

THE RIVER MURRAY WATERS AGREEMENT: PEACE IN OUR TIME?

by

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“A permanent solution to the problems of water quality in the River Murray is now within our grasp for the first time in the State’s History.”

The Hon P Arnold,
South Australian Minister of Water Resources
22 October 1981

On 12 December 1837, Sir John Jeffcott, the first Chief Justice of South Australia, died as he sought to navigate the Murray mouth in a whale-boat. In the ensuing century and a half, numerous South Australian statesmen and lawyers and the public causes which they represented, have also foundered in an attempt to substantiate Ernestine Hill’s romantic alchemy and turn water into gold.¹ In a centennial volume, it would be gratifying to celebrate a final resolution of the River Murray problem, for it was in 1883 that the federal movement gained irrevocable impetus. This began with the Victorian Premier’s call at the Albury banquet in June of that year to celebrate completion of the Sydney-Melbourne railway — “We want Federation and we want it now” — and was closely followed in November by the first inter-colonial convention, which adopted Samuel Griffith’s resolution calling for a Federal Australasian Council. And yet it seems that, from South Australia’s point of view, a satisfactory resolution of the river question remains as elusive as the bleached whalebones on Hindmarsh Island which tempted Jeffcott and Captain Blenkinsop to their fate in 1837.

Of all the inter-colonial issues which prompted thoughts of federation and were hammered out in great detail during the convention debates, the respective rights of New South Wales, Victoria and South Australia to the River Murray and the prospective role of the Commonwealth in resolving that dispute are the sole issues that have remained unresolved, unchanged in substance, through the intervening years. The fundamental uncertainty of the law applicable between the colonial disputants was complicated, but not resolved, by federation. Nor has the issue been subsequently tested by litigation. Equally, the Commonwealth Government has not sought to exercise its legislative powers over the river in the way in which the founding fathers apparently envisaged

1 Hill, *Water into Gold* (9th edn 1951).

during the convention debates. It is thus difficult to assess the consensual structure erected by the River Murray Waters Agreement in terms of underlying legal doctrine, or to predict what rules would be applied by the High Court to resolve disputes outside, or in the absence of, that Agreement.

Indeed, the issues canvassed by the great academic names at the time of Federation are as open today as they were then. In 1902, J W Salmond, as Professor of Law at the University of Adelaide, and Pitt Cobbett, Challis Professor at the University of Sydney, both went on record as to the respective rights of the States to receive and abstract water from the Murray; the law applicable between riparian States before and after Federation; the power of the upstream States to use tributary rivers in a way which interfered with the flow of waters in the main stem of the Murray; the obligations of other States to recognise irrigation concessions already granted by Victoria at Mildura; the proper interpretation of the Imperial Act of 1855 clarifying the border between New South Wales and Victoria; and the true meaning of s 100 of the Constitution.² In 1904, Professor W Harrison Moore, of the University of Melbourne, speculated upon the rationale of the Pental Island Case and the boundary between New South Wales and Victoria³ and, subsequently, upon the existence of an inter-State common law which might be invoked to resolve disputes such as the river question.⁴

The detailed history of the dispute and the underlying legal contentions prior to the River Murray Waters Agreement in 1914, have been considered elsewhere.⁵ Since that time, the Agreement has undergone amendment on seven occasions. As a result of South Australian initiatives in 1973 and the Report of a Working Party in 1975,⁶ a radically revised Agreement was approved at a meeting of the Prime Minister and the respective Premiers on 16 October 1981 and is currently awaiting ratification by the Parliaments of the contracting Governments. The purpose of this essay is to assess particular aspects of the new Agreement which are important to South Australia, and its likely success in resolving the historic problems between the States. At the outset, however, it is probably wise to review the extraordinary range of legal uncertainties which underlie the Agreement and the respective rights of the States.

The Boundary Business

To begin with, there is doubt whether, apart from the Agreement, Victoria can claim any rights to abstract and use waters from the Murray. The Imperial Act of 1855,⁷ in purporting to clarify the meaning

2 Aust, Interstate Royal Commission on the River Murray, representing the States of New South Wales, Victoria and South Australia, *Minutes of Evidence given before the Commissioners* (1902) 207-210, 242-248.

3 Moore, "The Case of Pental Island" (1904) 20 LQR 236; Moore, "The Murray River Boundary" (1904) 1 Commonwealth LR 157.

4 Moore, "Suits between States within the British Empire" (1925) 7 J Comp Leg & Int Law 155; Moore, "The Federations and Suits between Governments" (1935) 17 J Comp Leg & Int Law 163.

5 Clark, "The River Murray Question: Part I — Colonial Days" (1971) 8 MULR 11; "Part II — Federation, Agreement and Future Alternatives" (1971) 8 MULR 215.

6 River Murray Working Party, *Report to Steering Committee of Ministers* (1975).

7 18 & 19 Vict c 54 (1855) s 5.

of the Separation Act of 1850,⁸ declared that "the whole Watercourse of the said *River Murray*, from its Source . . . to the Eastern Boundary of the Colony of *South Australia*, is and shall be within the Territory of *New South Wales*".

The broader implications of this formula were first contested in 1859 when New South Wales proposed that they should receive rent from the Victorian occupiers of Pental Island. Matters came to a head in 1866 when the occupiers were summonsed to appear at Balranald under the New South Wales Scab Act for isolating diseased sheep on the island. The resulting stand-off between Victoria and New South Wales was ultimately resolved in 1872 by the Judicial Committee awarding the island to Victoria but, following its practice in the nine similar disputes referred to the Privy Council between 1683 and 1846,⁹ no reasons were given for the award. The High Court subsequently held that the Pental Island award had been an exercise of the royal prerogative and not of the judicial power of the realm; and that it had not inherited that part of the prerogative invoked by the Privy Council to determine inter-colonial boundary disputes.¹⁰ The Pental Island award thus offers little assistance in determining the precise meaning of the 1855 formula, or in predicting the law applicable to inter-State river disputes; nor did it decide whether Victoria is, indeed, a riparian State.

The 1855 formula did not arise for determination until 1979 in *R v Ward* where the issue was whether a fisherman shot at the water's edge on the Victorian side was in Victoria or New South Wales.¹¹ The Victorian Supreme Court and Court of Criminal Appeal both concluded that any doubts which the 1855 Act sought to clarify could not have included the status of land on the Victorian side and thus declined to give the word "watercourse" its common-law meaning, which requires and includes clearly identifiable bed and banks.

In the High Court, Stephen J, with whom Aickin and Wilson JJ concurred, exhaustively examined the historical context of the Imperial Acts and concluded that s 5 of the 1855 Act was "explicit in denying to Victoria any claim to a mid-river boundary line or to what is commonly known as a thalweg boundary, outcomes which may have been possibilities in terms of the Act of 1850. It must be some boundary line on the south side of the river, to use a neutral phrase, that the Act of 1855 established".¹² Three broad alternatives remained. The boundary could be at a particular water-level (eg mean high or low levels, or mean summer or winter levels) but the particular circumstances of the river would make any such criteria difficult to apply and nothing in the statutory language points to which of the various possible levels should be selected. A second possibility would be a vibrating boundary which varied according to the actual water-level. Such a boundary would lack

8 13 & 14 Vict c 59 (1850) s 1.

9 Pennsylvania and Maryland 1683-1709; Connecticut and Rhode Island 1725-1726; Virginia and North Carolina 1726-1727; Rhode Island and Massachusetts 1734-1746; Pennsylvania and Rhode Island (second case) 1734-1769; Massachusetts and Connecticut 1754; New Hampshire and New York 1764; New York and Quebec 1768; Cape Breton Case 1846.

10 *South Australia v Victoria* (1911) 12 CLR 667.

11 [1979] VR 205 (Marks J); (No 2) [1980] VLR 209 (CCA); (1980) 142 CLR 308 (HC).

12 (1980) 142 CLR 308, 324.

the element of fixity which O'Connor J¹³ felt was connoted by the very term and would lead to disconcerting results when the river indulged its propensities of bursting its banks and, at least in pre-Dartmouth days, of running dry. The third possibility would be to adopt the top of the Victorian bank: a solution which assumes that there is both a constantly ascertainable bank having a "top" on the Victorian side and carried the consequence that land between the water-line and the top of the Victorian bank is within New South Wales.

Carefully examining both the historical context and the words "the whole watercourse", Stephen J concluded that "the boundary line between the States runs along the top of the southern bank of the Murray, all territory to the north being within New South Wales".¹⁴ He reached this conclusion primarily by reference to the common-law meaning of "watercourse", as including both bed and banks, but placed no great weight on the use of the word "whole". Although he acknowledged that this result is not convenient, he rightly pointed out that to adopt a vibrating boundary at the water's edge would also be less than convenient.¹⁵ Barwick CJ, Gibbs and Mason JJ adopted the reasoning of Stephen J although they differed in the weight they were prepared to give to the word "whole" and to historical considerations. Murphy J emphasised the use of the word "whole" and Mason J expressed the view that considerations of convenience, which were rejected by Stephen J, should be given greater weight than the majority would allow.

Several interesting questions emerge from the case. Stephen J noted that it could not be assumed that either a "bank" or "top" would be readily ascertainable throughout the length of the river.¹⁶ Where there is no "bank", there can be no "watercourse" at common law and the common-law meaning of that phrase would cease to be a sufficient guide. If so, could recourse be had to wider considerations of "convenience" to provide a solution where the common law cannot? There are implications in Stephen J's judgment that this might be possible, at least for matters arising under s 75(iv) of the Constitution.¹⁷ If so, what subsidiary factors might properly be entertained? On the assumption that the Court would still prefer to resort to a rule of positive law rather than openly political considerations, would it at last acknowledge the existence of an "inter-State common law"¹⁸ which might be invoked to resolve border and interstate river disputes, having its roots, perhaps, in principles of international law? Would the result be that a different rule, and perhaps a different boundary, might apply to matters within the original jurisdiction of the Court, whereas appellate matters such as the *Beveridge Island Case*¹⁹ might be governed by the rule in *Ward's Case*?

Such questions will be relevant at many points on the River Murray. There are numerous places — particularly on the inside of bends —

13 Supra n 10 at 712.

14 Supra n 12 at 336.

15 Ibid 338.

16 Ibid 327.

17 Ibid 328-329.

18 See the arguments in favour of such a law in Moore, "The Federations and Suits between Governments" supra n 4; Renard, "Australian Inter-State Common Law" (1970) 4 Fed LR 87.

19 *Hazlett v Presnell* [1982] VR 137; Appeal to the High Court heard 3-4 August 1982.

where the southern side of the river is marked by gently sloping terrain, with no apparent bank. Here, there could be no "watercourse" at common law; but the Court offers no guidance, except a guarded aside concerning "convenience", as to how the boundary might be ascertained.

A further intriguing question is whether the Court, acting on inadequate evidence, actually misapplied its own test in *Ward's Case*. Barwick CJ, in a critical aside, noted other circumstances where the common-law definition of a watercourse might lead to the top of a bank, remote from the immediate channel, being accepted as the boundary.

"If, as is the case with English or some European continental streams, there is a seasonal flooding, the extremity of the stream's watercourse may extend to the seasonal flood bank. But no such question arises in this case. When this river bursts its banks in flood, so far as presently relevant, it submerges adjacent lands without forming either a flood plain or a flood bank. Here, the southern bank of the river is clearly apparent and easily defined."²⁰

Stephen J similarly concluded that the evidence established the existence of a clearly defined bank and top at the place where the shooting occurred.

