sup>107</sup>

It should be noted briefly that the High Court is bound by Chapter III of the *Constitution* and the resultant limits of federal judicial power. Accordingly, the discussion below relates to the declaration of existing rights by the Court (notwithstanding these rights may have never previously been 'declared' judicially), rather than the creation of rights by the Court, which is impermissible.<sup>108</sup>

### B Interpreting the *Constitution*

The *Constitution* is the foundation of our federal system. Due to the paramountcy of the *Constitution*, it is the first port of call in an examination of law specifically applicable to an inter-State water dispute. Such law may be explicit in the text of the *Constitution*, or may be implied from its text and/or structure.

102 *Constitution* s 75(iv); *Judiciary Act 1903* (Cth) s 38(b).

103 *South Australia v Victoria* (1911) 12 CLR 667 ('*State Boundaries case*'), 675 (Griffith CJ); see also 742 (Higgins J).

104 Ian Renard, 'The River Murray Question: Part III – New Doctrines for Old Problems' (1972) 8(4) *Melbourne University Law Review* 625, 637.

105 Ibrahim Kaya, *Equitable Utilization: The Law of the Non-Navigational Uses of International Watercourses* (2003) 1.

106 This requirement is a corollary of the principle that the Court must exercise judicial power only and the requirement that there be a 'matter': see Renard, above n 104, 637.

107 *State Boundaries case* (1911) 12 CLR 667, 721; Renard, above n 104, 638; see also *McBain, Re; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372. Questions may be raised with respect to justiciability and the political nature of such a dispute. Chief Justice Griffith was of the opinion that a controversy would not be justiciable if it could *only* be settled by the application of political considerations: *State Boundaries case* (1911) 12 CLR 667, 675; see also Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4<sup>th</sup> ed, 2006) 587; Campbell, above n 98.

108 See also *R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J), 388 (Menzies J), 396–7 (Windeyer J), 408–409 (Owen J).

There is no single method of constitutional interpretation which currently prevails over others in the High Court.<sup>109</sup> Nevertheless, it is accepted that when interpreting the *Constitution* the plain and ordinary meaning of the text is paramount.<sup>110</sup> Section 100 is directly relevant to the present discussion, referring to ‘the right of a State or of the residents therein to the reasonable use of waters of rivers for conservation or irrigation’. For the purposes of this article, only the right of a State, not of State residents, will be examined. Notwithstanding the primacy of the text of the *Constitution*, implications can be made from the text, and also from the structure of the *Constitution* if they are ‘logically or practically necessary for the preservation of the integrity of [the constitutional] structure’.<sup>111</sup>

## 1 Text

The text is paramount in modern constitutional interpretation.<sup>112</sup> The text of section 100 refers to ‘the right of a State ... to the reasonable use of the waters of rivers for conservation or irrigation’. This suggests a right to use waters of rivers for the purposes mentioned, but only so far as that use is ‘reasonable’. Section 100 limits Commonwealth legislative power, specifically the trade and commerce power; the right conferred by (or enshrined in) the section is integral to that limitation. According to Selway, ‘[i]f the text is sufficiently clear and if the result of a textual interpretation is sufficiently acceptable, then the judges will generally not look at extrinsic material except to the extent that it confirms the textual approach’.<sup>113</sup> In other words, the text needs to be either unclear and/or lead to a result which is not ‘acceptable’ before the Court will look to other interpretive aids.

Section 100 is silent on the rights of States inter se. However, the text of section 100 acknowledges that, as Renard puts it, ‘rights to water are not confined to individual residents, but may be vested in the States’.<sup>114</sup> A straightforward interpretation of the text of section 100 suggests that rights to water use may vest in a State. However, there is no express guidance on the nature of these rights inter se. In the absence of such guidance, the text is unclear. Moreover, it can be argued that the result of textual interpretation is unacceptable in that it provides for an equal right held by entities whose interests may conflict. Given these considerations, it is suggested that interpretive assistance may legitimately be obtained from relevant extrinsic materials.

It could be argued that section 100 represents the limit of State water rights within the *Constitution* – an argument akin to the *expressio unius* principle in statutory interpretation. However, this argument does not prevent implied

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109 *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J); see also Bradley Selway, ‘Methodologies of Constitutional Interpretation in the High Court of Australia’ (2003) 14 *Public Law Review* 234.

