Defining Rights, Powers and Limits in Transboundary River Disputes:
A Legal Analysis of the River Murray

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I chatter, chatter, as I flow
To join the brimming river,
For men may come and men may go,
But I go on for ever.

Alfred Lord Tennyson, The Brook

The atmosphere outside the House is rather foggy, and the debate has resolved itself into a somewhat similar condition. After listening to the Premier of New South Wales and other learned lawyers, I shall not even quote the celebrated case of the spring and the brook, or imitate those honorable members, some of whom, like Tennyson’s brook, would, I believe, be able to go on for ever. I intend to put my remarks in as few words as possible. Mr. Carruthers has proposed what he considers a fair compromise, but that compromise, boiled down, really means that New South Wales is to retain not only all the rights she has, but also all the rights that she says she has.

Vaiben Solomon, South Australian Delegate

Australasian Federal Convention, Melbourne, 2 February 1898
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ABSTRACT

Since Federation, the allocation of water from the River Murray between States of Australia has always been determined by political agreement. In 1914, the first formal agreement between New South Wales, South Australia, Victoria and the Commonwealth was reached. Subsequent agreements as to the allocation and regulation of the water of the River Murray have never been easy to reach and have caused tension between the States. As a consequence, there have been occasions when a State – most commonly South Australia – has considered its legal position (and the possibility of litigation) in the absence of an intergovernmental agreement. That, of course, has only added to the tensions associated with creating an intergovernmental agreement.

The uncertainty of how the waters of the Murray might be shared in the absence of an intergovernmental agreement has led to many assertions that the States have a ‘right’ to a share of the waters of the River and, moreover, that these ‘rights’ are enforceable by the High Court.

This thesis examines the allocation of water between States from a river that flows through or forms the border between two or more States (a ‘transboundary river’) in the absence of an intergovernmental agreement, with reference to the current known state of the law. To put it another way, the thesis tries to anticipate how the High Court might approach this problem if faced with litigating State parties agitating these legal questions. In this thesis I demonstrate that arguments contending that a State has, for example, a common law ‘right’ to a ‘reasonable share’ or ‘fair share’ of the water from the Murray may not provide the best solution. Instead, the solution to the problem lies in examining the limits on State legislative and executive power. However, such a conclusion does not leave one State at the mercy of its upstream counterpart. I contend that there are limits on a State’s legislative and executive power with respect to regulating a transboundary river that ensure each State has, at a minimum, access to sufficient water from transboundary rivers to meet the critical human water needs of the communities within the State.
DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

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STATEMENT OF AUTHORSHIP

This thesis contains material from or draws upon the following published works:

(1) Adam Webster and John M Williams, ‘Can the High Court Save the Murray River?’ (2012) 29 Environmental and Planning Law Journal 281

(2) John M Williams and Adam Webster, ‘Section 100 and State water rights' (2010) 21 Public Law Review 267

To the extent that this thesis draws upon these publications, it is the candidate’s own work.

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Author Contributions

Adam Webster (Candidate): research and analysis; drafting of the manuscript.

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Adam Webster (Candidate): additional research and drafting of manuscript relating to the drafting of s 100 of the Constitution at the Federal Convention Debates and cases dealing with s 100; editing manuscript.

John M Williams: research and analysis; drafting of manuscript; supervision of research.

By signing the Statement of Authorship, each author certifies that their stated contribution to the publication is accurate and that permission is granted for the publication to be used in the candidate’s thesis.

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CHAPTER 1: INTRODUCTION

1.1 The Thesis

Since Federation, the allocation of water from the River Murray between States of Australia has always been determined by political agreement. The first intergovernmental meeting after Federation to discuss how best to utilise the waters of the River was held in 1902 between representatives of the governments of South Australia, Victoria, New South Wales and the Commonwealth, and interest groups from along the Murray, in Corowa, a small town in rural New South Wales.\(^1\) Twelve years later, the first formal agreement between New South Wales, South Australia, Victoria and the Commonwealth was reached.\(^2\) However, reaching agreement between the States and the Commonwealth on how to allocate and regulate the waters of the River Murray has never been easy, and there have been occasions when a State – most commonly South Australia – has considered its legal position in the absence of an intergovernmental agreement.\(^3\)

The uncertainty of how the waters of the Murray might be used in the absence of an intergovernmental agreement has led to assertions being made as to the ‘rights’ of the States to a share of the waters of the River and that these ‘rights’ are enforceable by the High Court.\(^4\) In this thesis I demonstrate that arguments contending that a State has, for

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1 ‘The Corowa Conference’, The Register (Adelaide), 28 March 1902, 4. The conference was organised by the Main Channel League: see Daniel Connell, Water Politics in the Murray-Darling Basin (Federation Press, 2007), 83.

2 Agreement was reached on 9 September 1914 when the Prime Minister and the Premiers of New South Wales, Victoria and South Australia signed the River Murray Waters Agreement. The agreement was implemented by the Commonwealth and the relevant States passing separate but substantially similar legislation: see River Murray Waters Act 1915 (Cth), River Murray Waters Act 1915 (NSW), River Murray Waters Act 1915 (Vic), River Murray Waters Act 1915 (SA).


4 While this thesis will examine the current legal position, these arguments existed prior to the establishment of the High Court in 1903: see Chapter 2.4, Chapter 3.2 and Chapter 4.2.
example, a ‘right’ to a ‘reasonable share’\textsuperscript{5} or ‘fair share’\textsuperscript{6} of the water from the Murray are not the best solution to this problem. Instead, it is argued that the solution to the problem lies in examining the limits on State legislative and executive power. I contend that there are limits on a State’s power to regulate the use of water from a river that flows through or forms the border between two or more States (a ‘transboundary river’\textsuperscript{7}). I argue that these limits on State power can be supported by an implication derived from the text and structure of the \textit{Australian Constitution}.

The allocation of the waters from the Murray between New South Wales, Victoria and South Australia has caused the most controversy and will, therefore, be the focus of this thesis.\textsuperscript{8} However, the legal questions and their answers apply equally to other transboundary rivers. It is beyond the scope of the thesis to consider the allocation of water from rivers that flow through or border a State and a \textit{Territory}.\textsuperscript{9} The position of the territories is different in that the Commonwealth Parliament can ‘make laws for the government of any territory’.\textsuperscript{10}

The remainder of the introduction will \textbf{first} give a brief overview of the Murray-Darling Basin, placing the thesis in the broader historical, social, economic and environmental context. \textbf{Secondly}, it explains the current challenges in sharing water between the States

\textsuperscript{5} In the 1970s, Ian Renard argued that interstate water disputes could be resolved by the High Court developing a doctrine that he described as ‘the rule of reasonable sharing’: Ian Andrew Renard, \textit{Australian Interstate Rivers – Legal Rights and Administration} (LLM Thesis, University of Melbourne, 1971) 199-209. This argument is examined in Chapter 6.4.2.

\textsuperscript{6} When discussing the rights of the colonies and the future rights of the States during the Melbourne Convention, South Australian Charles Kingston stated that if water from the Murray were to be used for irrigation then South Australia was equally entitled to a ‘fair share’ of the water for that purpose: see \textit{Official Record of the Debates of the Australasian Federal Convention}, Melbourne, 24 January 1898, 94 (Charles Kingston). The arguments made by the convention delegates are examined in Chapter 3.2 and Chapter 4.2.

\textsuperscript{7} The term ‘transboundary river’ also refers to a river that flows through or forms the boundary between two or more of the Australian colonies prior to federation. The River Murray is not the only river in Australia that forms the boundary between two States or crosses borders: others include, for example, the Snowy River (New South Wales and Victoria), Cooper Creek and Diamantine River (Queensland and South Australia), and Dumaresq River and Macintyre River (New South Wales and Queensland). The history of the dispute over the waters of the Murray is examined in Chapters 2 and 3.

\textsuperscript{8} There are a number of rivers that cross the border between a State and a Territory: for example, the Georgina River (Northern Territory and Queensland) and the Finke River (Northern Territory and South Australia).

\textsuperscript{9} \textit{Australian Constitution} s 122. The fact that the Commonwealth can make laws for a Territory means that where the Commonwealth has legislated, s 109 of the \textit{Constitution} will apply with respect to any inconsistency between the law of the Commonwealth and the law of a State. However, s 109 does not apply to inconsistencies between the law of a State and the law of a Territory. As a consequence of the unique position of the Territories and the fact that the significant disputes to date have been between States, a detailed analysis of this issue is beyond the scope of this thesis.
within the Murray-Darling Basin and demonstrates that there is a real likelihood that the
question of how to allocate the waters of the Murray in the absence of an
intergovernmental agreement could be litigated in the near future. **Thirdly,** it reviews
the existing literature before finally turning to explain the methodology and overall structure
of the thesis.

### 1.2 The Murray-Darling Basin

The allocation of water within the Murray-Darling Basin affects a significant number of
people. The Murray-Darling Basin includes territory within four States – Queensland,
New South Wales, Victoria and South Australia. The Australian Capital Territory lies
wholly within the Murray-Darling Basin. The majority of the area of both New South
Wales (75 per cent) and Victoria (60 per cent) lies within the Murray-Darling Basin.\(^{11}\)
The Basin occupies about one seventh of the total area of Australia,\(^ {12}\) is made up of over
20 river valleys,\(^ {13}\) and includes Australia’s three longest rivers – the Darling
(approximately 2700 km), the Murray (2500 km) and the Murrumbidgee (1600 km).\(^ {14}\)
Figure 1 below is a map of the area within the Murray-Darling Basin as defined by the
*Water Act*.\(^ {15}\) During the drier months the Basin acts as a storage facility, with a capacity
of 22,214 GL.\(^ {16}\)

Australians rely heavily on the water from the rivers within the Murray-Darling Basin.
Over two million people (approximately 10 per cent of Australia’s population) live within
the Basin and more than 1.3 million from outside the Basin rely upon its water for

\(^{11}\) Brian Pink, ‘Water and the Murray-Darling Basin - A Statistical Profile 2000-01 to 2005-06’ (ABS

\(^{12}\) E S Hills, ‘The Physiographic Setting’ in H J Firth and G Sawer (eds), *The Murray Waters – Man,
Nature and a River System* (Angus and Robertson, 1974) 1, 1; see also Pink, ‘Water and the Murray-

basin/basin-environment/geography/hydrology>.

\(^{14}\) Murray-Darling Basin Authority, *Rivers and Wetlands of the Murray-Darling Basin*

\(^{15}\) References in this thesis to the Murray-Darling Basin mean the ‘Murray-Darling Basin’ as defined in
s 18A of the *Water Act 2007* (Cth). Figure 1 is a pictorial reference of that definition of the Murray-
Darling Basin: see *Water Act 2007* (Cth) Sch 1A. The definition of the Murray-Darling Basin as
defined in the *Water Act* is not controversial and is sufficient for the purpose of this thesis. Important
to this thesis is the fact that the Basin contains a number of rivers that form the boundary of or flow
between two or more States.

data/water-storage>. The storage capacity is a function of the locks and weirs installed throughout the
Basin.
domestic use, the vast majority of whom live in Adelaide.\textsuperscript{17} In addition to urban use, 39 per cent of Australia’s agricultural output comes from the Murray-Darling Basin.\textsuperscript{18} Agriculture is by far the largest user of water, accounting for approximately 80 per cent of water consumption in the Basin.\textsuperscript{19}

Figure 1 – The Murray-Darling Basin (Source: Water Act 2007 (Cth) Sch 1A)

Of the total water taken from the rivers in the Basin, 49 per cent is extracted in New South Wales, 35 per cent in Victoria, about 8 per cent in Queensland and 7 per cent in South Australia.\textsuperscript{20} Adelaide’s average water use accounts for approximately 1 per cent of


\textsuperscript{18} Pink, ‘Water and the Murray-Darling Basin - A Statistical Profile 2000-01 to 2005-06’, above n 11, 87; Connell, above n 1, 8.


the total water extracted from the Murray-Darling Basin. While Adelaide’s water use is a very small component of the total amount of water extracted, in times of drought up to 90 per cent of Adelaide’s water supply can come from the Murray. Approximately 75 per cent of South Australia’s population resides in greater Adelaide. Adelaide’s heavy reliance on the Murray in times of drought means severe water shortages in the Basin can affect a large proportion of South Australia’s population.

Of the rivers within the Murray-Darling Basin, the use of the waters from the River Murray has caused the greatest controversy. The volume of water within the River Murray is accessible by three States – New South Wales, Victoria and South Australia. East of the South Australian border the River Murray forms the boundary between New South Wales and Victoria. In 1850, the Imperial Parliament passed the Australian Constitutions Act 1850 (Imp) 13 & 14 Vict, c 59 which separated the colony of Victoria – previously known as the District of Port Phillip – from New South Wales. In doing so, that Act defined the boundary of the new colony (and thereby the boundary between that colony and New South Wales). In 1855 the New South Wales Constitution Act 1855 (Imp) 18 & 19 Vict, c 54 clarified the precise position of the border and confirmed that the River Murray remained within the colony of New South Wales. The southern bank, therefore, marked the border between the two colonies of New South Wales and Victoria. However, the Imperial legislation did not expressly state who owned the water of the River Murray or how the water was to be allocated between the colonies.

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24 See Figure 1.
25 Australian Constitutions Act 1850 (Imp) 13 & 14 Vict, c 59, s 1.
26 New South Wales Constitution Act 1855 (Imp) 18 & 19 Vict, c 54, s 5.
27 In 1980 the High Court examined the question of the precise location of the boundary for the purposes of determining whether a murder occurred in New South Wales or Victoria: Ward v The Queen (1980) 142 CLR 308.
1.3 The Current Problem

In 2002 significant parts of south-eastern Australia experienced a prolonged period of drought.\textsuperscript{28} Lower than average rainfall across parts of the Murray-Darling Basin resulted in the reduced flow of water through the Basin, causing the mouth of the River Murray to become choked with sand. In October of that year the mouth of the Murray was about to close completely.\textsuperscript{29} For the Coorong and Lakes Alexandrina and Albert at the mouth of the Murray, the environmental consequences associated with the mouth closing completely were significant.\textsuperscript{30} The short-term solution was to dredge a channel and keep the mouth of the Murray open.\textsuperscript{31} The long-term solution was to address the cause of the problem: the reduced natural flow of the River Murray.

Historically, one of the problems with water reform has been that it is reactionary, addresses only existing needs and will only be developed in times of extreme crisis. This phenomenon has also been observed in the United States and has been described by the American legal scholar, Robert Glennon, as the ‘hydro-illogical cycle’.\textsuperscript{32} Such an approach to reform runs the risk of focusing on the current crisis at the expense of developing a plan that considers the environmental sustainability of water resources over the longer-term.

\textsuperscript{28} Sometimes referred to as the ‘millennium drought’, from 2000 to 2010 large parts of south-eastern Australia were affected by drought. In some parts of this region, the drought began as early as 1997: see State of the Environment 2011 Committee, ‘Australia State of the Environment 2011’, (Independent report to the Commonwealth Minister for Sustainability, Environment, Water, Population and Communities, 2011) 75. Whether the frequency and severity of such droughts are a product of climate change is an important scientific question, but one which is beyond the scope of this thesis.


\textsuperscript{31} At a cost of about $2million per year: Australian Broadcasting Corporation, ‘Dredging the Murray’, above n 29.

\textsuperscript{32} Robert Glennon describes the willingness to act only when drought reaches crisis-point (and to ignore long-term water allocation problems when there is sufficient water) as the ‘hydro-illogical cycle’: Robert Glennon, Unquenchable – America’s water crisis and what to do about it (Island Press, 2010) 35.
On 25 June 2004 the Commonwealth Government and the Governments of New South Wales, Queensland, South Australia, Victoria as well as the Australian Capital Territory and the Northern Territory acknowledged the need to improve the regulation of water across Australia and signed the Intergovernmental Agreement on the National Water Initiative (NWI). The NWI sought to address the over-allocation of water from Australian rivers. The NWI also recognised the need for ‘a separate agreement to address the overallocation of water and achievement of environmental objectives in the [Murray-Darling Basin]’. In July 2008 the Commonwealth Government along with the Governments of New South Wales, Queensland, South Australia, Victoria and the Australian Capital Territory signed the Murray Darling Basin Agreement. As part of this regime, in late 2008 the State Governments agreed to refer legislative power to the Commonwealth for the purpose of the Basin being managed at a federal level. The Water Act 2007 (Cth) and the subsequent amendments made by the Water Amendment Act 2008 (Cth) established the Murray Darling Basin Authority (MDBA) to implement the intergovernmental agreements. The object of the Water Act is, amongst other things, ‘to ensure the return to environmentally sustainable levels of extraction for water resources that are over-allocated or overused’. 

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34 Intergovernmental Agreement on a National Water Initiative, above n 33, cl 23(iv).


36 The Constitution provides that the Commonwealth Parliament shall have power to make laws with respect to ‘matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopted the law’: Australian Constitution s 51(xxxvii). The referrals are made by the respective State Parliaments: see Water (Commonwealth Powers) Act 2008 (NSW), Water (Commonwealth Powers) Act 2008 (Vic), Water (Commonwealth Powers) Act 2008 (SA), Water (Commonwealth Powers) Act 2008 (Qld). These acts are in substantially the same terms. Section 4 of the Acts is the operative provision that makes the referral to the Commonwealth. The scope of the referral is defined in s 3 of the Acts.


38 Water Act 2007 (Cth) s 3(d)(i).
In 2009 the drought which had debilitated large parts of south-eastern Australia for up to ten years ended. That end was confirmed the following year in the most extreme fashion: widespread flooding. Consequently, the amount of water within the Basin increased and the urgency to find a long-term solution to the problem that existed five years prior had evaporated. However, the current ‘wet’ period will not last forever and south-eastern Australia will face another drought at some point in the future.

In 2011, pursuant to the Water Act, the MDBA released the draft Basin Plan for consultation. The Basin Plan is to ‘provide for limits on the quantity of water that may be taken from the Basin water resources as a whole and from the water resources of each … area.’ The draft Basin Plan was met with great opposition by some sectors of the community. Farmers and irrigators claimed the draft Basin Plan would return too much water to the Murray-Darling Basin at the expense of agriculture in the Basin and would result in the demise of many rural communities. Those concerns were shared by then Shadow Minister for Regional Development, Local Government and Water, and now Minister for Agriculture, Barnaby Joyce, when he explained that continuing with such reform in light of the increase in water was unnecessary:

We currently have the continued deliberations over the Murray Darling Basin and, as absurd as it is, with the amount of water around, we are still heading down a path that is going to shut regional towns down by shutting off their water.

At the same time, environmental groups claimed that the draft Basin Plan did not go far enough to ensure the long-term sustainability of the river system. In addition, a number

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40 Water Act 2007 (Cth) s 19(2). The purpose of the Basin Plan is set out in s 20 of the Water Act 2007 (Cth).


of State Governments were displeased with the amount of water to be returned to the river system. Upstream, the Queensland Government was concerned that too much water was to be returned to the Basin without the scientific basis for the recommendations in the draft Basin Plan being properly explained. As a consequence, the Queensland Government threatened to withdraw its referral of legislative power to the Commonwealth.\(^{44}\) In contrast, the South Australian Government demanded that more water be released into the lower reaches of the Murray, and asserted that it was legally entitled to ‘a fair share of the River Murray’ and would not rule out a High Court challenge should it be dissatisfied with the final Basin Plan.\(^{45}\)

The Basin Plan was adopted by the Minister for Sustainability, Environment, Water, Population and Communities in November 2012 and the various aspects of the Basin Plan will be implemented in the coming years.\(^{46}\) Whether such a legal challenge to the Basin Plan is forthcoming will depend on how it is received by the States in the next few years and whether it has the desired effect of creating a long-term solution that meets the environmental needs as well as the needs of water users along the River.

Evaluating the benefits of the Basin Plan for South Australia is complicated by the fact that the legal position of the States in the absence of an intergovernmental agreement is

\(^{43}\) It was reported at the time that ‘[e]nvironmentalists are unhappy, irrigators are angry, but the people who put the Murray-Darling Basin plan together think they have it basically right’: ‘Basin plan draws criticism from all sides’, above n 41. In 2010 the release of the \textit{Guide to the proposed Basin Plan} received similar mixed responses. As was noted in the Murray-Darling Basin Authority’s summary of the feedback that it had received regarding the \textit{Guide to the proposed Basin Plan}, ‘Some people thought that the volume of water proposed in the Guide to be returned to the environment was too low and others felt that it was too high’: see Murray-Darling Basin Authority, \textit{Overview of feedback on the Guide to the proposed Basin Plan} (April 2011), 6 <http://www.mdba.gov.au/files/publications/2011-basin-plan-feedback-report-20110511.pdf>.

\(^{44}\) It was stated by Andrew Cripps, Minister for Natural Resources and Mines, that ‘the Newman Cabinet was considering the possibility of withdrawing the State Government’s 2008 referral of power to the Commonwealth to manage water resources in the Murray-Darling Basin catchment in Queensland’: Andrew Cripps, ‘Queensland Concerns still not Addressed in Basin Plan’ (Media Statement, 2 July 2012) <http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=79726>.


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unclear. Would South Australia be better off if the South Australian Government withdrew its support for the Murray Darling Basin Agreement and litigated the matter instead? One claim that has been made by the South Australian Government is that the water from the Murray must be distributed between the States ‘equally and fairly’.

However, an Australian court has never adjudicated on the question of how to allocate water between States from a transboundary river.

In examining this issue, the extreme position that New South Wales could place South Australia in is sometimes raised: could the Government of New South Wales construct a dam on the River Murray so as to stop the flow of the River entirely and thereby deprive South Australia of all water from the River? Are there limits on the legislative and executive power of New South Wales that would prevent the construction of such a dam? The resolution of these questions is critical to the residents of South Australia – as the downstream State – because if such action is permissible then South Australia is solely reliant on the willingness of the upstream States to enter into an agreement that adequately provides for the needs of the lower reaches of the River. In the absence of an agreement, South Australia is dependent on the goodwill of the upstream States. It is therefore unsurprising that South Australia has resorted to the threat of litigation in an attempt to cajole the other States and the Commonwealth into an agreement.

The threat of legal action by the South Australian Government is a well-worn approach and has been used since before Federation. However, the likelihood that the current or a future South Australian Government will follow through with these threats is arguably greater than in the past. In 2009, South Australia commenced proceedings against Victoria claiming that the water trading rules, which restricted the amount of water that could be traded outside of water districts, were an impermissible restriction on interstate

48 The question whether s 100 of the Constitution provides the States with a right to water has been raised (but not considered in any detail) by the High Court: see Arnold v Minister Administering the Water Management Act 2000 (2010) 240 CLR 242, 264 [53] (Gummow and Crennan JJ); Commonwealth v Tasmania (1983) 158 CLR 1, 153 (Mason J). The scope of s 100 of the Constitution is considered in Chapter 3.
49 In 1897 South Australian, Henry Dobson asked this question during the debates regarding the drafting of the Australian Constitution at the Adelaide Convention: Official Report of the National Australasian Convention Debates, Adelaide, 17 April 1897, 822. See Chapter 4.2.
50 Historically the upstream States have not always been willing to negotiate with the South Australian Government: see Chapter 2.3.
51 See Chapter 2.3.4.
trade and commerce, and therefore offended s 92 of the Constitution. Although that matter settled, it demonstrated the South Australian Government’s willingness to litigate in an attempt to secure more water for South Australia. However, clarifying the legal position of the States is not without risk: if the High Court were to conclude that there are no limits on the legislative and executive power of New South Wales with respect to taking water from the Murray, South Australia would forever be on the back foot, as the upstream States would then have the geographical upper hand.

The threat of litigation by a State and the uncertainty surrounding this legal question can be used as a bargaining chip during negotiations in an attempt to bring about an agreement. However, Andrew Gregson, Chief Executive Officer of the New South Wales Irrigators’ Council has claimed that the South Australian Premier’s threat of litigation after the release of the draft Basin Plan took attention away from the more important issue:

SA would be better served by having a Premier engage in negotiations in good faith rather than perpetuate his recalcitrant ‘my way or I’m going to the courts’ political rhetoric.

Clarifying some of the issues surrounding the legal question could assist in any future negotiation of the allocation of water from the Murray between the States irrespective of whether the matter is ultimately litigated.

The legal question is, therefore, a live issue in Australian federalism. The fact that the question whether there exist a limit on State legislative and executive power with respect to regulating transboundary rivers has never been considered by an Australian court,

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53 The South Australian Government has continued to threaten to litigate the legal questions surrounding the allocation of the waters of the River Murray between the States: Keen, ‘Canberra expects river writs’, above n 3; Keen, ‘SA mulls legal redress’, above n 3.

54 After the release of the revised Murray-Darling Basin Plan South Australian Premier, Jay Weatherill declared: ‘We believe that our constitutional rights have also been trampled upon. ... I say now the season of poor compromises is over and the season for standing up and fighting has begun.’ See Jay Weatherill, ‘Response to the revised Murray Darling Basin Plan’ (News Release, 28 May 2012).

coupled with the fact that the High Court may be required to consider the issue in the near future, means that the issue requires further examination.

1.4 The Existing Literature

Disputes between States over water from the Murray-Darling Basin have always ultimately been resolved by political agreement. As a consequence, there has only been limited consideration of the legal questions surrounding transboundary rivers. The first detailed legal scholarship in this area was undertaken in the 1970s. Before then, there are fleeting references to the problem, but very little by way of academic discourse.

Prior to Federation, there was some consideration by politicians and representatives of the various colonial governments as to how to share the waters of the River Murray; however, the arguments take the form of political debate and rhetoric and were made in the context of attempting to negotiate a political solution. It was hoped that the question of how to share the waters of the Murray would be resolved in the drafting of the Australian Constitution. However, as I will explain in this thesis, the Constitution did not provide an express solution.

John Quick and Robert Garran in their book, Annotated Constitution of the Australian Commonwealth, published in 1901, provided one of the first post-Federation analyses of the legal issues surrounding the River Murray. Quick and Garran wrote that there was ‘no such thing as a riparian law between independent States’ and by ‘riparian law’ they were referring to common law riparian rights doctrine. In simple terms, the riparian rights doctrine granted the owners of the bank along a river within each colony – referred to as the ‘riparian proprietor’ – a right ‘to the reasonable use of the water for ... domestic purposes and for ... cattle’ (irrespective of how this use might affect other riparian proprietors downstream) and also the right to dam the river or take water for irrigation so long as those ‘extraordinary uses’ did not ‘interfere with the rights of other [riparian] proprietors’. Quick and Garran’s consideration of this issue was in part a response to an argument made prior to Federation: that the ‘rights’ of the States would be analogous to the ‘riparian rights’ of individuals within a colony. In rejecting the argument Quick and

56 I examine these arguments in detail in Chapter 4.2.
57 See Chapter 3.
59 Miner v Gilmour (1858) 12 Moo PC 131, 156; 14 ER 861, 870.
Garran explained that there could be no such thing as a ‘Federal common law on matters outside the legislative power of the Federal Parliament’.  

Also writing at that time, Andrew Inglis Clark, Tasmanian delegate to the 1891 National Australasian Convention and author of one of the early drafts of the Australian Constitution, explained that Federation must provide a solution to this problem. In reaching this conclusion, Inglis Clark contrasted the position of the newly formed States of the Commonwealth of Australia with nation states under international law. He explained that when nation states could not resolve their differences the ultimate recourse would be to war. However, Inglis Clark argued that because the colonies had come together by peaceful means to form a federation these disputes must now be resolved by the High Court; war as a method of dispute resolution was no longer an option for the States within the Federation. Inglis Clark’s analysis also raises the more difficult question: If the High Court was to resolve these disputes, what were the principles upon which the dispute would be settled. While Federation provided a forum, the role of federalism in identifying a solution is one issue that requires further and close attention and will be addressed in this thesis.

Inglis Clark also highlighted the glaring omission in s 100 of the Constitution – the only section of the Constitution to mention expressly the ‘waters of rivers’: while it placed a limit on the legislative power of the Commonwealth with respect to ‘the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation’, it made no mention of the ‘right’ of a State vis-à-vis another State. While Inglis Clark’s work identifies some of the central problems and questions that must be resolved by the High Court, he did not identify the legal reasoning that the Court could apply.

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60 Quick and Garran, above n 58, 890. A detailed analysis of Quick and Garran’s arguments is provided in Chapter 4.3.1.
62 A Inglis Clark, Studies in Australian Constitutional Law (Maxwell, 1901) 110.
63 The full text of s 100 of the Constitution provides: ‘The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.’
Dean of Law at the University of Melbourne and constitutional law scholar, Harrison Moore, in the second edition of his book, *The Constitution of the Commonwealth of Australia*, published in 1910, identified a number of key questions without providing substantial analysis or discussion. In the context of examining the jurisdiction of the High Court to determine ‘matters’ between States, Moore referred to the then-recent decision of the United States Supreme Court in *Kansas v Colorado*, which involved a dispute between two States as to how the waters of the Arkansas River, a transboundary river, were to be allocated between the States. He noted that the case ‘is peculiarly interesting to Australians since it deals with the respective rights of riparian States for which irrigation waters are desired or necessary’. Moore thought that the United States decisions provided guidance as to how similar transboundary river disputes might be resolved by the High Court. Moore wrote: ‘The American cases ... show that the right of a State to abstract waters is in any case subject to the right of other States to do the same, and that a balance has to be struck between them on grounds of reasonableness.’ One of the challenges for the United States Supreme Court was that the *United States Constitution* provided very little guidance in framing the legal relationships between the States. Similarly, the Australian High Court in dealing with any future dispute over the allocation of water between States from transboundary rivers will find very little assistance in the text of the *Australian Constitution* and will need to look beyond the bare words of the document. However, absent from Moore’s analysis is a detailed explanation of whether the American jurisprudence was applicable to the Australian constitutional setting.

The absence of any detailed discussion of the legal issues regarding transboundary rivers during the period immediately after Federation is not a criticism of those early constitutional scholars. Instead, it merely reflects the fact that there were many important constitutional uncertainties in this period and simply identifying the issues was the first step in their resolution. Furthermore, the focus of the State Governments was still on

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64 Section 75(iv) of the *Constitution* provides: ‘In all matters … between States … the High Court shall have original jurisdiction.’
65 *Kansas v Colorado*, 206 US 46 (1907). Moore also referred to the earlier decision of the Supreme Court in this dispute: see *Kansas v Colorado*, 185 US 125 (1902). The development of the law in the United States with respect to transboundary rivers is discussed in detail in Chapter 6.3.
67 Ibid 564.
68 The extent to which this is permissible to use extrinsic material, such as the drafting history, in constitutional interpretation is discussed later in this thesis: see Chapters 3.2.1 and 7.4.
reaching an agreement as to how to allocate the waters of the Murray between the States, which was achieved in 1914 with the signing of the River Murray Waters Agreement. However, how the waters of the Murray were to be shared in the absence of an intergovernmental agreement remained uncertain.

It was not until the 1970s that the first detailed legal scholarship in the field of water law in Australia was undertaken.\(^69\) Sandford Clark’s doctoral thesis submitted in 1971 was the first comprehensive analysis of water regulation in Australia.\(^70\) It examined the common law regulation of rivers and groundwater, and the implementation of legislative regimes and their effect on the common law. While Clark provided a detailed historical study of the dispute over the allocation of waters from the River Murray between the States, the legal analysis of the allocation of water from transboundary rivers was expressly stated to be beyond the scope of the thesis.\(^71\) Clark carved out this issue because Ian Renard, Clark’s colleague and student, was examining this problem. Renard’s thesis for the degree of Master of Laws (and associated publications) was the first comprehensive study of the legal problems associated with allocating water between States from transboundary rivers.\(^72\) In short, Renard’s thesis was that while the riparian rights doctrine was unsuitable in its application as between States, the common law was sufficiently flexible to create an ‘interstate common law’ doctrine, which he termed the ‘doctrine of reasonable sharing’.\(^73\) Renard contended that under this doctrine each State was entitled to a reasonable share of the water from a transboundary river. He gave four reasons in support of the existence of the doctrine: first, it is a dispute capable of judicial solution;\(^74\) secondly, the High Court has been given a specific grant of jurisdiction to deal with

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\(^{71}\) Clark, Australian Water Law – An Historical and Analytical Background, above n 70, 276, 425.


\(^{74}\) Renard, Australian Interstate Rivers – Legal Rights and Administration, above n 5, 180-1.
matters between States,\textsuperscript{75} thirdly, there is a presumption that within a federation states are bound by law,\textsuperscript{76} and finally, the common law is sufficiently adaptable and flexible to allow for such a doctrine.\textsuperscript{77}

Since the 1970s relatively little has been added to the literature analysing the legal issues surrounding transboundary rivers.\textsuperscript{78} It has only been in the last ten years when reaching political agreement has, at times, looked less likely that academic commentators have again considered the legal questions surrounding the sharing of water from transboundary rivers.\textsuperscript{79}

Over the past forty years there has been considerable development in the interpretation of the \textit{Australian Constitution}, which means the third reason given by Renard – that there is a presumption that within a federation states are bound by law – requires further attention. Renard acknowledged that ‘on several occasions the High Court has based decisions concerning relations between the Commonwealth Government and the States on the basic federal structure’. \textsuperscript{80} In support of this contention Renard referred to \textit{Essendon Corporation v Criterion Theatres Ltd}, \textsuperscript{81} an implied intergovernmental immunities doctrine case from 1947. Whether the doctrine can be extended to apply as between States and whether such an extension of the doctrine would further the resolution of a dispute over the allocation of water between States from transboundary rivers is examined in Chapter 7.

\textsuperscript{75} See \textit{Australian Constitution} s 75(iv); ibid 181-3.
\textsuperscript{76} Renard, \textit{Australian Interstate Rivers – Legal Rights and Administration}, above n 5, 183-9.
\textsuperscript{77} Ibid 189-91.
\textsuperscript{80} Renard, ‘Australian Inter-State Common Law’, above n 72, 112; Renard, \textit{Australian Interstate Rivers – Legal Rights and Administration}, above n 5, 187.
\textsuperscript{81} (1947) 74 CLR 1.
Nicholas Kelly, in a 2007 article in the University of New South Wales Law Journal considered briefly whether international law may assist in the resolution of transboundary river disputes. He concluded that the principle of ‘equitable utilisation’ is a principle ‘recognised as forming part of customary international law’ and that the principle ‘should be taken into account in any suit between Australian States related to a transboundary water resource.’ He describes the role international law could play in the resolution of the Australian problem in this way:

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

Having identified the argument that international law could provide some guidance in resolving this dispute, I return to examine international law in detail in Chapter 5.

The enunciation by the High Court of a number of ‘implied rights’ within the Constitution raises the question whether a constitutional implication can be identified that would support the existence of an ‘interstate common law’. While Renard argued that the common law is sufficiently flexible and could be extended to give rise to a ‘right’ to the waters of a transboundary river, these arguments were made prior to the High Court’s decision in Lange v Australian Broadcasting Corporation in which the Court further explained the interaction between the Constitution and the common law:

Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives. The

82 Kelly, above n 79, 661.
83 Ibid 662.
84 The High Court has acknowledged the existence of an implied freedom of political communication: see Lange v Australian Broadcasting Corporation (1997) 189 CLR 520; the implied intergovernmental immunities doctrine: see Melbourne Corporation v Commonwealth (1947) 74 CLR 31; an implied right to vote: see Rowe v Electoral Commissioner (2010) 243 CLR 1, Roach v Electoral Commissioner (2007) 233 CLR 162.
common law and the requirements of the Constitution cannot be at odds. The common law … could not be developed inconsistently with the Constitution.  

Renard’s approach requires further consideration in light of these and other developments in Australian constitutional jurisprudence. Does the Constitution support the modification of the common law to support the existence of an ‘interstate common law’ and the creation of an ‘interstate water right’? If an ‘interstate common law’ exists, are there limits on States or the Commonwealth preventing them from abolishing this aspect of the common law? It is the understanding of the nexus between the common law and the Constitution that this thesis seeks to develop. A material difference between this thesis and the previous consideration of the transboundary river problem is the emphasis that this thesis places on the development of a solution that conforms to the Constitution.

In summary, a review of the literature reveals a lack of detailed analysis of the relevant legal questions. In the period immediately after Federation, limited consideration was given to understanding the interstate water dispute in the context of the Constitution. The relatively recent High Court jurisprudence dealing with implied limits on legislative power as well as the Court’s statements explaining the nexus between the Constitution and the common law necessitates further examination of the legal questions involved in a transboundary river dispute.

1.5 Methodology and Thesis Structure

The objective of the thesis is to examine the allocation of water between States from a transboundary river in the absence of an intergovernmental agreement with reference to the current state of the law. To put it another way, the thesis tries to anticipate how the High Court might approach this problem if faced with it today or in the near future. While identifying a number of possible solutions to this problem, the thesis attempts to identify the best solution; that is, the approach that provides the most coherent legal solution that it consistent with existing legal doctrines.

This is a doctrinal thesis that employs traditional legal research methods, which include historical analysis, to inform constitutional and common law reasoning. Examining the history of the dispute not only demonstrates how the dispute has evolved over time, but

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86 (1997) 189 CLR 520, 566.
87 See Chapter 6.
aids in identifying the central issues and problems that then are considered in the legal analysis in subsequent chapters. History may help in not just identifying the problem, but also in its resolution. For example, reference to the Federal Convention debates and the drafting history of the Constitution are important tools in constitutional interpretation. Furthermore, with respect to the common law, understanding the development of the common law over time will inform the evolution of the law in future cases.

Following this introductory chapter, the thesis is divided into six substantive chapters and a conclusion. Chapter 2 sets out the history of the transboundary dispute over the River Murray prior to Federation. The chapter commences by demonstrating how changes in water use shaped the debate over the Murray during the late 19th century. At first the primary use of the River was for navigation; however, as the river trade diminished (as a result of the construction of railways) irrigation became the primary focus of the colonies. The first challenge that representatives from the colonial governments faced was attempting to arrange a meeting to discuss how to share water from the Murray. These attempts failed largely due to the position taken by representatives of New South Wales.

In the absence of an agreement between the colonies as to how to share the waters of the Murray, the colonial governments started to consider the legal position: did the colonies have a ‘right’ to the water from transboundary rivers? This chapter identifies the early arguments regarding the ‘rights’ of the colonies to the waters of the Murray. The arguments made were that the colony’s ‘right’ to water from a transboundary river was analogous to either the rights of nation states at international law or the rights of individual landowners at common law.

Chapter 3 explains why the Constitution failed to define the allocation of the waters of the Murray as between New South Wales, Victoria and South Australia. The chapter commences with a detailed analysis of the drafting history of s 100. The drafting history of s 100 shows that the section was a compromise between the representatives of the colonies at the Federal Conventions. The judicial consideration of s 100 (albeit limited) demonstrates that the section is a limitation on Commonwealth legislative power

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(specifically s 51(i)) and does not provide a corresponding limitation of the legislative power of a State as against another State.

Given the Constitution failed expressly to provide a solution to the transboundary river problem, the States considered other legal arguments that might assist in the resolution of the dispute. Chapter 4 reviews the post-Federation literature and primary source material regarding the legal analysis of the dispute. As the chapter demonstrates, the arguments made during the Federal Conventions regarding the existence of a transboundary river ‘right’ analogous to either nation states or individual landowners were again raised in the early post-Federation period. The purpose of this chapter is to identify the key legal arguments that require examination. These arguments are then considered in greater detail in the subsequent chapters.

Chapter 5 examines the riparian rights doctrine in Australia and the principles of international law upon which the analogy arguments are based. This chapter reveals that these bodies of law were often mischaracterised or over-simplified in the context of the transboundary river problem. I explain that at the time the international law argument was being made – both immediately before and after Federation – there was no definitive right at international law that supported the existence of a right to water from international rivers. I also demonstrate that the analogy would be equally futile today. In examining the riparian rights doctrine, I explain how the doctrine was unsuitable for the Australian conditions, yet the colonial courts continued to adhere to the English common law. This is contrasted with the way in which courts in the United States modified the English common law to take into account differences in water use and environment. Given the doctrine was unsuitable for the Australian conditions, the question remains whether the doctrine could be modified to take into account the local conditions and whether such a modification could assist in the resolution of a transboundary river dispute, a question examined in the following chapter.