But the conclusion of the Chief Justice was at variance with the geomorphological facts. The murder took place upstream of Echuca, three kilometres north of Stewart's Bridge, near Freeman's Lagoon. There, the primary channel of the River bisects an ancient lake-bed.²¹ When the River is in flood, it courses over an adjacent flood-plain on the southern side and is either contained by a wind-deposited lunette, formed in association with the ancient lake, or, in times of higher flow, by the more remote escarpment lying to the north of the Murray Valley highway. Contrary to the view of the Chief Justice, there is thus a defined flood-plain and a "seasonal flood bank", although there may be some difficulty in deciding whether the lunette, formed by wind-deposition rather than scouring, is to be regarded as the "bank", or the more remote escarpment. Whichever of the two were chosen, the top of that "bank" would, according to the High Court's test, constitute the border, with the result that a good deal of alienated land, subdivided for irrigation, together with a retention basin owned and operated by the Victorian State Rivers and Water Supply Commission, would be part of New South Wales.

This result might be avoided by concluding that flooding, at this point, is of insufficient frequency or regularity to justify regarding either of the more remote features as seasonal banks. But this conclusion is not open in relation to the adjacent reach of river between Barmah and Picnic Point, in the heart of the Barmah forest. There, the primary channel of the river actually forms a choke which is incapable of carrying the total

²⁰ *Supra* n 12 at 312f.

²¹ Currey and Dole, "River Murray flood flow patterns and geomorphic tracts" (1978) 90 *Proc Roy Soc Vic* 67; Currey, "Geomorphology of the Barmah-Millewa Forests environment" in Storrier and Kelly (eds), *The Hydrogeology of the Riverine Plain of South East Australia* (1978) 9.

volume of water entering the forest and less than half the volume of the river downstream of this constricted passage. Before the river was regulated by upstream storages, the normal winter run-off would pass downstream to the choke, where it would over-top the immediate constricted channel and spread out for several kilometres on the Victorian side, until contained by rising ground. This was an annual phenomenon, not a periodic, extraordinary occurrence and it was the very regularity of the flow which has allowed the forest to survive.

Indeed, it is the need to arrange for the continued inundation of the area, at the appropriate season, which constitutes one of the significant problems in management of the River Murray.²² Since the river has been regulated, inundation can now occur more often in the unseasonable summer months. The pattern has been altered because a large part of winter-spring flows are retained in upstream storages depriving the forest of part or all of its natural seasonal inundation.

Although the primary channel does have defined banks, the area of the riverine forest is regularly inundated and is normally covered by the river in times of high flow. The annual regularity of flow, even under present regulated conditions, would require the area of inundation to be characterised as part of the bed of the watercourse of the Murray.²³ If so, it seems that the southern limits of the Barmah forest must be regarded as the southern limits of the whole watercourse of the Murray – with the result that the Barmah forest falls within New South Wales.

Although Stephen J, as already noted, rejected a balancing of convenience as a relevant consideration in determining the meaning of “the whole watercourse”, he did fortify his conclusion by pointing out that the balancing of convenience of the result offered no guide to the preferable conclusion. This was partly because the inconvenience of the top-of-the-bank test

“may seem less acute when it is recalled that it is not title boundaries or the ownership of land but matters of jurisdiction, both curial and legislative, that are here in question. It must only be in rare cases that it will be of any practical importance which State’s writ runs. At least wherever the Murray’s southern bank resembles the particular stretch of bank where this shooting took place, the strip of land involved would seem of no economic value.”²⁴

On the other hand, a rule which placed the Barmah forest in New South Wales would have substantial practical and economic consequences as the disputed area supports a local economy based on forest produce, bee-keeping and grazing.

22 See the management alternatives proposed in Currey *supra* n 21 at 18, and Aust, River Murray Commission, *Rivery Murray: Tocumwal to Echuca. River regulation and associated forest management problems*, Review Report (1980).

23 The common-law test requires that a watercourse flow regularly or frequently. It need not flow continuously, but must not merely be casual, temporary or occasional: see Clark and Renard, *The Law of Allocation of Water for Private Use* (1972) vol 2, 12-19 and authorities there cited. All the land normally covered by water when the river is in high flow is deemed to be the “bed”: *Kingdon v Hutt River Board* (1905) 25 NZLR 145.

24 *Supra* n 12 at 338f.

The ultimate question then, is whether either the practical impossibility of applying the common-law definition of "watercourse" to those reaches of the river where there is no discernible southern bank, or the unfortunate effect of applying that definition where, as in the case of the Barmah forest, it would be to relocate a considerable area of land of economic significance in New South Wales, which has been administered by Victoria with no contrary claims for one hundred and thirty years, might lead the Court to adopt a different test.

If we predicate a dispute between Victoria and New South Wales over land between the water-line and the top of the southern bank, the practical result might not depend on the 1855 Act at all. Strangely, the New South Wales Limitation Act 1969 s 10(1) provides that the Act "binds the Crown and the Crown has the benefit of this Act". Section 11(1) further provides that, unless the context or subject-matter otherwise indicates or requires, "'Crown' includes not only the Crown in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities". Section 27(1) applies a limitation period of thirty years to actions by the Crown in respect of land and s 65(1) provides for the extinguishment of title on the expiration of the limitation period.

Assuming the validity of *Ward's Case*, the law of New South Wales, as the *lex situs*, would apply to any action in which Victoria asserted adverse possession;²⁵ and a literal interpretation of ss 10(1) and 11(1) would seem to allow Victoria to take the benefit of the Limitation Act 1969. In *Maguire v Simpson*²⁶ the High Court found it unnecessary to decide whether the Act could, of its own force, bind the Commonwealth Trading Bank and prevent it from suing to recover debts which had accrued beyond the limitation period, but the difficulties with such a proposition would not seem to apply to a case where the Crown in right of the Commonwealth or another State sought to take advantage of benefits expressly conferred against the Crown in right of New South Wales by legislation of that State.

On the assumption that sufficient acts of adverse possession could be shown by Victoria to satisfy the common-law rules, it would seem that there would be no reason why s 65(1) should not operate to extinguish New South Wales' title to that part of the bank which lies between the water-line and the top of the bank. Similarly, if the Barmah forest is properly characterised as part of the bed of the watercourse, New South Wales' title would be extinguished to that portion of the bed as has been adversely possessed since 1850.

If the Limitation Act 1969 does not apply of its own force, *Maguire v Simpson* and subsequent authority nevertheless establish that the Act would apply by virtue of s 64 of the Judiciary Act 1903, which provides that in any suit to which a State is a party "the rights of parties shall as nearly as possible be the same" as in a suit between subject and subject. It was strictly only necessary, in *Maguire v Simpson*, to hold that the Commonwealth Trading Bank's right to sue had been lost by virtue of the procedural sections of the Limitation Act 1969, but the whole Court, with the exception of Stephen J, took the opportunity to state their

25 Dicey and Morris, *Conflict of Laws* (10th edn 1980, Morris ed) 552.

26 (1977) 139 CLR 362.

unequivocal view that s 64 had both a substantive and a procedural effect, with the consequence that s 63(1) of the Limitation Act 1969 operated to extinguish the Bank's title. They thus sought to lay to rest previous doubts as to the constitutionality of s 64 of the Judiciary Act 1903 and its substantive operation, at least in suits to which the Commonwealth is a party. It was unnecessary to consider whether different considerations should weigh where a State, rather than the Commonwealth, is a party. As Mason J noted: "The extent to which the Commonwealth may legislate so as to affect the substantive rights of a State in the exercise of federal jurisdiction is an unexplored question."²⁷

In *China Shipping Co v South Australia*²⁸ the issue was whether s 64 operated to make the State of South Australia subject to the limitations on liability contained in s 503 of the Imperial Merchant Shipping Act 1894-1900. Gibbs, Stephen, Murphy and Aickin JJ were all of the view that s 64 could only operate where the matter was one of federal jurisdiction²⁹ but did not express dissent from the proposition that it could affect the substantive rights of a State in such a case. A dispute between Victoria and New South Wales over land between the water-line and the top of the southern bank would clearly invoke federal jurisdiction pursuant to s 75(iv) of the Constitution. Accordingly it would seem that the title of New South Wales would be extinguished by virtue of s 63(1) of the New South Wales Limitation Act 1969 unless the qualification "as nearly as possible" in s 64 of the Judiciary Act 1903 stands in the way.

The various judicial observations on that qualification were reviewed by Stephen J in *Maguire v Simpson*³⁰ but the explicit application of ss 10(1) and 11(1) of the Limitation Act 1969 to the Crown in its several capacities would seem to override any necessary caution in equating private and public law principles in such a case and to foreclose any argument based on "purposes or functions peculiar to Government". Further, in *South Australia v Victoria*³¹ the High Court, in holding that the dispute over the border between those two States was a justiciable issue, assumed that common-law principles of ownership and possession of property were applicable to disputes about territorial occupation between States.

In practical terms, a finding that New South Wales' title to the disputed riparian strip has been extinguished may be sufficient to lead the parties to take formal steps to achieve a re-definition of the boundary or to reach a workable political solution. But such a finding would not, of itself, involve the conclusion that New South Wales had lost jurisdiction over the disputed land or that it was no longer within the territory of New South Wales. Unless some means of achieving that result could be found it would, of course, be possible for New South Wales to legislate for the re-acquisition of the disputed land without compensation.

27 Ibid 401.

28 (1979) 54 ALJR 57.

29 Ibid 67f, 75, 79, 83f.

30 Supra n 26 at 393-395.

31 Supra n 10.

It is here that the implications of a guarded passage in Stephen J's judgment in *Ward's Case* may become important.

"This Court is neither a treaty-making body nor a boundaries commission, nor is it presently concerned with the resolution of such a dispute between States as that to which s 75(iv) of the Constitution refers. Its present concern is with the interpretation of Imperial statutes of the middle of the last century as they bear on the present application for special leave, although in arriving at a decision it cannot be unaware of the broader consequences that that decision may entail, and which account for the intervention of the States of New South Wales and South Australia. Reference was made in the argument of the Solicitor-General for Victoria to the weight given to matters of convenience where the United States Supreme Court has been concerned with border adjudication. In *South Australia v Victoria*, O'Connor J [at pp 708-9] explained the special jurisdiction possessed by the United States Supreme Court in 'controversies between the States', a jurisdiction which includes wide powers of settlement and adjudication and the determination of matters not of themselves justiciable, as well as matters justiciable. The approach of the United States Supreme Court in *Howard v Ingersoll* [(1851) 13 How 381] and in *Handly's Lessee v Anthony* [(1820) 5 Wheaton 374] as well as in subsequent cases involving the determination of border questions between States, with its emphasis upon 'public convenience and the avoidance of controversy' may be a product of experience of that jurisdiction. In its determination of the present case this Court would, I think, be transgressing the limits of its jurisdiction were it to have regard to present convenience in determining the location of the River Murray boundary. No doubt the gross inconvenience of a particular solution to the problem before the Court may suggest that it does not represent a proper reflection of legislative intent, but it is only in this way that I would regard convenience as a factor in the final decision."³²

Although Stephen J concludes that, to have regard to "convenience" would be beyond the Court's jurisdiction in the present case, he seems to leave open the possibility that, in other circumstances, such factors may have a determinative role. He is equivocal in relation to the test of "public convenience and the avoidance of controversy". While he notes that it "may be a product of experience" of the jurisdiction of the United States Supreme Court, with its wide powers of settlement and adjudication in both justiciable and non-justiciable matters, he does not firmly reject such a test as irrelevant in disputes which might otherwise be justiciable. Indeed, by expressly putting matters between States under s 75(iv) of the Constitution to one side, he seems to imply that other tests may be deployed in such disputes.