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

111 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ). See also 133–6; *McGinty v Western Australia* (1996) 186 CLR 140, 168 (Brennan CJ); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 41–5; Selway, above n 109, 237–8.

112 Selway, above n 109.

113 *Ibid* 239.

114 Renard, above n 104, 632.

limitations arising from the text of section 100. Nor can it act as a bar on implied limitations on State power which may be relevant to water use but arise independently as more general incidents of the federal structure created by the *Constitution*.

## 2 *Federal Implications*

If the High Court were to decline to accept that the text of section 100 contained a limitation on State water use, there is another interpretive option which may add support. Implications can be drawn from the structure of the *Constitution*, which is essentially a blueprint for federalism.<sup>115</sup> The High Court acknowledged in *Melbourne Corporation v Commonwealth*<sup>116</sup> that it was possible to draw implied limitations on Commonwealth legislative power from the federal system.<sup>117</sup> The cases in which this principle has developed are those dealing with Commonwealth-State relations. However, an implied limitation on State powers inter se could also be drawn from the federal system. Such a limitation could ensure the equitable sharing of water between States.

The States are *equal* in the federal system. This is reflected in a number of provisions in the *Constitution*: sections 7, 51(ii) and (iii), 92, 99 and 117.<sup>118</sup> According to Gaudron J '[f]undamental constitutional doctrines are not always the subject of exhaustive constitutional provision, either because they are assumed in the *Constitution*, or because what they entail is taken to be so obvious that detailed specification is unnecessary'.<sup>119</sup> The equality of the States is one such fundamental doctrine.

The implication from the federal structure made in *Melbourne Corporation* was a limitation on Commonwealth power based on the requirement that States be able to continue to function as independent political bodies.<sup>120</sup> Analogies with cases dealing with State immunity from Commonwealth law and vice versa may be of limited use because there is a fundamental difference in the power balance between the parties concerned. The Commonwealth will always be in a stronger legislative position than the States,<sup>121</sup> not least because of section 109, whereas the States must always be seen as equal with respect to each other.

Nevertheless, the need for limitations on State legislative power due to the equality of States is fundamental to a federal system. This is essentially what Isaacs was suggesting in his argument as counsel for South Australia in the High

115 Adrienne Stone, 'The Freedom of Political Communication, the Constitution and the Common Law' (1998) 26 *Federal Law Review* 219, 224.

116 (1947) 74 CLR 31 ('*Melbourne Corporation*').

117 See also *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *Re Australian Education Union*; *Ex parte Victoria* (1995) 184 CLR 188; *Austin v Commonwealth* (2003) 215 CLR 185; *New South Wales v Commonwealth* (2006) 231 ALR 1, [546]–[552] (Kirby J); Denis S K Ong, 'The Federal Balance: The Australian Constitution and its Implied Power, Implied Prohibition and Incidental Powers' (1984) 14(4) *Melbourne University Law Review* 660, 670.

118 See further Cheryl Saunders, 'Concepts of Equality in the Australian Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 209.

119 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 209 (citations omitted).

120 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 74–5 (Starke J).

121 *Ibid* 82–3 (Dixon J).

Court challenge that never was (outlined above). This proposition also finds support in comments made by the High Court. In *Union Steamship Co of Australia Pty Ltd v King*<sup>122</sup> the Court held that States' power to legislate extraterritorially could not 'affect territorial limitations of State legislative powers inter se which are expressed or implied in the Constitution'.<sup>123</sup> In a later case a majority of the Court clarified this and held that '[n]o doubt there remain territorial limitations upon the legislative powers of the States which arise from the federal structure of which each State is a part'.<sup>124</sup> In essence, the legislation of one State cannot take effect in another State without sufficient justification because of the equal standing of the States in the federal system.<sup>125</sup>

This proposition finds support in the case law of other federal jurisdictions. In the case which established the doctrine of equitable apportionment of inter-State waters in the US (discussed below), Brewer J made the following comment:

One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever ... the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.<sup>126</sup>

According to Harrison Moore, the German Staatsgerichtshof, deciding a case regarding an inter-State water dispute, held<sup>127</sup> that 'in the exercise of jurisdiction in a suit between States [in a federation]... the duty of reciprocal consideration of interests was more intensive than in the relation of other [international] States'.<sup>128</sup> Moore also states that

[i]n Switzerland, disputes as to the respective rights of cantons to water in rivers or streams flowing from the one to the other have been determined in the Federal Court on the principle that there are rights in each which the other must respect...