Having clearly set out the bodies of law upon which the analogy arguments were based, Chapter 6 examines whether an ‘interstate common law’ could be developed to provide a solution to the transboundary river problem in Australia. The first question considered is whether the High Court has jurisdiction to hear a transboundary river dispute. After concluding that the Court has jurisdiction, the chapter then determines whether the creation of an ‘interstate common law’ can solve the transboundary river problem. I
commence with a comparative study of the jurisprudence of the United States Supreme Court dealing with transboundary river disputes. While the Supreme Court has developed an approach for resolving transboundary river disputes, by developing a ‘federal common law’, it may be difficult for the High Court to take a similar approach given more recent developments in Australian constitutional jurisprudence, most importantly, developments involving the interaction between the *Australian Constitution* and the common law. I examine the arguments that the transboundary river problem can be resolved by the development of an ‘interstate common law’. I explain that the difficulty with this approach is that it is developing the common law in such a way that the common law ‘trumps’ State legislative power. My analysis in this chapter reveals that the solution to the problem lies not in the development of the common law, but in an examination of the limits on State legislative and executive power, which is the focus of the following chapter.

In **Chapter 7** I argue that one of the difficulties with previous analyses of the transboundary river problem is framing the problem in terms of the ‘rights’ of the States. As the history of the dispute shows, the early arguments framed the problem in terms of the ‘rights’ of the colonies (and later States). I contend that the problem must be reconceived in terms of limitations on State legislative and executive power. I then consider three limits on power: first, the scope of State legislative and executive power and its extraterritorial operation; secondly, the resolution of inconsistencies between the laws and regulations of two States; and thirdly, whether there are limits on State legislative and executive power that can be implied from the *Constitution*. With respect to the third limit, I examine two implications: an equality between States and an extension of the implied intergovernmental immunities doctrine. I argue that the *best* solution is to extend the implied intergovernmental immunities doctrine so as to apply between States. At a minimum, this solution would ensure States have access to sufficient water from a transboundary river to ensure the critical human needs of the communities living within that State are met.

**Chapter 8** concludes the thesis by drawing together the main themes that flow through the analysis. The conclusion closes with some final thoughts as to how this problem might be resolved in the future.
CHAPTER 2: THE COLONIAL HISTORY OF THE RIVER MURRAY DISPUTE

2.1 Introduction

During the second half of the 19th century the utilisation of the River Murray became an increasingly important issue for the colonies. In the 1850s the River was seen merely as a boundary separating the colonies of New South Wales and Victoria. Over the next 50 years, the way in which the colonial governments viewed the River changed; it became a highway for trade and later a water source for irrigation.

This chapter is divided into three parts. The first part shows the development of the River Murray from the 1850s to the 1880s. The second part explains the development of irrigation schemes along the Murray during the 1880s and the investigations that all three colonies undertook as to how best to utilise the River’s water. These first two parts detail the changes in water use along the river before Federation and explain how these changes in use affected the debate between the representatives of the colonies with respect to the sharing of water from the River Murray between the colonies. Importantly, the second part examines the tensions that developed after the failed attempts to arrange a conference between the colonies to discuss the allocation of water from the Murray and identifies the contrasting approaches of the representatives of the three colonies to resolving the dispute. The final part considers the early legal analysis during the colonial period of the sharing of the water from transboundary rivers in the absence of an intergovernmental agreement. I also explain that prior to Federation there was no court capable of hearing a dispute regarding the ‘rights’ of the colonies with respect to transboundary rivers without the consent of the colonies involved.

The pre-Federation interest in the use of water from transboundary rivers shaped the debate in terms of the ‘rights’ of the colonies.¹ In Chapter 4, I demonstrate that the way in which the dispute was initially framed in terms of the ‘rights’ of the colonies influenced the post-Federation analysis. In both periods, many of the same actors were involved and they did not deviate from their initial positions. In this thesis I contend that shaping the argument in terms of the ‘rights’ of the States is unhelpful in the legal analysis of the sharing between States of water from transboundary rivers in Australia.

¹ See Chapter 4 for how these arguments were developed in the post-federation period.
2.2 1850 – 1880: Navigation and River Trade

2.2.1 Steamboats Navigate the Murray

Navigation along the River Murray commenced during the 1850s. The South Australian Government was keen to encourage trade along the River and offered the payment of a bonus to the first steamboats to travel from Goolwa at the mouth of the Murray to the junction of the Murray and Darling Rivers. In August 1850 the South Australian Colonial Secretary, Charles Sturt, declared a bonus

of £4,000 to be equally divided between the first two Iron steamers of not less than 40-horse power, and not exceeding two feet draft of water when loaded, as shall successfully navigate the waters of the River Murray from the Goolwa to (at least) the junction of the Darling, computed to be about 551 miles.²

In 1853 two South Australians, William Randell and Francis Cadell, set off separately from Goolwa to navigate the River Murray. On 3 September 1853 Randell’s steamer, the Mary Ann, was first to reach the Darling River Junction.³ Cadell’s steamer, the Lady Augusta, caught up to Randell and overtook the Mary Ann just upstream of Euston; Cadell was the first of the two to reach Swan Hill on 17 September 1853.⁴ During the next ten years the upper reaches of the Murray, the Darling and the Murrumbidgee were navigated and cleared, and the river trade increased. By the 1860s there were almost 20 steamers transporting goods up and down the river.⁵ During the 1870s the river trade grew and there were hundreds of steamers travelling along the river.⁶ By 1882 the trade along the rivers within the Murray-Darling Basin was estimated to be worth in excess of £1,000,000.⁷ The growth in river trade was largely due to an increase in sheep numbers

³ Mudie, above n 2, 21. Each of Randell and Cadell was ineligible for the Government bonus as each steamer did not meet the specifications required: see Mudie, above n 2, 25.
⁴ Peter Phillips, River Boat Days on the Murray, Darling, Murrumbidgee (Lansdowne, 1972) 15.
⁵ Ibid 7. See also South Australia, Correspondence Re River Murray Riparian Rights, Parl Paper No 131 (1889) 15: ‘In 1857 ten steamers, with barges, were trading between Albury and South Australia’.
⁶ Phillips, above n 4, 7.
⁷ Patrick Glynn estimated total river trade to be worth £1,207,978 in 1882 and £517,717 in 1881: see P McM Glynn, *A Review of the River Murray Question, Riparian Rights, &c* (W K Thomas, 1891) 8. However, the value of the trade has been estimated to be as much as £5,000,000: see Painter, above n 2, 87.
across inland Australia and the transportation of the wool clip from inland rural settlements to port formed a significant proportion of the river trade.\(^8\)

### 2.2.2 Riverboats Compete with the Railways

The South Australian steamers had to compete with their Victorian counterparts. The Victorian steamers, based at Echuca, utilised the railway which had been extended to that town from Bendigo in 1864. The wool clip was brought by steamer to Echuca where it would then be transported by rail down to Melbourne for export.\(^9\) The South Australian vessels would bring wool back to Goolwa near the mouth of the Murray where it would be sent along the tramway to Port Elliot or Victor Harbor to be loaded on to boats for export to London.\(^10\) The South Australian Government was eager to ensure that it maintained – or even increased – its share of the river trade. While the South Australian boats controlled much of the Darling trade, the South Australian Government was concerned that trade from the Murrumbidgee River would pass through Echuca and on to Melbourne by rail rather than down the Murray to the South Australian ports. In 1870, the South Australian Parliament established a Select Committee to report on the river traffic along the Murray.\(^11\) The protectionist Victorian Government offered discounted haulage rates to farmers sending wool from the Riverina region in New South Wales to Melbourne and South Australia was concerned that this would affect its share of the river trade.\(^12\) Despite these fears, South Australia maintained its dominance in the river trade through the early 1880s, especially along the Darling River.\(^13\)

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\(^8\) Painter, above n 2, 59, 95; Phillips, above n 4, 50. Trade between the colonies was subject to tariffs and customs duties. On occasions the tariffs became a source of tension between the colonies: from W G McMinn, *A Constitutional History of Australia* (Oxford University Press, 1979) 98.

\(^9\) Phillips, above n 4, 51, 62; Painter, above n 2, 42.

\(^10\) Painter, above n 2, 41; see also, Phillips, above n 4, 54.


\(^12\) The discounted rate meant it was cheaper for farmers from NSW to send their wool to Melbourne than for the Victorian farmers on the other side of the river: see McMinn, above n 8, 98. The Select Committee concluded:

> Victoria has gradually, by the construction of the Echuca Railway, and the presentation of every possible inducement to attract the trade through her territory, obtained almost the whole of the traffic of the Murrumbidgee, although her natural position, even with regard to the districts through which that river flows, was vastly inferior to that of South Australia.


\(^13\) In 1882, over 50,000 bales of wool were transported by river steamers to South Australian ports, compared with the Victorian steamers that transported fewer than 8,000 bales that same year: South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 18.
The lack of rail infrastructure in New South Wales had initially allowed the South Australian steamers to transport wool from that colony down the Darling to the South Australian ports. However, that changed when New South Wales expanded its rail network inland during the 1880s and 1890s. The main southern railway line from Sydney had reached Albury by 1881, Hay in 1882 and Bourke in 1885.\(^{14}\) Similarly, the Victorian rail network had also been extended to Swan Hill in 1890 and would later reach Mildura in 1903.\(^{15}\) As a consequence, by the end of the 19\(^{th}\) century much of inland south-eastern Australia was easily accessible by rail and the expansion of the rail network ultimately led to a decline in the river trade.

2.2.3 Drought Hampers River Navigation

The steamers were not only competing against each other and the expanding rail network, but also against the harsh Australian climate. South-eastern Australia was affected by droughts in 1864-6, 1880-6 and 1895-1903.\(^{16}\) During these periods river levels dropped significantly and sections of the rivers became impossible to navigate. In particular, upper sections of the Darling River became nothing more than a series of watering holes for a number of months of the year.\(^{17}\) This often led to delays of some months in the wool clip reaching port.\(^{18}\) These delays only further strengthened the demand for rail transportation over the river steamers.

During this early period the focus on river navigation meant that the primary subject of intercolonial communications was the clearing of the river for navigation and the removal of snags from the river (and which colony was to pay for it);\(^{19}\) however, as water uses changed in the 1880s, so too did the issues of most concern to the colonies.

\(^{14}\) Painter, above n 2, 91; South Australia, *Correspondence Re River Murray Riparian Rights*, above n 13, 16.
\(^{15}\) Painter, above n 2, 92.
\(^{17}\) *Official Report of the National Australasian Convention Debates*, Adelaide, 17 April 1897, 818 (George Reid).
\(^{19}\) Even in 1881 the South Australian Government seemed more interested in clearing the Murray for navigation than considering the issue of irrigation: see South Australia, *Correspondence Re Clearing River Murray*, Parl Paper No 59 (1882).
2.3 1880 – 1895: Irrigation, Conservation and Royal Commissions

The devastating drought that struck south-eastern Australia in the early 1880s caused water shortages in parts of rural Australia so severe that potable water needed to be transported to the towns in those regions by rail. Victorian Member of Parliament, Mr Young, remarked that the water shortage was so serious that the situation became a matter of ‘life or death’. These dire conditions led to the colonial governments recognising a need to better utilise the water of the Murray-Darling Basin and resulted in all three colonies – New South Wales, South Australia and Victoria – establishing separate Royal Commissions to examine the issue of water use within their respective territories. The use of water for irrigation and water conservation (that is, the locking and damming of a river) were of particular interest to all three Royal Commissions. It was thought that for the colonies to grow and prosper the waters of the Murray needed to be better utilised for agriculture. However, diverting water for irrigation had the potential to lower water levels and thereby affect navigation and irrigation further downstream.

To varying degrees, each of the three colonies recognised the importance of discussing how water was to be shared amongst them. However, despite acknowledging the need to discuss the issue, arranging a meeting proved impossible, primarily due to the attitude taken by the Government of New South Wales. It was during this period that the seeds of antagonism were sown that would continue to grow after Federation.

This section examines the failed attempts to organise a meeting between the three colonies to discuss the issue of the allocation of water from the River Murray. It was during this time that the first assertions regarding the ‘rights’ of the colonies to the water from transboundary rivers were made, albeit with limited explanation as to the substantive principles governing them.

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20 Victoria, Parliamentary Debates, Legislative Assembly, 6 July 1886, 558 (Charles Young). From 1882 parts of the colony of Victoria were impacted by drought: Victoria, Parliamentary Debates, Legislative Assembly, 6 July 1886, 708 (Charles Officer).

2.3.1 New South Wales Royal Commission on the Conservation of Water

During a prolonged drought, on 10 May 1884, New South Wales was the first colony to establish a Royal Commission to consider the question of how best to conserve and utilise the waters of the River Murray. 22 The purpose of the New South Wales Royal Commission was to make a diligent and full enquiry into the best method of conserving the rainfall, and of searching for and developing the underground reservoirs supposed to exist in the interior of this Colony, and also into the practicability, by a general system of water conservation and distribution, of averting the disastrous consequences of the periodical droughts to which the Colony is from time to time subject.23

Between 1884 and 1886 the New South Wales Royal Commission produced three reports. The primary focus of the Commission was to investigate practical measures for improving water storage and supply across the colony of New South Wales as opposed to examining the legal questions. However, in the Commission’s first report it recognised that one of the ‘important points’ yet to be investigated was ‘the terms on which an equitable settlement of intercolonial water rights in the waters of the Murray River can be made.’24

The Commission was of the view that river traffic would ultimately decline in favour of the railways. 25 As a consequence, they showed little concern for how upstream conservation may affect river navigation. In its second report, the New South Wales Royal Commission concluded:

Capital has been invested in steamers, barges, wharves, and warehouses, and the facilities for communication and the transport of commodities afforded by the Murray to the dwellers upon its banks and in districts more remote have been considerable, but the necessity of navigation is being gradually superseded, and it is by no means improbable that, before the time arrives for joint action on the part of Victoria and New South Wales

24 Ibid 3.
25 The Commission was arguably going even further to suggest that railways should be the primary means of transport: Ibid 44-5.
in the construction of weirs, anything like the through navigation of the Murray will be abandoned as unprofitable.26

‘Joint action’ was limited in this context to that between New South Wales and Victoria; no mention was made of South Australia.27

The New South Wales Royal Commission’s second report concluded that the use of the waters of the Murray should be optimised and ought not to be allowed simply to ‘flow wastefully into the sea’.28 It was silent as to the effect any future development might have on the environment. The primary concern of the Commission, much like the Victorian Royal Commission appointed later that same year, was to maximise water storage and irrigation. In doing so, the area of land used for agriculture could therefore be increased, which would ultimately lead to the colony being able to grow and sustain a larger population. The focus on enhancing water conservation and irrigation within New South Wales, and the emphasis on practical measures for achieving this objective, meant that the legal questions regarding the allocation of the water from the River between the colonies were largely ignored in this early stage of the development of a legal framework for the River. To the extent to which the legal position was briefly mentioned, the Commissioners appeared to take the view that ownership in the water of the River Murray while it flowed through the territory of New South Wales was vested in that colony.29 As I explain later in this chapter, the legal question became most important when all three colonies – New South Wales, South Australia and Victoria – wanted to divert the waters of the Murray for irrigation.

2.3.2 Victorian Royal Commission on Water Supply

In the early 1880s the extent to which irrigation could be utilised in Australia was a great unknown. The Victorian Government was particularly interested in developing irrigation along the River Murray and further investigation was deemed necessary. By 1884, and

27 The Commission added: ‘the importance of navigation, so far as the Murray is concerned, may also be still further lessened by the further development of the railway systems of South Australia and Victoria’: ibid 6.
28 Ibid 3.
29 Relying on the *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict: ibid 2. There is also some brief discussion of water allocation between the colonies to ‘safeguard’ the rights of South Australia: at 4. However, the position seemed somewhat inconsistent with the position that New South Wales had the legal rights of ownership to the river: at 2.
after some experimentation, the potential for irrigation was beginning to be realised and farmers started to see the benefits first hand: crop yields were often double from irrigated land when compared against non-irrigated land.

On 23 December 1884 the Victorian Government appointed a Royal Commission, chaired by Alfred Deakin, and charged with the task of ‘inquir[ing] into the question of Water Supply, and into other matters relating thereto’. Deakin’s work as chairman of the Victorian Royal Commission was highly influential in the establishment and regulation of irrigation works within that colony. The focus of the Victorian Royal Commission’s reports was the investigation of the success of irrigation schemes established in other countries with similar climatic conditions to Australia and the consideration of whether like schemes could be implemented successfully in Victoria. On Christmas Eve 1884 – the day after the Royal Commission was appointed – Deakin departed for a three-month visit to America. Deakin travelled throughout the western United States; its dry, arid landscape was not dissimilar to parts of rural Australia. He was keen for Victorians to learn from his experiences and, upon his return, provided a detailed account to the Victorian Government of the American irrigation schemes. Two years later Deakin was invited to attend the Colonial Conference in London and en route to the Conference Deakin visited Egypt, Italy and France. Upon returning to Melbourne he published a further report of the Royal Commission examining irrigation in those countries and its applicability to Victoria.

30 Victoria, Parliamentary Debates, Legislative Assembly, 24 June 1886, 430 (Alfred Deakin).
31 Ibid 433-4 (Alfred Deakin).
32 Victoria, Royal Commission on Water Supply, First Progress Report (1885).
33 J A La Nauze, Alfred Deakin – A Biography (Melbourne University Press, 1965) vol 1, 85. La Nauze also notes (at 85) that Deakin returned to Australia in May 1885. See also J A La Nauze, Alfred Deakin (Oxford University Press, 1962) 10.
35 Ibid. La Nauze describes the report as ‘a brilliantly lucid survey of the types and methods of irrigation, and of irrigation settlements, in western America’: see La Nauze, Alfred Deakin – A Biography, above n 33, vol 1, 85. In a further progress report of the Royal Commission, Mr J D Derry, a civil engineer who had accompanied Deakin to America provided a technical report considering the engineering aspects of the irrigation works in America: Victoria, Royal Commission on Water Supply, Further Progress Report (9 July 1885). In 1885 The Victorian Royal Commission produced two reports entitled ‘Further Progress Report’. The first included the report of Mr Derry and the second provided an update as to the investigations that the Commission had undertaken in Victoria: Victoria, Royal Commission on Water Supply, Further Progress Report (31 August 1885).
36 Deakin did not spend a great deal of time in Italy and Egypt and he makes it clear that, unlike the report on western America, this report was based more on research than on personal experiences gained while visiting: see Victoria, Royal Commission on Water Supply, Fourth Progress Report
The reports of the Victorian Royal Commission focussed on establishing irrigation schemes within the colony of Victoria and did not consider how the schemes might affect the other colonies. The Commission did not examine legal questions associated with Victoria’s access to the River Murray and its tributaries. However, the Commission noted: ‘There are many matters of moment in connexion with the Water Supply of the northern parts of Victoria which can only be properly considered when the conditions of use of the Murray waters are clearly understood.’ It is not clear whether this was a reference solely to the physical conditions, or also to the legal conditions upon which Victoria was permitted to use the water. One glaring omission from the reports was whether Victoria was permitted to access the waters of the Murray given that the southern bank of the river formed the boundary between New South Wales and Victoria.

2.3.3 A Joint Royal Commission is Proposed

While the Victorian Royal Commission did not consider the issue of how the waters of the Murray were to be shared between the colonies, the Victorian Government was active in attempting to arrange for the colonies to meet to discuss the matter. In July 1885 – at about the time that Deakin was delivering his report on irrigation in the western United States – the Victorian Premier, James Service, wrote to the South Australian Chief Secretary, John Downer, and noted: ‘Various proposals have been made – some of considerable importance – for dealing with the River Murray, both in the way of improving its navigation and utilising its waters for irrigation.’ He suggested that a joint Royal Commission be appointed:

As of course the interests of New South Wales, South Australia, and Victoria would be affected by any works of the description referred to, it seems desirable that the three colonies should combine and appoint a joint Royal Commission to inquire and advise on the subject.

I beg to invite the co-operation of your Government in this preliminary measure.


37 Victoria, Royal Commission on Water Supply, *Further Progress Report* (31 August 1885) iv.


39 Ibid.

30
Downer wrote back expressing the view that there would be ‘great difficulties’ in any agreement which could affect navigation, and expressing doubt that large scale irrigation could take place without that result. However, Downer stated that South Australia would ‘probably’ join in a joint Royal Commission, ‘for the purpose of considering any proposals which might be submitted and for protecting the interests of this colony.”

Downer asked Service to inform him of ‘the nature of the proposals referred to in your [sic] letter as having been made to your Government respecting this matter.”

Reaching agreement with the Government of New South Wales with regard to a joint Royal Commission proved to be more difficult. In a letter to the Premier of Victoria dated 3 September 1885, the Premier of New South Wales, Alexander Stuart, stated that the letter which had been sent by Service

> on subject of waters of the River Murray, opens up a very important and very difficult question, which I have submitted for opinion of my honourable colleague, the Attorney-General, and which I must ask you to accept as my excuse for not having previously replied.

Stuart assured Service and Downer that as soon as he received the Attorney’s opinion he would advise them of that fact. Unfortunately, Stuart resigned as Premier in the following month due to ill health. In what would become a familiar occurrence, the Government of New South Wales did not respond and communications between the colonies broke down. By the end of 1885 – six months after the Victorian Premier’s first letter – a meeting between the three colonies had still not been arranged.

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41 Ibid. Downer also sent a copy of this correspondence to the Colonial Secretary of New South Wales: Letter from John Downer, Premier of South Australia to Alex Stuart, Colonial Secretary of New South Wales, 3 August 1885 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 1.

42 Letter from Alexander Stuart, Premier of New South Wales, to James Service, Premier of Victoria, 3 September 1885 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 2. Stuart also held the position of Colonial Secretary during his time as Premier. Downer’s letter to Stuart quoted the Imperial legislation defining the boundary between New South Wales and Victoria and arguably created the impression that Downer, at least at this stage, saw this as primarily an issue between New South Wales and Victoria.

43 Ibid. Premier Stuart also sent a letter to Downer advising the South Australian Premier that he would be back in contact once he had taken advice from the Attorney-General: see letter from Alexander Stuart, Premier of New South Wales, to John Downer, Premier of South Australia, 3 September 1885 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 2.

2.3.4 New South Wales and Victoria Meet Without South Australia

While South Australia waited for a response from New South Wales, in January and May of 1886, representatives of the Royal Commissions of Victoria and New South Wales met and reached agreement between themselves as to the ‘diversion and utilization of flood-waters of the Murray in their respective territories.’ The agreement required both colonies to pass legislation to implement the terms of the agreement. However, such legislation was never passed in either colony. It was probably because extractions of water in Victoria from the tributaries of the Murray could potentially diminish the flow of the River through New South Wales, whereas downstream extractions in South Australia could not, that the New South Wales Commissioners ignored the position of South Australia. The New South Wales Royal Commission later explained that not inviting South Australia was not through rudeness, and instead insisted that the deliberations in question had exclusive reference to that portion of the Murray which formed the common boundary of the two Colonies [of Victoria and New South Wales], and the tributaries of from each. Provision was made for maintaining the normal flow of the river, and for diversion of such surplus water only as might be available after that condition had been met.

45 The colonies of New South Wales and Victoria met on 22 and 23 January in Melbourne and on 5 and 6 May in Sydney in 1886: New South Wales, Royal Commission – Conservation of Water, Second Report of the Commissioners (1886) 1. The resolutions of the conference between New South Wales and Victoria are reproduced by the Interstate Royal Commission: see New South Wales, South Australia and Victoria, Interstate Royal Commission on the River Murray, Report of the Commissioners (1902) 4. This agreement had not been enacted by either colonial legislature and subsequent conduct by Victoria suggested that it was not entirely confident of its legal position. Limited consideration has been given to the question of the nature of the agreement and whether, in the absence of this agreement, Victoria had a right to water from the River. The fact that New South Wales was prepared to negotiate with Victoria only added to South Australia’s frustrations, for New South Wales had ignored numerous requests from South Australia for a meeting. The agreement between New South Wales and Victoria is also reproduced in New South Wales, Royal Commission – Conservation of Water, Second Report of the Commissioners (1886) 4-5. The agreement established:

That a joint Trust shall be constituted, equally representative of the colonies of New South Wales and Victoria, in which shall be vested the control of the whole of the Murray River and its tributaries... and such Trust shall have power to regulate all diversions of water from the river and tributaries within its jurisdiction.

New South Wales, South Australia and Victoria, Interstate Royal Commission on the River Murray, Report of the Commissioners (1902) 4

46 See cl 9 of the agreement reproduced in New South Wales, South Australia and Victoria, Interstate Royal Commission on the River Murray, Report of the Commissioners (1902) 4.


If provision had been made for South Australia, it had not been clearly explained.

When Downer became aware of the meeting between representatives of Victoria and New South Wales in May 1886 he wrote to the leaders of both colonies expressing his concern that a meeting had been held in the absence of representatives from South Australia. After noting that he had not received further communication from New South Wales during the latter part of the previous year, Downer remarked:

[B]ut I now observe from the public prints that a conference has been held between New South Wales and Victoria, of which we had no notice, and that certain resolutions had then been arrived at.

I wish to express my regret that we would have heard nothing from you on the subject, and to request that you will take no action on the resolutions arrived at before this Government has had an opportunity of giving them some consideration.49

During this time, Victoria also had a change in Premier and the new Premier, Duncan Gillies, sought to explain that South Australia’s absence was not Victoria’s doing. He stated that, like the Government of South Australia, his Government had been waiting for a response from New South Wales. Gillies pointed the blame squarely at the Government of New South Wales:

I beg to state that it was suggested at that conference [between New South Wales and Victoria] by the Victorian Commissioners that representatives from South Australia should be invited to the conference, but the suggestion was not concurred in. The absence of such representatives was not therefore owing to any action on the part of this colony.50

South Australia’s geographical disadvantage coupled with the fact that it had not been invited to the meeting at which New South Wales and Victoria reached an agreement left it in a vulnerable position. Downer seems to have concluded that South Australia needed to take a firmer stand and it was at this time that he started to make reference to the ‘rights’ of the colonies. However, precisely what Downer thought these ‘rights’ were and

49 Letter from John Downer, Premier of South Australia, to the Premier of Victoria, 26 May 1886 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 2. A letter in similar terms was also sent to the Colonial Secretary of NSW: see letter from John Downer, Premier of South Australia, to the Colonial Secretary of New South Wales, 26 May 1886 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 2.

50 Letter from Duncan Gillies, Premier of Victoria, to John Downer, Premier of South Australia, 7 June 1886 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 3.
the basis for them was not explained in his correspondence with the other colonies. In a letter to the Victorian Premier dated 14 June 1886 Downer wrote:

I can only express my surprise at the Governments of Victoria and New South Wales assuming the right and responsibility of making any such agreement.\(^{51}\)

This was the first time that the question of legal rights was raised and given prominence in the communications between the States.

Downer contended that the agreement between Victoria and New South Wales ignored South Australia’s ‘existing rights’:

The treaty, whilst altogether ignoring the status of this province in the matter, assumes throughout, and in fact expressly declares, the absolute title of the two colonies parties to it to the whole of the waters of the river; and though there is a provision for the reservation of such compensation water as the ‘trust’ may from time to time determine, still, I need hardly point out that this will scarcely compensate us for the abrogation of our existing rights.\(^{52}\)

Downer threatened that if Victoria was to proceed with this agreement and insist on excluding South Australia then his ‘Government will have no alternative but to request the Home Government to disallow any such Bill you may pass to give effect to the treaty, and to prevent by Imperial Legislation any future action such as the agreement contemplates.’\(^{53}\)

Three days later on 17 June 1886 Downer gave a lengthy speech in the South Australian Parliament detailing the correspondence between the colonies.\(^{54}\) The actions of New South Wales and Victoria had also caused other members of the South Australian Parliament to consider South Australia’s position with respect to the allocation of water from the Murray. At the end of Downer’s speech, South Australian Member of Parliament, Ebenezer Ward remarked that:

\[^{51}\text{Letter from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 14 June 1886 in South Australia, \textit{Navigation of and Irrigation from River Murray}, Parl Paper No 59 (1886) 4 (emphasis added).}\]

\[^{52}\text{Ibid (emphasis added).}\]

\[^{53}\text{Ibid (emphasis added).}\]

\[^{54}\text{South Australia, \textit{Parliamentary Debates}, House of Assembly, 17 June 1886, 189-93 (John Downer).}\]
It was true that by the Imperial Act New South Wales might technically maintain her claim to the southern bank, and Victoria could claim its sources, but we had the mouth, which was of as much use as any other position of the river. Ward probably overestimated the importance of the Murray mouth – it was often closed by sand and difficult to navigate. Furthermore, the fact that navigation was in decline in favour of rail transport meant that South Australia did not have the geographical advantage over the river that Ward asserted.

The fact that the agreement between New South Wales and Victoria had been brokered between the respective Royal Commissions provided the Victorian Government with a degree of separation from the agreement. When Victorian Premier Gillies wrote back to Downer on 3 July 1886 he stressed that the agreement reached between the Royal Commissioners of Victoria and New South Wales was not the doing of the Victorian Government. Gillies claimed that his Government had ‘no knowledge whatever of the arrangements made or the terms provisionally agreed upon until they were made public.’ Gillies appeared keen to allay Downer’s concerns, while emphasising the importance of resolving the dispute promptly:

I can say that this Government has no desire to place the rights (navigation and others) of South Australia either in jeopardy or at the mercy of any Commission in which your colony is not represented, or of which you do not approve, and nothing is further from the intention of this Government than to do anything destructive of the rights of your colony.

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55 Ibid 194 (Ebenezer Ward).
57 Letter from Duncan Gillies, Premier of Victoria, to John Downer, Premier of South Australia, 3 July 1886 in South Australia, Further Correspondence re Murray River Waters, Parl Paper No 59A (1886) 1, 1. See also letter from C H Langtree, Secretary for Mines and Water Supply, Victoria, to the Conservator of Water (SA), 4 July 1887 in South Australia, Correspondence Re River Murray Riparian Rights, Parl Paper No 131 (1889) 30, suggesting that the meeting between New South Welsh and Victorian Royal Commissions was ‘of an informal nature’. Whilst the Parliamentary Papers identify C H Langtree as the author of the letter, this appears to be an error; it should be C W Langtree.
It must, however, be borne in mind that the utilisation of the surplus waters of our rivers for irrigation purposes has become so urgent a necessity, and is so acknowledged on all sides, that the consideration of its practical solution cannot be longer delayed.\(^\text{58}\)

Downer wrote back and requested that until a joint commission or conference between the three colonies was arranged, the agreement reached between the Royal Commissioners of New South Wales and Victoria not be acted upon by their respective Governments.\(^\text{59}\) News of the agreement between New South Wales and Victoria spurred South Australia into action, which was the first real attempt to arrange for the colonies to meet and discuss the question of the sharing of the waters of the Murray.

Downer was concerned that any subsequent conference or commission would use as its starting point the agreement already reached between the New South Wales and Victorian Royal Commissioners, thereby placing South Australia at a disadvantage. In a subsequent letter to Gillies dated 12 August 1886 Downer stated:

> Whilst quite willing to take part in any Conference that may be held with reference to the use of the waters of the river, I thought I had sufficiently expressed the views of this Government that the Conference must begin \textit{de novo} and not on the basis of the treaty arrived at between New South Wales and yourselves, though doubtless the information and evidence there obtained and taken will be of great assistance.\(^\text{60}\)

In late September 1886, Gillies suggested that the best way for negotiations to proceed was for South Australia to appoint a Royal Commission much like the Royal Commissions already established in the other colonies:

> I beg to suggest, for your consideration, whether your Government could not see its way to proceed as those of Victoria and New South Wales have done, by appointing a Royal Commission of Inquiry; such a Commission could confer with the Commissioners of the other two colonies, and perhaps jointly with those bodies might be able to offer some

\(^{58}\) Letter from Duncan Gillies, Premier of Victoria, to John Downer, Premier of South Australia, 3 July 1886 in South Australia, \textit{Further Correspondence re Murray River Waters}, Parl Paper No 59A (1886) 1, 2.

\(^{59}\) Letter from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 9 July 1886 in South Australia, \textit{Further Correspondence re Murray River Waters}, Parl Paper No 59B (1886) 1.

\(^{60}\) Letter from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 12 August 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, \textit{Progress Report} (1890) 27.
important recommendations respecting the locking of the River Murray, and other points in connection with the question.\textsuperscript{61}

In that way, the three Commissions could finally meet and discuss the allocation of water from the River. Gillies concluded his letter by noting:

I desire, at any rate, to submit that though there may be points on which the several Governments cannot as yet take quite the same view, there should be nothing to prevent united action, so far as they are agreed, or indeed so far as they may be brought into agreement, by the suggested Conference of the various Royal Commissions.

I trust, therefore, in the interests of harmonious action amongst the colonies, you will see no objection to this preliminary step with a view of bringing them into accord, as far as possible.\textsuperscript{62}

Downer wrote back immediately and confirmed that South Australia was ‘still willing to appoint a Commission to meet the Commissioners appointed by the other colonies’.\textsuperscript{63} The discussions between the three colonies appeared to be back on track. That was, until, South Australia became aware that Victoria was about to allow large-scale irrigation works along the river.

\subsection*{2.3.5 The Chaffey Brothers’ Irrigation Scheme}

While in the United States during 1885, Alfred Deakin had met with Canadian brothers, George and William Chaffey.\textsuperscript{64} The Chaffey brothers had established successful irrigation businesses in California and Deakin discussed with them the potential for similar irrigation schemes in Victoria. In 1886 George Chaffey travelled to Victoria to investigate

\begin{footnotes}
\item[61] Letter from Duncan Gillies, Premier of Victoria, to John Downer, Premier of South Australia, 28 September 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, \textit{Progress Report} (1890) 27.
\item[62] Ibid.
\item[63] Letter from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 9 October 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, \textit{Progress Report} (1890) 27. Victoria agreed to contact New South Wales to organise the meeting: see telegram from Alfred Deakin to John Downer, 11 October 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, \textit{Progress Report} (1890) 28. Whether ‘still willing’ was an accurate characterisation of the South Australia position is questionable. It is not that South Australia had previously expressed an unequivocal willingness to appoint a Royal Commission.
\end{footnotes}
the feasibility of establishing an irrigation scheme on the Murray. His arrival was followed by his brother, William, in the following year.65

When Downer heard of the discussions between George Chaffey and the Victorian Government he sent a telegram to the Victorian Premier stating that he would assume that the Victorian Premier ‘will not proceed further in the matter of this agreement before the joint Commission has met and considered the whole question.’66 Gillies responded by explaining that while an agreement between the Victorian Government and the Chaffeys had been entered into, it was still subject to the approval of the Victorian Parliament. Gillies stated that, in any event, the agreement ‘would not have been entered into if there could have been the slightest apprehension that it could so interfere [with navigation].’67 In his view, the agreement entered into with the Chaffeys would not affect any intercolonial conference. However, the South Australian Premier was concerned that an agreement permitting large-scale irrigation within the Victorian colony would affect water levels at Morgan by at least 4 inches during the summer months.68 Downer requested that Victoria hold off on legislative approval of the scheme until a conference between the three colonies had had an opportunity to meet.69

Downer’s request was ignored and the agreement reached between the Chaffeys and Deakin was put before the Victorian Parliament for its approval.70 Rather than approving the agreement, the Parliament decided to put the offer of developing an irrigation settlement out to tender.71 However, this had little effect on the end result – no other tenders were received for the 250,000 acre Mallee Irrigation Scheme at what is now known as Mildura and the Chaffeys were awarded the tender.72

66 Telegram from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 11 November 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, Progress Report (1890) 28.
67 Telegram from Duncan Gillies, Premier of Victoria, to John Downer, Premier of South Australia, 12 November 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, Progress Report (1890) 28.
68 Telegram from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 15 November 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, Progress Report (1890) 28. No doubt Downer would have been concerned given the fact that river boats were already finding it difficult to complete with the railways.
69 Ibid.
70 Waterworks (Construction Encouragement) Act 1886 (Vic).
71 Ibid s 7.
72 ‘The Mallee Irrigation Scheme’, The Age (Melbourne) 4 March 1887, 5.
Despite Downer’s concerns regarding the Chaffey agreement, it appeared that the joint conference would still convene. On 31 December 1886 the Victorian Secretary for Mines and Water Supply, C W Langtree, wrote to Downer advising him that Alfred Deakin had received confirmation that the New South Wales Royal Commissioners were agreeable to a conference between representatives of the three colonies being held in Adelaide ‘for the purpose of setting all intercolonial rights involved in the apportionment of the waters of the River Murray.’

Eager for the three colonies to meet, on 9 February 1887 the South Australian Government appointed its own Royal Commission to investigate

the questions of utilising the waters of the River Murray for irrigation purposes, and the preservation of the navigation and water rights of this province in the river; and, for that purpose, to confer and consult with any Commission appointed, or to be appointed, by the Governments of New South Wales and Victoria on the same subject.

The South Australian Royal Commission was thus formed for somewhat different purposes to its counterparts in New South Wales and Victoria, which were formed primarily for the purpose of investigating the use of water within each of the respective colonies.

Despite Downer’s earlier protests regarding Deakin’s agreement with the Chaffey brothers, the South Australian Government was quick to make a similar arrangement with the Chaffeys to establish a settlement in South Australia at Renmark. The agreement was signed on 14 February 1887 by the South Australian Commissioner of Crown Lands, on behalf of the Government of South Australia, and George and William Chaffey. Whilst concerns were raised as to how the scheme would affect navigation and water levels in the lower lakes, the agreement was authorised by the Parliament by the Chaffey Brothers Irrigation Works Act 1887 (SA). The South Australian agreement granted the

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73 Letter from C W Langtree, Secretary for Mines and Water Supply, Victoria, to John Downer, Premier of South Australia, 31 December 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, Progress Report (1890) 28. The use of the word ‘setting’ suggests that this was not a process of examining existing legal principles to determine such rights, but rather that an agreement would be reached based solely on the negotiation.
74 South Australia, Royal Commission on the Utilisation of the River Murray Waters, Progress Report (1890) iii (emphasis added). Patrick Glynn and Charles Hussey were appointed additional Commissioners on 13 December 1889: at iii.
75 See, eg, South Australia, Parliamentary Debates, Legislative Council, 16 August 1887, 478-9.
76 The Act was assented to on 16 November 1887: Chaffey Brothers Irrigation Works Act 1887 (SA)
Chaffey brothers up to 250,000 acres and granted licences permitting them to extract water from the Murray for irrigation.77

In March 1887 the Victorian Premier wrote to the Premier of New South Wales, as he understood that the term of the New South Wales Royal Commission was about to expire and suggested that it be extended so that the conference between the Royal Commissions of the three colonies could take place.78 The Colonial Secretary of New South Wales, Henry Parkes, replied on 6 April and advised Victoria that the term of the Commission had been extended until 10 May 1887. However, this brief extension gave little time for Victoria and South Australia to arrange the joint conference. The matter was made more difficult by the fact that Deakin was attending the Colonial Conference in London and would not return to Australia until June; this complicated matters because the Victorian Government wanted Deakin, as President of its Royal Commission, to attend any such conference between the three colonies.79

Perhaps motivated by the fact that it had nothing to lose by maintaining the status quo, New South Wales declined to extend further its Royal Commission and the three colonies were again unable to arrange for the joint conference to take place as originally planned. Over the next two years the colonial governments turned their attention inward and focused on developing irrigation within the respective colonies.80

2.3.6 A Further Attempt to Meet

Despite the encouraging signs prior to the appointment of the South Australian Royal Commission, a meeting with representatives from all three colonies had proved difficult to achieve (primarily due to the position taken by New South Wales). However, two years later in April 1889, the South Australian Premier, Thomas Playford, wrote to the Governments of New South Wales and Victoria again urging them to agree to a

77 Ibid Schedule.
78 Letter from Duncan Gillies, Premier of Victoria, to the Premier of New South Wales, 10 March 1887 in South Australia, Correspondence Re River Murray Riparian Rights, Parl Paper No 131 (1889) 31.
79 Letter from Duncan Gillies, Premier of Victoria, to the Premier of New South Wales, 30 April 1887 in South Australia, Correspondence Re River Murray Riparian Rights, Parl Paper No 131 (1889) 31.
80 By the end of the 19th century the colonies had invested significant funds into developing irrigation: Official Record of the Debates of the Australasian Federal Convention, Melbourne, 24 January 1898, 69 (Richard O’Connor). See also Official Record of the Debates of the Australasian Federal Convention, Melbourne, 7 March 1898, 1956–8 (Joseph Carruthers).
conference between the three colonies.\textsuperscript{81} Victoria promptly replied expressing a willingness to attend a joint conference. The Victorian Premier noted, however, that the New South Wales Royal Commission had expired and it would be necessary to reappoint or appoint a similar Royal Commission in that colony.\textsuperscript{82} In the early days of attempting to secure a meeting between the three colonies the Victorian Government had been proactive in securing the support of New South Wales. However, by this time the Victorians took a more passive role and left it to South Australia to gain New South Wales’ support. As the South Australian Royal Commissioners noted in their second report:

Victoria has always been prompt in its profession of great readiness to concur in the appointment of a conference, but has carefully abstained from taking any decisive step that would tend to secure such a meeting of representatives.\textsuperscript{83}

With the establishment of the irrigation scheme at Mildura, Victoria now had more to lose and less to gain from any potential agreement between the colonies.