32 *Supra* n 12 at 328f.

It is possible that, of the range of possible tests which might be used, the Court would prefer to have recourse to well-established principles of international law as providing a law to which the parties are alike subject rather than "considerations of fair dealing, public convenience, or political expediency" which, although legitimate for the United States Supreme Court would not readily be embraced by the High Court.³³

This is not to suggest that principles of customary international law would operate of their own force as they do between sovereign states at international law: "The colonies never were and the States are not international persons."³⁴ Accordingly it cannot be argued that the doctrine of "incorporation" of principles of international law, favoured by Lord Denning MR in *Trendtex Trading Corporation v Central Bank of Nigeria*³⁵ could operate to import principles of international law to govern relations between constituent elements of the Australian federation, even if that doctrine is held to apply to such customary international law principles as the defence of state sovereignty. But it is possible simply to argue that, given the absence of an appropriate common-law rule, the High Court might prefer to have resort to clearly defined principles of international law by analogy, in order to supply an appropriate rule of law to apply to a territorial dispute which cannot satisfactorily be resolved by ordinary canons of statutory interpretation or common-law rules. Although they primarily related to the extent of the Commonwealth's ability, pursuant to the external affairs power, to implement conventional obligations by legislation, there are dicta in both the *Seas and Submerged Land Case*³⁶ and *Koowarta v Bjelke-Petersen*³⁷ which indicate a preparedness to give a wider operation to principles of customary international law, at least in the context of Commonwealth legislation.

If principles of customary international law could be applied by analogy to our hypothetical dispute between Victoria and New South Wales, they would support an argument that Victoria has effectively acquired the disputed territory, not by virtue of the operation of the Limitation Act 1969 but by principles of acquisitive prescription. While there is a difference of opinion as to whether there is, indeed, a discrete doctrine of acquisitive prescription in international law or whether the interaction of principles of effective occupation, acquiescence and estoppel means that such a doctrine has no independent function to fulfil,³⁸ application of the relevant tests would lead to the conclusion that Victoria had acquired the territory at international law, despite its original allocation to New South Wales by the 1855 Act.

Victoria has consistently displayed legislative and executive authority over riparian lands since 1850, at least above the ordinary winter level

33 *Supra* n 10 at 708 per O'Connor J, 715 per Isaacs J.

34 *New South Wales v Commonwealth* (The Seas and Submerged Lands Case) (1975) 135 CLR 337, 373 per Barwick CJ. Similar views were expressed by Gibbs, Stephen, Mason and Murphy JJ: *ibid* 407, 448, 468, 501.

35 [1977] 2 WLR 356. That doctrine has subsequently been accepted as correct in *Hispano Americana Mercantil SA v Central Bank of Nigeria* [1979] 2 Lloyd's Rep 277 (CA), *Planmount Ltd v Republic of Zaire* [1980] 2 Lloyd's Rep 393 and *I Congreso del Partido* [1981] 3 WLR 328 (HL).

36 *Supra* n 34 at 364, 450, 503.

37 (1982) 39 ALR 417, 444, 453, 454, 456, 462f, 466f, 486.

38 Brownlie, *Principles of Public International Law* (3rd edn 1979) 159.

and, in relation to sites where wharves, jetties and other structures have been erected pursuant to Victorian law, over portion of the bed as well. Although it apparently had some doubts over its ability to grant the Chaffey brothers rights to extract Murray waters at Mildura pursuant to the Waterworks Encouragement Act 1886,³⁹ no such reticence was displayed over riparian lands. Thus, pursuant to the Victorian Land Act 1869, an Order-in-Council of 23 May 1881 permanently reserved from sale for public purposes those lands:

“along the left bank of the River Murray from its source to the point where the boundary-line between the colonies of South Australia and Victoria intersect the same, all land, the property of the State, within a distance of three chains from the ordinary winter level of the river as confined by the said left bank. . .”⁴⁰

There has been a “continuous and peaceful display of State authority” on the part of Victoria within the meaning of the *Island of Palmas Case*⁴¹ which has been both public and uninterrupted.⁴² Furthermore, there has been acquiescence on the part of New South Wales, not merely by its failure to assert or perform competing claims or activities over the land, but also in acceding to Victoria’s claim to take water from the Murray, thereby implicitly acknowledging it as a riparian State with territory in lateral or vertical contact with the flow of water.⁴³ In 1885, members of Royal Commissions of New South Wales and Victoria met and agreed that the whole of the waters of the Lower Murray “shall be deemed to be the common property of the Colonies of New South Wales and Victoria”. Although the agreement was not ratified by the colonial Parliaments, H J McKinney, subsequently New South Wales’ Commissioner in Charge of the River Murray, acknowledged Victoria’s right in 1889⁴⁴ and it was not contested by New South Wales delegates to the Convention Debates. The right to a specified share of Murray waters was further acknowledged by New South Wales as a signatory to the River Murray Agreement 1914, which was subsequently ratified by the New South Wales Parliament.

In the light of the Victorian Order-in-Council of 23 May 1881, it may be argued that Victoria has only asserted a claim to lands lying above the ordinary winter level of the River, except at places where it has authorised occupation of portions of the bed. Against this is the fact

39 The Chaffey’s were granted “a sufficient water-right”, an interest unknown to the law because “the Government of the day did not see their way clear to state just what the right was”: W B Chaffey, *supra* n 2 at 60.

40 Notices to reserve the land permanently for public purposes were gazetted in this form on 11 February, 25 February and 4 March 1881. The words “the property of the State” imply no doubt as to Victorian title, but were commonly used in such notices to describe unalienated lands.

41 (1928) UN Rep Vol II, 829.

42 Long, uninterrupted administrative control is weighty evidence in establishing a territorial claim: *The Minquiers and Ecrehos Case (France v UK)* (1953) ICJ Rep 47.

43 This is the touch-stone of the right to use water: *Lyon v Fishmongers’ Co* (1876) 1 App Cas 662, 683 per Lord Selborne; *Hindson v Ashby* [1896] 2 Ch 1; *Gartner v Kidman* (1962) 108 CLR 12, 32.

44 In a minute to Sir Henry Parkes, Premier of NSW, 28 October 1889. Such admissions are also significant in establishing a territorial claim: *Legal Status of Eastern Greenland* PCIJ Ser A/B no 53 (1933); *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (1962) ICJ Rep 6.

that Victoria has asserted rights over lands between winter and summer levels, in order to take water conceded to it at times of low flow. Furthermore under the regime of river regulation since the 1914 Agreement, the winter level is now the lowest flow level, as deliveries for irrigation in the summer months result in a higher river level.

While there may thus still be an argument whether Victoria's claim based on acquisitive prescription would extend all the way to the low water-mark and, accordingly, still some uncertainty as to the resulting border, principles of customary international law would seem to support:

- (a) A claim by Victoria that it has effectively acquired the territory between the top of the bank and some point at the vibrating water-line.
- (b) A claim by Victoria that, even if the test in *Ward's Case* was wrongly applied to the facts of that case, it has similarly acquired the territory occupied by the Barmah forest.
- (c) A claim by Victoria that it has also acquired Beveridge Island, even if the High Court rules that the "whole watercourse" of the Murray does not lie to the north of the island.⁴⁵ Indeed, New South Wales, intervening in *Hazlett v Presnell*, went so far as to urge that Victorian title to the island should now be acknowledged, based on a "principle of prescriptive acquiescence" drawn from international law.⁴⁶

While Victoria may thus be able to maintain her historic occupancy of riparian land, the application of rules of acquisitive prescription would still leave some uncertainty where the precise boundary is to be drawn. In purely administrative terms, it would seem desirable to adopt a solution which enables the border to be accurately ascertained along its length, *ministerio legis*, without the need for actual delineation or demarcation by joint survey. Such a solution should, if possible, confirm Victorian administration of the southern bank as well as of wharves and other structures erected on the Victorian side. The middle-line of the river at a specified discharge or flow would be preferable, but the vibrating water-line on the southern side would also be feasible — although structures in the bed of the river would then technically still be in New South Wales.

As Gibbs J noted in *Ward's Case*, any inconvenience resulting from the top-of-the-bank test could be remedied by sensible co-operation between the States;⁴⁷ but if it were sought to adopt, say, the middle-line as a preferable boundary, there is a further division of opinion as to how this should be achieved.

45 In relation to Beveridge Island, a letter of 20 June 1876 from the New South Wales Colonial Secretary to the Victorian Chief Secretary following a mutual survey stated that "as ... there is no question whatever that Beveridge Island belongs to Victoria, the Government of New South Wales lays no claim to it." Since that time there have been continuing acts of administrative control. A proclamation of 11 December 1885, permanently reserving the land from sale for the purposes of an agricultural college reserve was repealed in 1944 and there have been successive leases of lands on the island.

46 Supra n 19, High Court, *Transcript of Proceedings*, 4 August 1982, 123, 131-136 per Gaudron QC, Solicitor-General for New South Wales, citing *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* supra n 44 at 32f.

47 Supra n 12 at 314.

One view is that to specify any test to supplant the rule in *Ward's Case* would amount to increasing, diminishing or otherwise altering "the limits" of New South Wales and Victoria within the meaning of s 123 of the Constitution, and could thus only be achieved by Commonwealth legislation after referenda in both States. The costs and complications of such a procedure may outweigh the benefits to be gained.

Another view is that New South Wales and Victoria can, in spite of s 123, proceed to exercise the power conferred by a proviso to s 5 of the 1855 Act whereby:

"it shall be competent for the Legislatures of the said Two Colonies, by Laws passed in Concurrence with each other, to define in any different Manner the Boundary Line of the said Two Colonies along the Course of the River *Murray* . . ." ⁴⁸

To adopt a formula other than "the whole watercourse" which would provide a different legal test for ascertaining the precise position of the border "along the Course of the River Murray" is thus within the precise contemplation of s 5 of the 1855 Act. The grant of territory effected by that section is subject to that power and to neglect the proviso is to give the section a wider operation than it allows. It is the whole of s 5, rather than any part of it, which declares the "limits" of the colonies and to pass the legislation contemplated by that section would not be to "increase, diminish or otherwise alter the limits" so established.

There is yet another possibility which might allow consensual definition of a precise frontier without invoking s 123 of the Constitution. Section 5 of 24 and 25 Vict, c 44 (1861) provides:

"Whereas the Boundaries of certain of Her Majesty's Colonies on the Continent of *Australia* may be found to have been imperfectly or inconveniently defined, and it may be expedient, from Time to Time, to determine or alter such Boundaries: Be it therefore further enacted, as follows:

It shall be lawful from Time to Time for the Governors of any contiguous Colonies on the said Continent, with the advice of their respective Executive Councils, by any Instrument under their Joint Hands and Seals, to determine or alter the common Boundary of such Colonies; and the Boundary described in any such Instrument shall be deemed to be, within the Limits there laid down, the true Boundary of said Colonies, so soon as Her Majesty's Approval of such Instrument shall have been proclaimed in either of such Colonies by the Governor thereof."