The importance of the cases under other federal constitutions [is that] ... in spite of the difference in legal systems, there is a striking concurrence both in those principles and in their application: that the relation of governments in a federal system is more emphatically than the relations of States in the international system a regime of law.<sup>129</sup>

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122 (1988) 166 CLR 1.

123 Ibid 14.

124 *State Authorities Superannuation Board v Commissioner of State Taxation for Western Australia* (1996) 189 CLR 253, 271 (Brennan CJ, Dawson, Toohey and Gaudron JJ).

125 It is argued there is an equality of right between the States, not that there is a right of equality for individuals implied from the *Constitution*, a minority argument which was never accepted by the High Court. On an individual right to equality see *Leeth v Commonwealth* (1992) 174 CLR 455, 486–7 (Deane and Toohey JJ); Jeffrey Goldsworthy, 'Implications in Language, Law and the *Constitution*' in Lindell, above n 118, 150, 181–2; Saunders, above n 118.

126 *Kansas v Colorado*, 206 US 46 97–8 (1907).

127 *Württemberg and Prussia v Baden (The Donauversinkung Case)* German Staatsgerichtshof, 18 June 1927, cited in Moore, above n 98, 190.

128 Moore, above n 98, 190.

129 Ibid 190–1.

These authorities demonstrate that the nature of a federation is such that it demands equality of right as between its constituent states, and a system of laws to ensure this equality.<sup>130</sup> This is especially so in the context of transboundary waters – one of the primary areas where action by one State could potentially threaten the effective functioning of another.<sup>131</sup> Accordingly, the structure of the *Constitution* may offer an implied limitation which could be used to protect a State's right to water on its own. Such an implication from the structure would also support an implied limitation arising from the text of section 100 which achieved a similar end.

### 3 History

History may be used as an aid to the interpretation of the *Constitution*.<sup>132</sup> Recourse to history and the Convention Debates in constitutional interpretation was sanctioned by the High Court in *Cole v Whitfield*,<sup>133</sup> 'for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the *Constitution* finally emerged'.<sup>134</sup> More recently the High Court has indicated the difficulties involved in trying to determine any kind of 'intention' attributable to the framers, suggesting it is like pursuing a 'mirage'.<sup>135</sup>

Inglis Clark argued that it can be implied from the text of section 100 that one State cannot act towards another in a manner similar to that which is proscribed for the Commonwealth by section 100. A similar position was taken by Professor Salmond before the Inter-State Royal Commission. Such a limitation would be subject to the requirements of section 100: reasonable use for conservation and irrigation, though it would not be possible to limit the States to one kind of legislative action (ie laws of trade and commerce). Such a reading of section 100 would remove the ambiguity with respect to State rights. However, this reading of section 100 does not receive explicit support from many other historical sources.

Finally, all sides drew heavily on the experience of the US and international law in framing their arguments on this issue, as well as with respect to Commonwealth–State relations. History adds support to international and US

130 See also Renard, above n 104, 661.

131 For example A\$16 billion worth of industry and commerce around the Adelaide region alone relies on Murray water: ABC Radio National, *Can Adelaide Survive Without the Murray*, (2001) Earthbeat <<http://www.abc.net.au/rn/science/earth/stories/s444384.htm>> at 8 October 2007. For further statistics on revenue from water use see Wayne Meyer et al, *Irrigation in Perspective: Irrigation in the Murray and Murrumbidgee Basin – a Bird's Eye View* (2005) Commonwealth Scientific and Industrial Research Organisation <<http://www.csiro.au/files/files/p3we.pdf>> at 8 October 2007.

132 *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J); Bradley Selway, 'The Use of History and Other Facts in the Reasoning of the High Court of Australia' (2001) 20(2) *University of Tasmania Law Review* 129.

133 (1988) 165 CLR 360.

134 *Ibid* 385.

135 *New South Wales v Commonwealth* (2006) 231 ALR 1, [120] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

material operating as an aid to the High Court's interpretation of section 100 and the issue of inter-State water resources generally.