While Playford's letter of 27 April 1889 was formally acknowledged by New South Wales,\textsuperscript{84} a substantive response was not forthcoming for over 10 months, despite a number of promises.\textsuperscript{85} It was not until 6 March 1890 that South Australia received the promised response. The Colonial Secretary of New South Wales, Henry Parkes, provided a reply that carefully ignored the request for a conference between the colonies. Parkes responded by telling South Australia that east of the South Australian boundary ‘the whole watercourse of the Murray ... and the waters of the river ... belong, therefore, to

\begin{footnotes}
\footnotetext{81}{Letter from Thomas Playford to the Colonial Secretary’s Office of New South Wales, 27 April 1887 in South Australia, \textit{Correspondence Re River Murray Riparian Rights}, Parl Paper No 131 (1889) 33. The receipt of Playford’s letter is acknowledged in letter from Culcheth Walker, Principal Under Secretary of the Colonial Secretary’s Office of New South Wales to Thomas Playford, 17 May 1889 in South Australia, \textit{Correspondence Re River Murray Riparian Rights}, Parl Paper No 131 (1889) 34.}
\footnotetext{82}{Letter from Duncan Gillies, Premier of Victoria, to the Premier of South Australia, 8 May 1889 in South Australia, \textit{Correspondence Re River Murray Riparian Rights}, Parl Paper No 131 (1889) 33-4.}
\footnotetext{83}{South Australia, Royal Commission on the Utilisation of the River Murray Waters, \textit{Second Report} (1890) v-vi.}
\footnotetext{84}{Letter from Culcheth Walker, Principal Under Secretary of the Colonial Secretary’s Office of New South Wales to Thomas Playford, 17 May 1889 in South Australia, \textit{Correspondence Re River Murray Riparian Rights}, Parl Paper No 131 (1889) 34.}
\footnotetext{85}{Telegrams from Henry Parkes to the Premier of South Australia, 20 June 1889, 23 July 1889 and 6 September 1889 in South Australia, \textit{Correspondence Re River Murray Riparian Rights}, Parl Paper No 131 (1889) 34.}
\end{footnotes}
New South Wales, as part of her territory.\footnote{Letter from Henry Parkes to John Cockburn, 6 March 1890 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, \textit{Progress Report} (1890) 48. Cockburn had succeeded Playford as Premier on 27 June 1889.} Parkes cited s 5 of the \textit{New South Wales Constitution Act 1855} (Imp) 18 & 19 Vict, c 54, which stated:

> the whole Watercourse of the said River Murray, from its Source therein described to the Eastern Boundary of the Colony of South Australia, is and shall be within the Territory of New South Wales'.\footnote{\textit{New South Wales Constitution Act 1855} (Imp) 18 & 19 Vict, c 54, s 5.}

New South Wales contended that the Imperial legislation made it clear in whose territory the river flowed and, within that territory, the scope of the colonial legislative power. Parkes – apparently adopting the position that attack was the best form of defence – reminded South Australia of the following:

> I desire, however, to intimate that it is held by this Government that South Australia cannot use the waters to such unreasonable extent as would interfere with the normal level of the river without committing a breach of \textit{international obligations}.\footnote{Letter from Henry Parkes to John Cockburn, 6 March 1890 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, \textit{Progress Report} (1890) 48 (emphasis added).}

Thus, in addition to the letter ignoring the request for a meeting between the three colonies, the letter from Parkes attempted to turn the tables on South Australia by focusing on whether the Imperial legislation placed any limitation on South Australia’s ability to use the waters of the Murray. That limit was drawn from ‘international obligations’. However, Parkes’ letter failed to address the question of whether New South Wales had a similar corresponding obligation. Parkes’ letter was the first correspondence in which the colony had asserted a legal position; earlier correspondence had spoken in terms of the ‘rights’ of the colonies,\footnote{See, eg, Letter from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 14 June 1886 in South Australia, \textit{Navigation of and Irrigation from River Murray}, Parl Paper No 59 (1886) 4 .} but had made no attempt to define those ‘rights’ or explain their source.

The South Australian Royal Commission published the first two of its three reports in June and December 1890 respectively, and provided a comprehensive analysis of the use of the River Murray for navigation and irrigation.\footnote{See South Australia, Royal Commission on the Utilisation of the River Murray Waters, \textit{Progress Report} (1890); South Australia, Royal Commission on the Utilisation of the River Murray Waters, \textit{Second Report} (1890).} The reports also detailed the attempts
made by the South Australian Royal Commission and Government to arrange a meeting of the three colonies. After the Royal Commission presented its second report in December 1890, it ‘suspended meetings in the hope that events would transpire favourable to the holding of an intercolonial conference to consider the riparian rights of the respective provinces’. Precisely what was meant by the ‘riparian rights’ of the colonies was not explained in the report; however, it appeared to go beyond acknowledging the rights of individuals within each of the colonies and to suggest that the colonies (or their governments) had a ‘right’ to water (as against each other).

It was now more than five years since the Victorian Premier, James Service, had first written to the South Australian Premier, John Downer, to suggest a meeting between the colonies and still the matter remained unresolved. On 27 October 1892 further promises were made by the Colonial Secretary of New South Wales, George Dibbs, who wrote to the South Australian Premier assuring him that a meeting of the colonies would soon be possible.

The South Australian Royal Commissioners had received similar promises before and did not believe that the Government of New South Wales was genuine in its desire to meet. The Commissioners were of the opinion that Dibbs’ letter did not contain ‘such an assurance that the question of a conference is being seriously considered as would justify us in postponing the presentation of this our final report’ and, in June 1894, the South Australian Royal Commission produced its final report. The report was much shorter than the previous two and simply stated that, despite numerous attempts to arrange a meeting with the other two colonies, arranging such a meeting had proved unsuccessful.

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91 South Australia, Royal Commission on the Utilisation of the River Murray Waters, Final Report (1894) 3 (emphasis added).
92 Letter from George Dibbs to John Downer, 27 October 1892 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, Final Report (1894) 4. Dibbs explained: I have the honor to inform you that a Bill has been prepared, and will be introduced at once (notice to that effect having already been given), which, inter alia, will give power to the Governor, with the concurrence of the Government of any other colony, to deal with matters of common concernment as to riparian and other rights; and that, pending this proposed legislation, the Government consider it advisable that the final consideration of Mr Playford’s suggestions should remain in abeyance.
93 South Australia, Royal Commission on the Utilisation of the River Murray Waters, Final Report (1894) 3.
94 Ibid.
2.4 The Early Water ‘Rights’ Arguments

The purpose of this thesis is to examine how current or future disputes over the sharing of water from transboundary rivers will be resolved in the absence of an intergovernmental agreement. However, history plays a significant role in solving the present day problem. The pre-Federation arguments framed the problem in terms of the ‘rights’ of the colonies. Those making them were primarily interested in bringing about a political solution and less concerned if such a ‘right’ actually existed. As I show in the subsequent chapters, this thinking continued during the Federal Convention debates and after Federation, and misconceives the true nature of the problem.95

2.4.1 New South Wales Claims Legal Ownership of the River

The New South Wales Royal Commission considered, in a limited way, the rights of the colonies to the waters of the River Murray. The New South Wales Royal Commission took the view that east of the South Australian border the Murray was within the colony of New South Wales and as such that colony had absolute legal control over the River as it passed through its territory:

We are fully aware that no action which it might be in our power to take could abrogate the legal rights of ownership in the Murray, which, as we have seen, is by the Constitution Act vested in the Legislature of New South Wales.96

However, the New South Wales Royal Commission acknowledged that this right was ‘qualified … by co-ordinate powers in regard to navigation and the collections of Customs duties by the Government of Victoria, and by the riparian rights of the inhabitants of Victoria who are settled upon the southern bank of the stream’.97 The common law riparian rights doctrine granted the owners of the bank along a river within each colony – referred to as the ‘riparian proprietor’ – a right ‘to the reasonable use of the water for … domestic purposes and for … cattle’ and also the right to dam the river or take water for irrigation so long as those ‘extraordinary uses’ did not ‘interfere with the rights

95 See Chapter 4.2 and Chapter 7.
97 Ibid 2-3. Although the Commission also took the pragmatic view that they should not ‘insist upon such an extreme view of our statutory position as should preclude the consideration and recommendation of any scheme which might seem to be equitable and advantageous to the two Colonies’: at 2 (emphasis added). The reference to the ‘two’ colonies was a reference to New South Wales and Victoria, omitting any reference at this point to South Australia.
of other [riparian] proprietors’. The emphasis of the riparian rights doctrine was on maintaining the natural flow and ‘extraordinary uses’, such as irrigation, were impermissible where they would disturb the flow for downstream users.98

While willing to concede that the Victorian land owners along the River might be entitled to use the waters as riparian proprietors, no such similar acknowledgment was made with respect to the downstream proprietors in South Australia. However, arguably the same concession should have applied to riparian proprietors in that colony. While the rights of the individual land owners were recognised, no mention was made as to the ability of the Victorian Parliament to regulate the Murray (or its tributaries) in a way that could affect the interests of either the Government of New South Wales or landowners within that colony.

While acknowledging the common law rights of the riparian owners, there was a practical problem with the application of the doctrine in Australia. The New South Wales Royal Commission took the view that the English riparian rights doctrine that applied between land owners along the banks of a river was unsuitable for the Australian conditions because rivers did not flow all year round:

> the presumptions of English law in regard to riparian rights are not applicable to the conditions of New South Wales, where, in too many cases, what are called rivers are actually the dry channels of watercourses, which need to be converted into canals; and this opinion has led us to the conclusion that each Colony must be allowed to deal with the tributaries of the Murray in such manner as will best conduce to its own development, with the sole reservation that a certain proportion of the water contained in those streams must be allowed to flow into the Murray.99

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98 *Miner v Gilmour* (1858) 12 Moo PC 131, 156; 14 ER 861, 870. The riparian rights doctrine is explained in detail in Chapter 5.3.

99 Ibid 3. Similar views were expressed in the first report:

> The doctrine of riparian rights ... appears better adapted to England, where the people are more concerned to drain off the water as quickly as possible than to New South Wales, where the all-important question is how best to retain it. ... We believe there is a large amount of uncertainty as to what the application of the common law of England would be in cases which might be brought before the Courts, inasmuch as those cases would be founded upon circumstances entirely novel, and to which no analogy could probably be discovered in causes tried elsewhere.

Furthermore, the Commission was of the opinion that if the riparian rights doctrine was to be applied across colonial boundaries it would impair development along the River Murray and in effect cede control of the Murray to South Australia:

A just application of the principle will safeguard the rights of South Australia, which we recognize to be as valid as our own; but the logical outcome of legal presumptions in regard to the riparian rights, if Queensland, New South Wales, Victoria and South Australia, were one community, would enable the last named Colony to insist on the uninterrupted flow of an immense proportion of the whole rainfall of the Continent, simply because the waters of the Murray run through her territory to the sea.\(^{100}\)

This passage is important as it shows that the legal questions were starting to be considered and that the obvious source of law – the riparian rights doctrine – might be inadequate for the conditions (both environmental and legal) in Australia. In Chapter 5 I explain the application of the riparian rights doctrine in Australia and in Chapter 6 I examine the utility of the doctrine in resolving transboundary river disputes after Federation.

In any event, the New South Wales Royal Commission was of the opinion that the most appropriate way to deal with the allocation of water as between the colonies was by mutual agreement. The Royal Commission was keen to develop the River in a way that would be ‘equitable and advantageous’\(^{101}\) to both New South Wales and Victoria.

In 1889 in a memorandum from Hugh McKinney, Engineer for Water Conservation in New South Wales, to the Colonial Secretary, Henry Parkes, McKinney set out what he believed to be the position with regard to intercolonial water rights.\(^{102}\) Like the New South Wales Royal Commissioners, he stated that the fact that the river was within the colony of New South Wales granted that colony the ownership of the water:

Under the Constitution Act the River Murray is altogether within the territory of New South Wales as far as the junction of South Australia; and, as national territory consists of water as well as land, the waters of the Murray belong primarily to New South Wales.\(^{103}\)


\(^{101}\) Ibid 2.


\(^{103}\) Memorandum of advice from Hugh McKinney to Henry Parkes, 28 October 1889, 1 in Mitchell Library ‘Sir Henry Parkes Papers’, Correspondence, Vol 27, 319-327.
McKinney, however, made a number of concessions to this position which were not fully explained. For example, with regard to the position of South Australia he noted:

The colony of South Australia has no statutory right in the River Murray and its only legal claim is under the British Law of Riparian Rights, which gives to South Australia only similar rights to those possessed by riparian owners and occupiers in New South Wales and Victoria.\(^{104}\)

McKinney may have been making a similar point here to that which was made by the New South Wales Royal Commission: that the individual landowners along the river, the riparian proprietors, might have a limited right to use the water, but the colony of South Australia at large did not have an entitlement to a particular share of the water from the river.

McKinney also contended that South Australia did not have a moral claim to the waters because there were no tributaries in that colony which contributed to the waters of the Murray.\(^ {105}\) There were a number of inconsistencies in McKinney’s analysis. First, according to McKinney, South Australia was not entitled to a share of the waters of the Murray, but the riparian proprietors in that colony were, whereas the colony of New South Wales (not just the riparian proprietors) was entitled to a share of the water despite the fact that the Murray flowed through both of these States. Secondly, if New South Wales was entitled to a share of the water from the tributaries from Victoria because the River flowed through its territory, why was South Australia not also entitled to a share of the water from those tributaries given that the lower parts of the Murray flowed through South Australia?\(^ {106}\) McKinney’s analysis is perhaps an example of barracking for one’s own State in preference to developing a well-reasoned analysis of the problem. However, in his defence, it must also be remembered that McKinney was an engineer, and not a lawyer, so it is unsurprising that there is no legal analysis supporting the conclusions he asserted in the memorandum to Parkes. While the memorandum does not assist in determining how water from the River Murray might be allocated in the absence of an

\(^{104}\) Ibid 1-2.

\(^{105}\) ‘Regarding the moral rights to the waters of the River Murray, New South Wales and Victoria are, in a large measure, in similar positions as contributors to these waters; but South Australia contributes practically nothing to the ordinary discharge of the Murray and therefore has no moral right on that ground’: see ibid 2.

\(^{106}\) ‘As owner of the River Murray, New South Wales has a certain right in the Victorian tributaries of that river – a point which is admitted in the resolutions agreed to by the Victorian Water Commission at its conference with the Water Commission of New South Wales’: see ibid 2.
intergovernmental agreement, it does demonstrate that officials from that colony were starting to realise that this was a legal question that – one way or another – needed to be resolved.

2.4.2 The Early South Australian ‘Rights’ Arguments

As time progressed, it must have become apparent to the South Australian Government and to the members of the South Australian Royal Commission that the chance of organising a joint conference between the Royal Commissions of the respective colonies was unlikely. The South Australian Royal Commissioners were also aware that the Royal Commissioners of New South Wales and Victoria had already met and made a tentative agreement regarding the allocation of water between those two colonies. It is unsurprising, therefore, that the South Australian Royal Commission and the South Australian Government sought advice as to the legal position of the colony with respect to the waters of the River Murray.

2.4.2.a The South Australian Attorney-General Briefs Counsel

While reference is made in the minutes of the South Australian Royal Commission’s meetings to legal opinions, the authorship and content of the opinions was not identified within the Royal Commissioners’ reports.\textsuperscript{107} The opinion of Charles Mann, the South Australian Crown Solicitor, dated 19 December 1887, is one of the earliest legal opinions on the question of how to allocate water from transboundary rivers between colonies in Australia. No mention is made of Mann’s opinion in the existing literature.\textsuperscript{108}

Mann’s opinion reveals that the Attorney-General, Charles Kingston, had also briefed prominent South Australian lawyers, John Downer and Josiah Symon.\textsuperscript{109} Mann’s opinion stated that while the three men ultimately delivered separate advices, for the most part,

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\textsuperscript{107} Reference was, however, made to them in the South Australian Parliament: see South Australia, \textit{Parliamentary Debates}, House of Assembly, July 5 1906, 2, 9. Reference is made to the opinions of JW Downer QC and JH Symon QC: South Australia, \textit{Parliamentary Debates}, Legislative Council, 17 August 1887, 510.

\textsuperscript{108} C Mann, ‘River Murray Riparian Rights – Memo for the Attorney General’ (19 December 1887) in \textit{Crown Solicitor Opinions}, State Records of South Australia (GRG57/16). Mann’s handwritten opinion has been transcribed and is annexed as Appendix A.

\textsuperscript{109} Kingston was Attorney-General from 11 June 1887 to 27 June 1889 and it must have been shortly after his appointment that he requested the opinions. The advice of Charles Mann makes reference to the opinion of Downer and Symon.
they reached the same conclusion. They reached the same conclusion. Unfortunately, the opinions of Downer and Symon have never been located, but they are referred to and described by Mann. Mann noted that those opinions

only differ and that not to any very great extent as to the principles on which the Imperial Parliament would be likely to act in settling the rights of this colony and those of Victoria and New South Wales to the reasonable use of the waters of the Murray.

That opinion recognizes the differing water uses of the colonies. From a practical perspective, Mann thought any concession made by South Australia that navigation could be interfered with may place the downstream colony in a difficult position. Even without water being extracted for irrigation, navigation along the river was at times extremely challenging. A further reduction in water levels by allowing upstream irrigation would only compound the problem. For the purposes of negotiations with the other colonies, Mann recommended that the approach advocated by Symon should be preferred as

once [we] admit the principle that the other colonies may so use the water as to injuriously affect even in a small degree the navigation of the lower river it seems to me it

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110 See Appendix A.
111 However, as will be explained in Chapter 4, Downer and Symon were both present at the Federal Conventions and the views on the question (or at least those they expressed publicly) are set out in the transcript of the debates. Further, Symon provided an additional opinion to the South Australian Government after Federation in 1906, which provides further insight into his view on the matter: see Ch 4.5.2.
112 Mann, above n 108. The question whether the Judicial Committee of the Privy Council provided a forum for the resolution of this dispute (rather than the Imperial Parliament) is explained at Chapter 2.4.3.
113 Ibid.
114 As I explained earlier in this chapter, South Australian steamers were already struggling to compete against the Victorian railways and a drop in the water level in drought years made the river difficult to navigate: see Chapter 2.2.2 and Chapter 2.2.3.
will be very difficult indeed for us afterwards to object and endeavour to fix the extent to which the navigation may be interfered with.\textsuperscript{115}

There was, therefore, awareness that there may need to be a difference between the publicly asserted bargaining position and the legal advice received on point. Mann’s opinion raises an important question that was considered again later during the Federal Convention debates: did the ‘riparian colonies’, as Mann described them, have the same ‘rights’ as individual riparian proprietors at common law?

2.4.2.b The Royal Commissioners Consider the Legal Question

The opinions from Mann, Symon and Downer were obviously of great interest to the South Australian Royal Commissioners. James Howe, Chairman of the South Australian Royal Commission and Commissioner of Public Works,\textsuperscript{116} wrote to the Chief Secretary of South Australia, Thomas Playford, requesting that the Royal Commission be provided with access to the legal opinions.\textsuperscript{117} At first, the Chief Secretary refused the request of the Commission; however, the Commissioners were ultimately permitted to view the opinions.\textsuperscript{118} While the legal opinions were mentioned briefly in the minutes of the proceedings of the South Australian Royal Commission, there was no detailed analysis of these views in the Commissioners’ reports.\textsuperscript{119}

As attempts to negotiate with the other colonies started to break down, the South Australian Royal Commissioners considered the colony’s legal position. In late 1890 the South Australian Royal Commission published its second progress report which set out, again albeit briefly, the legal arguments. There was some division amongst the Commissioners as to the best way to proceed. Patrick Glynn, Commissioner and Member of the House of Assembly, was reluctant to call upon the Imperial Parliament to interfere in the dispute. Glynn’s views reflected a desire for South Australia to self-govern without the need to involve the British Government. He thought that the Imperial Parliament could only amend the Imperial Act to ‘express what either is known already, or had been

\textsuperscript{115} Mann, above n 108.


\textsuperscript{117} South Australia, Royal Commission on the Utilisation of the River Murray Waters, \textit{Progress Report} (1890) ix.

\textsuperscript{118} The Commissioners were permitted to view the opinions on 5 February 1890. After the Commissioners viewed the opinions, they were returned to the Attorney-General: ibid x.

\textsuperscript{119} Ibid.
agreed’ between the colonies. Furthermore, he added that any such request would be ‘out of keeping with the spirit of constitutional liberty in the colonies’.

The question whether the Imperial Parliament would interfere in such disputes had been debated several years earlier in 1887 by Members of the South Australian Parliament. Some members were of the view that the Imperial Parliament should be appealed to without delay. However, as Member of the Legislative Council and former Commissioner of Public Works, William West-Erskine noted, the Imperial Government may be less inclined to interfere ‘if the other colonies went to any great expense’ in developing, for example, dams or irrigation settlements along the river. Fellow South Australian Member of Parliament, Richard Baker, also thought that the Imperial Government would not intervene; however, he took the more cynical view that the Imperial Government would not intervene merely for fear of ‘offending New South Wales or Victoria’. It must also be remembered that the colonies were now largely self-governing and any Act of the Imperial Parliament would only apply in the colonies if such an intention was made clear by the Imperial Parliament.

To reach an agreement Glynn suggested that the negotiations between the colonies could be ‘guided’ by principles of private and international law. He said that ‘[o]n the analogy of private riparian rights the mutual claims can easily be settled.’ In drawing a comparison with nation states, Glynn stated that:

The claim of a nation upstream to navigate a river to the mouth, though expressive only of an imperfect right, and having its origin only in a sense of natural justice, has been recognised by treaties in Europe and America, and has acquired the strength of custom.
Glynn referred to the rights with respect to navigation; however, no mention is made as to whether nation states had a right to take water for irrigation. The question whether an analogy can be drawn between the position of nation states and the colonies (and later, the States) is examined further in Chapter 5.\textsuperscript{128} Glynn’s argument that future negotiations should be guided by principles of either the common law or international law perhaps reflected the unique position of the colonies: the perception was that colonies fell somewhere in between wholly sovereign states and private citizens.\textsuperscript{129}

Charles Hussey, South Australian Royal Commissioner and fellow Member of the House of Assembly, dissented from the recommendations of the other Commissioners and wrote a separate, brief, opinion as to how the matter must be resolved. Hussey’s recommendations, like Glynn’s, reflected a practical desire to solve the problem rather than any detailed analysis of the legal issues. The difference between the two approaches was that for Hussey, the existence of s 5 of the \textit{New South Wales Constitution Act 1855} (Imp) prevented the colonies reaching a practical solution. Hussey was of the opinion that irrespective of whether s 5 of the Imperial Act actually granted New South Wales control of the water of the Murray, the existence of the provision meant that New South Wales would continue to make the argument and would have no reason to negotiate with South Australia. He noted that ‘so long as that Act is in existence the riparian rights of neither of the colonies concerned can be equitably defined or adjusted.’\textsuperscript{130} As a consequence, Hussey argued that s 5 of the Imperial Act impeded the resolution of the matter and needed to be ‘immediately repealed, and legislation clearly defining the riparian rights of each of these colonies adopted’.\textsuperscript{131} Like Charles Mann, Hussey was of the view that it was ultimately for the Imperial Parliament to resolve this matter and that the South Australian Government ought to request that the Imperial Parliament clarify the position by introducing legislation stating that s 5 did not confer a right to water.\textsuperscript{132} Hussey dissented from the final report of the Commission. He maintained his position that the

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    \item \textsuperscript{128} See Chapter 5.2.
    \item \textsuperscript{129} Glynn’s argument was developed further by the South Australian delegates at the Federal Conventions; see Chapter 4.2.
    \item \textsuperscript{130} South Australia, Royal Commission on the Utilisation of the River Murray Waters, \textit{Second Report} (1890) vii.
    \item \textsuperscript{131} Ibid.
    \item \textsuperscript{132} Ibid.
\end{itemize}

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Imperial Act must be ‘amended or repealed’ and ‘with a view of this being accomplished, the Privy Council should be appealed to without delay’.

Hussey thought that any request to the Imperial Parliament would need to be made through the Privy Council. However, the more likely avenue was a request to the Secretary of State for the Colonies. A few years later this problem arose in the context of a long running dispute between South Australia and Victoria over the location of the shared border. In 1894 the South Australian Governor, Lord Kintore, wrote to the Secretary of State for the Colonies requesting the Imperial Parliament pass legislation clarifying the location of the border between South Australia and Victoria. The Secretary of State for the Colonies, the Marquis of Ripon, wrote back advising that the Imperial Parliament could not interfere unless the colonies were in agreement as to the terms of the legislation. The difficulty for South Australia was that even the intervention of the Imperial Parliament would require New South Wales to agree a solution. Hussey’s recommendations in the final report of the Commission do, however, raise the question of what role the Privy Council could have played in the resolution of a transboundary river dispute between the colonies; and, more specifically, could a dispute such as this be referred to the Judicial Committee of the Privy Council.

2.4.3 A Forum to Hear Colonial Transboundary River Disputes?

If requesting the Imperial Parliament to intervene in a transboundary river dispute would require the consent of the colonies involved, could a colony appeal to the Judicial Committee of the Privy Council?

After the passing of the Judicial Committee Act 1833 (Imp) 3 & 4 Wm 4, c 41 and the establishment of the Judicial Committee of the Privy Council, intercolonial disputes were referred to the Judicial Committee instead of to the Committee for Trade and Plantations; which had previously dealt with these matters. Section 4 of the Act provided a

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133 South Australia, Royal Commission on the Utilisation of the River Murray Waters, Final Report (1894) 4.
134 South Australia v Victoria (1911) 12 CLR 667, 698.
135 Since as early as the 17th century, disputes between British colonies in North America had arisen involving the fixing of a shared boundary: ‘High Court of Australia – South Australia v Victoria’ (‘Documents’, vol 5) in Mitchell Library (Q990.4/A). In the early disputes, the power to settle intercolonial disputes rested with the Sovereign. As Griffith CJ explained: ‘up to the middle of the 18th century the Royal Prerogative to determine questions of disputed boundaries between Dependencies of the Crown was recognised and exercised’: South Australia v Victoria (1911) 12 CLR
discretion that allowed ‘any such other matters whatsoever as His Majesty shall think fit’ to be referred to the Judicial Committee. However, by the end of the 19th century the practice was to require all colonies party to the dispute to consent before the matter could be referred to the Judicial Committee.

South Australia, therefore, found itself in a difficult position. Both options available to it – seeking the Imperial Parliament to define the ‘rights’ of the colonies with respect to transboundary rivers or having the Judicial Committee settle the dispute – required the consent of the other colonies. What South Australia required was a mechanism by which this dispute could be settled without the need to seek agreement or consent from the other colonies. In the next chapter I examine whether the Constitution provided a solution to this problem.

2.5 Conclusion

During the second half of the 19th century there was great change in the use of the waters of the River Murray. Over this period river navigation started to decline due to the growth of the railways and irrigation had become an important water use. There was some tension between these water uses: navigation required water levels be maintained, whereas for irrigation to prosper there was likely to be a reduction in water levels. The discussion of the ‘rights’ of the colonies to the waters of the Murray evolved with the changes in use.

667, 702. The disputes often, but not always, came to the monarch with the consent of both colonies; however, on at least one occasion a dispute was resolved without the consent of both colonies. Griffith CJ noted that ‘It also appears that the jurisdiction was exercised in invitó, and not merely on reference by both parties (Massachusetts and Connecticut Case 1754)’: South Australia v Victoria (1911) 12 CLR 667, 702; see also ‘High Court of Australia – South Australia v Victoria’ (‘Documents’, vol 5) in Mitchell Library (Q990.4/A); W F Finlason, The Judicial Committee of the Privy Council – As a Judicial Tribunal (Stevens and Sons, 1878) 34.

Isaacs argued that s 4 did not extend beyond matters that were judicial in nature: South Australia v Victoria (1911) 12 CLR 667, 720-1. Whereas Harrison Moore has argued that the referral under s 4 can extend beyond matters that are solely judicial: W Harrison Moore, ‘The Case of Pental Island’ (1904) 20 The Law Quarterly Review 236, 236. For a discussion of s 4 see P A Howell, The Judicial Committee of the Privy Council 1833-1876 (1979, Cambridge University Press) 40-2.

In South Australia v Victoria, Griffith CJ suggested that by this time the Crown’s prerogative to resolve these matters on their own volition may have no longer existed:

the Prerogative so freely exercised in the 18th century ought not, in the existing conditions of the self-governing Dependencies, to be exercised without the consent of the Dependencies concerned. The Prerogative may, therefore, I think be regarded as having then fallen into abeyance, and as no longer affording a practicable means of solution of such difficulties.

South Australia v Victoria (1911) 12 CLR 667, 703.
All three colonies – New South Wales, South Australia and Victoria – recognised the importance of being able to utilise better the waters of the River Murray. Vital to achieving that objective was determining how the waters of the Murray would be shared between the three colonies. This chapter has demonstrated that there was considerable difficulty in arranging a meeting between the three colonies to discuss this question. This, of course, made reaching agreement impossible.

As early as the 1880s South Australians had started to assert a ‘right’ to the waters of the Murray. They thought that the scope of these ‘rights’ could be ‘guided’ \(^{138}\) by principles of international law or by the common law riparian rights doctrine. However, there was no detailed legal analysis of these proposed solutions. During the pre-Federation period there is a sense that no one truly wanted to get to the bottom of the legal questions surrounding the transboundary river problem. Perhaps this was a function of energies being focused on the attempt to negotiate a solution. Keeping the legal questions unanswered also keeps people at the bargaining table: while no one knows what the legal rights are, and fears what they could be, the negotiations will continue. The same pattern of behaviour can arguably also be observed in more recent negotiations. \(^{139}\)

Conceptualising the problem in terms of the ‘rights’ of the colonies influenced the drafting of the Constitution and the analysis of the problem after Federation. In Chapter 3 I examine s 100 of the Constitution, the only section of the Constitution to mention the ‘waters of rivers’. The tensions that had developed in the correspondence between the colonies continued during the Federal Convention debates. Many of the same colonial representatives who had tried to arrange a meeting of the three colonial Royal Commissions were present at the Federal Conventions. The delegates to the Federal Conventions were tasked with the challenge that had not been achieved in the previous decade: defining the ‘rights’ of the future States to the waters of the Murray.

In Chapter 3 I explain that s 100 does not resolve the problem of the allocation of water between States from a transboundary river. As a consequence, in Chapter 4 I return to consider the alternative arguments that evolved during the Federal Conventions and during the early post-Federation period. The way the arguments were shaped in this early

\(^{138}\) South Australia, Royal Commission on the Utilisation of the River Murray Waters, Second Report (1890) vi.

\(^{139}\) See Chapter 1.3.
pre-Federation period became highly influential in the development of the legal arguments post-Federation. I show in Chapter 4 that the early arguments regarding the ‘rights’ of the colonies being analogous to either the rights of nation states at international law or to common law riparian rights were developed further with respect to the States.
CHAPTER 3: SECTION 100 OF THE CONSTITUTION

3.1 Introduction

Despite the delegates at the Federal Conventions recognising the importance of the issue, attempts to define clearly within the Constitution the ‘rights’ of the States and the Commonwealth to the water from transboundary rivers largely failed. The only section in the Constitution to mention expressly the ‘waters of rivers’ is s 100, which states:

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

Section 100 is one of the few ‘express rights’ provisions in the Constitution that has been given little consideration either by the High Court or academic commentators.1 As such, there is some uncertainty as to the precise meaning of s 100. As Kevin Booker and Arthur Glass have noted, ‘whether correctly regarded as a guarantee of economic or property rights or simply as an express prohibition limiting Commonwealth power, its meaning has hardly been explored.’2 However, more recently there has been greater interest in the provision.3 Justices Gummow and Crennan alluded to the lacuna in constitutional jurisprudence in the 2010 case of Arnold v Minister Administering the Water Management Act 2000, remarking that one question of interpretation yet to be considered by the High Court was:

whether as between riparian States and their residents s 100 guarantees access to the use of the waters for the purposes mentioned, or does no more than impose a restriction upon the exercise of the power of the Commonwealth.4

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2 Booker and Glass, above n 1, 171.
Similar remarks were made by Mason J in *Commonwealth v Tasmania*. However, the Court has never needed to answer the question.

The purpose of this chapter is to determine the meaning of s 100 and, in essence, answer the question posed by Gummow and Crennan JJ. I argue in this chapter that the drafting history and the plain text of s 100 support the conclusion that the section is a limitation on Commonwealth power and does not extend further to provide the States with a ‘right’ to water from transboundary rivers. More specifically, s 100 is a limitation on s 51(i) of the Constitution – the Commonwealth’s ability to regulate interstate trade and commerce. In the second part of this chapter I demonstrate that this conclusion is consistent with the limited case law dealing with s 100.

### 3.2 The Drafting History of the Constitution

During the 1890s, representatives of the Australian colonies met at a series of conventions to discuss the formation of a federation of the colonies and the drafting of a constitution for that federation. The first Australasian Federal Convention was held in Sydney in 1891, followed by a series of three further conventions held in Adelaide and Sydney in 1897, and in Melbourne in 1898. The debates at the Federal Conventions provided a forum for a discussion of how to share the waters of the Murray – a forum that had eluded South Australia (despite its best efforts) over the previous decade. High hopes were held that the Federal Conventions would assist in bringing the colonies together and negotiating a solution. As the Premier of New South Wales, George Reid, stated at the Melbourne Convention in 1898:

> I want the rights and anxieties of the people of Australia with reference to water conservation to be cleared up and defined. If they are not defined, litigation, uncertainty, and paralysis are certain to follow.\(^6\)

The delegates were clearly aware of the consequences of failing to settle the issue when drafting the *Australian Constitution*.

Two of the most contentious issues discussed at the Federal Conventions were ‘the nature of existing rights to water, and the method for resolving future disputes over water’.\(^7\) This

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\(^5\) (1983) 158 CLR 1, 153 (‘Tasmanian Dam Case’).

is evidenced by the fact that close to one-fifth of the time during the Melbourne Convention in 1898 was spent debating the issues relating to transboundary rivers and, in particular, the River Murray. This lengthy discussion, debate and disagreement is unsurprising given that the Federal Conventions were the first opportunity for the colonies to discuss this issue in detail and face-to-face at a representative forum.

3.2.2 The First Draft – Sydney Convention, 1891

Prior to the first formal meeting of the Drafting Committee at the 1891 Sydney Convention, Samuel Griffith had prepared a draft constitution to be discussed with his fellow members of the Drafting Committee, Andrew Inglis Clark and Charles Kingston. Griffith’s draft proposed to give the Commonwealth legislative power with respect to:

- River Navigation in relation to the common purposes of two or more States.

Inglis Clark’s draft also focused on navigation, but was neither limited to rivers nor to navigation for a ‘common purpose’:

- To make an uniform law throughout the Federal Dominion of Australasia in regard to Navigation and Shipping and Quarantine, and to establish and maintain Marine Hospitals.

Charles Kingston had also prepared a draft in which he proposed that the Commonwealth Parliament be given the power

- To fix the right of any colonies with reference to the use of the water of any river or stream.

Kingston’s draft sought to grant extensive power to the Commonwealth in defining the rights of the States. However, Kingston’s draft provision was not adopted by the Drafting Committee and it was Griffith’s draft clause that was to become the starting point for discussions during the 1891 Convention. The reason for adopting Griffith’s draft

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8 Ibid 644.
9 First Official Draft, Sydney, 1891, cl 30(27), reproduced in John M Williams, The Australian Constitution – A Documentary History (Melbourne University Press, 2005) 144. That wording was kept in subsequent iterations of the draft during the 1891 Sydney Convention: at 175, 196, 224, 247. An earlier draft of the clause had read: ‘River Navigation in relation to the common purposes of States’: at 144.
10 Inglis Clark Draft , 1891, cl 45(XIV), reproduced in Williams, above n 9, 85.
11 Kingston Draft Constitution, 1891, Pt XII, cl xi, reproduced in Williams, above n 9, 130.
provision in favour of Kingston’s is not clear. However, given the lack of enthusiasm that the Government of New South Wales had demonstrated in the previous decade with respect to organising a meeting between the respective Royal Commissions of the States, it may have been that the Drafting Committee thought that Kingston’s clause would have been met with great opposition by the delegates of New South Wales.

When Griffith’s draft was put to the wider Constitutional Committee two additional amendments were made: the phrase ‘in relation to’ was replaced by ‘with respect to’ and the words ‘or parts of the Commonwealth’ was added to the end of the provision. The final draft clause defined the Commonwealth’s legislative power in the following terms:

River Navigation with respect to the common purposes of two or more States, or parts of the Commonwealth.

As can be seen from Griffith’s draft, the focus at this stage was on granting the Commonwealth power over river navigation, which was relatively uncontroversial. The ease by which agreement was reached is evidence of that fact. However, the more difficult question, which Kingston’s draft had sought to resolve, was how to define interstate water rights and whether the Commonwealth should also have power over regulating irrigation and conservation along the river.

When the clause was put to the wider Convention a further amendment was proposed by Griffith to include the words ‘and conservation of water’ after the word ‘navigation’. However, the proposal to give the Commonwealth power to legislate with respect to conservation was met with opposition. Edmond Barton suggested immediately that the amendment should be withdrawn, explaining:

Surely it is not intended to transfer to the federal parliament the power of legislation for the purposes of the commonwealth with respect to the general conservation of water. That is a matter for the taking away of which from the individual states there is no reason whatever. Matters relating to irrigation and so on, which are intimately connected with property and civil rights, and which we are all prepared to leave to the several states, ought certainly not to be dealt with by the federation. I can see no reason why control with respect to these matters should be transferred from the states to the commonwealth,

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12 See Chapter 2.3.
13 Constitutional Committee Meeting Draft, Sydney 1891, Pt V, cl 16, reproduced in Williams, above n 9, 274. Also, the words ‘in relation’ were substituted for ‘with respect’: at 274.
14 Final Draft, Sydney, 1891, Pt V, cl 28, reproduced in Williams, above n 9, 423.
and I think that the idea of the commonwealth being given power to take over control with regard to them will cause very great alarm. I trust that the amendment will be withdrawn.\textsuperscript{15}

Griffith explained that whilst he was not in favour of the amendment, he had proposed it because it was suggested during the discussions of the Drafting Committee.\textsuperscript{16} William McMillan also suggested that the amendment be withdrawn at this stage and that the clause be considered further at a later date,\textsuperscript{17} and it was on that basis that Griffith withdrew his amendment. Debate over the clause was not resumed and the clause remained unchanged.\textsuperscript{18}

Having the Commonwealth regulate navigation was seen as an achievement for the South Australian delegates. It was hoped that this would ensure the continuation of navigation along the River Murray and, specifically, the South Australian steamboat industry. However, the practical effect of granting the Commonwealth legislative power over navigation was not expressly considered by the Federal Convention delegates. Whether the provision would guarantee river navigation for South Australia in practice would depend in part on the composition of the Commonwealth Parliament and whether members of that Parliament would vote along state lines.\textsuperscript{19}

While the difficult question of how to share the water for irrigation and conservation did not receive a great deal of attention at the 1891 Convention, the issue was debated extensively at the subsequent conventions in Adelaide and Melbourne in 1897 and 1898 respectively.

\textsuperscript{15} Official Report of the National Australasian Convention Debates, Sydney, 3 April 1891, 690.
\textsuperscript{16} Ibid 691.
\textsuperscript{17} Ibid 692.
\textsuperscript{19} A vote along State lines may well have disadvantaged South Australia if New South Wales, Victoria and Queensland were to vote as one. At the 1897 Adelaide Convention, South Australian, John Gordon suggested that New South Wales and Victoria could hold the numbers in a Federal parliament: In the Federal Parliament New South Wales and Victoria will have such an overwhelming majority that it is very unlikely that anything unfair to Victoria or New South Wales will pass through very easily. Besides, we can trust the Federal Parliament to deal honorably and fairly in this matter. I believe that it will do what is absolutely fair and just to the colonies. Official Report of the National Australasian Convention Debates, Adelaide, 17 April 1897, 821-2.
3.2.1 The Use of the Drafting History in Constitutional Interpretation

Reference to the drafting history is a legitimate starting point in understanding the meaning of a particular constitutional provision.\(^{20}\) It has long been accepted that the draft bills of the 1891, 1897 and 1898 Federal Conventions can be used as an aid to constitutional interpretation.\(^{21}\) In *Cole v Whitfield* the High Court went further to hold that the Federal Convention debates can be referred to

for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.\(^{22}\)

Caution must be exercised so as not to substitute the plain meaning of the words for the intentions of the framers.\(^{23}\) As is illustrated in this chapter by the analysis of the Federal Convention debates in relation to s 100, the opinions among the framers often differed significantly and it is not possible to distil a unified view that can be attributed to the Convention delegates at large. However, focusing on the drafting history of s 100 shows that the language of the section was directed towards placing a limitation on Commonwealth legislative power, so that the Commonwealth’s regulation of navigation along rivers was not at the expense of the irrigation schemes established by the respective States.