It may be argued that the power to determine has survived the implied repeal of the power to alter boundaries by s 123;⁴⁹ that the precise

⁴⁸ *Supra* n 7.

⁴⁹ That there was no intention to repeal the whole of 24 and 25 Vict c 44 (1861) is fortified by the fact that, whereas s 8 of the Commonwealth of Australia Constitution Act 1900 expressly amends the Colonial Boundaries Act 1895, no mention is made of the 1861 Act.

delimitation of a frontier within the course of the Murray would determine an otherwise "imperfectly or inconveniently defined" boundary, rather than alter it; and that, accordingly, joint action by the Governors-in-Council is all that would be required.⁵⁰

South Australia's Rights

The same underlying uncertainty as to the sources of applicable law, if any, between colonies or States which complicate Victoria's claim also infects South Australia's position. That South Australia has "rights" which might be invoked before the High Court to obtain declarations and injunctions against New South Wales or Victoria has been as strongly asserted as it has been denied ever since the upstream States began to experiment with irrigation from the Murray and its tributaries a hundred years ago.⁵¹ Recent proposals for head-on confrontation made by the Australian Democrats⁵² thus do not have novelty on their side. And, as will be seen, the uncertainty of the outcome of such a confrontation continues to commend a political solution, if it can be achieved.

At the outset, it is important to note that South Australia's concerns have changed substantially over time. Prior to, and immediately after federation, her primary interest was to maintain the navigability of the Murray and the river trade to Mannum. Accordingly, she sought to limit withdrawals by the upstream colonies for irrigation, both from the Murray and from tributaries wholly within New South Wales or Victoria. Concurrently, she sought to protect her river trade from the railways of both colonies which had reached the Murray and its tributaries and were successfully diverting river trade to the ports of Sydney and Melbourne.

This explains the trade-off effected by ss 98 and 100 of the Constitution. By the time the navigation question was submitted to a full debate, the convention, in the light of American authority, had already agreed to give the Commonwealth power over trade and commerce. The issue was whether, without further elucidation, the Commonwealth would have power to control all rivers for both navigation and conservation, including tributaries of inter-State rivers which were in fact susceptible of navigation for part of their length.⁵³ Some thought it "inconceivable that the High Court would deny the applicability of the American decisions"⁵⁴ and that the trade and commerce power should remain unqualified.⁵⁵ Others did not share this view. Glynn, a graduate in law from the University of Adelaide and sometime examiner in Equity, Contracts and Constitutional Law, pressed for an express power over

50 This is the view adopted by Moore, *The Constitution of the Commonwealth of Australia* (2nd edn 1910) 596. See also Lumb and Ryan, *The Constitution of the Commonwealth of Australia Annotated* (3rd edn 1981) 396.

51 The history of the rival contentions and the positions taken by the various contributors to the debate are set out in Clark, *supra* n 5.

52 SA Parl, *Debates* (1980-1981) vol 2, 1307 per Millhouse (HA).

53 This result had been reached by interpretation of the US commerce power: *Gibbons v Ogden* 9 Wheat 1 (1824); *The Daniel Ball* 10 Wall 557 (1870); *US v Rio Grande Dam and Irrigation Co* 174 US 690 (1899).

54 National Australasian Convention, *Debates*, Melbourne Session, 1 February 1898, 416 per Barton.

55 *Ibid* 60, 62 per Higgins; 67 per O'Connor; 381 per Lyne; 407-416 per Holder; 596 ff per Barton.

navigation and a definition which left no doubt about Commonwealth power over intra-State tributaries.⁵⁶ Other formulae were floated, together with a scheme for leaving the issue of balancing competing interests to the proposed Inter-State Commission. Ultimately, after much division, a formula was devised which must have gratified South Australia. By s 98, the trade and commerce power was declared to extend both to navigation and railways, the property of any State. If the Commonwealth chose to act — and the fact that it would not was presumably beyond contemplation — South Australia's flagging river trade could be revived. At the same time, s 100 prohibited Commonwealth legislation which would "abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation".

The Commonwealth did not act, however. Barton, as Prime Minister, could not be expected to act, as he had already forecast in the Convention that navigation would give way to the railways; and that irrigation would meet little interference from Commonwealth legislation.⁵⁷ The only real suggestion that the Commonwealth might act came from Prime Minister Watson in June 1904 when he asked the States whether they would hand over control of the Murray to the Federal Parliament. This may have been a spur to a political solution, together with South Australia's appropriation of £1,000 to begin litigation. As a result, Glynn prepared an elaborate statement of the case in two volumes and he was retained, together with Isaacs and Symon, who also had close associations with the Law Faculty and had attended the Faculty meeting which appointed Salmond to the Chair of Law. The latter two, interestingly enough, held their retainers while they respectively acted as Commonwealth Attorney-General.⁵⁸

Counsel advised that South Australia might successfully litigate the matter, but her hand was stayed, first by the 1906 Premiers' Conference which reached agreement on a scheme for locking the Murray (which was subsequently upset) and then by the introduction of the Commonwealth Bill to establish the short-lived and ill-fated Inter-State Commission which, by s 17(1), gave the Commission wide powers of enquiry into works and diversions and the maintenance and improvement of navigability.

During this time, the parties had been working towards a political solution and various compacts were made but not ratified from 1908. Agreement was finally reached in September 1914, but it is ironic that, by the time the locks authorised by that agreement, and for which South Australia had fought so tenaciously, were constructed, the navigation trade was dead.

Thereafter, South Australia's interest in the Murray and her share of available waters turned to developing areas of consumptive use. Initially, she sought to maintain secure supplies for developing irrigation settlements, but the commissioning of the Morgan-Whyalla pipeline in

⁵⁶ *Ibid* 481.

⁵⁷ *Ibid* 503.

⁵⁸ The joint opinion of Glynn and Symon and the separate opinion of Isaacs were tabled in the SA House of Assembly in July 1906 and are analysed in Clark, *supra* n 5 at 224-231.

1944 followed by the Mannum-Adelaide pipeline in 1955 and Murray Bridge-Mt Bold pipeline in 1973 led to a more intimate interest within major urban centres in maintaining South Australia's entitlements — whatever they may be.⁵⁹

The threat of litigation has never been far from the surface. In 1957, agreements between Victoria, New South Wales and the Commonwealth effected a proposed division of diverted Snowy River waters between New South Wales and Victoria pursuant to the Snowy Mountains Scheme.⁶⁰ Armed with an opinion of D Menzies casting doubt on the adequacy of the defence power to support the Commonwealth legislation upon which the Snowy Scheme rested, Sir Thomas Playford issued a writ to restrain the Commonwealth from proceeding further with the scheme. He thus successfully used the threat of litigation to obtain amendments to the River Murray Waters Agreement in 1958 which superseded the water-sharing provisions in the Snowy Mountains Agreement and secured a greater share for South Australia.

This amendment also saw the first intrusion of questions of water quality, which now appear to be uppermost in South Australia's mind. The Commission was given power to declare periods of restriction in drought years and to fix amounts of water to be released for dilution of salinity in South Australia. South Australian public and political concern over matters of water quality, however, really began in the summer of 1967-1968, when high levels of salinity had a marked effect on productivity in her irrigation areas. Thereafter, South Australian arguments for a new dam at Chowilla, which had previously been to increase the amount of usable water, took on the added dimension of a need to provide dilution flows to reduce salinity. The State's adherence to the goal of reducing salinity was not, however, single-minded. When River Murray Commission studies demonstrated that to continue with the proposed Chowilla dam would have the effect of exacerbating salinity problems in South Australia, the Hall Government fell, precisely because it was prepared to agree to substitute Dartmouth for Chowilla in the interests of improving water quality in South Australia.

More recently, it has been questions of water quality — which were only incidentally addressed by the River Murray Waters Agreement prior to 1981 — that have once more driven South Australia to litigation. Learning that applications had been made for diversion licences on tributary rivers in New South Wales, South Australia requested the Premier of that State to place a moratorium on further irrigation licences, pending an assessment of their likely effect on the quality of River Murray waters. This step was taken partly because a 1979 study for the River Murray Commission had recommended that both the drainage and salinity effects of any proposed expansion or intensification of irrigation should be thoroughly investigated prior to adoption.⁶¹

59 The percentage of Adelaide's water supply from the Murray has varied in each decade as follows:

	Min year	Max year	Average
1954-63	6%	60%	31%
1964-73	7%	74%	30%
1974-82	18%	87%	44%

Source: SA Engineering and Water Supply Department.

60 See the schedules to the Snowy Mountains Hydro-electric Power Act 1949 (C'th).

61 Maunsell and Partners, *Murray Valley Salinity and Drainage: Development of a Co-ordinated Plan of Action* (1979).

Salinity is contributed to the river from several sources. Some is contained in water flowing from tributaries. Other contributions come from saline groundwater percolating into the river or from agricultural drainage generated on irrigated lands.⁶² Expert opinion is presently divided on whether existing or additional irrigation on New South Wales tributaries will eventually generate significant additional saline contributions to the detriment of South Australia. The cumulative effects of irrigation on both the mobility of saline groundwater and the salinity of surface drainage have been manifested earlier on the Victorian side. Most of the major identifiable salt inputs into the system presently originate in either Victoria or South Australia. One view is that New South Wales is already a substantial contributor of saline groundwater and that it is only a matter of time before the cumulative effects of irrigation in New South Wales will lead to substantial increases in saline drainage. On the other hand, the New South Wales position is that it is relatively blameless in this regard and that additional irrigation in that State will have no direct effect on the salt load. If this view were correct, South Australia would be forced to rely on the contention that, by allocating presently unused waters in her territorial tributaries, New South Wales would withdraw water from the system which presently serves to dilute the saline contributions from Victoria and South Australia. As can be seen, this argument pushes South Australia's interests to the extreme. Not only does she assert an interest in tributaries wholly contained within upstream States but also seeks to enjoin beneficial uses of water forming part of New South Wales' entitlement under the River Murray Waters Agreement as amended by the Menindee Lakes Storage Agreement 1963, which are not, in themselves, productive of salinity or adverse effects within those territorial tributaries.

South Australia's attack on the proposed New South Wales diversions did not assert general principles of inter-State riparian law which may, or may not exist. Instead, she sought to intervene in Land Board inquiries, as an objector to the proposed licences pursuant to s 11 of the Water Act 1912 (NSW), asserting that her interests would be affected by the granting of the applications, either because of consequential saline effects within South Australia or because, pursuant to the River Murray Waters Agreement, Lake Victoria has been vested in the Minister of Public Works for South Australia since 1922 and South Australia is thus a riparian proprietor in New South Wales.⁶³ Some Boards accepted South Australia's standing, others did not; but in an appeal to the Land and Environment Court from hearings in Wentworth, Perrignon J accepted that South Australia had standing, although, on the facts, he did not accept her grounds of objection.⁶⁴ As a result, New South Wales passed legislation which had the effect of depriving South Australia of

62 Thus the Maunsell study reckoned the salt flow to SA in a normal year, measured at Lock 6, as about 1,100,000 tonnes, comprising tributary inflows of 600,000 tonnes, drainage inflows of 250,000 tonnes. A further contribution of 500,000 tonnes is added within SA, mainly from groundwater inflows.