#### 4 *International Law*

Whether international law may be used as an aid to constitutional interpretation is highly contentious.<sup>136</sup> According to Hovell and Williams there has not been any clear indication by the High Court of appropriate and inappropriate uses of international law in an interpretive context,<sup>137</sup> with a number of inconsistent approaches put forward by the Court.<sup>138</sup> The only clear principle is that international law cannot be used to read down Commonwealth powers.<sup>139</sup> Acknowledging the High Court's inconsistent approach to this area, Simpson and Williams broadly identify four guiding principles when using international law as a constitutional interpretive aid:

- (1) There must be a clear ambiguity within the text.
- (2) Where this ambiguity can be satisfied using a higher order value or norm (such as intention derived from the Convention Debates) the latter should be used.
- (3) There must be a principle of international law which is directly relevant to the ambiguity and is clear and unambiguous.
- (4) The particular international law norm should not be inconsistent with any other value implicit in the Australian Constitution.<sup>140</sup>

With respect to the first principle, the ambiguity within the text of section 100 has been identified above, validating recourse to extrinsic interpretive aids. As to the second principle, the history is confused, but demonstrates an intention that inter-State water disputes were to be left to the High Court to determine. US and international law were historically influential in this area, and there was an understanding that these sources would guide the Court in any future determination of inter-State water rights.

The doctrine of equitable utilisation is particularly relevant to the issue at hand, in accordance with the third guiding principle above, due to the parallels between its development from a doctrine of US law into a broadly accepted international legal doctrine (see further below) and the influence of US and international law demonstrated in this portion of Australian legal history. Finally,

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136 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657–8 (Kirby J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 617–30 (Kirby J); cf 589–95; see also Devika Hovell and George Williams, 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29(1) *Melbourne University Law Review* 95; Amelia Simpson and George Williams, 'International Law and Constitutional Interpretation' (2000) 11 *Public Law Review* 205; Kristen Walker, 'International Law as a Tool of Constitutional Interpretation' (2002) 28 *Monash University Law Review* 85.

137 Hovell and Williams, above n 136; see also Simpson and Williams, above n 136.

138 Hovell and Williams, above n 136, 107 (and cases cited).

139 *Ibid* 108, citing *Polites v Commonwealth* (1945) 70 CLR 60 and *Al-Kateb v Godwin* (2004) 219 CLR 562.

140 Simpson and Williams, above n 136, 227 (and cases cited therein).

the doctrine of equitable utilisation is not inconsistent with any other value implicit in the *Constitution*. Having satisfied the guiding principles suggested by Simpson and Williams, some further analysis of the doctrine of equitable utilisation is warranted to demonstrate how it may play a role in an Australian domestic context.

There is a large body of legal rights, obligations and principles which has developed with respect to interstate water disputes at international law, with US law particularly influential in this development. A right to an equitable share of an interstate water resource was first adverted to in the US in the case of *Kansas v Colorado*<sup>141</sup> where the doctrine of equitable apportionment was declared by the Supreme Court of the United States. This doctrine has been subsequently applied throughout the lengthy history of interstate water disputes determined by the Supreme Court.<sup>142</sup>

The principle has, according to Kaya, since ‘been transferred from the US domestic law onto the international plane’.<sup>143</sup> However, it has not been picked up in its entirety. The international doctrine of equitable utilisation requires, in Caponera’s words, ‘that the right of a co-basin state is to be regarded in the light of a similar right of another co-basin state’.<sup>144</sup> It is this latter principle which is recognised as forming part of customary international law,<sup>145</sup> and can be seen expressed in international instruments such as the International Law Association’s *Helsinki Rules*<sup>146</sup> and the *United Nations Convention on the Non-Navigable Uses of International Watercourses*,<sup>147</sup> adopted by the General Assembly in 1997.

In essence both principles are about mutuality of right – no one state is able to use the waters of rivers absolutely. Rather, each state must take account of those states with which it shares the resource.<sup>148</sup>

Equitable utilisation should be taken into account in any suit between Australian States related to a transboundary water resource. The doctrine provides a clear set of guiding factors which may be applied with respect to a dispute between two separate polities with competing claims to a shared water resource.<sup>149</sup> The underlying principle governing these factors is mutual respect mandated by the equality of states. This is the same principle which underscores the position of states in a federal system. International law is not being used to limit the enumerated powers of the Commonwealth, rather it supports a reading

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141 206 US 46 (1907).

142 George Sherk, *Dividing the Waters: The Resolution of Interstate Water Conflicts in the United States* (2000); George Gould and Douglas Grant, *Cases and Material on Water Law* (6<sup>th</sup> ed, 2000).