3.2.3 Adelaide Convention 1897

At the Adelaide Convention in 1897 the previous draft from the 1891 Convention was disregarded. Unlike the clause drafted at the Sydney Convention in 1891, the initial draft clause at the Adelaide Convention was not limited to navigation and granted the Commonwealth Parliament wide-reaching power over:


\(^{21}\) *Tasmania v Commonwealth* (1904) 1 CLR 329, 350 (Barton J).

\(^{22}\) *Cole v Whitfield* (1988) 165 CLR 360, 385 (The Court). This principle was affirmed by the High Court in *New South Wales v Commonwealth* (1990) 169 CLR 482, 501 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ) (‘Incorporation Case’).

\(^{23}\) *Cole v Whitfield* (1988) 165 CLR 360, 385 (The Court); *Tasmania v Commonwealth* (1904) 1 CLR 329, 333 (Griffith CJ) (during argument); *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 213 (Barton J) (during argument).
The control and regulation of navigable streams and their tributaries within the Commonwealth, and the use of the waters thereof.\(^{24}\)

This was a controversial provision and Edmund Barton immediately alerted the delegates to the proposed expansion of the Commonwealth’s power:

not only is there power to legislate as to river navigation with respect to the common purposes of two States, but there is an entire control and regulation given of navigable streams and their tributaries within the Commonwealth, and also over the use of their waters, apart from the question of navigation.\(^{25}\)

The position taken by the delegates at the Adelaide Convention was much the same as at the 1891 Convention in Sydney – the South Australian delegates wanted to protect river navigation and believed that this would be achieved by granting control to the Commonwealth Parliament whereas the delegates from New South Wales were concerned that Commonwealth regulation of river navigation would come at the expense of landowners in its colony who were using the water from the Murray, the Darling and their tributaries for farming and irrigation.

As South Australia was primarily concerned with the rivers within the Murray-Darling Basin, John Gordon proposed that the clause could be couched in slightly more limited terms. Gordon suggested that the words ‘navigable streams’ be replaced with ‘navigation on the Rivers Murray, Darling and Murrumbidgee’ so that the clause read:

The control and regulation of navigation on the Rivers Murray, Darling and Murrumbidgee and their tributaries within the Commonwealth and the use of the waters thereof.\(^{26}\)

Unsurprisingly, the New South Wales delegates opposed Gordon’s amendments.\(^{27}\) Joseph Carruthers explained that the Darling and the Murrumbidgee did not flow all year round and that conserving water for navigation along those rivers would not only be

\(^{24}\) Adelaide Draft, 1897, cl 50(XXXI), reproduced in Williams, above n 9, 511. It appears the Drafting Committee of Barton, Downer and O’Connor must have reworked the provision prior to the Convention: *Official Report of the National Australasian Convention Debates*, Adelaide, 12 April 1897, 439 (Edmund Barton).


\(^{27}\) Ibid 794 (George Reid). 802 (Joseph Carruthers and William McMillan). Reid responded to Gordon: ‘You will want the Blue Mountains next’: at 794.
difficult but would be at the expense of farmers and irrigators.\textsuperscript{28} He explained this would hamper the growth of inland settlements and asked the delegates:

\begin{quote}
What is the use of navigation on these rivers if you have the people driven away from settlement, and you have no goods to carry?\textsuperscript{29}
\end{quote}

The debate was shaped in part by the fact that the delegates (especially those from New South Wales) saw the problem as one involving a number of separate rivers instead of viewing the rivers as part of a single river basin. As a consequence, the New South Wales delegates argued that the Darling (which flowed wholly within New South Wales) should not be subject to regulation by the Commonwealth.\textsuperscript{30} This approach ignored the fact that rivers such as the Darling were tributaries of the Murray, which was a transboundary river. At times the debate focused on the interests of the States associated with individual rivers as opposed to looking at which political entity might be best placed to regulate the Basin as a whole. New South Welshman, William McMillan, suggested that Gordon’s amendment – limiting Commonwealth regulation of navigation of the Murray, Darling and Murrumbidgee and their tributaries – should be limited further so as to include only the River Murray.\textsuperscript{31}

Gordon’s amendment was ultimately withdrawn in favour of an alternative proposal put forward by John Downer. Downer’s amendment was for the Commonwealth to have power over the regulation of navigation on ‘rivers running through or on the boundaries of two or more States so far as is necessary to preserve the navigability thereof’.\textsuperscript{32} Downer’s proposal was more limited than the amendment put forward by Gordon and may have been an attempt to strike a compromise with the delegates from New South Wales. However, even this more limited grant of Commonwealth power was rejected by the delegates when put to a vote.\textsuperscript{33} One of the arguments put forward by George Reid was that, from a practical perspective, river levels were at times so low that it might not even be possible to ensure that the Murray remained navigable.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{28} Ibid 803-5 (Joseph Carruthers).
\item \textsuperscript{29} Ibid 803 (Joseph Carruthers).
\item \textsuperscript{30} Ibid 797, 818 (George Reid). Reid expressed a similar view at the Melbourne Convention: Official Record of the Debates of the Australasian Federal Convention, Melbourne, 4 February 1898, 566.
\item \textsuperscript{31} Official Report of the National Australasian Convention Debates, Adelaide, 17 April 1897, 802.
\item \textsuperscript{32} Ibid 815.
\item \textsuperscript{33} Ibid 819.
\item \textsuperscript{34} Ibid 819.
\end{itemize}
After Downer’s attempt at compromise was defeated, a series of new clauses were suggested in quick succession. Victorian, Isaac Isaacs suggested the Commonwealth should have legislative power with respect to:

Control and regulation of rivers between two States, and the use of the waters thereof.35

South Australian, Josiah Symon thought Isaacs’ proposal should be amended to include:

The control and regulation of rivers between and through two States.36

Perhaps after recognising that attempts to grant the Commonwealth power with respect to navigation along the tributaries of the Murray was likely to be met with resistance from the New South Wales delegates, fellow South Australian Gordon proposed a slightly more restrictive clause than that suggested by Isaacs that focused on the River Murray and limited Commonwealth power to:

The control of the navigation of the River Murray, and the use of the waters thereof.37

Barton then proposed that the clause read:

The control of the navigation of rivers so far as they form boundaries between two States.38

With Barton’s consent, this amendment was withdrawn by fellow New South Welshman Richard O’Connor, a member of the delegation from New South Wales, in favour of the following wording:

The control of the navigation of the River Murray from Albury to the sea.39

After an attempt to remove the words ‘and the use of waters thereof’ from Gordon’s proposal failed, Carruthers sought to amend the clause so it would read:

The control and regulation of the navigation of the River Murray, and the use of the waters thereof from where it first forms the boundary between Victoria and New South Wales to the sea.40

This clause – a combination of Gordon’s original provision and Carruthers’ amendment – was the text finally adopted at the Adelaide Convention.41 Later that year at the 1897

36 Ibid 821 (emphasis added).
37 Ibid 821.
38 Ibid 821.
39 Ibid 824.
40 Ibid 826-7.
Sydney Convention the issue of the allocation of the water from interstate rivers received very little attention and no further amendments to the clause were made.\(^{42}\)

### 3.2.4 Melbourne Convention 1898

It was at the Melbourne Convention in 1898 that the question of how to regulate the waters of the rivers received the greatest attention. So many proposed amendments were put forward that it was agreed that the most appropriate course of action was to start the drafting of the clause afresh.\(^{43}\) As at the Adelaide Convention the previous year, the Sydney Convention in 1891 and during the earlier correspondence between the colonies, the greatest disagreement over how to regulate interstate rivers was between delegates from South Australia and New South Wales.

As I explained in Chapter 2, representatives from New South Wales relied on the fact that east of the South Australian border the Murray was entirely within that colony in order to assert that the Government of New South Wales could do what it pleased with the waters of the River while it flowed through its territory.\(^ {44}\) As was also the case at the previous Conventions, the representatives from New South Wales were not wholly against granting the Commonwealth Parliament power to legislate with respect to navigation.\(^ {45}\) However, they were most concerned that Commonwealth regulation of navigation should not be at the expense of farming and agriculture, which extracted water from the Murray and its tributaries.\(^ {46}\) In an attempt to protect the interests of New South Wales and its landowners, McMillan proposed that the Commonwealth Parliament should have power over:

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\(^{41}\) Adelaide Draft, 1897, cl 52(XXXI), reproduced in Williams, above n 9, 595.  
\(^{42}\) Sydney Draft, 1897, cl52(XXXI), reproduced in Williams, above n 9, 778.  
\(^{43}\) *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 February 1898, 480.  
\(^{44}\) Relying on clause 5 of the *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vic, c 54. See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 24 January 1898, 65 (Richard O’Connor). See also Chapter 2.4.1.  
\(^{45}\) The attitude of New South Wales was explained by Richard O’Connor at the Melbourne Debates: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 24 January 1898, 65 (Richard O’Connor). At the 1897 Adelaide Convention, George Reid stated:  
   In the interests of peace and goodwill I think we should all be prepared to hand over this matter to the Commonwealth, so far as the waters run as a boundary. If it does not form a boundary it is only a question of one State to deal with, and the Commonwealth has nothing to do with it.  
The Rivers Murray and Darling, so far as may be necessary to the maintenance and improvement of their navigability, but so that no state interested shall be prevented from using any of the water of such rivers for the purposes of conservation and irrigation.\textsuperscript{47}

The second part of the provision was intended to protect the interests of the irrigators in the upstream colonies.\textsuperscript{48} George Reid included a similar qualification in his proposed clause, which read:

If any question concerning the navigation of a river and the use of the waters thereof for the purposes of water conservation arise in the exercise of powers vested in the Federal Parliament, or in the exercise of powers belonging to the several states, the maintenance of navigation shall be deemed to be subservient to the maintenance and extension of works of water conservation.\textsuperscript{49}

The proposal prompted a heated exchange between Reid and Gordon on a day when temperatures in Melbourne reached 41.9 degrees:\textsuperscript{50}

Mr. GORDON: Unless this amendment is one of the right honorable gentleman's elephantine jokes, it will require only a few words to prove two things; first of all, that it is an attempt at a piece of colossal selfishness; and, secondly, that it evidences the complete inconsistency – I am almost inclined to say the political unscrupulousness –

Mr. REID: – You are entitled to say it on account of the hot weather –

Mr. GORDON: – Of the right honorable gentleman himself. It is a cool proposal for the right honorable gentleman to make that irrigation shall be placed above navigation, when the colony which controls the head-waters is New South Wales herself. To carry this would simply mean that the other colonies might be deprived of every drop of water in these rivers if New South Wales proposed to use it for irrigation.\textsuperscript{51}

Ultimately, these proposed amendments by Reid and McMillan were not adopted.\textsuperscript{52}

In 1896, the colonial Government of New South Wales had passed the \textit{Water Rights Act 1896 (NSW)}, which abolished the common law rights and vested the ‘right to the use and

\textsuperscript{47} \textit{Official Record of the Debates of the Australasian Federal Convention}, Melbourne, 4 February 1898, 546 (emphasis added).
\textsuperscript{48} Ibid 546-7 (William McMillan).
\textsuperscript{49} Ibid 565 (emphasis added).
\textsuperscript{52} McMillan’s amendment was rejected by the delegates: ibid 560; and Reid’s was withdrawn: at 572.
flow and to the control of water in all rivers\textsuperscript{53} in the Crown. The Act authorised the Crown to construct dams, locks and weirs along waterways and for landowners to pay a licence fee to utilise these facilities\textsuperscript{54}. The concern of the delegates from New South Wales probably stemmed from the fact that any draft provision granting rights to the other States or allowing the Commonwealth to regulate water across the colonies may have been inconsistent with their Government’s desire to encourage inland development and irrigation within its colony.

The delegates from New South Wales were also concerned with the financial implications of granting the Commonwealth power over navigation without qualification. O’Connor explained that the colonial Government had already expended a considerable amount of money developing the land and put his colony’s position in this way:

\begin{quote}
The Government [of New South Wales] have issued [water] licences to hundreds of persons who have expended money in the construction of works upon the faith of these grants by the Crown. As a matter of fact, some £3,000,000 have been invested in New South Wales in the construction of works for the purpose of making the lands occupied under tenure from the New South Wales Government more fertile and fruitful.\textsuperscript{55}
\end{quote}

Carruthers went even further than his colleagues from New South Wales. For Carruthers, optimising water use meant maximising irrigation:

\begin{quote}
If the day is to come when the Darling and the Murrumbidgee are to be drained dry for irrigation purposes, Australia will be all the happier and all the better for that day having arrived.\textsuperscript{56}
\end{quote}

While Carruthers’ position may have been at the extreme end of the spectrum, it reflected the prevailing attitude of the time within his colony, which was very much focused on developing irrigation.

\begin{footnotes}
\footnotetext{53}{Water Rights Act 1896 (NSW) s 1(I). The Act vested the common law riparian rights in the Crown: Hanson v Grassy Gully Gold Mining Co (1900) 21 LR (NSW) 271, 275-77, which was cited with approval in ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140, 172-3 [54] (French CJ, Gummow and Crennan JJ), 191-2 [116] (Hayne, Kiefel and Bell JJ). Contra Thorpes Ltd v Grant Pastoral Co Pty Ltd (1955) 92 CLR 317, 331 (Fullagar J).}
\footnotetext{54}{Water Rights Act 1896 (NSW) s 4.}
\footnotetext{56}{Official Record of the Debates of the Australasian Federal Convention, Melbourne, 7 March 1898, 1957.}
\end{footnotes}
As was raised at the Adelaide Convention, regulating navigation also presented practical problems. There was a real question as to whether it was even possible to maintain navigation along the rivers. In the summer months the upper reaches of the Darling and the Murrumbidgee were not navigable. At the Melbourne Convention, Premier George Reid explained that for the previous 13 years the Murrumbidgee (at Hay) was not navigable for an average of 22 weeks per year. Similarly he stated that the Darling River (at Walgett) was not navigable for an average of 18 weeks per year.\(^\text{57}\)

### 3.2.5 Victoria Attempts to Avoid Taking Sides

In Chapter 2, I explained that in the decade prior to the Federal Conventions the Victorian Government had indicated to the South Australian Government a willingness to settle the transboundary river dispute; however it avoided taking a proactive approach in the resolution of the dispute for fear of offending the Government of New South Wales.\(^\text{58}\) A similar attitude was adopted by some of the Victorian delegates during the Federal Conventions. Isaac Isaacs explained this fine balancing act in the most diplomatic way: ‘I have no wish to press anything that the representatives of South Australia do not want, and that the representatives of New South Wales are unwilling to give.’\(^\text{59}\) Victorian Premier, George Turner acknowledged the tension between the delegates from South Australia and New South Wales and urged the delegates to see if they could not find a compromise:

> I have been halting between two opinions in connexion with this matter. My sympathies are undoubtedly with South Australia. At the same time, I cannot conceal from myself the fact that our friends from New South Wales have urged strong arguments in favour of their views, and my great desire all through has been to endeavour to reconcile the conflicting interests, so that we might, if possible, arrive at a conclusion which would be fair and equitable to all the states concerned.\(^\text{60}\)

Despite stating that he was understanding of the position taken by the South Australian delegates, Turner went on to explain that ‘in the interests of the colonies, irrigation should

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\(^\text{57}\) Ibid 1961. Reid made a similar point at the 1897 Adelaide Convention, noting that for much of the year parts of the Darling were nothing more than a ‘mere chain of waterholes’: *Official Report of the National Australasian Convention Debates*, Adelaide, 17 April 1897, 818.

\(^\text{58}\) See Chapter 2.3.3 and Chapter 2.3.4.

\(^\text{59}\) *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 February 1898, 482.

\(^\text{60}\) Ibid 487.
be the first consideration, and navigation the second.'  

Like New South Wales, the Victorian Government had a clear interest in ensuring irrigation was regulated by the States. The Victorian Government had established irrigation settlements along the river and would have been keen to ensure they were not impaired by any future federal regulation.

However, not all Victorian delegates sided with their colleagues from New South Wales. Henry Higgins was in favour of granting the Commonwealth broad power to regulate the rivers: ‘the whole matter shall be trusted to the Federal Parliament, and that the Federal Parliament shall be able to say what is to be done with the River Murray and its tributaries.’ Whether this was a reflection of Higgins’ nationalistic tendency or his sympathies for the South Australian position, the political reality was that such a bold plan – and one which granted the Commonwealth Government control over more than just navigation – would never receive the support of delegates from New South Wales.

3.2.6 Limiting the Commonwealth’s Power

There was little objection in principle to the Commonwealth regulating navigation, provided that in doing so it did not interfere with irrigation within the respective colonies. During the last days of the Melbourne Convention the focus shifted from debating the definition and scope of the Commonwealth’s control over rivers, to placing a limitation on the Commonwealth’s trade and commerce power, which was to include river navigation. By this point in the debate the delegates had agreed a form of words for the

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62 Official Record of the Debates of the Australasian Federal Convention, Melbourne, 3 February 1898, 488 (George Turner).

63 As will be recalled from Chapter 2, the expansion of the railways inland in Victoria meant that farmers in that colony were not reliant on the river for transportation and river navigation was not, therefore, Victoria’s primary concern: see Chapter 2.2.2.

64 Official Record of the Debates of the Australasian Federal Convention, Melbourne, 21 January 1898, 60. Higgins proposed that the Commonwealth be given power over: ‘The adjustment of riparian rights as between states as to all waters which in the course of their flow or after joining other waters touch more than one state’: at 1 February 1898, 400. As Sanford Clark noted, this proposal had its own difficulties as it assumed the riparian rights existed between States and also raised the question of whether such a determination should be for the Parliament or a court to decide: see Sandford D Clark, ‘The River Murray Question: Part I – Colonial Days’ (1971) 8 Melbourne University Law Review 11, 35.

trade and commerce power which remained virtually unchanged during the rest of the Convention and was ultimately adopted in the Constitution. The trade and commerce power granted the Commonwealth legislative power with respect to:

The regulation of trade and commerce with other countries and among the several states.\footnote{Official Record of the Debates of the Australasian Federal Convention, Melbourne, 7 March 1898, 1947. Cf the final wording of s 51(i), which reads: trade and commerce with other countries, and amount the States’.}

South Australian delegate Patrick Glynn proposed that the following limitation be included within the trade and commerce power:

For the purposes of this sub-section, waters shall be deemed navigable for trade and commerce which, either by themselves or in connexion with other waters, are in fact navigated permanently or intermittently for trade and commerce with other nations, or among the several states.\footnote{Official Record of the Debates of the Australasian Federal Convention, Melbourne, 7 March 1898, 1947.}

Glynn’s intention was to ‘leave the various colonies in the position in which they were when the Constitution was drafted’.\footnote{Ibid 1947-8.} The obvious problem with this objective, as I identified in Chapter 2, was that there were differing opinions as to the nature of the existing rights of the colonies.\footnote{See Chapter 2.4.} Glynn’s proposal was not supported by fellow South Australians, Gordon, Symon and Downer.\footnote{Official Record of the Debates of the Australasian Federal Convention, Melbourne, 7 March 1898, 1953 (John Gordon), 1953-4 (Josiah Symon), 1954 (John Downer).} Glynn’s proposed amendment to the trade and commerce clause made reference to ‘navigable waters’. One question was whether this amendment would also affect the separate clause that granted the Commonwealth power over navigation and shipping. As a consequence, further debate of the amendment was deferred until the Convention delegates turned to consider the Commonwealth’s legislative power with respect to navigation and shipping.

When the delegates debated the navigation and shipping clause and returned to this problem, Reid explained that he did not wish to see the Commonwealth’s control of navigation to be at the expense of a State’s ability to regulate water:

If the states [sic] rights of legislation in connexion with the improvement of their resources by the use of water were on a par with the power of the Commonwealth, I might be prepared to let the matter stand at that, but as this Constitution is framed the
Commonwealth power of navigation is absolutely supreme and binding on all the states and on all the subjects, without the slightest opportunity of appeal or revision.\textsuperscript{71}

It was here that a shift in the debate occurred. Reid proposed an amendment to the navigation and shipping provision which would limit the Commonwealth’s legislative power with respect to trade and commerce to ensure that a State’s use of water for irrigation was not interfered with:

The powers contained in this sub-section, and those relating to trade and commerce under this Constitution, shall not abridge the rights of a state or its citizens to the use of the waters of rivers for conservation and irrigation.\textsuperscript{72}

Downer moved that Reid’s clause be amended so that the word ‘reasonable’ was inserted before the word ‘use’.\textsuperscript{73} Downer’s amendment was agreed to; however, there was some disagreement as to whether it added anything to the clause.\textsuperscript{74} The insertion of the phrase ‘reasonable use’ may have been an attempt to make reference to the common law riparian rights doctrine that had allowed for the ‘reasonable use’ of water for irrigation in circumstances where the use of the water would not affect downstream users.\textsuperscript{75} Glynn referred to the earlier discussion of riparian rights by Isaacs and explained:

I should like to draw the attention of the committee to the cases which the Attorney-General of Victoria cited some time ago. If I am not mistaken, in his reference to the subordination of the principles of the English common law to the necessities of irrigation in some of the states of America, he pointed out that the words ‘reasonable use’ came into the decisions. I cannot find these cases now; but I remember perfectly well that the rights granted for the purposes of irrigation in abrogation of the general principle of English common law of riparian ownership provided for the ‘reasonable use’ of the water.\textsuperscript{76}

However, whether Downer’s amendment in fact added anything in substance was questioned by other delegates. Isaacs contended that it added nothing to the clause:

\textsuperscript{71} Ibid 1959.
\textsuperscript{72} Ibid 1989.
\textsuperscript{73} Ibid 1989.
\textsuperscript{74} Both Isaacs and Reid questioned whether the word ‘reasonable’ added anything to the clause: ibid 1989-90.
\textsuperscript{75} The riparian rights doctrine is examined in detail in Chapter 5.3.
When you give the power to control navigation to the Federal Parliament, and you say that nothing in that power shall prevent a state from making a reasonable use of its waters for irrigation and conservation, the reasonableness is to be judged as between the necessities of water conservation and irrigation and the necessities of navigation, and not as between the rights of two states.\(^77\)

The amendment by Downer was accepted. The question whether the inclusion of the word ‘reasonable’ created a ‘right’ to water as between the States has never been considered by a court. However, as is explained in the second part of this chapter, when the word ‘reasonable’ is read in the context of the rest of the section, it limits Commonwealth power such that any regulation of trade or commerce must not restrict a State’s access to the reasonable use of water for irrigation or conservation and goes no further. It requires the Court to determine whether the State’s claim to water for irrigation or conservation (against the Commonwealth) is reasonable.

Reid’s amendment, like the qualification on the Commonwealth’s trade and commerce power proposed by Glynn, focused on placing a limitation on the Commonwealth’s legislative power. Finally, the delegates agreed on the following clause:

> Navigation and shipping, the powers contained in this sub-section, and those relating to trade and commerce, under this Constitution shall not abridge the rights of a State or its citizens to the reasonable use of the water of the rivers for conservation and irrigation.\(^78\)

It is from this final draft that ss 98 and 100 were born. The Drafting Committee made some minor changes – breaking up the provision and separating out what we now recognise as ss 51(i), 98 and 100; however, the substantial text was not altered. Sections 98 and 100 were drafted in the following terms:

- **Section 98** – Trade and commerce includes navigation and State railways
  The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

- **Section 100** – Nor abridge the right to use water

\(^77\) *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 March 1898, 1990. Barton explained that the purpose of the amendment was to ensure that the present irrigation works could continue without being affected: ‘It seems to me that the amendment now before the committee is better calculated to preserve the rights of the various states … This amendment simply provides that the existing rights of irrigation shall not be abridged.’: at 1989.

\(^78\) Melbourne Draft, 1898, cl 51(VIII) reproduced in Williams, above n 9, 954, 986.
The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.\footnote{Melbourne Draft (as amended by the Drafting Committee), 1898, reproduced in Williams, above n 9, 1026, 1107. Note that the numbering of these sections varied as the draft was updated.}

It was in this form that the sections were included in the Constitution. The sections have not been the subject of amendment since Federation.

\subsection*{3.2.7 Commentary}

The lengthy debate over the wording of s 100 was a reflection of the division between the South Australians and the New South Welshmen. Section 100 can be seen as a compromise of these opposing views. The delegates from New South Wales were against the Commonwealth regulating irrigation or conservation or regulating navigation in such a way as would impact on irrigation within that State. The South Australians were much more willing to grant the Commonwealth power over navigation and other uses of the Murray’s waters. Whilst that might not have resulted in Commonwealth regulation favourable to South Australia, it was perhaps preferable to the stalemate that had occurred in the previous decade and would at the very least provide South Australia with a forum – the Commonwealth Parliament – in which to air their concerns. Commonwealth regulation could provide for a consistent approach across the entire Murray-Darling Basin; for example, preferring irrigation to navigation across the whole of the system or setting uniform levels of water extraction throughout the Basin.\footnote{So long as such a scheme was within the scope of the Commonwealth’s legislative power. It must also be remembered that any Commonwealth scheme would not be able to preference one State over another: 
Australian Constitution s 99.}

Reviewing the drafting history shows that earlier drafts granted the Commonwealth power over irrigation and conservation or the power to define the ‘rights’ of the respective States to use water for these purposes. However, these drafts were not adopted largely because they were not supported by the delegates from New South Wales. Reid’s final draft, which was adopted by the Convention, is instructive as it shows the development of a provision that was to place a limitation on the Commonwealth’s legislative power with respect to ‘navigation and shipping … and those relating to trade and commerce’.\footnote{See above n 78.} The clear connection between ss 98 and 100 on the one hand, and
s 51(i) on the other, is readily apparent from the clause drafted by Reid and is not lost by the fact that the Drafting Committee made minor aesthetic changes in separating out ss 98 and 100.

The suggestion that the inclusion of the word ‘reasonable’ placed a limitation on the legislative power of the States with respect to each other is not supported by the drafting history. The argument that Downer was intending to create an interstate water right is to import the intention of one convention delegate into the text of the Constitution. Not only is this an impermissible use of the Convention Debates, but as has been shown in this section, Downer’s views were not unanimously supported by the other delegates. There was some question as to whether the inclusion of the word ‘reasonable’ had the effect that Downer desired. An interpretation that attempts to imply an interstate water right as between the States appears to be inconsistent with the drafting history of s 100, which emphasises that the section is a limitation on Commonwealth power.

To the extent that the inclusion of the word ‘reasonable’ may add something to the section, it must be interpreted in the context of the rest of the provision. If it adds anything, then it leaves the High Court with some discretion in the application of s 100. Where the Commonwealth has enacted legislation pursuant to the trade and commerce power and a State alleges that the Commonwealth legislation offends s 100, it will be for the Court to determine whether the Commonwealth has deprived the State of the right to the reasonable use of water for irrigation and conservation. There could be instances where the Court determines that the Commonwealth legislation partly deprives the State of some water, but that the State still has access to the reasonable use of the water for irrigation and conservation. The factors to be taken into account in determining whether the State continues to have access to the reasonable use of water will be for the Court to identify.

Despite the arguably narrow wording of s 100, it may have been that the drafters of the Constitution assumed that alternative mechanisms would be available for resolving transboundary river disputes via the establishment of the Inter-State Commission. Section 101 provides:

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82 See above n 22. See generally Chapter 3.2.1.
There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

The Commission has administrative and investigative powers with respect to matters regarding trade and commerce; the powers are much like those of a Royal Commission. However, the High Court has limited the power of the Commission by holding that the Inter-State Commission cannot be vested with judicial power. In *New South Wales v Commonwealth* a majority of the Court held that Part V of the *Inter-State Commission Act 1912* (Cth), which sought to vest the Inter-State Commission with judicial power and make the Commission a court of record was invalid. The majority’s decision prevented the Commission from awarding damages, granting an injunction or declaring legislation invalid. The role of the Inter-State Commission is further limited by the fact that its powers are restricted to matters relating to ‘execution and maintenance ... of the provisions of this Constitution relating to trade and commerce’. Within the scope of this power would be the ability of the Commission to investigate, for example, river levels necessary to maintain river navigation and interstate trade. However, what is less clear is whether it would be within the scope of the Commission’s power to examine issues relating to environmental conversation and sustainability. The ability to consider the matters might also be dependent on how these issues relate to trade and commerce. In addition, since the signing of the *River Murray Waters Agreement* by the Commonwealth and the States in 1914, many of the tasks that could have been performed by the Inter-State Commission – for example, monitoring and recording water levels – were performed by the River Murray Commission.

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84 *New South Wales v Commonwealth* (1915) 20 CLR 54, 60-1 (Griffith J), 90-2 (Isaacs J), 106 (Powers J), 107 (Rich J) (‘Wheat Case’).
85 Ibid.
86 ‘Trade and commerce’ extends to ‘navigation and shipping’: *Australian Constitution* s 98.
87 Or by subsequent commissions with similar names, which are a creature of statute.
3.3 Judicial Consideration of Section 100

Section 100 has received limited consideration by the High Court and, to the extent that it has been considered, that consideration has largely been indirect in the context of determining the meaning of other sections of the *Constitution* that use similar phrases or words to s 100. The lack of direct consideration of s 100 by the Court may be in part due to the fact that since Federation the Commonwealth and States have sought to resolve issues surrounding interstate water rights within the Murray-Darling Basin by negotiation. As I explained earlier, the first agreement between the Commonwealth and States over waters of the River Murray was entered into in 1914 and since that time there have been a series of intergovernmental agreements.  

In this part of the chapter I examine the four cases that have considered (either directly or indirectly) s 100. The purpose of the examination is to show that, to the extent to which the wording of s 100 has been considered, the case law supports the conclusion that the section is a limitation of Commonwealth power with respect to the trade and commerce power (which, by virtue of s 98, extends to navigation and shipping). The section is not a limitation on Commonwealth power at large and it does not place a limitation on State legislative power. This interpretation is consistent with the drafting history explained in the first part of this chapter.

While s 100 is not the source of a transboundary water ‘right’, it could be consistent with or subject to such a right, the source and content of that right being derived from either elsewhere within the *Constitution* (perhaps by implication) or from the common law. In Chapters 6 and 7 I explore the possible source and content of such a ‘right’.

3.3.1 Australasian Temperance and General Life Assurance Society v Howe

In *Australasian Temperance and General Life Assurance Society v Howe*, a 1922 case, the Society commenced proceedings against the defendant, Ellen Howe, for the foreclosure of a mortgage. This was the first decision of the High Court to mention s 100 and it did so in the context of examining the scope of s 75(iv) of the *Constitution*. The plaintiff in this case was incorporated in Victoria and the defendant lived in New South

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88 See above Chapter 1.1 and 1.4. The initial 1914 agreement was amended a number of times: see, eg, *River Murray Waters Act 1934 (Cth)*, *River Murray Waters Act 1983 (Cth)* and the agreements annexed in the schedules. The first Murray-Darling Basin Agreement was signed in 1987.

89 (1922) 31 CLR 290 (‘Howe’).
Wales. The plaintiff sought to commence proceedings in the High Court pursuant to s 75(iv) of the Constitution, which states that the original jurisdiction of the High Court includes matters ‘between residents of different States’. The question for the Court involved the meaning of the word ‘residents’ in s 75(iv); specifically, whether the word ‘residents’ was limited to natural persons. A majority of the Court held that the word ‘residents’ in s 75(iv) did not include corporations.90

It was submitted by the plaintiff during the course of argument that the word ‘residents’ must have the same meaning in s 75(iv) as it does in s 100 and that to restrict the meaning of ‘residents’ to natural persons would place an unnecessary restriction on s 100. In a joint judgment, Knox CJ and Gavan Duffy J rejected the argument:

We do not assent to the proposition that a particular word is necessarily to be given the same meaning wherever it is found in a given statute.91

Knox CJ and Gavan Duffy J sought to avoid giving a determinative answer to whether the reference to ‘residents’ in s 100 was limited to natural persons. However, their Honours remarked:

we at present see no difficulty in construing sec. 100 as protecting the rights of individuals resident within the State, whether those rights are exercised immediately by themselves or mediately through an incorporated company.92

The other member of the majority, Higgins J, stated that the ‘purposes for which the words are used in sec. 75 and in sec. 100 are widely different’.93 He concluded that irrespective of the meaning of ‘residents’ in s 100, there was nothing in that section to alter his conclusion that ‘residents’ in s 75(iv) was limited to natural persons.94 It must be remembered that these remarks were obiter and that the Court was reluctant to express a conclusive view with respect to the definition of ‘residents’ within s 100.

90  Knox CJ, Higgins and Gavan Duffy JJ; Isaacs and Starke JJ dissenting.
91  Howe (1922) 31 CLR 290, 299 (emphasis in original).
92  Ibid 299.
93  Ibid 335.
94  Ibid.
3.3.2  *Morgan v Commonwealth*

An important question, which was considered indirectly in the case of *Morgan v Commonwealth*, was whether the phrase ‘The Commonwealth shall not, by any law or regulation of trade or commerce’ meant that s 100 was limited only to those laws enacted pursuant to the Commonwealth’s trade and commerce power under s 51(i) (and not another head of Commonwealth legislative power) as I have argued above.

The case of *Morgan* considered the meaning of s 100 in the context of interpreting s 99 of the Constitution. Section 99 states:

The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

*Morgan*, a case decided at the end of the World War II, involved a challenge to orders made by the Rationing and Pricing Commissioners pursuant to the *National Security (Rationing) Regulations 1942* (Cth) and *National Security (Prices) Regulations 1940* (Cth) (‘the Rationing Regulations’). As part of the rationing regime in place during World War II, the Commissioners set the price of meat and these prices varied as between the States and also across parts of a State. One of the arguments advanced by the plaintiff was that these price differences offended s 99 of the Constitution. The Rationing Regulations and the enabling legislation were supported by the Commonwealth’s defence power. However, while the relevant legislation could not be supported by s 51(i), it was contended that the legislation still affected trade or commerce. The question for the High Court was whether the operation of s 99 was confined to laws supported under s 51(i), or alternatively, whether it applied to laws affecting trade or commerce irrespective of the fact that it was supported by an alternative head of Commonwealth power.

The question was also relevant to the interpretation of s 100, for the opening words of ss 99 and 100 are almost identical. The only difference between the opening words of the sections is that s 100 uses the expression ‘trade or commerce’ whereas s 99 extends to ‘trade, commerce, or revenue’.

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95 (1947) 74 CLR 421 (‘Morgan’).
96 Ibid 449 ((Latham CJ, Dixon, McTiernan and Williams JJ).
97 Ibid 449, 454 (Latham CJ, Dixon, McTiernan and Williams JJ).
98 Ibid 450.
The joint judgment of Latham CJ, Dixon, McTiernan and Williams JJ noted that s 51(i) did not grant the Commonwealth legislative power with respect to all aspects of trade and commerce, but was limited to ‘trade and commerce with other countries and among the States’.\(^9\)

The majority then stated that there was an important nexus between ss 51(i) and 99:

> Section 99 prohibits preferences to one State or part of a State over another State or part thereof, but does not purport to deal with preferences within a single State. This circumstance shows a connection between s. 99 and s. 51(i).\(^10\)

The majority held that the reference to ‘trade, commerce’ in s 99 was therefore limited to laws supported by s 51(i) and did not extend to laws supported by other heads of Commonwealth legislative power (even though a law supported by another head of power might affect trade or commerce).

With respect to s 100, the joint judgment acknowledged that the wording of this section raised a similar question and, whilst not necessary to decide for the purpose of the case before it, stated that s 100 raises a question as to the relation between it and the defence power which is not unlike that raised by s. 99. The prohibition contained in the section would, if it were construed as limiting the exercise of the defence power, limit it only in cases where the law of defence was also a law or regulation of trade or commerce and not in other cases. Such a limitation could find no justification in reason in that case and similar considerations apply in the case of s. 99.\(^10\)

The majority also examined ss 101 and 102, which made a similar reference to trade and commerce, to support their conclusion.\(^10\)

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99. Ibid 452.
100. Ibid.
101. Ibid 455.
102. Ibid. Section 101 states:

> There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

Section 102 states:

> The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this
The significance of the fact that the legislation in question in *Morgan* was enacted under the defence power is difficult to determine and it is an interesting question whether the Court might have taken a different view had the legislation in question relied on another head of power. The majority remarked that it would

be a remarkable thing for a Constitution to provide that laws for the defence of a country, at a time possibly of the most critical threat to national existence, should be limited by a requirement that they should not have the effect of giving some commercial preference to parts of the country over other parts.\(^{103}\)

The fact that this was a wartime case must have been influential in the Court’s decision.

### 3.3.3 Commonwealth v Tasmania (‘Tasmanian Dam Case’)

The first case to consider ss 100 directly was the *Tasmanian Dam Case*. In 1983, Tasmania contested the validity of regulations made in accordance with the *World Heritage Properties Conservation Act 1983* (Cth) and the *National Parks and Wildlife Conservation Act 1975* (Cth). As is well known, the Tasmanian Government sought to dam the Gordon River and install a hydro-electric power station. One of the arguments made by the Tasmanian Hydro-Electric Commission, a statutory body created by State legislation, was that, if the Commonwealth Acts were valid, the legislation ‘abridge[d] the right of Tasmania ... to the reasonable use of the waters of the Gordon River and its tributaries for conservation or irrigation’ contrary to ss 100.\(^{104}\) The ss 100 question was only briefly considered and by only four of the members of the Court.\(^{105}\)

Of the four judges to consider ss 100, Mason J considered it in the most detail. His Honour stated:

> The prohibitions in ss. 99 and 100 of the Constitution are plainly directed to the Commonwealth, not the States. It is unnecessary to decide whether s. 100 guarantees to riparian States and their residents access to the use of the waters for the purpose mentioned or whether it merely imposes a restriction on the power of the Commonwealth when legislating under ss. 51(i) and 98. It is, however, appropriate to point out that in the

\(^{103}\) Ibid 453–4 (citations omitted).

\(^{104}\) *Tasmanian Dam Case* (1983) 158 CLR 1, 34 (JD Merralls QC) (during argument).

\(^{105}\) The four judges to consider the ss 100 issue were Mason, Murphy, Brennan and Deane JJ. It was unnecessary for the other members of the court to consider the ss 100 argument.
form in which it is expressed s. 100 does impose a restriction on the exercise of Commonwealth legislative power, one which prevents the Commonwealth by a law or regulation of the kind described from abridging the rights of a State and its residents.106

Following the case of *Morgan*, Mason J held that the phrase ‘any law or regulation of trade or commerce’ was a reference to ss 51(i) and 98 and not to s 51(xx), which was the source of legislative authority for the impugned provision. His Honour acknowledged the perceived anomaly in the approach:

> At first glance it may seem somewhat artificial to confine the restriction on legislative power to laws made, or capable of being made, in exercise of one power when a somewhat similar effect in relation to the use of waters of rivers by a State and its residents for conservation or irrigation might be achieved by the Commonwealth in the exercise of other legislative powers.107

A law supported by s 51(xx) regulating, for example, trading corporations taking water from a river would not be subject to s 100, whereas a law supported by s 51(i) would be subject to the limitation in s 100. The practical effect, however, of both laws could be to restrict the amount of water available to a State for conservation or irrigation. Mason J postulated that the reason for s 100 being limited to ss 51(i) and 98 ‘probably lies in the importance of the Murray River to New South Wales, Victoria and South Australia’.108

As I have shown in the first part of this chapter, a review of the Federal Convention debates confirms this hypothesis; the limitation stemmed from a fear that the Commonwealth’s regulation of trade and commerce and, in particular, navigation would be at the expense of irrigation and conservation.109

The other three judges to consider s 100 – Murphy, Brennan and Deane JJ – applied the reasoning in *Morgan* and reached the conclusion that s 100 did not apply to the Commonwealth Acts because neither piece of legislation was a law with respect to s 51(i).110 As Deane J wrote: ‘None of the impugned provisions in the present case is,

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109 See above at Chapter 3.2.6.

110 See *Tasmanian Dam Case* (1983) 158 CLR 1, 153 (Mason J), 248-9 (Brennan J), 251 (Deane J).
either in character or in legal operation, a law or regulation of international, interstate or intrastate trade or commerce. As a consequence, s 100 could not apply.