63 South Australia appeared at Land Board Inquiries held at Bourke in September 1979, Wentworth in December 1979, Walgett in September 1980, Broken Hill in November 1980, Moree in February and March 1981 and Deniliquin in July 1981.

64 *Water Resources Commission of NSW v South Australia*, unreported, NSW Land and Environment Court. (Nos 30119-30131, 30144, 9 October 1981).

standing;⁶⁵ whereupon South Australia instituted proceedings under the broad standing provisions of the Environmental Planning and Assessment Act 1979 (NSW), asserting that the Act required relevant environmental plans to be prepared and promulgated before the proposed irrigation licences could validly be granted. This action, which might have had wide-reaching consequences for the emerging environmental planning system in New South Wales, was discontinued as a result of the meeting of Premiers on 16 October 1981 when agreement was reached on an amended River Murray Waters Agreement.

Despite the gradual shift in South Australia's focus of concern and the recurrent threat of a test of rights, there has never been litigation to determine the law applicable between the States. Abundant opinions exist. Perhaps the most notable collection of views is in the evidence given to the Inter-State Royal Commission in 1902⁶⁶ but the various attitudes expressed during the convention debates and the 1906 opinions prepared by Glynn, Symon and Isaacs are also important.⁶⁷

There are several recurrent themes. One is that there is neither domestic nor international law to apply to the case. This view (and its inevitable consequences) was nicely put in an exchange between Glynn and Reid of New South Wales during the Melbourne session of the convention:

“Reid: If there is any clear international law regulating these matters how is it that all the nations have had to agree by treaty to the use of such rivers — take, for instance, the Rhine. In every case agreements as to the use of these rivers have been come to by treaty.

Glynn: The honourable and learned member is a lawyer, and he is not such a political innocent as not to know that between States there is no such thing as law existing, except the right of the strongest.

Reid: If you take it that way the question is settled, because we are stronger than you are.”⁶⁸

Isaacs⁶⁹ — at least before he was retained by South Australia — and Oliver⁷⁰ regarded the need for treaties as fatal to the assertion of any rule of international law and even Salmond⁷¹ was forced to give his qualified assent to this view. While modern international lawyers would doubtless argue that the practice of civilised nations is, itself, a source of customary international law, there is still the difficulty, mentioned previously, that international law cannot apply of its own force to govern relations between the Australian States, and there is doubt whether the High Court would have recourse to such principles by analogy in order to resolve a dispute under s 75(iv) of the Constitution between South Australia and an upstream State, where there is no readily

65 *Water Amendment Act 1981* (NSW). This legislation was initially not proclaimed, but areas were proclaimed on 22 January 1982.

66 *Supra* n 2.

67 *Supra* n 58.

68 *Supra* n 54 at 51.

69 *Ibid* 416-423.

70 *Supra* n 2 at 226.

71 *Ibid* 208.

ascertainable pre-existing common-law rule which would be appropriate in the public law context.

Another common view was that the respective rights of the colonies to use River Murray waters were to be determined by reference to the private law doctrine of riparian rights. Notable among such advocates were Salmond, in his evidence before the Inter-State Royal Commission⁷² and Isaacs, who rested his 1906 opinion on the assumption that the States must be "looked upon in this regard for all practical purposes as riparian proprietors". To his mind, no law could "be found so applicable, so self-suggestive, or so inherently fair, as the well-known rule of riparian proprietorship".⁷³

There are three important deficiencies in the views of Salmond and Isaacs. The argument for applying private law doctrines in the public law context is most commonly that what is just between persons must be just between governments. And yet Victoria in 1886⁷⁴ and New South Wales in 1896⁷⁵ had both endeavoured to do away with the riparian doctrine as manifestly inappropriate for Australian private law, and the Supreme Court of New South Wales had concluded that the common law doctrine, which had been a source of almost insuperable difficulty, had been effectively abolished.⁷⁶ It is strange that neither Salmond nor Isaacs should have adverted to the executive and judicial distaste for the doctrine in its private law context, or the fact that it had been abolished in the upstream States.

In order to make the doctrine workable in an inter-State context, they further had to place two pragmatic glosses on the common law which have not, indeed, been accepted by Australian courts. The riparian doctrine only permitted unlimited diversion by upstream proprietors for "ordinary" purposes (ie for domestic and stock use). Extraction for "extraordinary" purposes, which included irrigation, was only permissible if water was returned to the river with "no sensible diminution" in quantity or quality. Irrigation inevitably caused such diminution and was consequently impermissible at common law. Nevertheless, Salmond and Isaacs conceded a right to the upstream States to a "reasonable" use of water, thereby invoking an American gloss on the doctrine developed by Chancellor Kent, but firmly rejected in *Embrey v Owen*⁷⁷ and as recently as 1964 by the Supreme Court of Western Australia.⁷⁸ They may have been led to this concession by virtue of s 100 of the Constitution, which speaks of the right of the States or the residents therein to the reasonable use of waters for conservation or irrigation.⁷⁹ Certainly,

72 Ibid at 207-210.

73 Supra n 58.

74 *Irrigation Act 1886*.

75 *Water Rights Act 1896*.

76 *Hanson v Grassy Gully Gold Mining Co* (1900) 21 NSWLR 271; *Dougherty v Ah Lee* (1902) 19 WN (NSW) 8; *Attorney-General v Bradney* (1903) 20 WN (NSW) 247. As to the actual correctness of these decisions see *Thorpes Ltd v Grant Pastoral Co Pty Ltd* (1955) 92 CLR 317, 331 per Fullagar J and Clark and Renard, "The Riparian Doctrine and Australian Legislation" (1970) 7 MULR 475.

77 (1851) 6 Ex 353, 155 ER 579.

78 *Williams v Cahill and Willmot*, unreported, WA University Law Library (1964) 2 Judgments of the Supreme Court 1118 per Negus J.

79 Salmond, in support of South Australia's navigation interests, argued from the common-law analogy that any use which interfered with the customary flow would be "unreasonable" and therefore unconstitutional: supra n 2 at 209 citing *Earl of Sandwich v Great Northern Railway Co* (1878) 10 Ch D 707.

Symon and Glynn argued that this "right" pre-existed Federation;⁸⁰ but if it did, it was not part of the private common-law riparian doctrine. That section must either be read merely as a fetter on the plenitude of Commonwealth power to legislate with respect to trade and commerce or, if it does have a substantive effect, it must be an invocation of existing, or a declaration of new, "inter-State common law",⁸¹ Whatever law was being applied by Salmond and Isaacs, it was certainly not the common-law riparian doctrine.

This conclusion is reinforced by their neglect of another inalienable aspect of the riparian doctrine, whereby upstream proprietors may obtain a prescriptive right to work sensible diminution to the quantity or quality of waters against downstream riparians who fail to seek injunctive relief to protect their proprietary interest. It is precisely because sensible diminution of either is an invasion of the downstream riparian's proprietary interests that an upstream proprietor's activities may be enjoined without proof of special damage, in order to prevent the invasion ripening into a prescriptive right.⁸² This aspect of the doctrine had been held to apply in Australia⁸³ and Victoria had already partially abolished it by legislation.⁸⁴ If the private law riparian doctrine were indeed applicable between States, South Australia would have to face the argument that her failure to take earlier action and her acquiescence in the water-sharing regime adopted for the purposes of the River Murray Waters Agreement, had allowed the upstream States to acquire prescriptive rights to work such sensible diminution to the quantity and quality of waters as presently prevails.

Those who perceived that the riparian doctrine could not afford a satisfactory solution to the problem either argued with Pitt Cobbett that principles of comity required an equitable sharing of the resource⁸⁵ or asserted that the only practicable means of resolving the dispute was by political agreement and concurrent legislation.

In more recent times, Renard has taken the issue of the respective rights of the States with respect to inter-State rivers as a paradigm for his argument that there must be an "inter-State common law". He argues that the United States doctrine of equitable apportionment would be inapplicable and would probably be characterised by the High Court as involving non-justiciable elements, rather than objectively ascertainable rules of law. Equally, the legislative systems of administrative rights to water, which have now superseded much of the common law in all three

80 *Supra* n 58.

81 Pitt Cobbett began from the premise that there had been no law between the colonies, but that, as soon as the Commonwealth legislated to preserve navigation, s 100 would give rise to rights in States and residents to divert water for irrigation and conservation. Until that time there was "still no common law of the Commonwealth on this subject" except that contained in the Constitution: *supra* n 2 at 244. Subsequent authors have argued for an "interstate common law": see *supra* n 18 and text below.

82 See generally Clark and Renard, *supra* n 23, vol 1, 96-111 and authorities there cited.

83 *Pring v Marina* (1866) 5 SCR (NSW) 390; *Howell v Prince* (1869) 8 SCR (NSW) 316.

84 The Irrigation Act 1886, s 5 abolished the possibility of obtaining a prescriptive title to divert water, thereby depriving a downstream proprietor of his right to enjoin interferences with the quantity of water without proof of special damage. It did not, however, deal with water quality; nor does its modern equivalent: Water Act 1958 (Vic) s 8. There is no comparable legislation in New South Wales or South Australia.

85 *Supra* n 2 at 243.

States, depend on administrative discretion and offer no sufficient guide to applicable rules of law. His conclusion is that the High Court, if faced with the issue, would adopt a rule of "reasonable sharing". "Reasonableness" is an essential element of the doctrine of equitable utilisation at international law and is embodied in article 4 of the Helsinki Rules. It has also been adopted by federal courts in jurisdictions other than the United States — eg Switzerland,⁸⁶ Germany⁸⁷ and India⁸⁸ — to resolve inter-State disputes; is a natural and logical out-growth of the maxim *sic utere tuo ut alienum non laedas*; and is implicitly recognised by s 100 of the Constitution.⁸⁹ He concludes that:

"Reasonableness is in short the one link between common law riparian rights, inter-State law in other federations and international law. It is a concept the application of which falls well within the judicial power exercisable by the High Court, and it provides a means of resolving in a just and sensible manner, potential inter-State river disputes. In the light of this unique status, the express reference to the right of the States to reasonable use of river waters in section 100 of the Constitution would seem to establish conclusively the rule of reasonable sharing as the doctrine of Australian inter-State common law applicable to inter-State river disputes at the governmental level."⁹⁰

If such a rule were adopted, the better view is that it would apply equally to tributary rivers as to the main stem of the river. Salmond,⁹¹ Symon and Glynn⁹² reached this view on the basis of *United States v Rio Grande Dam and Irrigation Co*⁹³ and the river basin is now accepted both as an hydrologic and legal entity at international law.⁹⁴

The majority report of the Inter-State Royal Commission in 1902 emphasised that "in the consideration of claims and apportionment of rights, the River and its tributaries must be looked on as one",⁹⁵ and it would seem that in applying any rule of reasonable sharing, the use of intra-State tributaries would have to be accounted for. This conclusion is likely to be most hotly contested by New South Wales which has always taken the position that the use of waters in intra-State tributaries — with the exception of the Darling below Menindee Lakes and the Mitta Mitta

86 *Aargau v Zürich* (1878) 4 Rec Off des Arrêts du Tribunal Fédéral 34.

87 *Württemberg and Prussia v Baden* (1927) 4 Ann Dig 128.