143 Kaya, above n 105, 73.

144 Dante Caponera, *Principles of Water Law and Administration: National and International* (1992) 214.

145 *Ibid* 190.

146 *Helsinki Rules on the Uses of the Waters of International Rivers*, adopted by the International Law Association at the 52<sup>nd</sup> conference, held at Helsinki in August 1966.

147 (1997) 36 ILM 700 (adopted 21 May 1997).

148 The doctrine in the US goes further as the Court will appoint a Special Master to apportion the amounts of water which each is to receive. However this is antecedent to the recognition of the equality of the rights of the States.

149 See the non-exhaustive list of factors in the *United Nations Convention on the Non-Navigable Uses of International Watercourses* (1997) 36 ILM 700 (adopted 21 May 1997), art 6.

of section 100 which places upon States a limitation similar to that imposed upon the Commonwealth with respect to water.

It is not being argued that the doctrine of equitable utilisation would actually be used by the High Court as a source of States' rights inter se. Given the contentiousness of using international law as an interpretive aid, it would be foolhardy to suggest otherwise. However, it is argued that when examining the *Constitution* for evidence of implied rights governing the sharing of waters, the international doctrine of equitable utilisation should be considered both as a factor supporting an interpretation recognising such rights and as an interpretive guide to the nature of any such a right.

### C Constitutional Conclusions

The text of section 100 does not deal directly with inter-State water disputes. However, it does confirm that a right to access to water for reasonable use can vest in a State, leading to a lack of clarity in the text. Some historical material suggests an implied limitation on State water use, though mostly it is not conclusive with respect to the rights of States inter se. The history examined in Part 1 demonstrates that inter-State water disputes were of key concern to the drafters, and reflects the influence that international law and the law of the US had on the drafters. International law contains a doctrine of equitable utilisation which is drawn from the US doctrine of equitable apportionment. This doctrine requires one state to consider the interests of other states sharing its water resources, and act accordingly, and provides a particularly relevant interpretive basis for determining the nature of any constitutional rights. The structure of the *Constitution*, as a blueprint for federalism, supports a concept of equality of right between States, which carries an implied limitation on State power to legislate inter se. This limitation could perhaps operate to protect water rights between States, as it seems to have done in other federations. It also supports a reading of section 100 which limits State water use, as well as Commonwealth legislative power.

## IV CONCLUSION

The early history of shared water resources in Australia is full of acrimony and disagreement. The Convention Debates were split along State lines, with no agreement reached on how best to deal with the rights of States to shared water resources. Instead it was decided to leave the matter to the 'glorious uncertainty' of the common law and the High Court. The confusion in the Debates was reflected in the *Constitution*, with commentators after Federation disagreeing on the operation of section 100 in particular. It has been argued in this article that this historical material provides a bridge between the past and current doctrines within US and international law which could be relevant to an inter-State water dispute today.

Inter-State water resources have hitherto been successfully managed by inter-governmental agreement. However, these agreements may not guarantee any of the rights contained therein and, as the pressure on our rivers increases in years to



come, a dispute coming before the High Court on this issue is increasingly likely, whether between States or between the Commonwealth and a State (or States). The existence of law applicable to an inter-State dispute over water is necessary for the High Court to have jurisdiction to hear such a dispute, as well as for it to determine the dispute. The source of this law could be inter-governmental agreements, however these are of questionable enforceability and subject to legislative override by any of the States party to the agreement. Alternatively the source could be an inter-State common law.

It has been suggested in this article that a limitation on water use may be implied from section 100 of the *Constitution*, or may stem from a broader limitation on State power implied from the equality of states in a federation. Either way, a limitation on water use of this kind is consonant with current US and international law, which were the most influential authorities in the development of the sections of the *Constitution* dealing with water.

Finally, the Commonwealth has taken a much greater interest in managing Australian water resources in the last decade. There is now no doubt that the Commonwealth intends a full tilt at taking control of, at least, the Murray-Darling Basin, with suggestions by the Commonwealth that it will wrest power from recalcitrant States through a combination of its corporations, trade and commerce and external affairs powers.<sup>150</sup> This article has focused on inter-State relations, but the rich history of this aspect of constitutional law is ripe for analysis with respect to Commonwealth–State relations as well. It seems that section 100, and the debates which led to its final form, may yet play a starring role in Australian constitutional jurisprudence.

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150 See, for example, Williams, above n 7.