In the *Tasmanian Dam Case* it was unnecessary for the Court to answer the s 100 question. However, to hold that s 100 guarantees States a right to water for irrigation and conservation as against each other would be inconsistent with the approach taken by the Court in *Morgan* and applied in the *Tasmanian Dam Case*. The rationale for limiting the operation of s 100 to laws made with respect to ss 51(i) and 98 was the close connection between the provisions.

If s 100 were to create a right as between the States guaranteeing each State the reasonable use of water for irrigation and conservation, but the principles in *Morgan* were to remain, then States could not deprive each other of the reasonable use of water but the Commonwealth could do so, so long as the Commonwealth legislation was not a law with respect to s 51(i). However, even if *Morgan* were reconsidered so that the phrase ‘by any law or regulation of trade and commerce’ were to extend beyond laws enacted pursuant to s 51(i), there could still be circumstances where the Commonwealth could deprive a State of the reasonable use of water where the law was entirely unrelated to any form of trade and commerce. The obvious example would be a law with respect to the implementation of an international treaty related to the preservation of the environment.

It has also been argued, by Nicholas Kelly, that international law may assist in developing the argument that s 100 creates an implied guarantee to water from transboundary rivers as between the States. However, there are two significant problems with this approach. First, with the exception of Kirby J, the High Court is yet to accept that international law may be used in constitutional interpretation let alone develop principles as to how it might be used. Secondly, interpreting the *Constitution* based upon principles of

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111 Ibid 251.
113 Kelly, above n 7, 660.
115 See *Polites v Commonwealth* (1945) 70 CLR 60, 78 (Dixon J). Dixon J rejected the argument that the Commonwealth’s legislative power must be read in a manner consistent with international law. In that case the question was whether the scope of s 51(vi) ought to be interpreted in a manner consistent with ‘the recognized international rule which restricts the right of a country to compel aliens within its borders to bear arms to the purpose of maintaining internal order or defending the community against savage or uncivilised assailants threatening its existence’: at 77. In rejecting the argument, Dixon J explained that ‘the power of the Parliament was intended to be supreme’ and the scope of the
international law to support the existence of a ‘right’ between States yields a conflicting result to the conclusion that is reached when referring to the drafting history. Kelly’s proceeds on the basis that an examination of international law and an historical analysis of the problem both support the conclusion that s 100 can be interpreted so as to imply a ‘right’ or guarantee to water as between States.\(^{116}\) As I explain further in Chapter 5, a close examination of international law demonstrates that it may be difficult to find international legal principles that assist in the resolution of this problem.\(^{117}\)

### 3.3.4 Arnold v Minister Administering the Water Management Act 2000

The case of *Arnold* is the most recent decision of the High Court to consider s 100. However, the case does not answer any of the outstanding interpretive questions surrounding the provision.

On 25 June 2004, the Commonwealth Government and the State and Territory Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory entered into the Intergovernmental Agreement on the National Water Initiative. One of the objectives of the Agreement was to deal with the over-allocation of water within the Murray-Darling Basin. Pursuant to the agreement, the Commonwealth enacted the *National Water Commission Act 2004* (Cth) and also established the National Water Commission in accordance with the Act. The Act allowed the Commonwealth Minister to award funding to projects related to Australia’s water resources and the National Water Commission was responsible for administering

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\(^{116}\) Kelly stated: ‘History adds support to international and US material operating as an aid to the High Court’s interpretation of section 100 and the issue of inter-State water resources generally’: Kelly, above n 7, 659-60. Kelly reaches this conclusion by examining secondary historical sources rather than the drafting history of s 100.

\(^{117}\) See Chapter 5.2.
On 4 November 2005 the Commonwealth and New South Wales entered into a funding agreement, the purpose of which was to assist in achieving sustainable groundwater entitlements in parts of New South Wales, including the Lower Murray region. To achieve this end, bore licences held under the Water Act 1912 (NSW) were replaced with aquifer access licences held under the Water Management Act 2000 (NSW). The effect of the change in licence was to reduce the amount of ground water extracted in the Lower Murray region.

A number of irrigators who had had their bore licences replaced with aquifer access licences raised two objections on constitutional grounds. First, the irrigators contended that the replacement amounted to an acquisition of property on other than just terms and therefore offended s 51(xxxi) of the Constitution. The argument relied upon the fact that the licences were replaced in accordance with the funding agreement entered into between the Commonwealth and New South Wales Governments. This argument was considered in greater detail in the case of ICM Agriculture Pty Ltd v Commonwealth, which was argued at the same time as Arnold. In ICM Agriculture, the acquisition of property argument failed, and as a consequence, it was unnecessary for the Court in Arnold to consider this argument further.

The second argument raised is the one most relevant for present purposes. The irrigators submitted that the National Water Commission Act and the funding agreement entered into by the Commonwealth was a regulation of trade and commerce which contravened s 100 in that it abridged the right of the licence holders to the reasonable use of waters of rivers. The question whether special leave should be allowed with respect to the s 100 argument was referred to the Full Court.

The appellants sought to have the Court reconsider Morgan and argued that the expression ‘law or regulation of trade or commerce’ in s 100 was not limited to laws

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118 The Chief Executive Officer of the National Water Commission is responsible for the administration of the funding, either from the Australian Water Fund Account or another Commonwealth program: National Water Commission Act 2004 (Cth) ss 24(1)(a) and 7(1)(d)(ii).

119 The facts of the case are set out in considerable detail in the earlier decision of the New South Wales Court of Appeal: Arnold v Minister Administering the Water Management Act 2000 2008) 73 NSWLR 196, 199-205 [1]-[30] (Spigelman CJ).

120 (2009) 240 CLR 140 (‘ICM Agriculture’).


made with respect to s 51(i).\textsuperscript{123} It was unnecessary for the Court to reconsider \textit{Morgan} as the case was ultimately decided on other grounds.\textsuperscript{124} However, French CJ noted with regard to the decision in \textit{Morgan} that the ‘confinement of the limitation was endorsed by three of the Justices in the \textit{Tasmanian Dam Case}\textsuperscript{125} although his Honour acknowledged that ‘the artificiality of its consequences, to which Mason J adverted in the \textit{Tasmanian Dam Case}, remains.’\textsuperscript{126}

The application of s 100 in \textit{Arnold} ultimately turned on a question of fact. That was, whether the ‘waters of rivers’ included groundwater. Justices Hayne, Kiefel and Bell JJ rejected the appellants’ argument and held:

\begin{quote}

Water extracted from the Lower Murray Groundwater Source is not encompassed by the expression in s 100: ‘the waters of rivers’. The water at issue in this appeal is not surface water. It is groundwater that percolates through the soil. It does not flow in a defined channel. Together, these are reasons enough to conclude that the water in question does not form part of ‘the waters of rivers’.
\end{quote}

The plurality explained that the conclusion was supported by the purpose of s 100, which was to place a limit on the Commonwealth’s power to legislate with respect to navigation.\textsuperscript{128} Justices Gummow and Crennan reached the same conclusion, giving three reasons for their decision. First, their Honours referred to the drafting history of s 100 and noted:

\begin{quote}

the compromise represented by the formulation of s 100 responded to the conflicting interests of the colonies of New South Wales, Victoria and South Australia with respect to the Murray-Darling river system.
\end{quote}

The second reason Gummow and Crennan JJ gave was that the common law had always distinguished between surface water and groundwater, and therefore supported this

\textsuperscript{123} This argument was raised previously before the New South Wales Court of Appeal. The Court of Appeal determine that it was bound by \textit{Morgan} and that s 100 applied only to laws ‘made under the power conferred by s 51(i): \textit{Arnold v Minister Administering the Water Management Act 2000 2008)} 73 NSWLR 196, 217 [89]-[92] (Spigelman CJ), 225 [147] (Allsop P), 225 [148] (Handley AJA).

\textsuperscript{124} Ibid 257 [23] (French CJ), 264 [53] (Gummow and Crennan JJ), 269 [76] (Hayne Kiefel and Bell JJ).

\textsuperscript{125} Ibid 257 [23].

\textsuperscript{126} Ibid 257 [23].

\textsuperscript{127} Ibid 269 [75]. The question of whether groundwater fell within the meaning of ‘waters of rivers’ within s 100 was not addressed by the Court of Appeal: \textit{Arnold v Minister Administering the Water Management Act 2000 2008) 73 NSWLR 196, 217 [88] (Spigelman CJ), 225 [147] (Allsop P), 225 [148] (Handley AJA)}.

\textsuperscript{128} Ibid 269 [75].

\textsuperscript{129} Ibid 264 [56].
construction of s 100. Finally, their Honours also noted that the meaning of the expression ‘waters of rivers’ in 1900 did not include groundwater.

French CJ, like Gummow and Crennan JJ, referred to the drafting history of s 100. After reviewing the drafting history the Chief Justice concluded that it was ‘clear that the qualification on Commonwealth legislative power imposed by s 100 was directed to the application, to the waters of rivers, of legislative powers’ and ‘there is no plausible basis for construing the limitation as applying to underground water in aquifers’.

In the end, the case could be disposed of in a relatively straight forward way. The Court’s decision that the ‘waters of rivers’ did not include groundwater is unsurprising and is consistent with the drafting history of s 100. The case was thus an inappropriate vehicle for answering some of the more difficult questions regarding the interpretation of s 100.

3.4 Conclusion

In this chapter I have demonstrated that s 100 – the only section within the Constitution to mention the ‘waters of rivers’ – is a limit on Commonwealth power. The drafting history shows the connection between ss 100, 51(i) and 98 and supports the conclusion that s 100 is a limitation on s 51(i) and does not place a limit on Commonwealth power at large.

There remain a number of unanswered questions with regard to the interpretation of s 100: first, whether the obiter remarks in Howe restricting the interpretation of ‘residents therein’ in s 100 to natural persons could be extended to include corporations; secondly, what factors are to be taken into account when determining what constitutes a ‘reasonable use’. There is also the question that the High Court found unnecessary to answer in Arnold: whether the reasoning in Morgan should be reconsidered so that s 100 is not limited to laws supported by s 51(i).

For present purposes, it is the question that Mason J raised (and left unanswered) in the Tasmanian Dam Case – whether s 100 imposes a limit on State legislative or executive power as against another State – that is most relevant to this thesis. The opening words of

130 Ibid 265 [57].
131 Ibid 265 [58].
132 Ibid 257-8 [26].
133 Ibid 258 [26].
134 Ibid 257 [24]. French CJ has acknowledged (at 257) the uncertainty in s100 and stated: ‘There is also an interesting question whether the term “right of … the residents” in s 100 is used in a collective sense rather than as a reference to individual rights’.
s 100 place the emphasis of the provision on the Commonwealth. The provision is defining what the Commonwealth ‘shall not’ legislate or regulate with respect to the ‘right of a State’. However, the argument might have developed because the wording in s 100 partly mirrored the earlier arguments regarding the ‘rights’ of the colonies. In Chapter 2, I explained that when the issue was first considered it was framed in terms of the ‘rights’ of the colonies; s 100 continued to frame the problem in terms of ‘rights’. In addition, Downer had argued earlier, that each colony was entitled to a ‘reasonable use’ of the water of the Murray. Perhaps it was the fact that s 100 used the same expression that led to the argument that the provision also defined the ‘rights’ of the States as between each other. However, to the extent that the views of the Federal Convention delegates are relevant, I have shown in this chapter that Downer’s amendment to include the word ‘reasonable’ was not universally accepted as defining the ‘rights’ of the States as against each other. When the section is read as a whole, the use of the word ‘reasonable’ prevents a State from making an ‘unreasonable’ claim to use the water for irrigation or conservation. A court may find that where a State is seeking a claim for an amount of water that far exceeds the volume of water that would ordinarily be needed to irrigate the land in question such a use is not reasonable. In effect, the work that the word reasonable does is to provide the Court with some discretion in balancing the interests of the Commonwealth (when regulating with respect to trade and commerce) and the interests of a State with respect to irrigation and conservation, as it will be for the Court to develop principles for determining what amounts to a ‘reasonable’ use. The drafting history does not, therefore, support the contention that s 100 also defines the ‘rights’ of the States as between each other to the waters from transboundary rivers. 

Importantly, however, s 100 may be consistent with or subject to a ‘right’ or limitation on a State that provides the other States with access to a share of the waters from a

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135 A similar phrase is used in the opening wording of s 99. Section 99 states: ‘The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.’

136 Downer’s earlier views were expressed in the legal opinion given by South Australian Crown Solicitor Charles Mann: C Mann, ‘River Murray Riparian Rights – Memo for the Attorney General’ (19 December 1887) in Crown Solicitor Opinions, State Records of South Australia (GRG57/16). See above Chapter 2.4.2.a.

137 See above Chapter 3.2.1.

138 See above Chapter 3.2.6.
transboundary river. The challenge is to locate the source of content of such a ‘right’ or limit on State power. In the following chapters I examine this question.
CHAPTER 4: IDENTIFYING THE ALTERNATIVE ARGUMENTS

4.1 Introduction

In Chapter 3, I demonstrated that s 100 of the Constitution did not provide a solution as to how to share water from transboundary rivers between States in the absence of an intergovernmental agreement. In this chapter, I identify and outline the arguments made during the Federal Convention debates and in the decade immediately after Federation with regard to how to solve this problem. With respect to the post-Federation period, I consider the academic literature, the evidence given by legal experts who testified before the 1902 Interstate Royal Commission on the River Murray and further legal opinions obtained by the South Australian Government in 1906. This examination shows that three arguments were developed regarding the ‘rights’ of the States that warrant further investigation: first, that the rights of the States were analogous to the rights of sovereign states at international law; secondly, that the rights of the States were analogous to the rights of riparian proprietors along the river; or thirdly, that the United States Supreme Court had developed a doctrine for apportioning water between States in that country and that the High Court was able to develop a similar doctrine in Australia.

In the following three chapters I then critique and evaluate the arguments in detail with a view to determining whether the arguments provide a solution to a transboundary river dispute today. In Chapter 6 I examine the argument that the common law can provide a solution to the transboundary river dispute. I conclude that there are some conceptual difficulties with this approach and, in Chapter 7, I provide an alternative solution that is consistent with existing constitutional jurisprudence.

4.2 The Australasian Federal Conventions

An examination of the Federal Convention debates is an important and necessary step in identifying the key legal arguments that are developed further after Federation. While the Federal Convention delegates examined the issue in considerable detail, the legal analysis was not always balanced and many of the arguments put forward were aimed at influencing the drafting of the Constitution and advocating a position which most

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1 Chapter 5 considers the international law argument and the riparian rights argument, and Chapter 6 examines the analogy with the United States jurisprudence.
favoured the delegate’s colony’s own interests rather than working to expound the legal position.

The existence of ‘rights’ to water from transboundary rivers was explored in greatest detail by the delegates at the Melbourne Convention in 1898 and, to a lesser extent, in the previous year during the Adelaide Convention. During the first Federal Convention in Sydney in 1891 the issue of transboundary rivers was given only limited consideration and the existence and nature of rights to water from transboundary rivers was not considered. One possible explanation for the lack of debate in these early stages is simply that the delegates were confronted with such a number of challenges that it was inevitable that not all of those matters could immediately be given the necessary consideration. That said, the delegates recognised that if Federation was to succeed, ‘[t]he big and difficult question of the rights to the Murray River will have to be settled in the spirit of liberal compromise.’

Without a right to water South Australia would, as many of its delegates feared, be left at the mercy of the upstream colonies. During the Adelaide Convention in 1897, Tasmanian delegate Henry Dobson drew attention to the extreme position that South Australia could find itself in when he asked:

> the point I want answered by some of my legal friends is this: May New South [Wales] by constructing enormous irrigation works and cutting channels entirely cut off the flow of these waters before they enter the boundary of South Australia?

Dobson’s question put the transboundary river problem at its most stark and highlighted the geographical vulnerability of South Australia’s position.

The South Australian delegates wanted to ensure that the River Murray and its tributaries remained open to navigation. Notwithstanding this view, by the time of the Federal Conventions in Adelaide and Melbourne river boat numbers had started to decline as the railways expanded inland and drought had again hit large parts of south-eastern

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2 The issue was only briefly discussed during the Sydney Convention of 1897: see Chapter 3.2.3.
3 Other difficult questions related to, for example, uniform customs and fiscal changes.
6 See, eg, ibid 801 (Josiah Symon).
Australia. The South Australians would have been eager to ensure that any draft Constitution did not favour the railways over river navigation and thereby place further pressure on the already struggling river trade.

While some South Australian delegates focused on navigability of the rivers, it was not the colony’s only concern. During the Adelaide Convention when Josiah Symon declared ‘[w]e only want as much water as will maintain the navigability of the river,’ fellow South Australian John Gordon was quick to qualify the statement and added ‘[w]e want a little more. We make a claim for a fair proportion of the water of the Murray for irrigation.’ As I explained earlier in Chapter 2, irrigation along the River Murray had commenced in New South Wales and Victoria and South Australia followed (at places such as Renmark). Now that such schemes were established, South Australia was eager to ensure that irrigation would continue. These water uses shaped the colony’s arguments regarding transboundary river ‘rights’.

During the Adelaide Convention, South Australian delegate James Howe was the first to raise the issue of the allocation of water from transboundary rivers when he remarked:

> A question for Federation, and one which is likely to endanger our commerce in a great degree, is the question of riparian rights. ... The New South Wales Government takes the position that the waters that form in their colony belong to them, and that they can divert and use them as they think proper. ... I question whether [New South Wales] can legally divert the water from its proper channel so as to endanger the navigation of the river.

Howe did not, however, explain the basis upon which he questioned New South Wales’ ability to divert water.

The explanation of the South Australian cause was largely left to two delegates – Patrick Glynn and John Gordon – both of whom were lawyers and members of the South

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7 Official Record of the Debates of the Australasian Federal Convention, Melbourne, 1 February 1898, 382 (William Lyne). See also Chapters 2.2.2 and 2.2.3.
9 Ibid.
10 See Chapter 2.3.5.
11 See, eg, Official Record of the Debates of the Australasian Federal Convention, Melbourne, 1 February 1898, 405 (Frederick Holder).
Australian House of Assembly. As I explained in Chapter 2, Glynn, who had been a member of the South Australian Royal Commission, had already considered the issue in some detail. Gordon recognised the importance of resolving these questions for he ‘regard[ed] it as a most serious intercolonial question, and one which must be settled if we have Federation. It would be fatal to leave this question unsettled.’

There were two grounds upon which the South Australian delegates argued that each colony had a ‘right’ to water from transboundary rivers. These arguments had been canvassed earlier by the South Australian Royal Commissioners and in the previous legal opinions sought by the South Australian Government. Both arguments were made by analogy. First, the South Australians claimed that there existed a ‘right’ at international law to navigate rivers flowing through two or more nation states and that the same principle applied between the colonies. This, they argued, granted South Australians the right to navigate the River Murray and its tributaries. The second argument advanced was that an analogy could be drawn between private law riparian rights and the rights of the colonies. South Australia contended that if the colonies were instead individual riparian proprietors they would have rights to water and that, if those rights were available to individuals, they ought to be equally available to the colonies.

At the Adelaide Convention Gordon stated that any ‘rights’ to water should be based upon ‘principles of natural justice’. He contended that these same principles of natural justice were the foundation of both international law and the private law riparian rights doctrine:

that [rivers] running as they do through great lengths of the earth’s surface and being necessary to all the countries through which they run, they equally belong to all. I contend that principle cannot be disputed. On the same principle rests the riparian rights of individuals. It is as just to say that one riparian owner can stop the stream from flowing to the owner lower down as to say that one nation can take the water from the

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13 ‘[O]n the conference floor, together with Patrick McMahon Glynn, [Gordon] led and won the case for South Australia’s equal access to River Murray water’: Graham Loughlin, *Gordon, Sir John Hannah (1850-1923)*, Australian Dictionary of Biography <http://adb.anu.edu.au/biography/gordon-sir-john-hannah-6429>. Whether Glynn and Gordon ‘won the case’ is debateable, however, they were both clearly influential in the debate. Equally, whether it resulted in ‘equal access’ may be contested by some South Australians today: see Chapter 1.3.
14 See Chapter 2.4.2.b.
16 See Chapter 2.4.2.b.
stream which is running to a nation lower down. There is no difference. ... The principle upon which this contention rests is, I think absolutely sound, that no nación has any right to divert or seriously diminish the flow of a river running to another nation. The only difference is that individuals are in a forum where the principle can be enforced, whereas the final reference, if nations cannot agree, is the arbitrament of war. But the principle of justice remains the same.\textsuperscript{18}

Both arguments were contested by the delegates of New South Wales and Victoria. In rejecting South Australia’s claims, the delegates of New South Wales again argued that the Imperial Parliament had granted the water within its borders to New South Wales.\textsuperscript{19}

\textbf{4.2.1 An analogy with the riparian rights doctrine?}

The argument based upon drawing an analogy with the private law riparian rights doctrine received most attention during the Melbourne Convention. South Australian delegate and lawyer Josiah Symon adopted a similar position to the advice he had provided to the Attorney-General some years earlier and advanced the following argument:

\begin{quote}
Now, there is no legal ownership of the water in the River Murray. There is a user of the water in the river, and that user can only be exercised subject to the rights of the people lower down the stream. The same thing applies to individual states as applies to private individuals. The principles of justice governing riparian disputes between individual states are exactly of the same nature and character as the principles of justice governing riparian disputes between private individuals.\textsuperscript{20}
\end{quote}

Symon, however, conceded that ‘you cannot enforce these riparian rights as between states in the same way as you can enforce them as between individuals’.\textsuperscript{21} Symon’s concession was perhaps an acknowledgement that settling the dispute may have required the intervention of the Imperial Parliament. As I explained in Chapter 2, one of the

\begin{footnotesize}
\textsuperscript{18} Ibid.
\textsuperscript{19} See, eg, ibid 817-8 (George Reid). Reid maintained the position taken earlier by the colony: see Chapter 2.3.6.
\textsuperscript{20} \textit{Official Record of the Debates of the Australasian Federal Convention}, Melbourne, 24 January 1898, 76. For the advice Symon gave to the South Australian Government, see the references in Mann’s Opinion: Chapter 2.4.2. Here the word ‘user’ is the legal meaning of ‘user’, which refers to the use of property; ‘user’ in this context means the use (or act itself) and is not a reference to user (the actor): Peter Butt and David Hamer (eds), \textit{Concise Australian Legal Dictionary} (LexisNexis, 4th ed, 2011) 602.
\end{footnotesize}
problems that South Australia faced during the pre-Federation period was the lack of a forum to agitate the dispute.

Fellow South Australian Frederick Holder drew a similar analogy with the private law riparian rights doctrine. Holder was one of the few South Australian delegates not legally trained and it seemed peculiar to him that the same rights might not exist between colonies as between individuals. He remarked:

> Whatever the legal position may be, surely South Australia occupies lower down the river, in relation to states higher up the stream, in equity the same position which she would occupy if she were individual persons.²²

Victorian Henry Higgins, who was sympathetic to the position put by the South Australian delegates, considered the position of the colonies of South Australia and New South Wales if they were individual land owners along the river. He remarked:

> Supposing that New South Wales were the owner in fee simple of all the land along the Darling in New South Wales, and that South Australia were the owner in fee simple of all the land along the Murray down below where it runs into the Southern Ocean, there is not the slightest doubt that South Australia would be able to get an injunction to prevent New South Wales from using the waters of the Darling so as to diminish substantially the normal flow.²³

The delegates from New South Wales denied the existence of an intercolonial riparian right and also identified the lack of a forum in which the dispute could be heard. In response to South Australia’s claims, George Reid, Premier of New South Wales replied, ‘Where would such an injunction be got?’²⁴ Reid’s quick retort highlighted the first problem that Symon had acknowledged – the lack of a forum in which the dispute could be heard.²⁵

The legal question was further complicated by the fact that in the year prior to the Adelaide Convention the New South Wales Parliament had passed the *Water Rights Act 1896* (NSW) which purported to abolish the common law riparian rights doctrine within

²⁴ Ibid; see also at 388.
²⁵ For an examination the pre-Federation position see Chapter 2.4.3.
that colony in favour of a licensing scheme.\textsuperscript{26} Victoria had also implemented a similar scheme.\textsuperscript{27} These legislative changes raised a further question of whether the riparian rights doctrine could exist between the colonies (and later States) notwithstanding that the riparian rights doctrine no longer applied within Victoria and New South Wales.

The question still remained: would the riparian rights analogy provide South Australia with the necessary water levels to maintain navigation and provide sufficient water for irrigation in the downstream State? The debate failed to deal with many of the more difficult questions relating to the application of the riparian rights doctrine to the dispute between the future States. For example, the common law riparian rights doctrine did not allow for water to be removed from the riparian land (that is, the land adjacent to the bank of the stream).\textsuperscript{28} In Chapter 6, I return to consider the applicability of the riparian rights doctrine to resolving transboundary river disputes during the post-Federation period.

These statements made by the delegates with respect to the ‘rights’ of the colonies were not accompanied by a detailed explanation or analysis of the law. Despite the fact that this issue occupied a significant amount of time during the debates, the absence of this detail is unsurprising given the forum. This was but one of a number of issues that needed to be resolved if Federation was to succeed and it was simply not possible to dedicate any further discussion to this issue.

### 4.2.2 An analogy with international law?

During both the Adelaide and Melbourne Conventions the South Australian delegates also sought to draw an analogy between the position of the future States of Australia and nation states at international law. John Downer spoke of ‘preserv[ing] the right’\textsuperscript{29} of the colonies which impliedly asserted that the colonies had a pre-existing right to water. He explained in Adelaide:

> if we are not to have the ordinary right which citizens would have, supposing a stream passed through only one State, then [we are] to fall back on the rights which prevail by

\begin{enumerate}
\item[26] See above Chapter 3.2.4.
\item[27] \textit{Irrigation Act 1886} (Vic) s 4.
\item[28] \textit{Attwood v Llay Main Collieries Ltd} [1926] 1 Ch 444, 459; \textit{Swindon Waterworks Co Ltd v Wiltshire & Berkshire Canal Navigation Co} (1875) LR 7 HL 697, 704. The riparian rights doctrine is explained in detail in Chapter 5.3.
\end{enumerate}
Similarly, at the Melbourne Convention Downer asserted that ‘[a]s far as justice is concerned, the control and regulation of navigable streams is founded on international right’. He added:

Keep the stream navigable, and let each riparian proprietor, each riparian state, take what it wants. But if you impose the condition that the navigability shall be preserved, then you are simply preserving the international law which has been recognised for many a long year now, and you are not, I think, interfering with a private right.

However, he conceded during the Melbourne Convention that ‘the right of New South Wales to take if they please every drop of water that runs through their territory’ was ‘legal in a strict technical sense, but it is most immoral.’ If Downer was asserting that South Australia had a right to navigation based on an analogy with international law, it seems from his concession that he was not contending that it was a legal right but rather a moral obligation.

Fellow South Australian Patrick Glynn also made arguments based upon international law. He claimed: ‘It is held in international law that the right to the use of water depends not upon the right to the water-course, but upon the right to the banks of the stream.’ He added: ‘Among civilised states the obligations of international comity have been held to be binding in decency and conscience, so far as anything without a sanction can be

30 Ibid.
31 Official Record of the Debates of the Australasian Federal Convention, Melbourne, 21 January 1898, 57 (emphasis added).
32 Ibid 58. However, when discussing the 1897 Adelaide Convention proceedings in the South Australian Parliament, Downer was not as confident about South Australia’s legal position. He noted:

There arose a question about the River Murray, and South Australia very unambitiously asked that the control of navigable rivers should be under the Commonwealth. [New South Wales] were clearly right upon every point of international comity and constitutional law. The question was so clear that it could only be met by bluff.

South Australia, Parliamentary Debates, House of Assembly, 13 July 1897, 174.


34 Alternatively, Downer’s reference to ‘each riparian state’ (as opposed to ‘riparian colonies’) might suggest that he was attempting to set out what he believed ought to be the future rights of the states within a federation. It is difficult to discern from the use of the term ‘riparian state’ whether Downer was making an attempt to draw an analogy with international law or with the common law riparian rights doctrine.

binding\textsuperscript{36}, which was essentially the same argument he had made prior to the Federal Conventions.\textsuperscript{37}

South Australian, John Gordon, told the delegates at the Adelaide Convention that

There are scarcely two civilised countries in the world which have not made conventions about the rivers running through their territories, even, although, as in Europe, these countries are armed to the teeth against each other.\textsuperscript{38}

Gordon quoted from international law texts at both the Adelaide and Melbourne Conventions; however, it is doubtful whether his analysis furthered the South Australian cause. At the Adelaide Convention Gordon read the following from Pitt Cobbett’s \textit{Cases and Opinions on International Law}:

But though in strict law each State could thus appropriate and regulate waters wholly within its territory, the use and navigation of most of the more important navigable rivers that traverse the territory or different States, have now come to be generally regulated by treaty or convention.\textsuperscript{39}

Gordon argued that ‘this strict law is in violation of natural justice’ and the resolution of such disputes by treaty or convention ‘have restored that natural right to its proper position’, \textsuperscript{40} which appears to have been a concession that disputes over rights of navigation must be resolved by agreement.

In referring to these texts on international transboundary rivers, Gordon overlooked one important difference between the principles set out in the books on international law and the dispute over the Murray: in the case of the Murray it was the downstream colony asserting the right to navigate upstream, whereas the literature on international transboundary rivers referred to the rights of the upstream colony to navigate downstream to the sea.\textsuperscript{41} At the Melbourne Convention the following year, Gordon referred to Theodore Woolsey’s \textit{Introduction to the Study of International Law}. Quoting from that text, Gordon said:

\textsuperscript{36} Ibid 51.
\textsuperscript{37} See Chapter 2.4.2.
\textsuperscript{39} Ibid 795.
\textsuperscript{40} Ibid.
\textsuperscript{41} I return to this in Chapter 5.2.
Another eminent constitutional writer, Mr. Wolseley [sic], discussing the principle, says –

When a river rises within the bounds of one state and empties into the sea in another, the inhabitants of the lower state have a *moral coequal claim* to its use. That is our case. This great river system has its rise in other colonies; but it flows through Victoria and South Australia, and Victoria and South Australia for that reason have a moral co-equal claim to the use of the water, and that use should be controlled in the interest of all the riparian co-proprietors. Mr. Wolseley [sic] continues – and this is the crux of the position –

Is such a nation –

The nation lower down the stream.

to be crippled in its resources and made to depend upon another's caprice for a great part of that which makes nations fulfil their vocations in the world?42

However, Gordon’s quotation from Woolsey’s book was not exact. The text actually read:

When the river rises within the bounds of one state and empties into the sea in another, international law allows to the *inhabitants of the upper waters* only a moral claim or imperfect right to its navigation. … Is such a nation to be crippled in its resources, and shut out from mankind, or should it depend on another’s caprice for a great part of what makes nations fulfil their vocation in the world, merely because it lies remote from the sea which is free to all?43

Woolsey was setting out the navigation rights of the ‘inhabitant of the *upper* waters’, whereas Gordon presented Woolsey’s opinion as establishing the rights of a downstream State. In quoting from Woolsey, Gordon described the right as a ‘moral coequal claim’. These were not the words of Woolsey. Woolsey had used the expression ‘moral claim or imperfect right’. In misquoting Woolsey, Gordon gave the impression that the downstream State had a ‘coequal right’ to *use* the water. He implied that upstream and downstream States had equal rights. However, when the actual text of Woolsey’s book is examined it is evident that the right that the author is referring to is more limited; it is the right of an *upstream* nation state to navigate the downstream waters to access the sea. Gordon ignored the fact that Woolsey was making reference to the rights of an ‘inland


state’ or ‘interior nation’ (to access the sea). It may be that an argument can be made that a downstream State has the same right to navigate the waterway upstream; however, this argument was not made as Gordon did not even acknowledge the factual distinction between the dispute over the Murray and the analysis in the international law texts.

The fact that Gordon’s argument was based upon nothing more than a ‘moral’ or ‘natural’ right was a point not missed by the delegates of New South Wales and Victoria. Richard O’Connor, delegate from New South Wales, summarised the argument put forward by Gordon in the following way:

My honourable friend (Mr Gordon) in the very interesting and admirable speech which he addressed to us, based his claim to carry this amendment, in the first place, on the ground that his position was absolutely justified in law. He appealed to natural law first of all, and then to international law; and finally, he appealed to the federal sentiment, which, as he knows, actuates every member of this Convention.

O’Connor rejected any argument based solely upon natural law and added:

Now, the honorable member, perhaps, came a little bit nearer to the real issue when he raised the question that by international law the right to the control of these rivers was in every country through which they passed. I do not concede that that is the law. I say that, in regard to international law, there is no clearly-settled law that any rights over rivers are given between adjoining States.

O’Connor, along with other members of the delegation from New South Wales, was of the view that an analogy with international law did not assist in resolving the dispute between the colonies. The Premier of New South Wales, George Reid, was one of the strongest opponents of South Australia’s attempts to assert a right to water and took a similar view. Reid was keen to highlight the distinction between a legal right enforceable against the other colonies and a ‘natural’ or ‘moral’ right. He referred to Wheaton on International Law in drawing to the Convention’s attention that South Australia’s claim was merely to an ‘imperfect right’.

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44 Ibid.
46 Ibid 64.
47 Ibid 64-5.
48 Official Record of the Debates of the Australasian Federal Convention, Melbourne, 2 February 1898, 440. The passage referred to in full read:

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On this point the Victorian delegates largely sided with their colleagues from New South Wales. Victorian delegate, Alfred Deakin, rejected any argument that South Australia had a right to water based upon international law:

if it be a legal issue, this is practically a question of international law, and though it may be the custom of adjoining nations in the old world, and also in the new, to agree to conferences in regard to the navigation or the use of waters of rivers, I know of no power to coerce any self-governing colony into holding such a conference. … I do not know of any international law that can deal with this question.\(^{49}\)

In an exchange between Gordon and New South Welshman William Lyne, Gordon relied upon the notion of international comity for the purpose of suggesting that New South Wales had a moral obligation:

GORDON: While we are willing that irrigation should be placed above navigation, provided that there is a fair adjustment of the use of the water, we are not going to be so silly as to allow New South Wales the command of the whole of the water.

LYNE: New South Wales has the command now. You are simply trying to take away a right from us.

GORDON: We have heard that parrot cry day after day. Our answer is that, according to the principles of international comity, you have it not. The honorable member's interjection shows how callously selfish this proposal is.\(^{50}\)

Both Henry Higgins and Edmund Barton were also dismissive of Gordon’s arguments. When Gordon quoted from William Hall’s leading treatise on international law Higgins and Barton were quick to interject:

GORDON: Another writer, Mr. Hall, expresses the opinion that –

‘The freedom of rivers to all the riparian inhabitants is a sentiment written in deep characters in the heart of man.’

HIGGINS: Is Mr. Hall a lawyer or a poet?

The right of navigating, for commercial purposes, a river which flows through the territories of different States, is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text-writers call an imperfect right, its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise.


\(^{50}\) *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 February 1898, 566.
GORDON: He is a lawyer; but occasionally even a lawyer has a vein of sentiment in his composition.

BARTON: It is when the lawyer is sentimental that he seems to suit the honorable member's purpose best.

GORDON: Well, this is a question of large fairness, into the consideration of which sentiment enters to a very great extent. It is not a matter to be decided upon the narrow dictates of old legal maxims; it is not only a question of international law. It is a question of State policy and international law, and the sentiment of friendship is represented in it. There is no honorable member who knows better the strength of a sentiment of that kind than the leader of the Convention. 51

Given the well-known tensions that had developed between the colonies of South Australia and New South Wales over the previous 15 years with respect to the River Murray, 52 it is difficult to see how an appeal to the ‘sentiment of friendship’ was likely to assist in the resolution of the matter.

For the South Australian delegates international law was clearly influential in their analysis of the dispute over the waters of the Murray. The questions of interest in this thesis are: does international law assist today in resolving a dispute between the States over the waters of the Murray? To what extent could international law be used in the development of the common law? These questions are addressed in Chapter 6.

4.3 Early Post-Federation Literature

In this section of the chapter I examine the three leading constitutional law texts in the early post-Federation period: Quick and Garran’s Annotated Constitution of the Australian Commonwealth, Inglis Clark’s Studies in Australian Constitutional Law and Harrison Moore’s the Constitution of the Commonwealth of Australia. The three authors took a different approach to the problem. Quick and Garran’s approach was much more literal – s 100 made no provision for water ‘rights’ as between States and therefore no such ‘rights’ existed. Inglis Clark took a more practical approach – he argued that within the Federation the High Court must be able to resolve these sorts of problems. Harrison Moore took a comparative approach – he noted that similar disputes had recently been


52 See Chapter 2.3.
addressed by the United States Supreme Court and this may assist in the resolution of similar disputes in Australia.

4.3.1 Quick and Garran

John Quick and Robert Garran were both present during the Federal Conventions in 1897 and 1898. Quick was a member of the Victorian delegation and Garran attended the Conventions as secretary to the Premier of New South Wales, George Reid. At the request of Edmund Barton, Garran was appointed secretary of the Convention’s drafting committee. Quick and Garran’s text, *Annotated Constitution of the Australian Commonwealth*, published in 1901, was one of the leading texts of its time. Given the role that Quick and Garran played in the drafting of the *Constitution* and the nature of the book, it is unsurprising, therefore, that their analysis of the transboundary river problem was centred on the constitutional text.

Quick and Garran were of the opinion that there was ‘no such things as a riparian law between independent states’. They argued that whilst each colony inherited the riparian rights doctrine as part of the common law from England, this law operated within each colony and did not operate between colonies. Quick and Garran rejected the suggestion put forward at the Federal Conventions that an analogy could be drawn between the rights of the States and either the riparian rights doctrine or with the rights of nation states at international law.

Quick and Garran explained that international law did not provide a suitable analogy:

> international law [does not] carry the matter any further. There is no principle which limits the rights of a State or its citizens to the use of waters flowing through the State. Free navigation of such waters, subject to certain conditions, is indeed generally a subject of treaty or convention between States, and it may be that a refusal to enter into any such convention might be a breach of international comity. ... *But there is certainly no principle of international law, and no conventional usage, which purports to apportion*  

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56 Ibid 890.
the rights of States to appropriate the waters of rivers. The rights of irrigation do not seem to have even formed the subject of international question in Europe.57

One of the difficulties with the analogy with international law that Quick and Garran identified was that disputes between nation states had focused on navigation and the law was yet to deal with the question of the allocation of water between sovereign states for irrigation.58

With respect to the riparian rights analogy Quick and Garran concluded:

it seems quite clear that each State retains its own riparian law, and that no interstate riparian law arises, nor – except as to navigation – can arise. The Federal Parliament has power to legislate as to inter-state navigation, and it may incidentally – subject to the restriction as to reasonable use – control the waters for that purpose; but it has no power to dispose of the water for any other purpose, such as irrigation or conservation. Nor can there be any Federal common law regulating such appropriation; for that would lead to the absurdity that there was a part of the common law which could not be altered either by the Federal Parliament or by the State Parliament. There can be no Federal common law on matters outside the legislative power of the Federal Parliament; so that after Federation – as before – the claim to an undiminished flow, as between states or citizens of different states, would seem still to fall on the ground that there is no law applicable in the case.59

Accordingly, Quick and Garran determined that there were no intercolonial water rights prior to Federation and that Federation had not altered that position.60 Further, they rejected the notion that there could be a common law which was to be applied between States, or as they described it, a ‘federal common law’;61 they were referring to a common law operating between States as opposed to a common law operating in the federal jurisdiction. Instead, they focused on the express provisions of the Constitution and noted that the Commonwealth Parliament had power to legislate with respect to ‘inter-state navigation’62 and that that power was limited by the restriction in s 100.

Quick and Garran also considered the application of the United States jurisprudence to the Australian transboundary river problem. However, unlike others writing at this time,

57 Ibid 888.
58 The analogy is examined further in Chapter 5.2.
59 Quick and Garran, above n 55, 890.
60 Ibid.
61 Ibid.
62 Ibid 890.
Quick and Garran explained that the United States jurisprudence had to be considered in the context of Australia’s new constitutional framework:

In considering the applicability of the American decisions, it must be borne in mind that the Australian Constitution is explicit on two points on which the Constitution of the United States is silent. It provides (sec. 92) that after the imposition of uniform duties, inter-state commerce shall be absolutely free; and it provides (se. 107) that every power of the State Parliaments, unless exclusively vested in the Federal Parliament or withdrawn from the State Parliaments shall continue. ... It would seem therefore that, in the absence of Federal legislation, the States may exercise concurrent control over all navigable waters within their jurisdiction; subject of course to all the constitutional conditions – such as the prohibitions against interfering with freedom of trade (sec. 92) and against discriminating against the citizens of other States (sec. 117) – by which the exercise of State power is controlled.63

By virtue of s 107, the State Parliaments were able to continue to regulate the waters of the Murray subject to the constitutional limitations, such as ss 92 and 117.