88 *Sind v Punjab* in Indus Commission, *Report and Printed Proceedings* (1941).

89 Renard, "The River Murray Question: Part III — New Doctrines for Old Problems" (1972) 8 MULR 625.

90 *Ibid* 662. See also Renard, *Is the Doctrine of Equitable Apportionment a rule of customary international law?*, unpublished LL B (Hons) thesis, University of Melbourne (1970); Renard, *supra* n 18; Clark and Renard, *supra* n 23, vol 3, 191-212.

91 *Supra* n 2 at 208.

92 *Supra* n 58.

93 *Supra* n 53. See also *Wyoming v Colorado* 259 US 419 (1922); *Oklahoma (ex rel Phillips) v Guy F Atkinson Co* 313 US 508 (1941).

94 International Law Association, *Report of the Forty-Eighth Conference* (1958) 99; Teclaff, *The River Basin in History and Law* (1967) 193; Bourne, "The Development of International Water Resources: The 'Drainage Basin Approach'" (1969) 47 Can Bar Rev 62.

95 Interstate Royal Commission on the River Murray, *Report of the Commissioners* (1902) 49.

below Dartmouth, both of which are subject to agreements — is entirely a matter for the State within which that tributary flows.

It is patent that any doctrine such as a doctrine of reasonable sharing will not call for a judicial apportionment of available water between States, or an a priori determination of permissible levels of pollution. It is precisely in this respect that the doctrine would differ from the American doctrine of equitable apportionment. Rather, such a doctrine would merely call for a determination whether particular diversions or developments called into question in fact exceeded a State's reasonable share of the resource.

River Murray Waters Agreement 1914

On the other hand, as between the contracting States of New South Wales, Victoria and South Australia, certain rights pursuant to any doctrine of reasonable sharing have been displaced by the provisions of the River Murray Waters Agreement. Prior to 1981, the Agreement primarily dealt with three matters. First, it specified the shares of available waters allocated to each State in ordinary years and provided a formula for dividing the available water during periods of restriction which may be declared by the River Murray Commission. In ordinary years, since the building of Dartmouth Dam, South Australia was guaranteed a minimum annual flow of 1.5 million acre feet, which must be delivered in not less than certain specified amounts in each month.⁹⁶ Provided that they each allowed sufficient water to flow, in order to meet one-half of South Australia's minimum monthly entitlement, New South Wales and Victoria were entitled:

- (a) to share Murray waters passing Albury equally between them;
- (b) to fully utilise all waters contained in intra-State tributaries below Albury;
- (c) to use waters from tributaries above Albury, provided an equal deduction was made from that State's share below Albury.⁹⁷

The second aspect of the Agreement was to authorise the construction of specified structures on the Murray, the Murrumbidgee and the Mitta Mitta which included major dams and weirs; combined locks and weirs; barrages at the Murray mouth and works to prevent the loss of regulated flow in reaches such as the Barmah forest.⁹⁸ A mechanism was also provided for approval of new works to be undertaken by a State, rather than the Commission, but this was confined to works on the main stem of the river.⁹⁹ If an upstream State proposed to erect new works on an intra-State tributary, it was obliged merely to inform the River Murray Commission of its intention and keep it supplied with such information as it might require.¹⁰⁰

Finally, the Agreement empowered the River Murray Commission to administer the provisions of the Agreement, granting it limited discretion

⁹⁶ River Murray Waters Agreement 1914 cl 49.

⁹⁷ Ibid cls 45-48.

⁹⁸ Ibid cl 20.

⁹⁹ Ibid cl 30.

¹⁰⁰ Ibid cl 52, 59.

to operate the authorised storages and structures consistent with the water-sharing arrangements specified.

These provisions manifestly displace any inter-State common-law rules in important particulars. First, South Australia's volumetric entitlements are to be ascertained by reference to the Agreement and they are determined by reference to minimum monthly entitlements. In actual fact, water delivered to South Australia rarely falls to the specified volumes;¹⁰¹ but the expectation that upstream States will customarily allow more water to flow than they are obliged to do under the Agreement does not, of itself, enlarge South Australia's entitlement. Equally, South Australia, as a party to the compact, is not in a position to object to the exercise by the upstream States of rights conferred on them by the Agreement, provided each continues to allow sufficient water to flow to meet South Australia's share. If this is done, South Australia would seem to have no grounds to object to the quantity of proposed diversions in New South Wales, for she is merely exercising her rights, pursuant to the Agreement, to make full use of tributary rivers. Again, the fact that there is, from time to time, insufficient flow to keep the mouth of the Murray open — as occurred in April 1981 — does not necessarily indicate that South Australia is receiving less than her entitlement. Indeed, as the *Register* noted in 1902: "The prevailing difficulty with most mouths is to keep them closed. With the Murray, the experience has been the reverse."¹⁰²

101 The River Murray Commission estimates that, under natural conditions prior to the construction of storages and diversion of water for irrigation and other purposes, the flow reaching South Australia would have only been less than the current *annual* entitlement under the Agreement perhaps once in every hundred years. The provision of storages, despite increased use of water, means that the probability of South Australia receiving less than her annual entitlement in any year is about the same as under natural conditions.

Computer studies also predict that in post-Dartmouth conditions, the future median *annual* flow (ie the flow which is exceeded for half the years of the record) reaching South Australia will be about 4 million megalitres or more than twice the *annual* entitlement of 1.85 megalitres. On the other hand, South Australia is expected to receive only her *annual* entitlement under the Agreement and very little more for about 25 years in every 100.

The likelihood of South Australia receiving less than her *annual* entitlement under the Agreement is thus slight; but there is a much higher occurrence of occasions when South Australia has and will receive at or near her entitlement for any particular *month*. Predictably these are in the months of December to April when irrigation demand is at its peak and the advantages to be gained from surplus dilution flows would be greatest. Thus, in evidence presented to the Senate Standing Committee on Science and the Environment by the South Australian Engineering and Water Supply Department in June 1981, reliance was placed on River Murray Commission Study 477 which endeavoured to simulate, on the basis of data between 1895 and 1972, what would have happened under post-Dartmouth conditions if the development predicted for 1985/1986 had prevailed. This Study shows that South Australia might expect to receive only its monthly entitlement or less for the months mentioned on between 54 and 67 occasions over the 77 year (ie 924 month) period. However, this situation can generally be managed by South Australia requesting the Commission to release more than her entitlement for such months, which will be debited against her entitlement in months where the flow may be expected to be in excess of her monthly entitlement. This possibility is expressly contemplated by the River Murray Waters Agreement 1981, cl 74, although strictly the Commission has a discretion whether or not to accede to a South Australian request.

102 SA *Register*, 28 May 1902.

The other aspect of South Australia's common-law rights displaced by the Agreement concerns navigation. Symon and Glynn¹⁰³ had rested their opinion on an asserted public right of navigation. There are serious doubts whether such a right exists beyond tidal influence at the mouth of a river;¹⁰⁴ but even if it did, it would now necessarily be qualified by the structures authorised by the Agreement and the power to regulate flows conferred on the Commission.

Before 1981, however, the Agreement had little to say on the subject of water quality. In 1958, cl 51 was amended to require the Commission, in times of declared restriction, to determine an allowance for dilution of salinity in South Australia before fixing the amount of water available for sharing between the three States. Amendments in 1970 gave passing recognition to problems of salinity by providing that, unless otherwise directed by the Commission, flows passing Torrumbarry and Euston weirs should as far as possible be regulated to prevent salinity exceeding 300 parts per million of total dissolved solids, at Swan Hill and Merbein, respectively, provided that certain specified maximum flows are not exceeded.¹⁰⁵

Such incidental provisions would not seem to have supplanted whatever common-law rights South Australia might assert, to have water quality maintained pursuant to a doctrine of reasonable sharing. On the other hand, one of the means of mitigating in-stream salinity within the main stem of the Murray is by dilution flows and there is thus an intimate relationship between water quality and water quantity. By ceding the right to make use of all tributary and main stem waters, other than the specified minimum monthly flows, to the upstream States, South Australia would appear to have necessarily agreed to accept such salinity as results from the provision of specified minimum monthly flows and the operation of Torrumbarry and Euston weirs in accordance with cl 45A in normal seasons, and only requires special allocations to be made for salinity in periods of restriction, at the discretion of the Commission. Where the cause of increased salinity is the exercise of rights to extract water from tributaries or the main stem pursuant to the Agreement, South Australia would seem to be without a remedy. On the other hand, there is little doubt that the intentional discharge of pollutants into tributaries by the upstream States might be enjoined if it goes beyond a reasonable sharing of the resource.

River Murray Waters Agreement 1981

The substitute Agreement approved at the meeting of the Prime Minister and Premiers on 16 October 1981 contains important modifications. South Australia's entitlement in ordinary times is still determined by the same schedule of monthly minimum flows;¹⁰⁶ but during periods of restriction there is now a specific allocation of 58 000 megalitres per month for losses by evaporation, percolation or for dilution of salinity within South Australia, unless otherwise determined by the Commission.¹⁰⁷ While the substitute Agreement provides means to

103 *Supra* n 58.

104 *Supra* n 5 at 229.

105 *Supra* n 96, cl 45A.

106 River Murray Waters Agreement 1981 cl 73.

107 *Ibid* cl 105.

introduce principles of water accounting between the upstream States, so that excessive use by one State in one period might be debited against its entitlement in the next, the general principle of allowing New South Wales and Victoria to share available waters, subject only to providing monthly flows to South Australia, remains.

The substitute Agreement accords somewhat greater powers to the River Murray Commission. One view of the prior Agreement which had, at times, been pressed by New South Wales, was that its objects were strictly confined to water conservation and navigation and to the main stem of the River Murray. Accordingly, in deciding how to exercise its albeit limited discretion to regulate storages on the river, the Commission could not have regard to such other matters as flood protection, recreation and the needs of flora and fauna. Equally, it was not entitled to give weight to water quality matters, except to the limited extent provided by the Agreement. Certainly, it had no interest in, or power to control, activities on intra-State tributaries.

At first sight, then, the 1981 Agreement appears to contain major advances. The Commission's previous power to carry out, or cause to be carried out, surveys and investigations as to the desirability and practicability of new works has been broadened to include the protection or improvement of water quality, as has its power to initiate proposals.¹⁰⁸ The previous cl 28B allowed the Commission, of its own initiative, to investigate tributaries above Albury or the Darling below Menindee. That power has also been widened to embrace water quality investigations; but investigation of tributaries below Albury, where the major problems of salinity contribution occur, may only be done with the consent of the State in which the tributary lies.¹⁰⁹ Similarly, the power of the Commission to make proposals is now subject to a requirement to inform and consider representations from a contracting Government where the implementation of that proposal would significantly affect the flow, use, control or quality of water under its control, supervision or protection.¹¹⁰ One might expect that sensible provision to be reciprocal; and that contracting Governments might equally be required to advise, and consider representations from the River Murray Commission with respect to State proposals which might significantly affect River Murray waters, but proposals for such a clause were effectively undermined at the meeting of the Prime Minister and Premiers on 16 October 1981.