In crafting a legal solution to the problem, other commentators focused on the common law riparian rights doctrine or the broad principles upon which these transboundary river disputes could be settled. One of the criticisms that can be mounted at some of the other early analyses is the lack of consideration given to the Constitution. In contrast, Quick and Garran’s analysis was founded firmly on the express provisions of the Constitution. However, beyond the express limitations, important to this study is also the question of whether further limitations on State legislative and executive power can be implied from the constitutional text.64

4.3.2 Inglis Clark

In his 1901 book Studies in Australian Constitutional Law, Tasmanian Supreme Court judge, Andrew Inglis Clark, took the view that the High Court would provide a forum for the resolution of transboundary river disputes between the States. He contrasted the position of the States with nation states at international law and explained that within a federation, unlike between nation states, these matters ought to be able to be resolved by the High Court and without recourse to violence:

63 Quick and Garran, above n 55, 887.
64 I return to this question in Chapter 7.3.3.
If the several States were so many independent nations, any interference in one of the States with the waters of a river that flowed through that State and another State, to the extent that would produce any damage to the riparian proprietors in the other State, would be a matter of international complaint for which redress in the last resort would be sought by war. But the States of the Commonwealth are constituent parts of the same nation, and any act on the part of any one of them which inflicts injury on the residents of another State of the Commonwealth, which would be a matter of international complaint, if the two States were separate and independent nations, is a matter for redress in the High Court. 65

However, what Inglis Clark did not explain was the source of the law and how the law was to be applied to resolve a dispute between the States. He appears to suggest that there is something about the colonies coming together at Federation which in itself supports the existence of such a right. Quick and Garran’s argument had focused on the text of the Constitution to conclude that it expressly granted legislative power with respect to navigation, and trade and commerce to the Commonwealth but went no further. However, Inglis Clark’s argument is based upon not just the express provisions of the Constitution, but also on the practical effect that Federation had on the relationship between the colonies.

Inglis Clark argued that the absence of an interstate water right would lead to an unusual result when considered in conjunction with the operation of s 100. He explained that

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65 A Inglis Clark, Studies in Australian Constitutional Law (Charles F Maxwell, 1901) 110. Inglis Clark did not attend the Federal Conventions in 1897 and 1898. However, he followed the proceedings with interest and corresponded with the delegates. Inglis Clark wrote to the delegates during the 1898 Melbourne Convention and agreed with the position taken by New South Wales’ delegates that there was no intercolonial right to water prior to Federation. Importantly, however, Inglis Clark thought that Federation altered the position regarding interstate water rights and provided a mechanism by which residents of one State could bring a cause of action against a resident of another State. Writing to the Federal Convention delegates, Inglis Clark suggested that:

The riparian rights of the owners of land abutting on the River Murray in the colony of South Australia are rights of property in South Australia, and if those rights shall be infringed by any private person or any public body professing to act under colour of the authority of an Act of the Legislature of New South Wales, when both colonies are constituent parts of the Commonwealth of Australia, the citizen of South Australia whose riparian right has been violated will have a remedy in the federal courts of the Commonwealth, either for damages or for a writ of injunction to restrain the continuance of the injury, or for both.

Inglis Clark’s Notes, 7 February 1898 reproduced in John M Williams, The Australian Constitution – A Documentary History (Melbourne University Press, 2005) 844-5. While his letter to the Convention delegates did not address the rights of the States themselves, Inglis Clark did consider this issue subsequently.
although s 100 placed a restriction on the Commonwealth, there was no limit on the harm that one State could inflect upon another. He wrote:

There is not any restriction directly or expressly imposed by the Constitution upon the several States in respect of their use of the rivers of the Commonwealth for the purposes of conservation and irrigation, but it would be an anomalous result if each State has the power under the Constitution to divert the water of a river for the benefit of the residents of the State, or to diminish the quantity of it, to the detriment of the residents of another State, whether the river is navigable or not, and that the Parliament of the Commonwealth cannot for any purpose that would be beneficial to all the States, or to a majority of them, do the same thing.66

However, as I have shown in Chapter 3, s 100 places a limit only on the Commonwealth’s trade and commerce power. If Inglis Clark is correct in his assertion that within the Federation there must be peaceful means by which a dispute such as this can be resolved, the question still remains: what are the substantive principles of law governing the dispute? If the Constitution (and specifically s 100) does not provide an express solution, are there any limitations on State legislative and executive power that can be derived from implications drawn from the text and structure of the document?67 I consider this question in Chapter 7.

4.3.3 Harrison Moore

The second edition of Harrison Moore’s book The Constitution of the Commonwealth of Australia was published in 1910, after the first early decisions of the United States Supreme Court dealing with transboundary river disputes in that country. As I explained in the introduction,68 Harrison Moore referred to the Supreme Court’s decision in Kansas v Colorado and noted that the case was ‘peculiarly interesting to Australians’.69 However, precisely why a doctrine similar to that developed by the United States Supreme Court should be adopted in Australia was not explained. As Quick and Garran argued, there were some differences between the constitutions of the two countries and these differences needed to be taken into account when considering the limits on State legislative and executive power with respect to transboundary rivers.

66 Inglis Clark, above n 65, 109.
67 I return to this question in my analysis of the problem in Chapter 7.3.
68 See Chapter 1.4.
Moore, like Inglis Clark, noted that s 100 dealt with the issue of limiting Commonwealth power without expressly placing a similar limitation on the power of the States.\footnote{Ibid 564.} However Moore drew upon United States Supreme Court decisions to suggest that ‘rights’ of the States as against each other could be balanced using the principle of ‘reasonableness’:

The American cases just referred to ... show that the right of a State to abstract waters is in any case subject to the right of other States to do the same, and that a balance has to be struck between them on grounds of reasonableness. It remains to be determined whether, apart from legislation altogether, similar reasons do not prevent an abstraction of water to the impairment of ordinary navigation; [s 100] does not determine that there is a subsisting right of reasonable use for conservation and irrigation which is paramount to all rights of navigation.\footnote{Ibid.}

Moore’s use of the phrase ‘it remains to be determined’ seemed to suggest that he was identifying the central questions to be considered and was cautious not to express a conclusive view as to how the matter was to be resolved.

\subsection*{4.3.4 Summary of the Post-Federation Literature}

There are some important differences in approach between these three leading texts. Quick and Garran, having been more involved in the drafting of the Constitution, emphasised the text of the Constitution. The fact that the Constitution did not expressly resolve the problem was central to Quick and Garran’s conclusion that there was no limit on State legislative and executive power with respect to the use of water from transboundary rivers. On the other hand, Inglis Clark acknowledged that the Constitution did not solve the problem, but argued that a practical solution must still be found. Inglis Clark’s argument that Federation had fundamentally changed the relationship between the States was perhaps an attempt to find a theoretical basis for the conclusions that he thought were practically necessary. Similarly, Moore’s reference to the decisions of the United States Supreme Court was perhaps an acknowledgement that similar legal questions were likely to be raised and would require a solution. While leaving open the question of whether the High Court would adopt the same approach as the United States
Supreme Court, Moore’s analysis suggests that he thought the jurisprudence of the United States could well have been influential.

4.4 Interstate Royal Commission

At the Corowa Conference in March 1902 the Premiers of New South Wales, Victoria and South Australia agreed to appoint a joint Royal Commission to examine the issues surrounding the allocation of water from the River Murray (the ‘Interstate Royal Commission’). On 7 May 1902 three Commissioners – one from each State – were appointed

to make a diligent and full enquiry concerning the Conservation and Distribution of the Waters of the River Murray and its Tributaries for the purposes of Irrigation, Navigation, and Water Supply, and to report as to the just allotment of the waters of the Murray basin to the use of each State.72

Interestingly, the three Royal Commissioners, Joseph Davis from New South Wales, Stuart Murray from Victoria and Frederick Burchell from South Australia, were all engineers. The lack of legal expertise reflected the primary role of the Commission: to examine from a practical perspective how the Murray’s waters were being used and to identify future construction works necessary to optimise the water within the Murray-Darling Basin. Despite the complete lack of legal expertise between the three Commissioners, the Interstate Royal Commission considered in some detail the question of how to share water between States from transboundary rivers in the absence of an intergovernmental agreement.

4.4.1 Seven Legal Experts Give Evidence

As part of the Interstate Royal Commission’s enquiry, seven legal experts gave evidence to the Commission.73 The transcript of the testimony given by the experts provides great insight into how some of the leading legal scholars of the time approached the problem. Perhaps unsurprisingly given the lack of legal expertise of the Royal Commissioners, the transcript provides greater discussion of the issues than the final report of the

72 New South Wales, South Australia and Victoria, Interstate Royal Commission on the River Murray, Report of the Commissioners (1902) 2.
73 The Royal Commission took evidence from Professor Pitt Cobbett, Patrick Glynn, WP Cullen, Professor Salmond, Alexander Oliver, Stephen Mills and Joseph Carruthers. All legal experts who appeared before the Royal Commission were asked a series of identical questions, which allowed the Commissioners to compare their responses.
Commission. There were significant differences in opinion between the witnesses as to not just the ‘rights’ of South Australia, but also as to the ‘rights’ of Victoria with respect to the waters of the Murray.

Unsurprisingly, the two South Australian witnesses, Patrick Glynn and John Salmond, maintained the position presented by the South Australian delegates at the Federal Conventions: that there existed an ‘interstate riparian right’.\footnote{New South Wales, Victoria and South Australia, Interstate Royal Commission on the River Murray, Minutes of Evidence (1902) 7 (Patrick Glynn), 208 (John Salmond). For a brief overview of the position of the legal experts see Nicholas Kelly, ‘A Bridge? The Troubled History of Inter-State Water Resources and Constitutional Limitations on State Water Use’ (2007) 30 University of New South Wales Law Journal 639, 650.} The starting point for any argument rebutting this submission was that the Imperial Parliament had granted New South Wales ownership of the waters east of the South Australian border.\footnote{In establishing the colony of Victoria, the Imperial Parliament passed the Australian Constitutional Act 1850 (Imp) 13 & 14 Vict which separated the colony of Victoria – previously known as the District of Port Phillip – from New South Wales. In doing so, that Act defined the border between the two colonies as the Territories now comprised within the said District of Port Phillip, including the Town of Melbourne, and bounded on the North and North-east by a straight Line drawn from Cape Howe to the nearest Source of the River Murray, and thence by the Course of that River to the Eastern Boundary of the Colony of South Australia. Australian Constitutions Act 1850 (Imp) 13 & 14 Vict, c 59. (emphasis in original). In 1855 the New South Wales Constitution Act 1855 (Imp) 18 & 19 Vict, c 54, s 5 clarified the precise position of the border and confirmed that the River Murray remained within the colony of New South Wales:

And whereas Doubts have been entertained as to the true Meaning of the said Description of the Boundary of the said Colony: It is hereby declared and enacted, That the whole Watercourse of the said River Murray, from its Source therein described to the Eastern Boundary of the Colony of South Australia, is and shall be within the Territory of New South Wales. (emphasis in original).} Glynn, anticipating the likely argument of the New South Welshmen, contended that s 5 of the \textit{New South Wales Constitution Act 1855 (Imp)} did not grant New South Wales a ‘right’ to the water of the Murray:

The New South Wales Constitution Act, by necessary inference, declares the existence of reciprocal riparian rights and obligations between the States. No extra-territorial riparian rights could have been given to New South Wales that did not impose corresponding obligations on that State in respect of the other riparian States. ... But while it is probable that in the acquisition of our law and powers, riparian laws within States were conditioned by a similar law between States, section 5 of [the New South Wales Constitution Act 1855 (Imp) 18 & 19 Vict, c 54], was not intended to confer or limit riparian rights. The object of the Act was to indicate a boundary which, under the [Australian Constitutions Act}
1850 (Imp) 13 & 14 Vict, c 59], was doubtful, and the word ‘watercourse’ was used for that purpose only.  

Glynn argued that the word ‘watercourse’ had been used interchangeably with the phrase ‘course of the river’ and in that sense s 5 placed the bed of the river within the colony of New South Wales, but did not grant that colony the exclusive use of the water.  

Glynn contended that Victoria, as the owner of one bank of the river, was still entitled to a ‘reasonable’ share of the water of the Murray. He said:

I do not think the Imperial Parliament meant in taking half the bed from Victoria to cancel her right to a reasonable use of the water, which some think – though I do not share the opinion – is incident to ownership, not of the bank but of the bed. I think, as already stated, the Imperial intention was to define a boundary, not to cancel the previous rights of Victoria, which rights to whatever incident then clearly included a right to the reasonable use of the water of the Murray.

Glynn conceded, however, that if Victoria had no right to either the bed or the banks on either side of the river, then the colony would not have a ‘right’ to the water.

At times, however, Patrick Glynn focused on how an agreement might be reached between the States as opposed to the legal solution. In his evidence he referred to the position he had taken prior to Federation as a member of the South Australian Royal Commission and submitted that the rights of the States should be guided by drawing

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76 New South Wales, Victoria and South Australia, Interstate Royal Commission on the River Murray, Minutes of Evidence (1902) 201-2 (Patrick Glynn).
77 Ibid 201-2 (Patrick Glynn). Glynn argued (at 202):
   The section [section 5] does not make New South Wales the legal possessor, in the sense of absolute owner, of the water passing along the bed of the river.
   (a) No right was expressly conveyed, but as a consequence of the ‘watercourse’ being declared to ‘be within the territory of New South Wales’ –
      1. That State acquired, subject to certain express conditions, jurisdiction in respect of offences and trespasses committed between the banks against the laws of New South Wales.
      2. A more accurately-defined boundary line, the indefinite delimitation of which, under the 13 and 14 Vic. C. 59 rendered territorial jurisdiction doubtful.
   (b) Jurisdiction in respect of matters arising under the Commonwealth Constitution, or laws passed thereunder, became vested in the Commonwealth.
   It was evidently not the intention of the Imperial Parliament, by declaring that the whole of the bed was within New South Wales territory, to deprive Victoria, as a riparian State, whose territorial jurisdiction would otherwise have extended to half the bed, of the right to a reasonable use of the waters.
78 Ibid 205 (Patrick Glynn).
79 Ibid.
80 Ibid.
analogies with international law and with the private law riparian rights doctrine. However, Glynn drew the analogy primarily for the purpose of urging for an agreement between the States to be reached and to suggest how to allocate the waters of the River in such an intergovernmental agreement. Glynn was clearly more interested in finding a practical solution, as he acknowledged that:

The question of the existence and scope of a riparian law between States forming part of an Empire may be a nice point for lawyers to discuss, but it is of much less practical interest to politicians.

That is not to suggest that Glynn rejected the ‘nice point’, but his primary focus was on bringing about an intergovernmental agreement. At the same time, he did not want to concede that there was no legal remedy available. He argued that the High Court now provided an avenue for the resolution of such disputes:

If the States fail to amicably adjust their mutual claims, the High Court of Australia must determine the extent of their rights and obligations. The better opinion seems to be that, when States federate, they submit the validity of all acts that affect the rights of citizens of different States to the decision of the Federal tribunal.

Glynn had referred to Inglis Clark’s work and appears to be making a similar argument: Federation could bring about a solution because there was a tribunal (the High Court) capable of hearing interstate disputes.

Writing a few years later in 1905, Glynn fleshed out his reasoning a little further. He explained that in interstate cases in the United States, the United States Supreme Court ‘would apply Federal law, State law, and International law, as the exigencies of the particular case might demand’ to bring about a solution. Glynn’s reasoning seemed to be that within a federation there must be a practical solution to the problem and that the

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81 See above Chapter 2.4.2.b.
82 New South Wales, Victoria and South Australia, Interstate Royal Commission on the River Murray, Minutes of Evidence (1902) 201 (Patrick Glynn).
83 Ibid. The only authority given for this proposition is ‘6 Wheaton 380’. This case is Cohen v Virginia, 19 US 264 (1821) and deals with the case of when a Government has submitted to be sued.
84 However, as explained in Chapter 6.2, the High Court does not have jurisdiction over every dispute between States. For the High Court to have jurisdiction there must be ‘a matter’: Australian Constitution s 75(iv).
Court can draw upon whatever principles necessary to bring about a resolution of the dispute:

There may be difficulties of fitting the principles to the case, or the remedy to the principles, but certain rights between independent nations regarded as imperfect, are none the less justiciable between the States of a Federation ... Communities on entering into Federal Union surrender those powers or rights, the retention of which by each would be inconsistent with the objects to be attained, which include the mutual recognition of the equal rights of one another, and of the limits of territorial sovereignty or power.\footnote{Ibid 242-3. After explaining the ‘imperfect rights’ of nations states at international law, Glynn states (at 245): ‘The Supreme Court of the United States, as we have seen, has decided that under the Federal system, the obstruction of such rights can be restrained by legal sanctions.’ And also (at 246) ‘Thus old ideas of territorial sovereignty and interstate rights become modified by new conditions and necessities. ... [A state] can neither with impunity injure, nor confer authority to injure, property rights in another State.’}

This approach, however, seemed to be driven by the result rather than by a search for a principled approach upon which the dispute could be resolved.

How Glynn thought international law might assist in the resolution of the dispute is unclear; however, he appears to suggest that there are principles of international law that may inform the development of a common law that applies between the States to resolve transboundary river disputes. Making a similar point to that which Harrison Moore made and drawing upon the jurisprudence of the United States Supreme Court, Glynn explained:

\begin{quote}
On the authority of the American decisions it appears that there may be in force throughout the Commonwealth a substantive law other than that which attaches to the Executive powers of the Crown, or is derived from the Commonwealth Constitution or legislation thereunder, but to which the Constitution has supplied a sanction. ... This substantive law has been described in America as the Common Law between States and deduced from the principles of International law and usage.\footnote{Ibid 247-8.}
\end{quote}

Given the history of the dispute, it comes as no surprise that the New South Welshmen took a different approach to Glynn.

Barrister Stephen Mills from New South Wales rejected Glynn’s argument that there existed an ‘interstate riparian law’. Mills argued that from a practical perspective the application of the riparian rights doctrine would not solve the existing problem and would
lead to a waste of water, as the riparian rights doctrine would require the natural flow of the river to be maintained at the expense of water being used for industry or irrigation.  

Mr Glynn is dealing purely with the riparian law as between an upper and lower proprietor of a stream where both proprietors are under the same government. His contention would only be true as applied to two States if there were an inter-state riparian law exactly similar to the Common law affecting individuals; but I do not think there is any such riparian law. If there were such a law, and it were strictly enforceable, we should have the astounding result that South Australia could demand that all the waters collected from an area nearly twice as large as France, should pass into her territory except as to such limited domestic use as does not diminish the customary flow.

The problem, as Mills explained, was that the riparian analogy lacked a rational justification as to why the analogy was to apply between States.

Glynn appeared before the Royal Commission a second time, which provided him with an opportunity to respond to Mills’ criticism by reiterating the argument he had earlier put:

When States federate, they submit the validity of all acts that affect the rights of citizens of different States to the decision of the Federal tribunal.

While Glynn argued that the High Court was in a position to resolve interstate disputes he proffered little in terms of how the Court might go about this task.

John Salmond, Professor of Law at the University of Adelaide, also took the view that the New South Wales Constitution Act 1855 did not grant or alter the rights of the colonies

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88 New South Wales, Victoria and South Australia, Interstate Royal Commission on the River Murray, Minutes of Evidence (1902) 271 (Stephen Mills).
89 Ibid 147 (Stephen Mills).
90 As Mills explained: ‘Every possible analogy from private riparian law which might be applied either in favour or against any of the colonies is always subject to the ‘if’ the law is applicable. My view is that it is not, and I do not know of any court where it has ever been enforced against a Colonial Government. Since Federation another power has arisen, and the rights of the States are to some extent modified.’: ibid. Mills also noted later that the colonies were in a similar position to nation states at international law. As such they were ‘bound by no other obligations than those of comity’: at 271. However, this comparison is imperfect, as it does not have regard for the role of the Imperial Crown. Upon federation (or perhaps later), that power is transferred: see Australia Act 1986 (Cth). Mills further argued that the riparian doctrine as applicable between individuals did not apply between colonies and the colonies had the right to pass laws dealing with their own territory and could therefore pass laws controlling the rivers within their boundaries: at 271. (The ‘power’ that had arisen was presumably that of the Commonwealth.).
91 New South Wales, Victoria and South Australia, Interstate Royal Commission on the River Murray, Minutes of Evidence (1902) 271 (Stephen Mills) 201 (Patrick Glynn).
with respect to water, but merely defined the boundary between the colonies of New South Wales and Victoria.\textsuperscript{92} Salmond stated that he was of the opinion that

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even before Federation there was an inter-State riparian law in force between the Colonies – that is to say, that even by legislation the different states had no power so to interfere with the rivers as to do material injury to other States. Any such legislation would, I believe, have been \textit{ultra vires} and unconstitutional.\textsuperscript{93}
\end{quote}

By ‘inter-State riparian law’ Salmond must have been referring to a law applying between individuals – as opposed to a limit on State legislative power – as he went on to note that prior to Federation the State Supreme Courts had jurisdiction to decide matters between private individuals from different States, but could not hear matters \textit{between} States. Salmond argued that ‘if the [southern] bank is Victorian territory, Victoria is in exactly the same position as regards riparian rights as New South Wales.'\textsuperscript{94} Salmond thought that Federation ‘had not altered the matter in any way, except to declare that these rights exist, and to protect them against federal legislation’, which seems to be a tangential reference to s 100 and would appear to suggest that he thought that s 100 at the very least recognised the existence of the States’ rights.\textsuperscript{95}

What is most interesting about the analyses by Salmond and Glynn is the attention given to s 5 of the \textit{New South Wales Constitution Act 1855} (Imp) in the absence of any detailed analysis of the \textit{Australian Constitution}. Perhaps this can be explained by the fact that representatives from New South Wales had previously relied upon s 5 of the \textit{New South Wales Constitution Act 1855} (Imp) and Salmond and Glynn were trying to anticipate the arguments that might be put to the Interstate Royal Commission.

Of the five New South Welshmen who gave evidence before the Commission, Alexander Oliver, President of the Land Appeal Court, was the only person from that State to concede that the riparian rights doctrine might operate between the States; however, he acknowledged that the application of the doctrine presented some difficulties. He was of the opinion that the \textit{New South Wales Constitution Act 1855} did not vest New South Wales with the water within the River. Oliver distinguished between the ‘stream’ and the ‘water’. He thought that New South Wales did not own the water, but merely a ‘right’ to

\begin{footnotes}
\textsuperscript{92} Ibid 207 (Patrick Glynn).
\textsuperscript{93} Ibid 208 (John Salmond).
\textsuperscript{94} Ibid.
\textsuperscript{95} Ibid.
\end{footnotes}
use ‘the liquid that is passing along, and which is supposed to go on forever, a vehicle for carrying things, and so forth, as flowing in a given direction and of a certain height.’

Presumably the distinction that Oliver was trying to make was that the ‘stream’ could be used to power a mill or for navigation, but that the ‘water’ could not be held back by New South Wales.

In considering the position of Victoria, he stated that that State had a ‘right’ to a share in the water and described it as a ‘public easement’ or ‘public servitude’. Oliver thought that these rights were ‘territorial’ rather than an incident of property, which seems to acknowledge that states within a federation are in a different position from private citizens who own land abutting the River. Whether the riparian rights doctrine would apply between States in exactly the same way as between individuals was a question which Oliver left open, but he acknowledged that one of the further difficulties would be that conditions in Australia were such that the riparian rights doctrine as it applied in England might need to be modified. However, he ultimately dodged the question by explaining that it would be for the High Court to determine how similar the position between the States was to that between individuals and that this would determine how closely the analogy with the riparian rights doctrine would apply.

Oliver did refer to the Constitution to explain how Federation may have largely maintained the legal position that existed before Federation. Oliver first explained that s 98 provided the Commonwealth with the power to legislate with respect to navigation, but that that power was limited by s 100. Oliver then referred to s 106 and 107, which he described as ‘two very important savings’, as the provisions ensured that the legislative power of the colony shall continue after Federation unless that power has been withdrawn or vested in the Commonwealth by the Constitution.

William Cullen, Member of the Legislative Council of New South Wales, took a different view. He thought that the term ‘watercourse’ referred ‘both to the channel of the stream

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96 Ibid 224 (Alexander Oliver).
97 Ibid (Alexander Oliver). Oliver noted that whilst the river ‘may be technically within the territory of New South Wales, yet Victoria is, to all intents and purposes, a quasi-riparian state with this easement’: ibid.
98 Ibid 223-4 (Alexander Oliver).
99 Ibid (Alexander Oliver).
100 Ibid 227 (Alexander Oliver).
101 Ibid 225 (Alexander Oliver).
102 Ibid.
and to the water upon it.'

Cullen rejected the notion of an interstate water right. He said that the New South Wales Legislature had jurisdiction over its territory and the same principle applied to the State of Victoria. As the Murray was in New South Wales, he argued that that State had jurisdiction over the River. In rejecting the idea of an interstate riparian right he argued that the

Legislature of New South Wales ... could ... validly have authorised an extraordinary use of the waters of the Murray, and the Victorian residents would have had no remedy for any injury thereby done, any more than the New South Wales residents would have had.

Further, he contended that the creation of a ‘Federal Court’ (by which he was presumably referring to the High Court) did not in itself create an interstate right.

The question was put to Cullen as to whether New South Wales or Victoria could take water from the Murray if it would diminish the water available to South Australia in the lower reaches of the River. As Cullen believed that each State could legislate as it saw fit within its own territory, to answer this question was a matter of considering whether the act of taking or diverting water on a property in New South Wales was lawful under the law of that State. If so, then for Cullen it did not matter that it reduced the water available to South Australians.

Professor Pitt Cobbett, Challis Professor of Law at the University of Sydney and expert in international law, also gave evidence to the Interstate Royal Commission. He stated that the New South Wales Constitution Act 1855 placed the Murray within the territory of New South Wales and as such both the riverbed itself, and the usufruct of the water, were subject to the legal control of the Legislature of New South Wales. He explained the legal position of South Australia in the following way:

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103 Ibid 229 (William Cullen).
104 Ibid 230 (William Cullen).
105 Ibid 231 (William Cullen). Cullen also noted that South Australia could vary the riparian rights within its colony and Victoria could do the same. However, he submitted that there was no ‘inter-colonial’ or ‘inter-state’ riparian right: at 232.
106 Ibid 231 (William Cullen). Cullen stated that ‘The creation of a new legal tribunal does not of itself create law’: at 231.
107 Ibid 232 (William Cullen).
108 ‘Usufruct’ is a right to use or enjoy.
109 New South Wales, Victoria and South Australia, Interstate Royal Commission on the River Murray, Minutes of Evidence (1902) 242 (Pitt Cobbett).
As regards the other riparian State, South Australia, I do not think it can be said that the control vested in the Legislature of New South Wales was subject to any legal limitation such as exists between private riparian owners; but I think it may fairly be said that it was subject to a somewhat similar limitation as a matter of comity. As to the value of a right of comity, it is true that a violation of such a right as between independent States is commonly met by mere revision, but in the case of two British colonies I think than [sic] a serious invasion of such rights might conceivably have afforded good ground for a petition addressed to the Crown with a view to the correction of the injury by Imperial legislation, and that such a petition might well have formed the subject of a special reference to a general committee of the Privy Council under 3 and 4 William IV, chapter 41, section 4 as a matter involving not so much a legal issue as a question of general policy.\textsuperscript{110}

Cobbett stated that Victoria had no ‘legal control’ over the water of the Murray and, like the right of South Australia, its right was one of comity.\textsuperscript{111} That is, a right based on goodwill as opposed to a legal obligation. With regard to the application of the riparian rights doctrine Cobbett thought that each State was ‘at liberty to alter the inherited common riparian law’\textsuperscript{112} and that, whilst the doctrine might apply within each State, it did not apply as between the States.\textsuperscript{113}

Cobbett’s views very much reflected the fact that he thought that the rights of the colonies were not similar to the rights of individual riparian proprietors. As an expert in international law, he was more comfortable in drawing an analogy with the position between nation states. For him the issue here was one of territorial sovereignty – the river was within New South Wales and therefore that colony had control over the waters within its borders.\textsuperscript{114} He noted that ‘it may not be fair or reasonable, but it is what the Act provides.’\textsuperscript{115} Cobbett argued that prior to the New South Wales Constitution Act 1855 the boundary was in fact the middle of the Murray. However, the Act changed this position.

\textsuperscript{110} Ibid 242-3 (Pitt Cobbett). The Judicial Committee Act 1833 (Imp) 3 & 4 Wm 4, c 41, s 4 arguably provided for the Privy Council to issue advisory opinions: see Chapter 2.4.3.

\textsuperscript{111} Ibid 243 (Pitt Cobbett). For Cobbett the term ‘watercourse’ means ‘the bed of the river, the bank of the river up to the level of the ordinary flood, the title of which carries a usufruct of the flowing water’: at 243.

\textsuperscript{112} Ibid 246 (Pitt Cobbett).

\textsuperscript{113} Ibid 247-8 (Pitt Cobbett).

\textsuperscript{114} Ibid 243 (Pitt Cobbett). The Imperial Act ‘has the effect of depriving Victoria of any territorial interest in the watercourse of the Murray.’ Cobbett stated that Victoria might have had rights to the Murray prior to the passing on the Imperial Act, but since its passing those rights no longer existed: at 243.

\textsuperscript{115} Ibid 243 (Pitt Cobbett).
and placed the boundary on the southern bank, therefore granting control of the Murray to New South Wales.\textsuperscript{116} Cobbett also remarked that the Act allowed the boundary to be moved with the consent of both colonies.\textsuperscript{117} If ownership of the river was essential for the use of the stream then the ability to move the boundary may have provided New South Wales and Victoria some mechanism by which the Murray could be shared. This, however, was unlikely to assist South Australia.

The New South Welshmen were quick to point out some of the difficulties in the interstate riparian rights argument. Joseph Carruthers and Cullen both stated that while the Constitution may have created a tribunal vested with jurisdiction to hear ‘matters between States’, this fact alone did not necessarily make the matter justiciable nor did it create law which could be used to resolve such disputes; it merely created a forum.\textsuperscript{118}

Cobbett suggested that s 51(\textsuperscript{xxxviii}) – the referral power – might provide a suitable mechanism to bring about a solution. He thought that the States could refer power to have the Commonwealth legislate and declare how the water from the Murray was to be allocated between States.\textsuperscript{119} Curiously, Cullen thought that this approach may be met with some opposition from the States of Western Australia and Queensland on the basis that Commonwealth money may be used to regulate a river over which they had no control.\textsuperscript{120}

As the recent referral of power to allow the Commonwealth power to pass the Water Act 2007 (Cth) has shown,\textsuperscript{121} the greater problem with the use of the referral power was likely to be getting New South Wales, Victoria and South Australia to agree the basis for the referral and ensuring that they did not withdraw the referral of power.

Like the evidence of Salmond and Glynn, what is most surprising about the evidence of the New South Welshmen is the lack of engagement with the text of the Constitution. Even if their starting premise – that s 5 of the Imperial Act placed the River within New South Wales and it could, therefore, regulate the waters as it saw fit – was correct, there

\begin{thebibliography}{99}
\bibitem{116} Ibid 244 (Pitt Cobbett).
\bibitem{117} Ibid. The Act allowed 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, and to alter the other Provisions of this Section.’ Further, Cobbett said that any unreasonable extraction of water from a tributary might have resulted in a similar plea to the Imperial Government: at 246. Since Federation, the Commonwealth Parliament (with the consent of the Parliament of a State) is able to alter the boundaries of a State: \textit{Australian Constitution} s 123.
\bibitem{118} Ibid (William Cullen), 238-9 (Joseph Carruthers).
\bibitem{119} Ibid 247 (Pitt Cobbett).
\bibitem{120} Ibid (1902) 234 (William Cullen).
\bibitem{121} See Chapter 1.3.
\end{thebibliography}
was very limited analysis of the secondary question: did the *Australian Constitution* alter this position in any way? Perhaps they drew comfort from ss 106 and 107, which ensured the State Constitutions continued to operate and that the powers of the State Parliaments shall continue save for any withdrawal or alteration of power provided for by the *Constitution*.

The opinions of the legal experts given before the Interstate Royal Commission were some of the most detailed analyses of the legal issues to date. The international law analogy that had received considerable attention during the Federal Conventions was not as prominent during the testimony before the Commission and the division between the South Australians and the experts from New South Wales largely came down to the potential application of the riparian rights doctrine between the colonies. 122 Two important issues arose from the Interstate Royal Commission: first, could the riparian rights doctrine apply as between the States? And secondly, if it applied, could it assist in the resolution of a transboundary river dispute? I consider these questions in Chapter 6.

### 4.4.2 The Conclusions of the Royal Commissioners

A majority of the Commissioners – Davis and Murray, the Commissioners from New South Wales and Victoria – concluded that the riparian rights doctrine was unsuitable for Australian conditions and that legislation similar to the *Water Rights Act 1896 (NSW)* should be adopted in each of the other States, ‘vesting ownership and control of all natural waters in the Crown’. 123 In reaching the conclusion that the riparian rights doctrine was unsuitable to the Australian conditions the Commissioners drew comfort from the jurisprudence of the United States. The Commissioners were aware that courts in a number of the States in the United States had abandoned the riparian rights doctrine in favour of approaches that were more suitable to the local arid conditions and that legislatures in some States had also abolished the doctrine. 124 However, that did not address the question of whether the doctrine could apply *as between* the States.

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122 Notwithstanding the fact that Cobbett was an expert in international law.
124 Ibid 27, 45, 47.
With respect to *interstate* water rights, it was noted in the Royal Commission’s report that one factor to take into account when determining the share of the waters of the respective States was that

there must be recognition of, and concession to, what would be the *riparian rights of the States*, if they were private proprietors, or if the Common law of riparian rights could be held applicable to their case.¹²⁵

What is unclear from the Royal Commissioners’ recommendations is whether this was intended to be a factor to be taken into account in negotiating an agreement, or whether they thought it was one of the *legal* principles that the High Court would acknowledge in settling the rights of the respective States.

Perhaps unsurprisingly, the South Australian Royal Commissioner, Frederick Burchell, dissented with respect to a number of aspects of the final report. With respect to the application of the riparian rights doctrine in Australia, and specifically whether it applied between the States, he concluded:

> I also dissent from recommendation 4, that the Common Law Doctrine is unsuitable in Australia, particularly in regard to the waters of the Murray Basin. I believe the riparian rights existing as between individuals [are] the only equitable basis upon which to arrive at any decision in regard to the apportionment and distribution of the waters of the Murray River to the riparian States.¹²⁶

The conflicting views among the Royal Commissioners with respect to the application of the riparian rights doctrine as between States is hardly surprising given the varying views proffered by the witnesses who gave evidence on this question and the allegiances that were shown to one’s home State. However, given that the Royal Commissioners were not legally trained, the importance that can be attached to these conclusions is relatively low. Instead, it was the testimony of the witnesses that provides the most useful and detailed analysis of the transboundary river problem.

**4.5 South Australian Legal Opinions from Isaacs, and Symon and Glynn**

Neither an intergovernmental agreement nor an immediate legal challenge arose as a result of the Interstate Royal Commission. Consequently, in 1906 the South Australian

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¹²⁵ Ibid 49 (emphasis added)
¹²⁶ Ibid 60.
Government, perhaps frustrated that agreement between the States as to how to share the waters of the Murray was still unable to be reached, sought two legal opinions on the question whether a State had a right to water from a transboundary river: one opinion was from Isaacs and the other was a joint opinion from Symon and Glynn.

4.5.1 Isaacs’ Change of Heart

During the Federal Conventions Isaacs had been careful not to side with South Australia. However, his allegiances changed after being retained by the Government of South Australia in 1906. Isaacs’ opinion was 23 typed pages and was arguably the most detailed analysis of the interstate river question to that date. Despite that fact, Isaacs’ opinion has still been criticised for failing to develop fully some of the important arguments regarding interstate water rights.

Helpfully, however, Isaacs broke the problem down into four key issues:

1. Does New South Wales or Victoria possess a right as against South Australia to divert the waters of the Murray or its tributaries:
2. If such right exists then to what extent:
3. What remedy for excess:
4. Appropriate procedure.

He then proceeded to deal with each issue in turn. Of these four issues, the first two are the most important and are the focus of this thesis. Isaacs’ opinion focused on the question that had occupied a great deal of the time of the joint Royal Commission in 1902: whether the riparian rights doctrine could also apply between the States. Isaacs, quoting at length from English cases dealing with the riparian rights doctrine, wrote:

127 See Chapter 3.2.5.
129 Isaac A Isaacs, Re Waters of the Murray River and its Tributaries and Interstate Rights to Divert Them (Opinion, 22 March 1906) 1. A copy of the legal opinion can be found in the South Australian Parliamentary Library.
130 About 7 months after writing the opinion, on 12 October 1906, Isaacs was appointed as a judge of the High Court of Australia. While Isaacs would arguably not have been able to sit on the case given his involvement, it is interesting to consider what might have come of an action in the High Court at that time. Four days before his appointment to the High Court, Isaacs (as the then Commonwealth Attorney-General) also provided the Commonwealth with advice regarding the waters of the Murray: Isaac A Isaacs, River Murray Waters – Effects on Commonwealth of Agreements Between States (Opinion, 8 October 1906) in Patrick Brazil, Opinions of Attorneys-General of the Commonwealth of Australia (Australian Governmental Publishing Service, 1981).
In my opinion New South Wales and Victoria must as regard South Australia be regarded as standing in the position of riparian proprietors and the water rights of the respective States should be determined on this basis.\textsuperscript{131}

Isaacs commenced by acknowledging that the States were ‘for all purposes of government’ sovereign and ‘entirely independent’ of each other. However, he placed a caveat on that statement by explaining that because each derived their governmental powers from the same Imperial source, the various Grants of Constitution ought, in my opinion, to be read so as to harmonise. The British Parliament in granting Local self-government in New South Wales had full knowledge that the Murray River ran beyond New South Wales territory and was as much a natural and permanent feature of Australia as the Blue Mountains or Spencer Gulf: and in granting to South Australia similar rights over its own territory it meant that the land covered or watered by the Murray River should preserve its actual character unaltered by outside interference.\textsuperscript{132}

Whether the Imperial Parliament had even considered the question of allocating the waters of the Murray when forming the separate colonies is questionable, as the Imperial legislation separating the colonies of New South Wales and Victoria had not even defined the precise location of the boundary and required clarification, and it could not have been aware of competing water uses that would emerge subsequently. Assuming that Members of the Imperial Parliament were even aware that the Murray flowed between the colonies at the time of their establishment,\textsuperscript{133} the absence of any express statement with regard to the allocation of the River Murray’s waters could equally be used to support the contrary argument: had the Imperial Parliament wanted to limit the amount of water taken by the upstream States or wanted to maintain the natural flow, it could have expressly provided for these conditions.

Furthermore, Isaacs’ starting premise that the Murray was a ‘natural and permanent feature’ – like the Blue Mountains or Spencer Gulf – seems to ignore the very problem with the interstate river dispute that made it unique. The waters of the Murray were not permanent in any sense: first, the flowing water of the Murray moved from one State to

\textsuperscript{131} Isaacs, above n 129, 1.
\textsuperscript{132} Ibid 1-2 (underlining omitted).
\textsuperscript{133} There was no discussion of the River Murray by the Imperial Parliament when passing the \textit{Australian Constitutions Act 1850} (Imp) 13 & 14 Vict, c 59 and the \textit{New South Wales Constitution Act 1855} (Imp) 18 & 19 Vict, c 54.
another and in that sense was arguably different to a mountain or even a lake or inland sea; and secondly, the amount of water flowing varied from year to year and at different times of the year. The waters of the Murray were, therefore, neither permanent in a geographical nor temporal sense.

Isaacs’ solution attempted to equate what he described as the ‘territorial rights’ of a State with the riparian rights of individuals. He explained the approach in this way:

As between themselves I think the States must ... be looked upon in this regard for all practical purposes as riparian proprietors. Within their own territorial limits they are omnipotent, even with respect to diverting or utilising water, provided always they do not infringe the territorial rights of another State. The moment one State interferes with the territorial right of another State it acts beyond its jurisdiction and is not justified by its constitution. It cannot of course be said that every act done on Victorian soil can be legalised by Victorian legislation. For instance if before or since Federation a Victorian Act provided that a cannon might be lawfully be fired across the Murray River from Wodonga to Albury and in pursuance of the Enactment shells were thrown whereby people in Albury were killed or property there destroyed it would, as I conceive, be quite impossible to assert a justification for the individuals who fired the shot. ... I do not see how such a statute would be really a law made ‘in and for Victoria’ within the meaning of the State constitution.