The Commission's previous power to measure stored water and flows has been extended to cover the measurement and monitoring of water quality in the Murray and its storages, and in tributaries at or near their confluence with the Murray. Again, however, measurement of water quality on or adjacent to a tributary below Albury (apart from the Darling below Menindee) requires consent of the State in which the tributary lies.¹¹¹

The object of obtaining such data, in normal circumstances, would be to ascertain variations in salinity at various points on the river and to

108 Ibid cl 25(1) and (3).

109 Ibid cl 25(2).

110 Ibid cl 25(3)(b).

111 Ibid cl 26(1)(c) and (2).

model the system in order to draw up appropriate management guidelines which would enable certain water quality objectives to be met. Successful management would, of course, require compliant regulation of inflows from tributary rivers and, in particular, the operation of any salinity amelioration works on tributary rivers would have to be co-ordinated and controlled. As the Inter-State Royal Commission asserted in 1902, the Murray and its tributaries "must be looked on as one".¹¹²

It is here, however, that the me-firstism and parochialism of the Australian colonies and States reassert themselves and the River Murray Commission is denied any effective power to establish and enforce water quality objectives or standards. Similarly, it is denied any formal voice in the way in which salinity amelioration works on tributaries, such as the Barr Creek works in Victoria, are operated. The implementing Acts for the original Agreement gave the River Murray Commission power to make regulations, having the force of law, for certain limited, formal purposes, including the making of tolls;¹¹³ but the Governor-General-in-Council was given general regulation-making powers for carrying out other purposes of the legislation.¹¹⁴ There was also a further intriguing provision whereby "the orders, determinations, decisions and declarations of the Commission made in the exercise of its powers and discharge of its duties shall bind the Government and all persons and corporations, and may be made a Rule or Order of the High Court and shall be enforceable accordingly".¹¹⁵ It is possible that the provision, or at least the version of it which is contained in the Commonwealth Act, is unconstitutional. However, this issue was never tested as there was never an attempt to use the power conferred.

Under the new draft legislation, the Governor-General's power to make regulations is maintained,¹¹⁶ but the Commission no longer has power to make regulations. There is, indeed, no longer any express power to make tolls, and any such power must arise merely by implication from other provisions in the Agreement.¹¹⁷ It is obviously not intended that the power to make regulations be used to promulgate water quality objectives or standards in a way which might become binding on individuals or on contracting Governments. Indeed, the relevant clause in the Agreement carefully limits the Commission to a consultative and recommendatory role:

"The Commission may, in consultation with the appropriate responsible authorities of each of the Contracting Governments, formulate water quality objectives and, where appropriate, standards for any part of the River Murray and may make recommendations with respect thereto to the Contracting Governments."¹¹⁸

112 *Supra* n 95.

113 *Eg* River Murray Waters Act 1914 (C'th) ss 7, 8.

114 *Ibid* s 22.

115 *Ibid* s 12. The corresponding State enactments provided that orders, etc of the Commission could be made a rule or order of the State Supreme Court; see River Murray Waters Act (NSW) s 11; River Murray Waters Act (Vic) s 11; River Murray Waters Act (SA) s 13.

116 River Murray Waters Bill 1982 cl 15.

117 River Murray Waters Agreement 1981 cl 66.

118 *Ibid* cl 27.

While the power to make recommendations — which is supplemented by a more general power in cl 28, to make recommendations concerning any matter which may affect the quantity or quality of Murray waters to any contracting Government or authority, agency or tribunal thereof — would presumably include a power to recommend consequential water quality objectives for tributaries at the point of confluence, or management guidelines for the Barr Creek works in Victoria, the Commission has no supervening power to impose its will; nor is there any obligation on contracting Governments to accept or implement the recommendations made.

In practice, it is possible that matters may not even get this far. In addition to the lack of any coercive executive powers given to the Commission, there is the general deficiency that the new Agreement retains the unanimity requirements of the old Agreement. Thus, except for a limited class of matters, any decision of the Commission requires the unanimous concurrence of all Commissioners.¹¹⁹ If any difference of opinion arises between Commissioners, cumbersome arbitration provisions come into operation.¹²⁰ There have been occasions in the history of the Agreement when a restrictive attitude to the scope of the Agreement on the part of one or more Commissioners, coupled with the unanimity requirement, have combined to prevent even the open discussion of, let alone the resolution of, or action upon, contentious matters. In fairness, it must also be noted that there have been other notable instances, such as the Commission's unanimous decision to reverse its view on the desirability of Chowilla Dam in favour of Dartmouth, despite the opposition of South Australia, where independent, professional judgment on the part of the Commission has carried the day and the requirement of unanimity has not proved to be a barrier. But such fortitude on the part of individual Commissioners, in the face of clear instructions from the Government by whom they are appointed, must be exceptional. Accordingly, it must be quite possible — indeed, likely — that the Commission will prove to be unable to agree to make recommendations to a Government pursuant to cl 27 if any element of those recommendations is, or might be, unpalatable to the Government appointing one of the Commissioners.¹²¹

The powers of the Commission with respect to water quality are thus precarious. At the most, it would seem to be able only to act as a spur to responsible and co-operative action by the contracting Governments. In recognition of this, the draft cl 29 was originally conceived of as a mirror of cl 27(3)(b), which requires the Commission to inform and to consider matters raised by, a contracting Government where the implementation of any Commission proposal would significantly affect the quality of water under that Government's control, supervision or protection. Historic sensitivities about State sovereignty precluded any solution which gave the Commission any veto over, or executive

119 *Ibid* cl 19(5).

120 *Ibid* cl 116.

121 In this context, it is worth noting that the River Murray Working Party established to report to the Steering Committee of Ministers on changes required to the River Murray Waters Agreement, set up a Water Quality Committee, an Irrigation Farm Practices Committee, a Salinity Committee and a Biological Conservation Committee. The last Committee was unable to report because New South Wales refused to appoint a representative to the Committee: see *supra* n 6 at 5.

authority in relation to, developments, on intra-State tributaries or adjacent thereto. The best which could be done was to give the Commission power to pre-empt the moral plane and allow it to point out to, say, the Water Commissions of either of the upstream States, or the Victorian Environment Protection Authority or the New South Wales Department of Environment and Planning, as the case may be, that a particular development proposal is not in accordance with the Commission's view of what is best for the River Murray. Such a public stand, as custodian of the national conscience, could have the effect of showing up State parochialism and discourage at least more flagrant acts of selfishness.

Manifestly, such an indirect brake on State selfishness would only have a chance of working if each State undertook to give the Commission advance information of any sensitive proposals and allowed it sufficient time to digest that information and make effective representations, before deciding that a particular proposal should proceed. What is more, a Commissioner should not be in a position to muzzle the voice of the Commission and to prevent it from making representations which might embarrass the Government which appointed him, or authorities within his State.

The draft cl 29 before the Premiers and the Prime Minister at their meeting of 16 October 1981 applied to any proposal which might significantly affect the flow, use, control or quality of any water under the control or supervision of the Commission. New South Wales suggested that the power to make representations and the prior obligation to inform the Commission should be confined to State projects. Such a limitation was unacceptable to the other parties, as it would rule out proposed private diversions, such as those to which South Australia had objected before Land Board inquiries, or other private projects such as the proposed wood-chip plant near Albury. Nevertheless, in purely practical terms, the Commission would not wish to have every proposed development referred to it and block exemptions of particular types of proposals were envisaged. Thus, draft cl 29(2) envisaged that the Commission would consult with each Government to reach agreement with it and its relevant authorities, as to those proposals which need *not* be referred to the Commission. Until such an agreement was reached, however, all proposals would have to be referred.

Unfortunately, the clause did not survive the furnace of the meeting on 16 October 1981. Somehow, a slight but sinister deletion of the word "not" occurred in cl 29(2). It could hardly have been inadvertent; but one also wonders whether its effect can have been understood by all those present. The result is now that no proposed developments within upstream States need be reported to the Commission, unless and until each State agrees to report particular categories of proposal. It is always possible that the upstream States, or their agencies, will be unable to reach agreement on those categories of proposal which must be referred to the Commission. If so, the Commission will be denied any opportunity of presenting an independent, balanced view of the conflicting interests before licensing authorities within that State. Furthermore, even if certain proposals are referred to the Commission, its decision to make representations to a contracting Government or its agency will still have to comply with the unanimity requirements.

In summary, then, Mr Arnold's view that the new Agreement constitutes "a permanent solution to the problems of water quality in the River Murray" rests on

- (a) The Commission's power to conduct water quality investigations on the Murray and — with the consent of the upstream States — relevant tributaries.
- (b) The Commission's power to monitor water quality in the main stem and — with the consent of the upstream States — relevant tributaries.
- (c) The Commission's power to formulate water quality objectives. This can only be done in consultation with responsible authorities within the contracting Governments, who may regard themselves as under no obligation to consult. Even if objectives are formulated, there is no obligation on the upstream States either to consider those objectives or to adopt them, formally or informally, as their own.
- (d) The Commission's power to make recommendations to a contracting Government or to any authority, agency or tribunal thereof on any matter which may affect the quality of the Murray or of its storages.
- (e) The Commission's power to make representations on State proposals which may have a significant effect on the quality of the Murray or its storages — provided the State chooses to refer that proposal to the Commission.

All of these powers of the Commission are, of course, subject to the Commission's decision to exercise them and, as has been noted, this decision must be a unanimous one. It should be noted that no such paralysing fetter is placed on the Snowy Mountains Council, where majority decisions are taken but provision is made for recording dissent.¹²² The imperative need to abolish the unanimity provisions and to allow majority decisions was squarely placed before the Working Party and appears in an appendix to its Report to the Steering Committee of Ministers.¹²³ The fact that they have been retained means that it remains possible — indeed, probable — that Commissioners will continue to use that sanction to muzzle the Commission and to prevent it from taking any effective action on water quality matters.

The only other clause which might form part of Mr Arnold's "permanent solution" is cl 30, which was inserted to broaden the deliberative powers of the Commission and to counter arguments that it might only legitimately consider matters relating to water conservation and irrigation. In exercising its powers under the Agreement, including its discretion in implementing the water-sharing provisions, "the Commission may, at its discretion, have regard to the possible effects of its decisions on any river or water management objectives".¹²⁴ Accordingly, the Commission has power to consider the consequences of its acts on water quality, but it is not obliged to do so and the clause could not thus be said to enlarge or confirm any rights South Australia may have in this respect.

122 Snowy Mountains Hydro-electric Agreement 1957 cl 18(4) and (6).

123 *Supra* n 6, Appendix D, para 7.

124 This power is reinforced by cl 81(2)(b)(i) which entitles the Commission in giving directions for releases to have regard to "the improvement or maintenance of the quality of the waters" downstream of the South Australian border.

It thus seems impossible to view the 1981 Agreement as providing any more definitive guarantees to South Australia that water quality will be maintained. Certainly, the Agreement places no additional obligations on the upstream States to maintain water quality, although they may, at their election, accede to quality criteria proposed by the Commission or to recommendations or representations made by it in relation to intra-State activities which may have adverse effects on the Murray waters.

At the same time, the very imprecision of the additional powers of the Commission and the obligations accepted by the contracting Governments with respect to water quality, would seem to indicate that the Agreement does not effectively displace whatever rights South Australia might have to maintain water quality under a common-law doctrine of reasonable sharing, as qualified by the express water-sharing provisions of the Agreement. The problem remains that, by conceding that the upstream States may share all available water in the main stem and tributaries, except for the guaranteed monthly minimum flows, and by accepting only limited water quality objectives at Swan Hill and Merbein, she may have agreed to accept whatever water quality consequences accrue in South Australia, provided the provisions of the Agreement concerning deliveries are observed. It thus seems that acquiescence by South Australia in the quantitative entitlements of the upstream States, pursuant to the Agreement, might be fatal to her arguments for improved water quality.