Isaacs next considered the extreme situation of the upstream States damming the river to the detriment of South Australians – the extreme position that had caused concern for some delegates during the Federal Conventions:

if New South Wales and Victoria were to combine in making a dam across the Murray and the dam suddenly burst and overwhelmed some South Australian farms, it would hardly be said that a law enabling such a dam to be made was one for the good government of the respective States passing it. That would be in such a case a direct trespass to South Australian lands.

However, in this example it is not clear whether the cause of action would arise from the fact that the hypothetical law that enabled the building of the dam was beyond the

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134 Isaacs, above n 129, 2.
135 Ibid 2-3. Isaacs cited Badische Anlin [1898] AC 200 in support of his argument. However, the facts of that case and the examples (at 204-5) deal with the question of the limits of a court’s jurisdiction rather than the question of the limits of legislative power.
136 Isaacs, above n 129, 3.
legislative power of the State, or merely a tortious act in releasing the water and flooding the South Australian farms.

Isaacs also considered the scenario where the dam does not burst, but simply holds back water from the downstream State:

> In my opinion there would be no difference of principle between [the dam that bursts and floods South Australian farms] and that of a dam successfully retaining all the water of the Murray and enabling diversion on to the irrigable lands of the two States in question. This ... would be equally an interference with South Australian property.\(^\text{137}\)

In the first example, does the hypothetical legislation purport to authorise the construction of the dam and flooding of the downstream State, or does it merely seek to construct a dam and, through tortious wrongdoing, cause flooding to the downstream State? Whether these two examples are founded on the same principle might depend on the nature of the legislation and regulatory scheme established by the upstream State.

Isaac argued that these limits on the legislative power of the States were a function of the State Constitutions:

> State constitutions both by their terms and their intendment when read in relation to each other and the circumstances of their application are plainly to be used as beneficial instruments of government mutually assisting to develop the same Continent improving its capabilities and making the most of its natural opportunities but certainly not by any means as weapons of antagonism or as engines of destruction of great natural features.\(^\text{138}\)

Absent from the Isaacs’ opinion is consideration of the operation of the *Australian Constitution* and whether that *Constitution* in anyway harmonises the interaction between the States or alters the pre-Federation position. This possible oversight might be due to the fact that Isaacs had expressly ignored the question ‘from any standpoint which concerns the Commonwealth.’\(^\text{139}\) Perhaps not considering the Commonwealth’s position led Isaacs to ignore the *Australian Constitution* altogether.

Isaacs drew comfort from the fact that in 1901 the United States Supreme Court heard a dispute between the States of Kansas and Colorado with respect to the waters of the

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137 Ibid.
138 Ibid.
139 Ibid 23.
Arkansas River. The decision of the Supreme Court in 1902 dealt only with the question of whether the Court had jurisdiction to determine such a dispute. Isaacs explained:

We have however in America under the Federal System an excellent analogy and guide. [In] case of Kansas v. Colorado ... the Court clearly indicates that on proper proof of the necessary facts it would be prepared to determine the respective rights of the two States.

In that case the Supreme Court held that the Court had jurisdiction to hear disputes between States over the sharing of the waters of a transboundary river. However, the Supreme Court did not develop a doctrine to allocate the waters of transboundary rivers between States until 1907, a year after Isaacs wrote his opinion.

While Isaacs sought to draw an analogy between the rights of the States and the riparian rights doctrine, it would appear that he intended that the doctrine would require some modification when applied between States. Isaacs was seeking to take the notion of ‘reasonableness’ from the riparian rights doctrine, but leaving it to the High Court to determine how that principle might apply between States. He explained:

All one can say is that the rights of the upper States to divert water would be regarded as unlawful as soon as it became unreasonable. This is of course a very vague and uncertain test but as indicated by the extracts from important judgments already quoted no other test can be found because circumstances being variable reasonableness in relation to those circumstances must vary accordingly. If however a sensible and appreciable injury were occasioned to the lower State either in quantity quality or regularity of flow of the water, that would in my opinion constitute unreasonableness as between the States and would amount to an excess of rights.

One question that this approach raises is whether this is in fact an analogy with the riparian rights doctrine or whether there is one factor in common – the use of the standard of reasonableness. I examine the analogy with the riparian rights doctrine in Chapter 5.

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140 See Kansas v Colorado, 185 US 125 (1902).
141 Isaacs, above n 129, 17.
142 Kansas v Colorado, 206 US 46 (1907). The case was argued in December 1906 and the Supreme Court delivered its decision in May 1907.
143 Isaacs, above n 129, 18.
4.5.2 The Symon and Glynn Opinion

The 15-page joint opinion of Symon and Glynn took a slightly different approach to Isaacs. The way they framed the problem was in terms of the ‘rights’ of the States and they explained the scope of their opinion in this way:

The essential purpose of the case submitted is to ascertain and define the rights of South Australia relatively to the other States riparian to the River Murray in that river and its waters, and first the authority, and then the procedure, to determine them in case of difference.144

They focused on what they thought was a ‘public right of navigation’145 as a way of solving the problem. Symon and Glynn asserted:

The Murray is unquestionably a navigable and commercial waterway. It is certainly so within the borders of South Australia, and is so also to an extent depending on the time of year and the seasons for hundreds of miles higher up. ... And even though, like most rivers, it ceases to be navigable as it nears its source, such cessation of navigability or the entire absence of navigable capacity in any of the tributaries which go to make up the volume of the main Stream, does not in our opinion change or diminish the rights (if any) to the maintenance of the natural or normal navigability lower down, or entitle the States riparian to the upper course, or the tributaries, on the ground of non-navigability there, to take the water so as to lessen or destroy the navigability lower down.146

However, one problem with this approach that was identified by Sandford Clark was that ‘the English public right of navigation had only ever been acknowledged to the extent of the tidal reach in a river’.147 Symon and Glynn seemed to ignore this point by boldly declaring that the River Murray was a navigable river and by ignoring the fact navigation had traditionally been recognised as a right to the reach of the tidal flow. Symon and Glynn’s focus on navigation is also curious given that by 1906 riverboat numbers had started to decline and the use of the waters of the Murray for irrigation was growing

144 J H Symon and P McM Glynn, *The Rights of the States and the Residents Therein in and to the use of the Federal Power in Respect of the Waters of the River Murray and its Tributaries and Ex Parte the State of South Australia* (Opinion, 26 March 1906) 1. A copy of the legal opinion can be found in the South Australian Parliamentary Library and in the Papers of Sir Josiah Symon, National Library of Australia.
145 Ibid 7.
146 Ibid 2.
147 Clark, above n 128, 229. Clark was critical of the opinion of Symon and Glynn. Clark stated that ‘[t]he opinion is, on the whole, disappointing in its lack of tight analysis and its obvious deficiencies in argument’: at 231.
rapidly. The reason for focusing on navigation is not explained in the opinion, but perhaps Symon and Glynn focused on the issue of navigation because they were aware that Isaacs had already dealt with the issue of riparian rights in his opinion in some detail and it was unnecessary to repeat those arguments.\textsuperscript{148}

Symon and Glynn describe the right to navigation not only as a right that South Australia possessed, but as a ‘public national right which is within Commonwealth cognisance’ and that the Commonwealth Parliament had a ‘duty’ to maintain that right.\textsuperscript{149} This was clearly a reference to the Commonwealth’s power to legislate with respect to interstate trade and commerce, and navigation pursuant to ss 51(i) and 98. A difficulty remained, however, if the Commonwealth declined to discharge that ‘duty’: where would that leave South Australia? One of the problems with this argument is that while ss 51(i) and 98 provide the Commonwealth with the power to legislate with respect to navigation in the context of interstate trade and commerce, the exercise of these powers is not mandated.

Symon and Glynn also considered the meaning of s 100 and concluded that the section did not alter the pre-Federation position: ‘What the States could lawfully do before Federation in regard to diversion and storage for irrigation and conservation is the measure of what they can lawfully do now.’\textsuperscript{150} The difficulty with that approach was that many other legal experts took the view that prior to Federation the colonies were free to deal with the waters of the River Murray as they saw fit.

In the absence of Commonwealth legislation, Symon and Glynn argued that the matter could be resolved by the High Court. In reaching this conclusion, Symon and Glynn adopted similar reasoning to Inglis Clark:

> In a Federation of States the Judicature stands instead of the obligations of international law and the sanction of force between independent States. This applies equally to Sovereign States as to non-sovereign States entering into a Federal compact. Upon entering the Union they equally give up their right (if any) to independent action, or rather

\textsuperscript{148} The covering note to Symon and Glynn’s opinion made reference to Isaacs’ opinion and stated: The joint opinion of Sir Josiah Symon KC and Mr Glynn and the opinion of Mr Isaacs KC, so far as they deal with the same questions, are in agreement. Mr Isaacs deals with the questions as between State and State only. Both opinions support the view that this State and its residents have rights in respect and to the use of the waters of The Murray and its tributaries capable of being judicially asserted and enforced.

\textsuperscript{149} Symon and Glynn, above n 144, 8.

\textsuperscript{150} Symon and Glynn, above n 144, 11.
the action which independent States may take against each other for grievances or wrongs at the hands of each other, and substitute therefor judicial redress and Commonwealth control.\textsuperscript{151}

The ‘independent action’ that Symon and Glynn referred to was presumably a declaration of war. They argued that where the Commonwealth would not legislate the High Court could uphold South Australia’s right to navigation.

The secondary argument advanced by Glynn and Symon, which was summarised in less than one typed page, was that the ‘riparian rights of South Australia and its inhabitants\textsuperscript{152} could also be protected. These rights could ‘not be encroached upon or sensibly diminished by the up stream States.’\textsuperscript{153} Despite these bold assertions, the opinion is lacking any analysis as to the nature of the ‘riparian right of South Australia’ and the reasoning behind the existence of such rights. To put it another way, the reasoning only explained why there \textit{needed} to be an interstate right of some kind and did not provide guidance as to why the riparian rights doctrine provided a suitable analogy or the scope of that right. I analyse the riparian rights analogy in Chapter 5.

4.6 An Agreement Between the States and Commonwealth is Reached

While the Government of South Australia had on several occasions considered the prospect of commencing legal proceedings as a means of resolving the transboundary river dispute, litigation was never instituted. The States sought to resolve the matter by negotiation, and agreement was reached in 1914. In that year, the Commonwealth, New South Wales, Victoria and South Australia entered into the first intergovernmental agreement, the River Murray Waters Agreement and legislation giving effect to the agreement was passed in each jurisdiction in 1915.\textsuperscript{154} The primary purpose of the Agreement was to establish the River Murray Commission to regulate the river waters, to specify the amount of water that each State would receive and to authorise the construction of dams, weirs and locks along the River Murray.\textsuperscript{155} By this time South Australia’s attitude to navigation had changed and, like New South Wales and Victoria, it

\textsuperscript{151} Ibid 12.
\textsuperscript{152} Ibid 14.
\textsuperscript{153} Ibid 14.
\textsuperscript{155} The River Murray Commission was established in 1917.
was now more concerned with ensuring that it received its share of water for extraction – primarily for irrigation.

Since the initial agreement in 1914, there have been a number of amendments made to the River Murray Waters Agreement and subsequent agreements. These amendments have taken into account further construction works as well as environmental and recreational matters. More recently, in 1987 the agreement was amended by the Murray-Darling Basin Agreement which was subsequently replaced by an updated agreement in 1992. Legislation was passed in each State in 1993 implementing the agreement.156 In 1996 and 1998 respectively, Queensland and the Australian Capital Territory also signed the agreement.157 The current regime commenced when the Commonwealth and States signed the National Water Initiative in 2004. This agreement led to the abolition of the Murray-Darling Basin Commission and the establishment of the Murray-Darling Basin Authority. Should such agreement break down, States will again be left to consider how to resolve transboundary river disputes in the absence of an intergovernmental agreement.

4.7 Conclusion

If one criticism can be levelled at the views of the legal experts during the time immediately after Federation it is that they generally failed to explain why the riparian rights doctrine was said to apply between States. To the extent that they attempted to explain this extension of the doctrine, they relied on notions of equality or fairness between the States without properly explaining from where such principles are derived (as we know, such principles are not mentioned expressly within the Constitution). In the alternative, they justify the analogy by declaring that within the Federation there must be a peaceful resolution of the dispute and that the High Court can have jurisdiction over interstate disputes. These approaches place the desire to find a practical solution ahead of developing a well-reasoned approach that is legally sound.

The legal opinions that South Australia received were very positive with regard to the likely success of litigation. However, some of the opinions appear to be driven by what the author thought the position between the States ought to be without explaining the underlying principles which might support that conclusion. Perhaps this is unsurprising

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156 See, eg, Murray-Darling Basin Act 1993 (Cth), Murray-Darling Basin Act 1993 (SA).
given that the representatives opined a position favourable to their own State (or in the case of Isaacs, the State retaining his services).\textsuperscript{158} It must be remembered that these opinions were made while States were trying to reach an agreement as to how to allocate water from an interstate river. Any concession from South Australia, in particular, would have left that State in a vulnerable position. Consequently, these opinions were also an important political tool in the negotiation process.\textsuperscript{159}

From the Federal Convention debates to the time that an intergovernmental agreement was finally signed in 1914, the same arguments were frequently raised; it was often the same representatives raising the same arguments that would best serve their own State’s interests. With perhaps the exception of the texts by Quick and Garran, Inglis Clark and Harrison Moore, the other analysis of the legal problem was always made in the context of pursuing other objectives – for example, drafting the Constitution or giving evidence to a Royal Commission. The legal analysis was rarely divorced from the political battle.

The purpose of this chapter was to identify the alternative arguments regarding how to share water between States from transboundary rivers. Despite the lack of rigor in the analysis, the arguments made provide a useful starting point for further investigation in the subsequent chapters of this thesis. This thesis seeks to develop an approach with a particular end in mind – finding a mechanism for sharing the waters of transboundary rivers – but to develop a solution that is based upon sound legal reasoning. The analogy between the rights of the States and the rights of nation states at international law is examined in greater detail in Chapter 5. In Chapters 5 and 6, I examine the riparian rights doctrine in Australia and whether an analogy can be drawn between that common law doctrine and an interstate water right. The then recent decision of the United States Supreme Court in \textit{Kansas v Colorado}\textsuperscript{160} was of great interest to those examining the transboundary river dispute in the first decade after Federation. Legal experts referred to the case in support of the argument that the Australian High Court was likely to hear and determine a transboundary river dispute. There seemed to be general consensus that the High Court had jurisdiction to hear the transboundary river dispute. However, the more

\textsuperscript{158} Perhaps with the exception of Alexander Oliver during the 1902 Royal Commission: see above nn 96-102. See Chapter 4.4.1.

\textsuperscript{159} Isaacs’ opinions may have recently been used as a political tool when a copy was released to the media: Michael Owen, ‘Old Brief May Sink Murray Plan’, \textit{The Weekend Australian} (Sydney) 31 March 2012, 2.

\textsuperscript{160} 206 US 46 (1907).
difficult question was determining the principles upon which the matter would be resolved by the Court. In Chapter 6, I examine the United States jurisprudence dealing with the development of substantive legal principles for resolving transboundary river disputes with a view to determining whether reference to it provides any guidance as to how similar disputes could be resolved in Australia.
CHAPTER 5: ANALOGIES WITH INTERNATIONAL LAW AND RIPARIAN RIGHTS

5.1 Introduction

In Chapter 4 I identified the two main arguments made with respect to a State’s ‘right’ to water from a transboundary river. These arguments sought to draw an analogy with either international law or the common law riparian rights doctrine for the purpose of showing that there was a common law ‘right’ to water as between States. However, in making these arguments a careful analysis of the bodies of law with which an analogy was to be drawn was not undertaken. This chapter shows that those making those arguments misstated important legal issues or oversimplified the law for the purpose of furthering their particular cause. This chapter explains the development of each body of law and identifies the relevant principles that could be drawn upon to develop the common law in Australia to resolve disputes between States over the allocation of water from transboundary rivers. The first part of the chapter deals with international law and the second part considers the common law riparian rights doctrine. Having identified the central principles in both bodies of law, in Chapter 6 I examine when courts in Australia can modify the common law and whether the principles identified in this chapter can be used to provide States with a share of the water from transboundary rivers.

5.2 The International Law Analogy

By the end of the 19th century the colonies saw themselves as largely independent, quasi-sovereign nations.1 With this in mind, it is unsurprising that representatives of the colonies (and later States) resorted to international law in an attempt to determine how to share the water from the River Murray in the absence of an intergovernmental agreement. In Chapter 4, I demonstrated that during the Federal Convention debates South Australians referred to various texts on international law and previous international disputes over transboundary rivers that had been resolved by treaty to urge the colonies to

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reach agreement over the sharing of the waters of the Murray. At times these arguments went even further than merely urging the parties to negotiate a settlement, and South Australian delegates asserted that the ‘rights’ of the colonies with respect to transboundary rivers could be determined by drawing an analogy with the rights of nation states under international law. I also explained that similar arguments were made after Federation with respect to the ‘rights’ of the States. To date, a detailed analysis of these arguments has not been undertaken. The purpose of this part of the chapter is to identify the principles of international law that could be used to resolve a transboundary river dispute.

In this section I examine the development of international law with respect to international transboundary rivers. I commence by showing that historically international transboundary river disputes related to navigation and did not involve non-navigational water uses. I explain that even at around the time of Federation – when the international law analogy received the greatest attention – international law was yet to develop principles dealing with the ability of a nation state to divert water for uses such as irrigation or industry. I then demonstrate how international law has since developed to encourage water allocation between nation states on the basis that each state is entitled to a ‘reasonable’ and ‘equitable’ share of the water from a transboundary river. However, those developments are yet to reach the status of customary international law. I conclude that international law is unlikely to provide a ‘driving force’ for the development of a common law solution and is therefore unlikely to assist in the resolution of transboundary river disputes in Australia.

5.2.1 Earlier disputes in North America and Europe

During the 18th and 19th centuries a number of disputes between nation states over river navigation in North America and Europe were ultimately resolved by treaty. The ability to navigate rivers was vital for upstream nations to engage in trade and commerce with other nation states. It allowed them to access the sea and coastal ports, which facilitated transportation of goods further afield. The desire of upstream nations to have access to the sea along international rivers often led to the upstream nation asserting a ‘right’ to

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3 See Chapter 6.4.6.
navigate the river. However, this view was not universally accepted and some nation states – usually those downstream – sought to maintain territorial sovereignty over the transboundary river and deny navigation by other nations through their territory.

The United States on two separate occasions argued that a right to navigate along international rivers existed. The first such instance involved the right to navigate the Mississippi River. After the signing of the Treaty of Paris in 1783, which ended the American Revolution and recognised the United States as an independent nation, the British gave up territory along the Mississippi to Spain. The result was that Spain was then in possession of both banks of the lower portion of the Mississippi from south of the border with the United States to the mouth of the river. Spain claimed an exclusive right to navigation and closed this lower part of the river to navigation by the United States. That claim was resisted by the United States; it asserted that a right to navigate was not only supported by previous treaties, but also ‘by the law of nature and nations’. While Spain rejected the United States’ argument, the dispute was resolved by mutual agreement in 1795: the Treaty of San Lorenzo el Real. The treaty allowed navigation by citizens of the United States along the lower part of the river controlled by Spain.

A similar dispute subsequently arose in 1826 between the United States and Great Britain with regard to the right to navigate along the St Lawrence River, the upper reaches of which formed the border between the United States and what is now Canada. In those upper reaches, Great Britain (and subsequently Canada) had possession of the northern bank and the United States had possession of the south. The lower reaches of the river to the sea were wholly within the territory of Great Britain. The United States sought the right to navigate the lower reaches within Great Britain’s territory so that its vessels could access the sea. The United States put forward similar arguments to those asserted during

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5 Ibid. As Henry Wheaton explained, the arguments put forward by the United States in support of a right to navigation were based upon natural law: at 508. However, Wheaton argued (at 509, 514) that this natural law right was in a sense a qualified right:

> It would indeed be what those writers call an imperfect right, because the modification of its exercise depends, in a considerable degree, on the conveniency of the nations through which they were to pass. But it was still a right as real as any other however well defined; and were it to be refused, or shackled by regulations not necessary for the peace or safety of the inhabitants, as to render its use impracticable to us, it would then be an injury, of which we should be entitled to demand redress.

its earlier dispute with Spain over the Mississippi River based upon natural law.\textsuperscript{7} It contended that as it was in possession of the southern bank of the upper reaches, it was entitled to navigate the whole of the river to the sea.\textsuperscript{8} Great Britain responded by denying the existence of any such right at international law.\textsuperscript{9} The dispute over the navigation of the St Lawrence River was ultimately resolved by mutual agreement by the signing of the Treaty of Washington in 1871, which allowed the United States to navigate that part of the river within the Canadian territory.\textsuperscript{10}

During the same period in which the United States was negotiating rights of navigation to the Mississippi and the St Lawrence Rivers, a number of the rivers of Europe were also opened to navigation. The Congress of Vienna in 1815 agreed that rivers such as the Rhine and the Scheldt should be free to navigate.\textsuperscript{11} Over the next 40 years, further agreements were made among European nations regulating the rivers flowing between states.\textsuperscript{12} In 1856 the Congress of Paris agreed that the River Danube should also be open to navigation.\textsuperscript{13} These treaties usually granted a right of navigation to those nations through which the river passed or formed a boundary.\textsuperscript{14}

The South Australian delegates at the Federal Conventions made reference to the fact that international transboundary disputes over navigation had been resolved by treaty.\textsuperscript{15} However, they ignored the obvious difference between those disputes and the Australian dispute over the Murray: the international disputes dealt with the rights to access the sea whereas the South Australian delegates were interested in securing rights for their citizens to navigate the upstream reaches of the Murray and for irrigation. That is not to suggest that this was fatal to the argument; however, it does perhaps illustrate that these legal questions were not always given close and careful consideration. Further, one of the limitations of referring to these international transboundary river disputes was that they

\textsuperscript{7} Wheaton, \textit{History of the Law of Nations in Europe and America}, above n 4, 512.
\textsuperscript{8} Pitt Cobbett, \textit{Leading Cases on International Law} (Hugh H L Bellot (ed), Sweet and Maxwell, 4th ed, 1922) vol 1, 199; ibid 511.
\textsuperscript{9} T J Lawrence, \textit{The Principles of International Law} (MacMillan, 1895) 197.
\textsuperscript{10} Canada became one dominion from 1867: \textit{Constitution Act 1867} (Imp), 30 & 31 Vict, c 3.
\textsuperscript{11} Lawrence, above n 9, 194.
\textsuperscript{13} Lawrence, above n 9, 194; Cobbett, \textit{Leading Cases on International Law}, above n 8, 125.
\textsuperscript{14} However, in the case of the River Po the treaty allowed ‘universal equality of flags’ along the river, thereby allowing all nations to navigate the river: John Westlake, \textit{International Law: Part I – Peace} (Cambridge University Press, 1904) 148. See also Cobbett, \textit{Leading Cases on International Law}, above n 8, 124-5.
\textsuperscript{15} See Chapter 4.2.2.
focused on navigation of international transboundary rivers, which was only one aspect of the dispute between the Australian colonies over the waters of the Murray.

### 5.2.2 International Law in the Early Post-Federation Period

At the time of Federation in Australia in 1901, there were conflicting views amongst international law commentators as to the existence of a right to navigate international transboundary rivers. Writing shortly after Federation, Professor Pitt Cobbett, Challis Professor of Law at the University of Sydney, noted that there were ‘divergent opinions ... as to whether there exists at international law, and apart from treaty, a right of innocent passage on the part of co-riparians over the water of a navigable river which flows through two or more States.’

Writing in 1901, American scholar Hannis Taylor set out the three competing views in this way:

> One extreme school denies that the right of riverain navigation ever existed at all upon the general principle that a state possesses such absolute propriety rights over its own territory that it may exclude the vessels of all other powers from its own section of a waterway. Another declares that in time of peace all navigable rivers in communication with the sea are open to the navies of all nations. Between the two stands a third, which holds that when a navigable river flows in part of its course through the territory of one state and in part through that of another, those who live upon its upper waters have an imperfect or moral right to use that portion beyond their own bounds.

Of the three approaches identified in the literature, the argument that there existed a legal right to navigate the rivers flowing through the territory of another nation state (the second possibility referred to in the quote) received the least support. Of the other two approaches identified in the literature, opinion was divided among academics as to whether territorial sovereignty was absolute, thereby denying navigation of rivers within the territory of another state, or whether there existed an ‘imperfect’ right that required the parties to resolve the dispute by treaty. As I explain in this section, there was some uncertainty as to precisely what was meant by an ‘imperfect right’, but the predominant use of the term was in the sense that while a ‘right’ might have existed, the precise nature

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16 Cobbett, *Leading Cases on International Law*, above n 8, 122. Similarly, Lawrence noted that ‘there is no general agreement among authoritative writers on International Law with regard to this question.’: Lawrence, above n 9, 187.

17 Hannis Taylor, *A Treatise on Public International Law* (Callaghan & Co, 1901) 281-2. See also Lawrence, above n 9, 187.
of the right and any conditions of exercising the right must be defined by treaty. These three views will be examined in turn.

The fact that during this period there was disagreement amongst commentators as to the right of navigation at international law reflected the general movement at international law that was occurring during this time: that is, a shift from naturalism towards positivism. As Malcolm Shaw noted, during the 18th and 19th centuries there was a movement away from the doctrine of natural law as a theoretical basis for international law and the nineteenth century was ‘a practical, expansionist and positivist era.’

5.2.2.a A legal right to navigate?

The less commonly held view among academics during the late 19th century was that there existed a legal right to navigate international transboundary rivers. The origin of this approach was attributed to Johann Bluntschli, Professor of Law at the University of Heidelberg.

Bluntschli’s work had been translated from German to French and the French edition of his text published in 1874 – entitled Le droit international codifié – was referred to by a number of the authors writing in English. Bluntschli stated that:

The navigable rivers which are in communication with an open sea, are open in time of peace to the vessels of all nations. The right of free navigation cannot be abrogated or restricted at the expense of some nations.

Bluntschli’s approach, which did not receive support from other leading scholars at the time, was described by Lassa Oppenheim in 1905 as ‘at best an anticipation of a future rule of International law’.

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19 Taylor, above n 17, 282.
21 Hall, above n 6, 140.
5.2.2.b Absolute territorial sovereignty?

Of the two opposing schools of thought identified by Taylor, the argument based upon the principle that a nation state’s right to territorial sovereignty is absolute received the greatest support in the literature. English jurist, Travers Twiss, stated:

We find accordingly by the practice of Nations, that a Nation having physical possession of both banks of a river is held to be in juridical possession of the stream of water contained within its banks, and may rightfully exclude at its pleasure every other nation from the use of the stream, whilst it is passing through its territory, and this rule of Positive Law holds good whatever may be the breadth of the river.23

Cambridge academic Thomas Walker adopted a similar view. He too noted that, ‘whilst trading nations have, except in defence of their own exclusive privileges, shown a general desire to secure the international freedom of navigation of great rivers’,24 such practice was not evidence of state practice that would support a claim based upon customary international law.25 Fellow English academic William Hall explained that while, from a practical perspective, agreement was often reached between nation states, a state’s right to territorial sovereignty remained absolute.26 It was the fact that many of the international disputes over navigation of international rivers were able to be resolved in a practical way


although the doctrine of the freedom of navigation of great rivers has advanced in general favour, the new order has arisen by virtue of particular treaty entered into by the interested nations, not by the outright recognition of a general law, and the right of riparian states to regulate the traffic has been, in each instance, formally acknowledged.

25 Later in this Chapter I examine what the current position is with respect to state practice and customary international law: see Chapter 5.2.3.

26 Hall, above n 6, 145-6. Hall stated: ‘It is clear therefore that the principle of the freedom of territorial waters, communicating with the sea, to the navigation of foreign powers has not been established either by usage or by agreements binding all or most nations to its recognition as a right.’ Hall described the difference between the practical resolution of these disputes and the position at international law in this way (at 145-6):

A marked tendency has no doubt shown itself during the present century to do away with prohibition, or to lessen restrictions, of river navigation by foreigners as a needless embarrassment to trade, but this has been the result, not of obedience to law, but of enlightened policy; and it may be said without hesitation that so far as international law is concerned a state may close or open its rivers at will, that it may tax or regulate transit over them as it chooses, and that though it would be as wrong in a moral sense as it would generally be foolish to use these powers needlessly or in an arbitrary manner, it is morally as well as legally permissible to retain them, so as to be able when necessary to exercise pressure by their means, or so to have something to exchange against concessions by another power.
by nation states reaching agreement that led some commentators to describe the right of nation states as an ‘imperfect right’ to river navigation.

5.2.2.c A ‘moral’ or ‘imperfect’ right?

The third approach identified in the literature was that there existed an ‘imperfect’ or ‘moral’ right to navigation. It was referred to as an imperfect right because, while its proponents thought that a right existed per se, it was necessary to define the precise nature of the right by treaty.\(^{27}\) The origins of the notion of an imperfect right are attributed in a number of the texts to the European international law scholars such as Hugo Grotius, Samuel Pufendorf and Emmerich de Vattel.\(^{28}\) The imperfect right to navigation arose from what Grotius described as a right to ‘free passage’. Grotius, writing during the 17\(^{th}\) century, claimed that ‘a free passage through countries, rivers or over any part of the sea, which belongs to some particular people, ought to be allowed to those, who require it for the necessary occasions of life’.\(^{29}\) The right was not absolute as a nation was entitled to charge a toll.\(^{30}\)

Also writing during this period, Pufendorf was influenced by the ‘law of humanity’\(^{31}\) and stated that ‘allowing innocent passage over our lands, rivers, and such parts of the sea as have become subject to ownership, if any would use them for legitimate reasons; for instance, ... to carry on commerce with a distant people.’\(^{32}\) However, these statements by Grotius and Pufendorf were normative statements based upon what the authors believed were the laws of nature rather than descriptive statements of state practice at that time.

In Joseph Chitty’s translation of Vattel’s \textit{Law of Nations} (originally written in French) Vattel stated that the right of navigation ‘necessarily supposes that the river shall \textit{remain free and navigable}, and therefore excludes every work that will entirely interrupt its


\(^{28}\) Ibid 159; See Taylor, above n 17, 282. Hall noted that ‘when states have been engaged in the endeavour to open a closed section of river to the trade of their subjects, the weapons of international controversy have been drawn in the main from the arsenal provided by the assumptions of Grotius and his successor.’; Hall, above n 6, 137.

\(^{29}\) Hugo Grotius, \textit{The Law of War and Peace} (A C Campbell trans, 1901 ed) [trans of: \textit{De Jure Belli ac Pacis} (1625)] 95.

\(^{30}\) Ibid 97. Cf \textit{Australian Constitution} s 92.


\(^{32}\) Ibid, 354.
Vattel contended that there existed a right to ‘innocent use’ or ‘innocent advantage’ which allowed a ‘right to things of which the use is inexhaustible.’ In doing so, he drew a distinction between access to the water – for navigation – and diverting water – for example, for industry or farming. Vattel, a Swiss lawyer who was writing during the eighteenth century, noted that rivers and the sea were generally inexhaustible and that ‘nature ... design[ed] her gift for the use of all mankind’. However, he did not submit that the Law of Nature could be relied upon to support a right to navigation. Instead, he placed greater rights on the ‘proprietor’ or ‘owner’ of the land and concluded any such right to navigation could be conceived as only an ‘imperfect’ right.

Vattel qualified the right of innocent use in the following way:

This right of innocent use is not a perfect right, like that of necessity: for, it belongs to the owner to judge whether the use we wish to make of a thing that belongs to him will not be attended with damage or inconvenience. If others should presume to decide on the occasion, and, in case of refusal, to compel the proprietor, he would be no longer master of his own property. It may frequently happen that the person who wishes to derive advantage from a thing shall deem the use of it perfectly innocent, though it is not so in fact; and if, in such case, he attempts to force the proprietor, he exposes himself to the risk of committing an act of injustice; nay, he actually commits one, since he infringes the owner’s right to judge of what is proper to be done on the occasion. In all cases, therefore, which admit of any doubt, we have only an imperfect right to the innocent use of things that belong to others.

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34 Ibid 181.

A river may be subject both to domain and empire; but, in quality of running water, it remains common, – as that is to say, the owner of the river cannot hinder any one from drinking and drawing water out of it. Thus, the sea, even in those parts that are held in possession, being sufficient for the navigation of all mankind, he who has the domain cannot refuse a passage through it to any vessel from which he has nothing to fear. But it may happen, by accident, that this inexhaustible use of the thing may be justly refused by the owner, when people cannot take advantage of it without incommoding him or doing him a prejudice. For instance, if you cannot come to my river for water without passing over my land and damaging my crops it bears, I may for that reasons debar you from the inexhaustible use of the running water: in which case, it is but through accident you are deprived of it. ... Nature, who designs her gifts for the common advantage of mankind, does not allow us to prevent the application of those gifts to a useful purpose which they may be made to serve without any prejudice to the proprietor, and without any diminution of the utility and advantages he is capable of deriving from his rights.

36 Shaw, above n 18, 26.
37 Vattel, above n 33, 181-2 (emphasis added).
Like Grotius and Pufendorf, the language used by Vattel implies a moral obligation on the upstream owner rather than a strictly legal obligation.

Scholars during the 19th century drew upon the earlier works of Grotius, Pufendorf and Vattel to support the contention that, for the purpose of enabling trade between nation states, there existed an ‘imperfect’ right to navigation of international rivers. They were not necessarily arguing that a general right of free passage existed; merely that a right to navigation was necessary for the purpose of trade between nations.

Writing also during the 19th century, philosopher John Stuart Mill drew a similar distinction between ‘imperfect’ and ‘perfect’ obligations:

ethical writers divide moral duties into two classes, denoted by the ill-chosen expressions, duties of perfect and of imperfect obligation; the latter being those in which, though the act is obligatory, the particular occasions of performing it are left to our choice ... duties of imperfect obligation are those moral obligations which do not give birth to any right. I think it will be found that this distinction exactly coincides with that which exists between justice and other obligations of morality.\(^38\)

Mill’s distinction between legal and moral obligations was similar to the distinction that was being made at international law with respect to the rights of nation states to access transboundary rivers.

If an ‘imperfect’ right existed, it had to be secured by agreement between nation states. In the second edition of *Wheaton’s International Law* published in 1880 the editor AC Boyd explained the argument in this way:

The right of navigating, for commercial purposes, a river which flows through the territories of different States, is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text-writers call an *imperfect right*, its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise.\(^39\)

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Proponents of this approach supported their thesis by referring to the fact that in practice these matters had been resolved by treaty in both North America and Europe. In the third edition of Halleck’s *International Law*, published in 1893, the editor Sherston Baker noted:

> Such right of innocent passage, though an imperfect right, and requiring mutual conventions regulating the mode of its exercise, is nevertheless a real, and subsisting right, founded upon the law of nature, and recognised by the most approved writers on public law. It may also be added that it has been recognised by the general consent of nations, and must now be regarded as an established principle of international law.\(^{40}\)

However, as the literature at this time shows, there were conflicting views as to the nature of the navigational rights of nation states and it was doubtful that the right was an ‘established principle of international law’. As has been noted earlier, the fact that disputes had been resolved by treaty led others to argue that the right was not an ‘imperfect right’, but simply that in the absence of a treaty there was no right at all.\(^{41}\)

Precisely what is meant by the term ‘imperfect right’ is difficult to discern from the literature. Hall, who was critical of the concept remarked: ‘some writers ... envelop their assertion of [an imperfect right] with an indistinctness of language which it is hard to penetrate to the real meaning.’\(^{42}\) The problems associated with a vagueness of language were compounded by the fact that, as Cobbett noted: ‘[m]uch difference of opinion also exists as to what precisely is meant by an “imperfect right”.’\(^{43}\) He stated that ‘this term is commonly applied to some claim to an advantage purporting to rest on natural justice, but which is really based on comity than law.’\(^{44}\) Like J S Mill, the distinction that Cobbett

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\(^{40}\) Sir Sherston Baker, *Halleck’s International Law* (Kegan Paul, Trench, Trubner & Co, 3rd ed, 1893) vol 1, 174. See also H W Halleck, *Elements of International Law and Laws of War* (J B Lippincott & Co, 1866) 83. Westlake referred explicitly to the resolution of these matters by treaty in Europe in support of this contention: ‘We conclude that a sufficient consent of states exists to warrant the assertion that a right of navigation, of which the best statement is that made for the Danube by the treaty of Paris in 1856, exists as an imperfect right on navigable rivers traversing or bounding the territories of more than one state.’; Westlake, *International Law: Part I – Peace*, above n 14, 157.

\(^{41}\) Walker, above n 24, 37.

\(^{42}\) Hall, above n 6, 140.

\(^{43}\) Pitt Cobbett, *Cases and Opinions on International Law* (Stevens and Haynes, 3rd ed, 1909) part 1, 119.

\(^{44}\) Ibid.
was drawing was that the ‘right’ was not, in fact, based upon any legal obligation, but merely ‘politeness, convenience and goodwill’. 45

The differing opinions as to the meaning of an ‘imperfect right’ led to disagreement as to how such a right might be enforced and what was the appropriate sanction for denying a nation state the ‘imperfect’ right. Westlake stated that ‘the peaceful navigation of international rivers must be [an] imperfect [right] in the sense that conventions are indispensible in their due enjoyment’ and that such rights were ‘not as a general rule enforceable until they have been embodied in conventions’. 46 Lawrence took the view that ‘[t]he tendency in favour of freedom of navigation is so strong that any attempt to revive the exercise of the right of total exclusion, or even to levy tolls for profit, would be regarded as an act of aggression.’ 47 In contrast, Cobbett explained that the right was based on comity and that the right ‘if violated, would scarcely warrant a resort to force, or, indeed, to any other mode of redress than bare retorsion.’ 48 The fact that these disputes had ultimately been resolved by agreement between nations – most notably in Europe and North America – meant that no nation had ever had to test these measures. In this way, the ‘imperfect right’ appears to be no more than a right to negotiate.

An examination of the commentary up to the early 20th century shows that international law was unsettled and it was not universally accepted that there existed a right to navigation. At best, there was an ‘imperfect’ right to navigation that needed to be defined by treaty, which appeared to be nothing more than a moral obligation on the part of nation states to resolve the matter by agreement. The international law principles had developed to facilitate inland nation states’ access to the sea, which would greatly enhance their ability to trade with other nations.

46 John Westlake, _Chapters on the Principles of International Law_ (Cambridge University Press, 1894) 75-6. He went on to note (at 76) that ‘imperfect’ rights ‘have a legal basis, generally left without notice, but which in rare cases obtrudes itself on the attention and may justify action.’ Westlake rejected the approach in so far as it applied to rivers that flowed wholly within one state (‘national rivers’). The reason he gave was that in the case of national rivers there was no ‘just cause’ for river navigation. Westlake asserted that the ability of upstream states to trade with other nations amounted to a ‘just cause’ and was only present in the case of international transboundary rivers: John Westlake, _International Law: Part 1 – Peace_, above n 14, 144.
47 Lawrence, above n 9, 189.
48 Pitt Cobbett, _Cases and Opinions on International Law_, above n 43, 123.
International law focused on the rights of navigation and was yet to develop principles dealing with non-navigable water uses, which were the primary concern of the States. The international law texts did not examine the issue of how to allocate water between nation states for non-navigational uses such as industry or irrigation. Similarly, the international treaties signed before the twentieth century had defined the navigational rights of the nations, but were silent on the issue of diverting water, holding water back upstream or disturbing the natural flow for non-navigational uses.

Like those international disputes, the controversy between the States of Australia over the sharing of the waters of the River Murray was resolved by agreement. However, it is doubtful whether international law would have assisted in the development of the common law at the time of Federation to guarantee for the States a share of the water from the River Murray. To the extent that securing navigation was of concern to the States, the Commonwealth Parliament had been granted power to legislate with respect to navigation between the States by virtue of ss 51(i) and 98 and any disputes over interstate river navigation that might have arisen could be resolved by the Commonwealth. This may have alleviated the South Australian concern that New South Wales or Victoria could hamper navigation upstream; if there was any dispute, hopefully the Commonwealth would intervene. The fact that international law was yet to deal with non-navigational uses coupled with the fact that the Commonwealth could potentially resolve disputes with respect to interstate navigation might explain why the international law analogy, which had received considerable attention during the Federal Convention debates, was less prominent after 1901.