The question arises, then, whether South Australia would be better off to resile from the Agreement and seek to assert her common-law rights, both as to a reasonable quantity and a reasonable quality. Such a course of action would readily be contemplated were a comparable situation to arise in the United States, and the Supreme Court would not hesitate to make an "equitable apportionment" of the available resource between the contending States. As previously suggested, however, such an apportionment would require the application of principles other than pre-existing rules of law. Even if the High Court were to adopt a "reasonable sharing" doctrine, it would confine itself to declaring whether particular existing or proposed activities of the upstream States were in breach of South Australia's rights to a reasonable share. Quite apart from the substantial problems of proof which would confront South Australia in sheeting home responsibility for particular water quality problems to either of the upstream States, a succession of actions would be necessary before South Australia could be guaranteed anything approaching the certainty of the minimum monthly entitlements established by the Agreement. In addition, she runs the risk that the High Court may not, in fact, recognise an inter-State common law to apply to the case; in which event, she would be forced to renegotiate a political solution, having already spurned an existing compact.

It is always possible, of course, that although the new formal provisions of the Agreement do nothing to enlarge or protect South Australia's rights, the upstream States may elect to observe the spirit rather than the letter of the Agreement. Some encouraging signs already exist. Thus the Commission has engaged Binney and Partners and Maunsell and Partners to prepare a water quality model for the Murray and its storages, as a prelude to positing appropriate water quality objectives. If the upstream States accept these objectives and operate their intra-State works, and control future development, in a manner

which accords with the objectives proposed, South Australia's interests may well be protected. Again, although no longer strictly obliged so to do, as a result of amendments made to the draft Agreement of 16 October 1981, Victoria has already voluntarily reported to the Commission the proposed disposition of additional post-Dartmouth waters recommended by the Victorian Public Works Committee.¹²⁵ Finally, it is possible (although by no means certain) that water accounting rules, which are currently being proposed to adjust the entitlements of New South Wales and Victoria from season to season, may incorporate certain penalties for unusual saline contributions by either upstream State, thereby allowing the Commission greater latitude in providing dilution flows to benefit South Australia.

Ultimately it is the lack of any coercive powers in the Commission and correlative obligations on the States concerning water quality and the absence of power in the Commission to make decisions by majority vote, which make the compact a precarious one. To confer one without the other might not advantage South Australia. Coercive powers, which could only be implemented by a unanimous decision of the Commission, would obviously carry no guarantee of implementation. On the other hand, in the absence of correlative obligations on the part of the States which are clearly specified in the Agreement, South Australia would be ill-advised to accede to majority voting provisions. In the final analysis the unanimity requirement is presently South Australia's last bastion against possible obduracy on the part of Commissioners representing the other contracting Governments.

As things stand, South Australia's interests in the matter of water quality continue to depend on the goodwill of the upstream States. There is nothing in the history of the Murray question to create sanguine expectations of the continuance of that goodwill or that any solution which depends upon it will be permanent. It is thus salutary to recall Glynn's opinion, in 1902:

"all the States apparently desire to treat the rivers from a federal point of view; unfortunately, however, with politicians, other considerations take weight — we, perhaps, play too much to the galleries at times."¹²⁶

Postscript

The recently reported decision of the High Court in *Hazlett v Presnell*¹²⁷ offers interesting confirmation of two possibilities raised in the course of this paper. The first concerned the preparedness of the High Court, in the light of its recent attitudes, to adopt firmly established principles of international law by analogy to resolve inter-State disputes where the common law affords no appropriate pre-existing rule of law. The second concerned the connected possible existence of an inter-State common law.

The substantive question was whether Beveridge Island lies within Victoria or New South Wales which, in turn, depended on a conclusion

125 Victoria Parliamentary Public Works Committee, *Progress Report No 1: Water Allocations in Northern Victoria Inquiry* (1982).

126 *Supra* n 2 at 8.

127 (1983) 43 ALR 1; (1982) 56 ALJR 884.

whether "the whole watercourse" of the River Murray was wholly comprised by the channel to the north of the Island or, in whole or in part, included the southern channel. The principal grounds of the decision were that the Imperial Acts of 1850 and 1855¹²⁸ included an implied grant of executive power jointly to ascertain the identity of the River Murray, its course and whole watercourse. This executive power was effectively exercised by the Colonial Secretary of New South Wales and the Chief Secretary of Victoria by reaching a bona fide "accord" (albeit without the prior or subsequent sanction of either Parliament or Governor-in-Council) through a joint survey which established that "the main channel" of the River lay to the north of Beveridge Island. As a result, the Colonial Secretary of New South Wales had conceded by letter in 1876 that as "there is no question whatever that Beveridge Island belongs to Victoria, the Government of New South Wales lays no claim to it".

The Court relied heavily on the High Court and Judicial Committee decisions in *South Australia v Victoria*¹²⁹ in concluding that such an implied executive power existed and pressed the analogy still further to hold that there was not only an additional implied executive power, but a positive duty, on the colonial administrations physically to delimit or mark the boundary established by the Acts of 1850 and 1855 on the terrain. This much of the case must, however, be open to serious doubt. It depends on a false analogy between the astronomical boundary in question in *South Australia v Victoria* — which would only be perceptible to citizens of either colony if it were translated, with as much precision as was possible, into a border zone by double lines of blazed trees or mounds of earth at intervals of one mile — and a riverine boundary — where the border zone is patent for all to see and the precise line is established by a rule of law, once the watercourse of the Murray is identified. The finding further fails to take into account that the Act in question in *South Australia v Victoria* contains an express grant of executive power to the King-in-Council to "fix the boundaries" of the new provinces it was empowered to erect; whereas the Act of 1855 contains no such executive power. Instead, it provides a test to operate *ministerio legis*, with no need for ancillary executive powers beyond those necessary to identify the course and whole watercourse of the Murray. Finally, the executive obligation of demarcation, if it exists, would potentially conflict with the top-of-the-bank test enunciated by the Court in *Ward's Case*.

For present purposes, it is the subsidiary conclusion of the Court that, even if the purported exercise of the implied executive power had been deficient, Beveridge Island would nevertheless be in Victoria, which is most important. Relying on obiter dicta by Griffith CJ in *South Australia v Victoria*,¹³⁰ United States authority and principles of international law, the Court adopts a doctrine of "prescription and acquiescence".¹³¹ According to this doctrine, an assertion and exercise of sovereignty for a sufficient period by Victoria, accompanied by acquiescence of New South Wales, was sufficient to produce the result that Beveridge Island was now Victorian territory.

128 Supra n 7 and 8.

129 Supra n 10; (1914) 18 CLR 115.

130 Supra n 10 at 706.

131 Supra n 127 at 14; 892.

The doctrine thus enunciated is, for all intents and purposes, the same as the international law doctrine of "acquisitive prescription" which, it has earlier been suggested, could be adopted by analogy in the absence of an appropriate common-law rule to apply to disputes between States. It will be recalled that the argument for such a doctrine was made in the context of examining whether, in a dispute between Victoria and New South Wales, it could be argued that Victoria had, by open and effective acts of sovereignty in which New South Wales had acquiesced, obtained territorial sovereignty over such lands as lie between the top of the southern bank and some appropriate water-line. Although the High Court does not specifically advert to this consequence, it does seem to be a necessary result of the doctrine enunciated in *Hazlett's Case*. Accordingly, it seems that the precise boundary can no longer be conveniently ascertained by application of the rule of law embodied in the 1855 Act and elaborated in *Ward's Case*. Instead, it may now only be discovered by a careful examination of the facts on which claims of territorial acquisition by prescription and acquiescence might be established at any point along the river. The result, in terms of administrative convenience, may well be even less helpful than the top-of-the-bank test and lend additional urgency to jointly establishing a more convenient border.

The High Court sought to invoke analogies with the common-law doctrine of adverse possession in enunciating the rule of prescription and acquiescence. In the earlier discussion of the New South Wales Limitation Act 1969, however, it has been suggested that the common-law rules as embodied in Statutes of Limitation, while they may bar actions for recovery and even, in some cases, extinguish title, cannot bear on territorial sovereignty. Under common-law or statutory rules, it would still be open to New South Wales to legislate with respect to the contested strip and the border would remain unchanged. Under the doctrine of prescription and acquiescence, however, New South Wales would also lose its territorial rights. Such a result cannot be reached by any known doctrines of the common law.

The other sources which the High Court acknowledges for its doctrine are, firstly, federal common law as developed by the United States Supreme Court, with its special jurisdiction to determine both justiciable and non-justiciable matters and to give weight to "public convenience and the avoidance of controversy", and international law. Insofar as the doctrine is not based in English common law, it is difficult to resist the conclusion that the Court has here enunciated a principle which can only be appropriately characterised as "inter-State common law".

Elsewhere in its judgment, the Court enunciates another rule which can similarly only be characterised as a rule of "inter-State common law". The Court holds that the boundary established by the rule in *Ward's Case* is subject to gradual and imperceptible change by accretion and erosion. Despite their assertion that this is an application of ordinary common-law rules, the common-law doctrine only applies to water/land or in-river (*medius filus* or thalweg) boundaries. The Court, in seeking to apply it to a top-of-the-bank boundary, extends the doctrine to a land/land boundary.¹³² To do so is to apply the doctrine in

132 The only case where the doctrine has apparently been applied to such a boundary is *Foster v Wright* (1878) 4 CPD 438. Lindley LJ in subsequently reviewing his earlier

circumstances where at least one of the two rationales of the doctrine accepted by the Judicial Committee in the recent case of *Southern Centre of Theosophy Inc v South Australia*¹³³ is manifestly inapplicable. The doctrine exists in order to protect the natural incidents of proprietorship of riparian lands. To apply the doctrine to a land/land boundary is to apply it where one landowner, of necessity, is not a riparian proprietor and accordingly has no special incidents of title to protect.

Accordingly, if the doctrine of accretion enunciated by the High Court were applicable to land/land boundaries between private landowners, common-law rules of accretion would be extended well beyond their accepted limits, and invidious choices would have to be made between almost contemporaneous decisions of the High Court and the Judicial Committee. It would, it is suggested, be preferable to regard the High Court's actions not as a purported, straightforward application of the common law, but as a particular doctrine enunciated to assist in determining the location of a top-of-the-bank border between federal States. It, too, would be a particular doctrine of "inter-State common law".

Hazlett's Case thus seems to offer substantial support for the arguments previously advanced in the paper for recognition of principles of "inter-State common law". In view of the studied caution of Stephen J in *Ward's Case* to confine himself to the task at hand and not to speculate on rules which might apply in a dispute between States arising under s 75(iv) of the Constitution, it is interesting that the Court chose to enunciate two doctrines of inter-State common law in *Hazlett's Case*, which was not such a dispute.

132 *Cont*

decision in *Hindson v Ashby* [1896] 2 Ch D 1 was equivocal as to correctness and chose to treat it as having involved a *medius filus* boundary, which manifestly it did not. *Foster v Wright* must thus be viewed as dubious authority for extending the doctrine to land/land boundaries.

133 [1982] 2 WLR 544.