The questions, however, remain: has international law developed during the past century to deal with non-navigational water uses? Would, therefore, current international legal norms aid in the contemporary development of the Australian common law to resolve transboundary river disputes?

5.2.3 More Recent Developments in International Law

It was not until the early 20th century – after the Federation of the Australian colonies – that international law scholars considered the rights of a nation state to extract or divert water from an international transboundary river. Herbert Smith remarked in 1931 that
with regard to navigation rights ‘there is now a large library of literature covering the last three hundred years’. In contrast, he noted that the literature did not address the fact that ‘rapid economic developments in modern times have created a new group of problems of increasing importance arising out of diversions of water and other artificial interferences with the natural course of streams.’

Writing in 1905, after Federation in Australia, Lassa Oppenheim, lecturer in public international law at the University of London, was one of the first authors to consider the right to divert water in addition to the right to navigate. Oppenheim supported the theory that each nation state had a right to territorial sovereignty. He noted that ‘[a]s regards boundary rivers and rivers running through several States, the riparian States can regulate navigation on such parts of these rivers as they own.’ However, Oppenheim argued that territorial sovereignty was not absolute. He stated that ‘territorial supremacy does not give a boundless liberty of action’ and that ‘a State is, in spite of its territorial supremacy, not allowed to alter the natural conditions of the territory of a neighbouring State – for instance, to stop or to divert the flow of a river which runs from its own into neighbouring territory.’

During the twentieth century international tribunals started to consider how to deal with the sharing of water between nations for non-navigational uses. In the 1929 case of *Territorial Jurisdiction of the International Commission of the Oder (United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden v Poland)* the Permanent Court of International Justice stated:

> [The] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.

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50 Ibid. Smith added that ‘these interferences are directed to various economic ends, such as navigation, irrigation, and the development of hydro-electric power, and in many cases they have given rise to a serious conflict of state interests.’


52 Ibid 175.


54 *Territorial Jurisdiction of the International Commission of the Oder (United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden v Poland)* [1929] PCIJ (ser A) No 16, 27.
While this case dealt with the rights to navigable rivers, the same principles have now been recognised with respect to non-navigable uses. In 1997, in the Gabcikovo-Nagymaros Project (Hungary v Slovakia), the International Court of Justice was asked to decide a dispute between Hungary and Slovakia over the interpretation of a treaty dealing with the construction and operation of a series of locks along the Danube, which formed the border between the two countries. In its judgment the Court referred to the Oder case of 1929 and explained that:

Modern development of international law has strengthened [the principle of perfect equality of all riparian states] for non-navigational uses of international watercourses as well.55

In support of that conclusion the Court also referred to the adoption of the Convention on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly on 21 May 1997.56

The first attempt to articulate general principles that could be used to allocate water from international transboundary rivers between nation states was the International Law Association’s Helsinki Rules on the Uses of the Waters of International Rivers.57 Article IV of the Helsinki Rules stated that:

Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.58

While these rules are no more than a guide as to how nation states could allocate waters from international transboundary rivers, they were influential in the drafting of the

Article 5(1) of that Convention states:

Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner.

Like the Helsinki Rules, the Convention states that water is to be shared between nation states by determining what is ‘reasonable’ and ‘equitable’. The development of the principles of reasonable and equitable sharing was influenced by the United States Supreme Court’s decisions dealing with transboundary river disputes. In addition, art 6 provides the factors to be taken into account when determining whether the watercourse is being utilised in an ‘equitable and reasonable manner’. Further, the Convention provides an obligation not to cause ‘significant harm’ to neighbouring nations and to cooperate ‘on the basis of sovereign equality, territorial integrity, mutual benefit and good faith’, which again emphasises the notion of equality and fairness.

As Schwabach explains, international transboundary disputes display a tension between ‘absolute territorial sovereignty’ and ‘absolute territorial integrity’:

Absolute territorial sovereignty would allow an upstream state to do as it wished with the waters within its territory, without regard to the effects on the downstream or co-riparian states. Conversely, absolute territorial integrity would entitle a downstream state to an

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59 Ibid 266.
61 These factors are:
  (a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
  (b) The social and economic needs of the watercourse States concerned;
  (c) The population dependent on the watercourse in each watercourse State;
  (d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
  (e) Existing and potential uses of the watercourse;
  (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
  (g) The availability of alternatives, of comparable value, to a particular planned or existing use.
uninterrupted flow of water in an international watercourse, undiminished in quality or quantity.64

The compromise is resolved by what Schwabach describes as ‘the doctrine of limited territorial sovereignty’, which uses principles of equitable utilisation to balance the two competing absolute positions.65 It is a similar tension that exists between upstream and downstream States within Australia with regard to the waters of the Murray.

5.2.4 International Law and the Development of the Common Law

At the time that reference was made to international law by the South Australian delegates at the Federal Conventions there were no established principles dealing with the allocation of water from international transboundary rivers for non-navigational uses. References to international law at this time were an attempt to bring about a negotiation and did not examine closely the state of the law. At the time of Federation the argument attempting to draw an analogy between international law and the ‘rights’ of the States would have provided little assistance. However, international legal norms have since been developed to deal with the problem of sharing water from international transboundary rivers.

As I explained in Chapter 4, the arguments made immediately before and after Federation regarding the international law analogy were primitive. Bold assertions were made that the ‘rights’ of the States were analogous to the rights of nation states at international law without detailed analysis of the problem. While not clearly explained, the arguments appear to centre around a suggestion that international law might provide some basis for the development of a common law doctrine that could apportion the waters of a transboundary river between States. If that is so, the first question for consideration is: to what extent can international law guide the development of the common law in Australia today?

As Michael Kirby has noted, Australian courts have displayed ‘hesitation’ towards the use of international law to shape domestic law.66 Rules of customary international law are

64 Schwabach, above n 58, 276.
65 Ibid
not automatically incorporated into Australian domestic law; however, those principles may play a role in the development of the common law. The obvious starting point for any discussion of the role that international law can play in the development of the common law is Brennan J’s judgment in *Mabo v Queensland (No 2)*. Brennan J, with whom Mason CJ and McHugh JJ agreed, explained that

The common law does not necessarily conform with international law, but international law is a *legitimate and important influence* on the development of the common law, especially when international law declares the existence of universal human rights.

That statement has since been endorsed to support the proposition that both customary international law as well as international treaties can assist in the development of the common law. In *Minister for Immigration and Ethnic Affairs v Teoh*, Mason CJ and Deane J explained that

the provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide to developing the common law.

These comments were made in the context of determining whether the ratification of the *Convention on the Rights of the Child* gave rise to a legitimate expectation that the Executive would act in a way consistent with the provisions of the treaty (despite the provision not being implemented into Australian domestic law). However, Mason CJ and Deane J also explained that Australian courts must exercise care when using international law as a basis for the development of the common law:

[T]he courts should act in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a backdoor means of importing an unincorporated convention into Australian law. A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hitherto adopted to the development

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67 Chow Hung Ching v The King (1949) 77 CLR 449, 477 (Dixon J).
69 Ibid 42.
of the common law by reference to statutory policy and statutory materials. Much will depend upon the nature of the relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.\(^{73}\)

If we accept that international law can provide some assistance when developing the common law, it is necessary to examine whether there are principles of international law dealing with transboundary rivers that would assist in the resolution of the current problem between States of Australia. The important question for resolution in this chapter is whether international law (either customary international law or international conventions) can assist in the development of the Australian common law so as to create or support the development of a transboundary water ‘right’ between the States.

As I explained earlier in this chapter, there is doubt as to whether international custom has developed to the extent that principles of equitable and reasonable utilisation of water from transboundary rivers reflects state practice such that it could be considered customary international law.\(^{74}\) However, there are principles within the *Convention on the Law of the Non-Navigational Uses of International Watercourses*\(^{75}\) that could potentially be drawn upon to develop the common law.\(^{76}\)

Where international law has been used in the past to develop the common law in Australia, the principles drawn upon have been well-established and universally accepted. For example, in *Mabo v Queensland (No 2)* Brennan CJ referred to the *Optional Protocol to the International Covenant on Civil and Political Rights*\(^{77}\) in developing the common law.\(^{78}\) One obvious difference between previous Australian cases that have drawn on international law is that in those cases Australia has been a signatory to the convention that was being used to develop the domestic law.\(^{79}\) Australia has not signed the


\(^{76}\) See Chapter 5.2.3.


\(^{78}\) *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42

\(^{79}\) Cf ibid; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288; *Dietrich v The Queen* (1992) 177 CLR 292, 321 (Brennan J), 360-1 (Toohey J).
Because, as an island nation, it does not have any international transboundary rivers. In these circumstances, the extent to which the Court is likely to rely on the Convention to develop the common law is arguably more limited. Using the Convention to develop the law in Australia by relying on the specific principles set out in the Convention may be difficult. In contrast to human rights norms, the principles in the Convention are but one way of allocating water and are not necessarily universally accepted.\(^{80}\)

In summary, international law is unlikely to be of assistance in developing a common law solution to the transboundary river problem.\(^ {81}\)

### 5.3 The Riparian Rights Analogy

During the early 19\(^{th}\) century the English common law of riparian rights developed to ensure that all owners of land along the bank of a river – the riparian proprietors – had access to the natural flow of the river. The second analogy argument, which was identified in Chapter 4, was that the ‘rights’ of the States were analogous to the rights of individual land owners along a river. The previous chapter showed that when the riparian rights analogy argument has been made in the past there was very little analysis of the riparian rights doctrine itself.\(^{82}\) Understanding the development of the doctrine becomes important in evaluating whether the doctrine can be used to resolve transboundary river disputes in Australia.

The second half of this chapter commences with an examination of the development of the riparian rights doctrine in England. I show that a doctrine that ensured that all proprietors had access to the natural flow of the river was preferred over a doctrine that gave priority to water users on a first-in-time basis. Secondly, I explain how Australia received the common law of England and, more specifically, the riparian rights doctrine. I demonstrate that Australian courts applied the English riparian doctrine and this was

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\(^{80}\) To date, 33 parties have ratified, accepted, approved or acceded to the Convention. The Convention will enter into force when 35 parties have ratified, accepted, approved or acceded: United Nations, *Convention on the Law of the Non-Navigational Uses of International Watercourses*, United Nations Treaty Collection <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&lang=en#1>, Schwabach, above n 74, 264-75.

\(^{81}\) In Chapter 6.4, I explain there are further (and more fundamental problems) associated with the development of a common law solution to the transboundary river problem.

never challenged. Thirdly, in contrast, I explain that in the United States, the riparian rights doctrine was modified to take into account the different water uses and environmental conditions of that country. Courts in the United States abandoned the English doctrine, which preserved the natural flow of the river. Fourthly, I explain that in Australia the doctrine was largely unsuitable, which led legislatures in the colonies to abolish the common law riparian rights doctrine in favour of statutory water licensing schemes. I identify the key principles of the riparian rights doctrine with a view to determining in the next chapter whether the common law can be modified to apply similar principles to the riparian rights doctrine as between States.

5.3.1 The Riparian Rights Doctrine in 19th Century England

The industrial revolution that had started in England in the late 19th century and continued well into the 19th century had a significant impact on water use; rivers were used to power mills, water was diverted for industrial uses and the rivers also became the dumping ground for industrial waste.83

How courts regulated water was an issue of some uncertainty at the start of the 19th century. Courts were confronted with two competing theories: on the one hand there was the ‘prior appropriation’ doctrine which gave preference to the water user who could prove they had been using the water for a longer period of time, and on the other was the theory that all riparian proprietors had the right to the natural flow of the stream.84

While the King’s Bench at the start of the 19th century applied the prior appropriation doctrine in a small number of cases, it was not to be the prevailing view.85 Legal historian, John McLaren, explained that the adoption of the prior appropriation doctrine may have been an attempt to protect established industry from losing water to upstream

83 John P S McLaren, ‘Nuisance Law and The Industrial Revolution – Some Lessons from Social History’ (1983) 3 Oxford Journal of Legal Studies 155, 167, 170. A similar change in water usage was observed in the United States. As is noted in Commentaries on American Law:

Important questions have arisen in respect of the use of running waters, between different proprietors of portions of the same stream; and such questions are daily growing in interest, as the value of water power is more and more felt in manufacturing establishments.

O W Holmes (ed), Commentaries on American Law (Little, Brown, and Co, 12th ed, 1873) vol 3, 581. The earlier editions of this book were written by James Kent and the text is often referred to as ‘Kent’s Commentaries’.

84 McLaren, above n 83, 171.

85 For early cases adopting the prior appropriation doctrine see, eg. Williams v Morland (1824) 2 B & C 910; 107 ER 620 and Bealey v Shaw (1805) 6 East 208; 102 ER 1266.
proprietors who later want to divert it.\(^{86}\) However, as McLaren went on to show, the doctrine did not always have this effect:

> It could certainly work in favour of industrial activity where industry in general or a particular factory or mill was established long before the incursions of home owners or residential developers. *It had the opposite effect where the industry or plant was the intruder.*\(^{87}\)

The prior appropriation doctrine did not find favour in the longer term and the English courts settled on a doctrine that allowed the riparian proprietors a right to the natural flow of the river.

The modern riparian rights doctrine developed through a series of cases during the nineteenth century; three cases were of particular importance to its development. The first case, *Mason v Hill*,\(^ {88}\) delivered by the King’s Bench in 1833, is the birth of the modern riparian rights doctrine.\(^ {89}\) The second case of significance was *Embrey v Owen*. In that case, decided in 1851, the Court of Exchequer reviewed not only the current state of the law in England, but referred to a number of American authorities, which were highly influential in the development of the doctrine. The final case, *Miner v Gilmour*, delivered in 1858, was the first opportunity for the Privy Council to review and approve the riparian rights doctrine. I turn now to examine these important cases in further detail.

### 5.3.1.a Preserving the Natural Flow

In 1833 the King’s Bench delivered their decision in *Mason v Hill*. As legal academic Joshua Getzler wrote, in that case the court ‘constructed a new riparian theory re-emphasizing natural rights.’\(^ {90}\) The case involved a dispute over the extraction of water from a stream near Stafford.\(^ {91}\) The defendant, an upstream proprietor, had built a dam which disturbed the natural flow of the water downstream. The plaintiff, who owned the land downstream of the defendant, argued that the defendant was not allowed to interfere with the natural flow of the waterway.\(^ {92}\) The defendant contended, amongst other things,
that he had a right to the water on the basis that he had appropriated the water before the plaintiff.\textsuperscript{93} The Court, in reviewing previous decisions, rejected the proposition that an earlier appropriation of water would trump an appropriation made later in time.\textsuperscript{94} In rejecting the notion that water could be appropriated on a first in time basis the Court explained:

\begin{quote}
   it appears to us there is no authority in our law, nor, as far as we know, in the Roman law (which, however, is no authority in ours), that the first occupant (though he may be the proprietor of the land above) has any right, by diverting the stream, to deprive the owner of the land below, of the special benefit and advantage of the natural flow of water therein.\textsuperscript{95}
\end{quote}

However, the Court found the downstream owner had a right to the flow of the stream through the application of a new doctrine. The Court rejected the notion that water was \textit{bonum vacans} – goods without an owner – and held that flowing water was \textit{publici juris} – public property;\textsuperscript{96} not ‘public property’ in the sense that it was owned by the Crown, but public in the sense that proprietors along the river had a right to access or use it without causing detriment to others. No individual had property in the water, although they might have property in the land adjoining the stream.\textsuperscript{97} The doctrine ensured that all proprietors along the river had access to the flow of the stream, which was vital for those landowners who wanted to use the force of the water to drive their mills.

The 1851 case of \textit{Embrey v Owen}, has frequently been referred to in subsequent cases in both England and Australia as authority for the modern riparian rights doctrine.\textsuperscript{98} The plaintiffs in the case, the occupiers of a downstream grist mill, commenced an action against the defendant for removing water from the stream for irrigation. The defendant contended that the diversions occurred only in the wetter months when there was more than a sufficient amount of water for the plaintiff to operate his mill. The defendant also

\begin{footnotes}
\footnotetext{93}{\textit{Ibid.}}
\footnotetext{94}{‘None of these dicta ... ought to be considered as authorities, that the first occupier or first person who chooses to appropriate, a natural stream to a useful purpose, has a title against the owner of land below, and may deprive him of the benefit of the natural flow of water’: (1833) 5 B & Ad 1, 23; 110 ER 692, 700.}
\footnotetext{95}{(1833) 5 B & Ad 1, 25; 110 ER 692, 701.}
\footnotetext{96}{(1833) 5 B & Ad 1, 24; 110 ER 692, 701.}
\footnotetext{97}{\textit{Ibid}}
\end{footnotes}
claimed that most of the water taken for irrigation was returned to the stream (with the exception of a small portion lost through absorption and evaporation). Furthermore, the defendant claimed a right as riparian owner for ‘watering, fertilization, and general benefit and advantage thereof’.

Baron Parke, writing the decision for the Court in *Embrey*, developed and refined the principle set out in *Mason* into a doctrine that could be applied by the courts in subsequent decisions. Like the Court in *Mason*, Parke B explained that water was public property in the sense that all proprietors along the stream were entitled to the flow of water passing their land. Often referred to as the defining statement of the modern riparian doctrine, the judgment provided:

> The rights to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is publici juris, not in the sense that it is a bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the usufruct [that is, the right of enjoying the use without destruction] of the stream which flows through it.

> This right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right to the flow of all the water in its natural state; if it were, the argument of a learned counsel, that every abstraction of it would give a cause of action, would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence.

The right to use the water had to be ‘reasonable’ in the sense that it could not deprive other riparian proprietors of that same right.

In their submissions both parties made references to the leading American texts as well as recent decisions of the American courts, which were influential in the Court’s decision. Parke B noted that ‘the law on this subject is most perspicuously stated’ in James Kent’s

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99 *Embrey v Owen* (1851) 6 Exch 353, 355; 155 ER 579, 580.
Commentaries on American Law and quoted extensively from that text. Kent, an American judge and legal scholar who was well respected on both sides of the Pacific, drew upon the principle that everyone was entitled to use the water from rivers. Kent acknowledged that it was necessary to have a degree of flexibility in such a doctrine; for example, he noted that with any extraction of water there would inevitably be some loss of water due to evaporation and possibly also a change in ‘the weight and velocity of the current.’ Ultimately, Kent explained, it would be a question of whether the use was ‘reasonable’:

All that the law requires of the party by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream.

Kent noted that an overly restrictive doctrine which prevented any extraction because it might cause a small change in flow would ‘deny all valuable use of the water to the riparian proprietor.’ Further, an extraction would not automatically give rise to a cause of action and would be dependent on the nature and extent of the injury, ‘otherwise rivers and streams of water would become utterly useless, either for manufacturing or agricultural purposes.’

Importantly, Baron Parke expressed a note of caution in blindly following the American decisions and explained that in America ‘a very liberal use of the stream for the purposes of irrigation and for carrying on manufactures is permitted’.

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101 Embrey v Owen (1851) 6 Exch 353, 369; 155 ER 579, 586. Commentaries on American Law was written by Chancellor James Kent and subsequently edited by Oliver Wendell Holmes in 1873. James Kent was Chancellor of New York. Commentaries on American Law is at times referred to as ‘Kent’s Commentaries’. The other popular American text referred to during argument was Joseph K Angel, A Treatise on the Law of Watercourses (Little, Brown and Co, 5th ed, 1854): at 6 Exch 353, 359-60; 155 ER 579, 582. Of the English texts, the most commonly referred to text was Charles James Gale, A Treatise on the Law of Easements (H Sweet, 3rd ed edited by W H Willes, 1862): at 6 Exch 353, 362, 365; 155 ER 579, 583, 584.

102 ‘Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes.’: Holmes (ed), above n 83, 583-5. Quoted by Parke B in Embrey: see Embrey v Owen (1851) 6 Exch 353, 370-1; 155 ER 579, 586.

103 Holmes (ed), above n 83, 586.

104 Ibid 583-5. Quoted by Parke B in Embrey: see Embrey v Owen (1851) 6 Exch 353, 370-1; 155 ER 579, 586.

105 Holmes (ed), above n 83, 586.

106 Ibid.

107 Embrey v Owen (1851) 6 Exch 353, 371; 155 ER 579, 586.
maintained the need to preserve the natural flow and did not adopt the same ‘liberal’ approach as was developed in the United States. As I explain later in this chapter, the approach adopted in the eastern United States is one based solely on the principle of reasonableness, without the same emphasis on maintaining the natural flow.\textsuperscript{108} Ultimately, Parke B in \textit{Embrey} held that ‘it is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application\textsuperscript{109} and ‘must depend on the circumstances of each case.’\textsuperscript{110} Parke B’s reliance on the concept of reasonableness provided the Court with a discretion to determine whether an extraction of water was permissible based upon the particular circumstances in the individual case. However, such an approach provides little guidance to water users as to how disputes over the allocation of water might be resolved. Subsequent decisions sought to provide some guidance regarding which uses would be given priority and the extent to which extractions of water from a river would be permitted.

\textbf{5.3.1.b \hspace{1em} The Privy Council Considers the Riparian Rights Doctrine}

In 1858 the riparian rights doctrine was considered by the Privy Council on an appeal from the Court of the Queen’s Bench of Lower Canada in the case of \textit{Miner v Gilmour}. The case approved the principles developed by the Court in \textit{Embrey} and dealt with the issue of irrigation by drawing a distinction between ‘ordinary’ and ‘extraordinary’ uses of water. The case involved a dispute between the plaintiff, who wished to dam the stream and divert water to a tannery, and the defendant, who sought to keep the sluice gate on the dam open so that water would continue to flow down the stream to power his mill. The Committee found that the plaintiff had no right to obstruct the natural flow of the river.\textsuperscript{111} The judgment, delivered by Lord Kingsdown, held that:

\begin{quote}
By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the \textit{reasonable} use of the water for his domestic purposes and for his cattle, and this without
\end{quote}

\textsuperscript{108} See Chapter 5.3.3.a.
\textsuperscript{109} (1851) 6 Exch 353, 372; 155 ER 579, 587. Perhaps this was a reflection of a cautious approach; not wanting to favour the rights of irrigators who wanted to extract large amounts of water.
\textsuperscript{110} (1851) 6 Exch 353, 372; 155 ER 579, 587. The Court held that in this case there was no infringement of the plaintiff’s riparian right: at 372.
\textsuperscript{111} \textit{Miner v Gilmour} (1858) 12 Moo PC 131, 157; 14 ER 861, 870.
regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the *extraordinary* use of it, provided that he does not thereby interfere with the rights of the other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But, he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.\(^{112}\)

The effect of the decision was that riparian proprietors were granted a ‘reasonable’ amount of water for domestic use irrespective of the harm it might cause. In this sense, the word ‘reasonable’ was not being used as a measure of how the use affected other proprietors, but was a measure of what the water was being used for and was to prevent waste and excess. The question was whether the volume of water being taken was ‘reasonable’ having regard to, for example, the number of head of cattle and the purported domestic uses. While the Court stated that a riparian proprietor was entitled to a ‘reasonable’ amount of water for domestic use irrespective of the effect this might have on downstream users, water for domestic use was likely to be a relatively small volume compared to the volume of water normally used for irrigation or manufacturing.\(^{113}\) By drawing a distinction between *extraordinary uses* – which included irrigation – and using water for *domestic purposes* the effect of the Committee’s decision was to restrict greatly the amount of water that could be used for irrigation; large scale irrigation works upstream would be impermissible where it interfered with the natural flow.

Aside from a dalliance with the prior appropriation doctrine at the start of the 19\(^{th}\) century, the riparian rights doctrine developed from the fundamental premise that all riparian proprietors had a right to enjoy the natural flow of the river. Such an approach clearly favoured proprietors using the water to power mills or to transport goods along the river over those seeking to use the water for irrigation or manufacturing, where it was more likely that there would be some reduction in the flow of the river.

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\(^{112}\) (1858) 12 Moo PC 131, 156; 14 ER 861, 870 (emphasis added). In delivering the decision for the Court, Lord Kingsdown noted that there was no ‘material distinction’ between the French law that applied in lower Canada and the English law: at 156.

\(^{113}\) Domestic use include water for one’s own garden as well as water for cooking and drinking, and household uses: Alex Gardner, Richard Bartlett and Janice Gray, *Water Resources Law* (LexisNexis, 2009) 538 and the cases cited therein. Obviously the more that is included within the definition of ‘domestic use’, the less water there is to flow downstream.
5.3.2 Application of the Riparian Rights Doctrine in Australia

In this section I first explain how the English common law was received in the separate colonies in Australia before examining the application of the English riparian rights doctrine by the Australian colonial courts. One challenge for the Australian courts was to apply the English doctrine in circumstances where the drier Australian climate meant that rivers did not flow year round and water uses in Australia were different to those in England.\textsuperscript{114} The lower rainfall in Australia meant that irrigation was much more critical for crops to succeed than in the mother-country. Despite these obvious environmental differences, the Australian colonial courts applied the English riparian doctrine.

5.3.2.a The Reception of English Common Law in Australia

The extent to which English law applied in a British colony was dependent on how the colony was established. A distinction was drawn between colonies that were ‘settled’ and those that were ‘conquered’ or ‘ceded’.\textsuperscript{115} Australian colonies were considered ‘settled’ colonies, which meant that, as William Blackstone explained, the English common law was the ‘birthright’ of the people of the colony and that ‘such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of the infant colony’.\textsuperscript{116} In determining whether the law is ‘applicable’ the court must simply consider whether it is capable of being applied in the colony and need not examine whether the law is suitable or beneficial to the colony.\textsuperscript{117} Whether a principle of English common law is suitable or beneficial is a question for the colonial legislature.\textsuperscript{118}

As Australian legal historian Alex Castles explained, the fact that New South Wales was established as a penal settlement led to some uncertainty as to whether New South Wales

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\textsuperscript{114} See Chapter 2.2.3.
\textsuperscript{117} \textit{Delohery v Permanent Trustee Co of New South Wales} (1904) 1 CLR 283, 310-11; cited with approval in \textit{State Government Insurance Commission v Trigwell} (1979) 142 CLR 617, 634 (Mason J).
\textsuperscript{118} See \textit{Delohery v Permanent Trustee Co of New South Wales} (1904) 1 CLR 283, 310-11.
was a ‘settled colony’ and, therefore, whether English law applied.119 Accordingly, the Imperial Parliament passed the *Australian Courts Act 1828* (Imp) 9 Geo IV, c 83, which removed the uncertainty and clarified the position. Section 24 of the Act provided:

> that all laws and statutes in force within the realm of England at the time of the passing of this act ... shall be applied in the administration of justice in the courts of New South Wales and Van Diemen’s Land respectively, so far as the same can be applied within the said colonies.120

The Act was passed on 25 July 1828 and, therefore, by that date at the latest the laws of England – both the common law and the statutes in force at that date – applied in the colonies of New South Wales and Van Dieman’s Land. When the colonies of Victoria and Queensland separated from New South Wales in 1851 and 1859 respectively, the laws of New South Wales became the laws of the newly established colonies.121 As a consequence, the relevant date for the reception of English law in Queensland and Victoria was also 25 July 1828. In the case of South Australia and Western Australia, the date upon which English law was received in those jurisdictions was separately defined. In South Australia, English law was received as at the date of settlement122 – 28 December 1836 – and, in the case of Western Australia the relevant date was 1 June 1829.123

The fact that the common law was received in the eastern colonies as at 25 July 1828 did not mean that the common law was to remain static in Australia.124 The common law in the Australian colonies continued to evolve after that date and that evolution closely followed the English common law. The fact that there was very little deviation between the common law in Australia and the English common law is unsurprising given that the Privy Council was the ultimate court of appeal for all Australian colonies. Many of the

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119 Castles, ‘The Reception and Status of English Law in Australia’, above n 115, 2. However, from a practical perspective it would appear that even in these early days of the settlement, English law was applied in New South Wales: at 2.


122 *Bagshaw v Taylor* (1978) 18 SASR 564, 576 (Bray CJ).


Law Lords sitting on appeals in the House of Lords were also members of the Judicial Committee of the Privy Council hearing appeals from the colonies. Castles identified two further reasons for the lack of divergence between Australian and English law: first, there appeared to be a "disinclination on the part of Australian courts to take into account special local conditions in deciding whether general principles of unenacted [common law] should apply", and, secondly, Australian courts placed a great deal of weight on decisions of the English higher courts. This general reluctance to diverge from English decisions is evident in the early riparian rights cases decided by Australian courts. Before turning to those cases, I examine the first decision of the Privy Council that applied the riparian rights doctrine in Australia.

5.3.2.b The Privy Council Applies the Riparian Rights Doctrine in Australia

A year after the Judicial Committee of the Privy Council decided the appeal in the Canadian case of Miner v Gilmour, the Australian case of Lord v Commissioners for the City of Sydney was decided by the Committee. Lord was the first decision of the Committee from an Australian colonial Supreme Court involving the application of the riparian rights doctrine. While not expressly stated, the Judicial Committee proceeded on the basis that the English riparian rights doctrine applied without modification in Australia. The question whether the riparian rights doctrine must be varied in Australia to take into account the dry climate and rivers that did not flow all year round was never brought before, and therefore never considered by, the Judicial Committee of the Privy Council.

The case of Lord involved two grants of land made by the Crown along a creek near Botany Bay. The first grant, made in 1810, was to a gentleman by the name of Redmond. The second grant was made in 1823 to Simeon Lord. Both parcels of land were bound by the creek. The second grant, however, reserved to the Crown "[a]ny quantity of water and any quantity of land, not exceeding ten acres, in any part of the said grant, as might be required for public purposes." The reservation was made pursuant to the Sydney Water Act 1853 (NSW). Simeon Lord subsequently acquired title to Redmond’s land and

125 Judicial Committee Act 1833 (Imp) 3 & 4 W 4, c 41, s 1.
127 Ibid 10.
128 (1859) 12 Moore 473; 14 ER 991.
129 (1859) 12 Moore 473, 473; 14 ER 991, 991.
constructed a flour mill upon that land. Upon his death, Simeon Lord’s will provided that the land previously owned by Redmond be left to his widow, the appellant, Mary Lord.\(^{130}\)

In 1855 the Governor of New South Wales acquired a parcel of land pursuant to the reservation. In accordance with the *Sydney Water Act 1853* the Commissioners for the City of Sydney also appropriated water from the creek adjoining the two parcels of land. The diversion of this water affected the operation of the mill on the appellant’s property. The appellant sought compensation as the initial grant in 1810 to Redmond never included a reservation to the Crown to extract water. The question raised by the appeal was whether the reservation associated with the second grant of land applied equally to both parcels of land given that they were subsequently owned by the same person. The Judicial Committee held that the reservation only applied to the grant of land to Simeon Lord in 1823 and did not apply to the land originally granted to Redmond (and subsequently acquired by Simeon Lord). As a consequence, the appellant was entitled to compensation for the extraction of water by the Crown as it was an interference with the appellant’s riparian right.\(^{131}\)

During argument in *Lord*, the parties referred to the cases of *Embrey* and *Mason* for the purpose of setting out the riparian rights doctrine.\(^{132}\) Like in the English case of *Embrey*, the Judicial Committee quoted from James Kent’s *Commentaries on American Law* in explaining the riparian rights doctrine:

> Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream ‘adjacent to his lands’... Though he may use the water while it runs over his land, he cannot unreasonably detain it.\(^{133}\)

The Committee’s approach sought to ensure that users further downstream were protected from upstream water users taking advantage of their geographical advantage and restricting the natural flow of the river.

\(^{130}\) The other parcel of land was left to his son, Edward Lord: (1859) 12 Moore 473, 478; 14 ER 991, 993. (1859) 12 Moore 473, 500; 14 ER 991, 1001.

\(^{131}\) (1859) 12 Moore 473, 484; 14 ER 991, 995. Lord Kingsdown also noted during argument that the doctrine had recently been upheld in *Miner v Gilmour* (1858) 12 Moo PC 131; 14 ER 861: at (1859) 12 Moore 473, 484; 14 ER 991, 995-6.

\(^{132}\) (1859) 12 Moore 473, 496; 14 ER 991, 1000. The Court could not have given a more glowing endorsement of the text when it noted the ‘learned author ... may be safely relied on in any question of general principle: at 12 Moore 473, 497; 14 ER 991, 1000.
Lord was the only case in which the Judicial Committee considered the application of the riparian rights doctrine in Australia and the Privy Council applied the doctrine without modification. There was no suggestion in the case from any party that the riparian rights doctrine should not be applied in the same way in Australia as it was in England. It was, therefore, left to the Australian courts to determine how to apply the doctrine to the Australian conditions.

5.3.2.c Australian Courts Applying the Riparian Rights Doctrine

During the latter part of the 19th century and after the Privy Council’s decision in Lord, Australian colonial Supreme Courts cited with approval the leading English decisions dealing with the riparian rights doctrine and applied the doctrine without modification in the colonies. There are relatively few reported cases that deal with the riparian rights doctrine during this period; however, as usage expanded and the population spread inland, there are a few instances towards the end of 19th century where Australian courts identified a number of difficulties in applying the riparian rights doctrine. Despite the differences in geography and use, the question of whether the Australian common law should depart from the existing English doctrine was never considered by an Australian court.

In 1866 the riparian rights doctrine was applied by the Full Court of the Supreme Court of New South Wales in Pring v Marina. In this case the defendant had diverted the whole of the stream for a brief period of time to fill a dam. Once the water level rose in the dam, the flow in the river would return. The plaintiff asserted that, as a riparian proprietor, he was entitled to the continued flow of the stream.

In the course of oral submissions the parties quoted from the English case of Embrey and the Court applied the English riparian rights doctrine as set out in that case. Stephen CJ remarked:

The question whether a particular use of the water, therefore, by any such occupier, is or is not justifiable, depends on the inquiry whether the use was reasonable, relatively to the rights of other riparian owners. Now it may be a reasonable use, possibly, to cause a

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134 (1866) 5 NSWSCR (L) 390.
135 Ibid 390
considerable portion of the stream to be diverted, temporarily, into a dam, but here the whole stream has been so diverted.\textsuperscript{136}

While the plaintiff’s right to the flow of the stream was not absolute and the defendant could have potentially diverted part of the flow, it was the fact that defendant had taken the extreme step of diverting the whole of the flow that which led the Court to rule in favour of the plaintiff.

Eight years after the case of \textit{Pring}, a case involving riparian proprietors came before the South Australian Supreme Court. In \textit{White v Taylor}\textsuperscript{137} the plaintiff, White, complained that the defendant, Taylor, was undertaking wool-washing in the river which was polluting the waters. The case was not a case involving a question of water allocation between the parties, but was a case of nuisance, for the plaintiff claimed that the wool-washing was polluting the stream. In this case there was no dispute between the parties that the plaintiff was a riparian proprietor.\textsuperscript{138} Instead, the question was whether it was the defendant who was causing the pollution to the river.

Despite the fact that the allocation of water between riparian proprietors did not arise, the judge’s description of the river and his Honour’s observations of Australian rivers more generally are instructive. The river in question was the River Torrens, which flows through the city of Adelaide. The judge described the river in this way:

Like most Australian rivers its waters undergo great changes, sometimes, according to the season of the year, rushing as a headlong torrent; sometimes subsiding into a chain of mere waterholes.\textsuperscript{139}

Even today a weir is used to maintain the water in the Torrens year round.\textsuperscript{140} As this description of the River Torrens highlights, one of the obvious difficulties with the riparian rights doctrine would be how to grant a ‘reasonable’ share of water to proprietors where the river does not flow or the flow was insufficient for either party’s purposes. As my analysis of the English cases shows, one of the central principles of the riparian rights\textsuperscript{136}

\textsuperscript{136} Ibid 396. Hargrave J explained (at 397): ‘Any right to stop for a single day the flow of any stream would be inconsistent with the common law rights of other riparian owners’. Cheeke J stated (at 397) that had the water continued to flow the plaintiff’s plea may have been more difficult to make good.

\textsuperscript{137} (1874) 8 SALR 1.

\textsuperscript{138} Ibid 36.

\textsuperscript{139} Ibid 28.

\textsuperscript{140} The weir was built in 1880 and is still operational today: State Library of South Australia, \textit{River Torrens}, SA Memory <http://www.samemory.sa.gov.au/site/page.cfm?u=272>.
doctrine is the right of all riparian proprietors to the flow of the stream. How does a court uphold this right when even under usual conditions the riparian proprietor is unlikely to have access to the flow of the stream all year round? Perhaps it is the potential or opportunity to access the flow of the river should there be sufficient water.\(^{141}\)

In 1885 in the case of *Lomax v Jarvis* the Full Court of the Supreme Court of New South Wales considered whether the *Mining Act 1874* (NSW) had abolished the riparian rights doctrine. In that case the defendant was granted a right to mine gold in accordance with the *Mining Act*. In carrying out that mining, the defendant diverted water from a stream adjacent to his property and ‘caused large quantities of mud and sludge and dirty water’ to be returned to the stream.\(^{142}\) The plaintiff, whose land was downstream of the defendant’s dam, claimed damages on the basis that the defendant was depriving the plaintiff of his riparian rights.

The judgment of Martin CJ is the most detailed analysis of the application of the English case law in Australia during this period. Martin CJ held the English decisions on the riparian doctrine in high regard, noting:

> The rights of riparian owners have been the subject of numerous decisions. Many of these were determined in the mother country and many of Courts in America, whose decisions on such points are referred to in England as of very high authority.\(^{143}\)

Citing the English cases of *Minor v Gilmour*, *Mason v Hill* and *Embrey v Owen*, and also referring to Kent’s *Commentaries on American Law*, Martin CJ held that

> Now all these cases show that the riparian proprietor has a right to have the water of a stream flowing through his land in an undiminished quantity and in its natural state, subject to a reasonable use of the same for purposes of irrigation, turning water wheels, watering cattle, and domestic use. But such use must be reasonable; it must not have the effect of depriving the persons lower down of the use of the stream.\(^{144}\)

Martin CJ’s explanation of the law was slightly different to the doctrine set out in the English cases. The difference was that Martin CJ’s statement of the law did not distinguish between, what Lord Kingsdown described in as *Miner* as, ‘ordinary’ and

\(^{141}\) I return to consider the suitability of the riparian rights doctrine in Australia in the context of transboundary rivers in Chapter 6.4.5.

\(^{142}\) *Lomax v Jarvis* (1885) 6 NSWR 237, 238.

\(^{143}\) Ibid 241-2.

\(^{144}\) Ibid 244.
‘extraordinary’ uses. It will be recalled that in *Miner* Lord Kingsdown stated that all riparian proprietors were entitled to a ‘reasonable’ use of the water for domestic purposes and for cattle ‘without regard to the effect which such use may have ... upon proprietors lower down the stream’. However, Martin CJ’s restatement of the doctrine required that even water used for domestic purposes must not deprive the downstream proprietors of the use of the stream. Whereas Lord Kingsdown in *Miner* stated that water for domestic use could be taken from a river without consideration of how it might affect downstream proprietors, Martin CJ stated that water could not be taken if it deprived a downstream user of the use of the flow.

Whether Martin CJ’s statement of the riparian rights doctrine was an attempt to depart from the English doctrine is difficult to determine; there was no express statement that suggested that it was the Chief Justice’s intention and subsequent cases have maintained the English doctrine. One explanation for Martin CJ’s apparent divergence from the English doctrine was that the case involved the use of water for mining purposes – an extraordinary use – in circumstances where the defendant had clearly altered the natural flow of the stream. As a consequence, in applying the English doctrine to the facts of this case, the central issue was whether the extraordinary use deprived the downstream proprietor. Arguably Martin CJ’s restatement of the riparian rights doctrine was not an attempt to alter the doctrine in Australia, but merely a shorthand statement that captured the central elements of the doctrine necessary to decide the present case. Alternatively, it may have been that because domestic uses were usually a smaller volume of water in comparison to irrigation or industrial uses they were thought to be insignificant and unlikely to affect the natural flow to the same extent as other ‘extraordinary uses’.

Martin CJ also went on to acknowledge that while the hot, dry Australian summer could reduce the flow during these warmer months, the riparian rights doctrine still applied and may in some circumstances prevent the upstream proprietor taking water altogether:

145 *Miner v Gilmour* (1858) 12 Moo PC 131, 156; 14 ER 861, 870. See Chapter 5.3.1.b.

146 *H Jones & Co Pty Ltd v Kingborough* (1950) 82 CLR 282, 299 (Latham CJ), 311 (Dixon J), 342-4 (Fullagar J). Latham CJ, for example, referred to *Embrey v Owen* (1851) 6 Exch 353; 155 ER 579 as well as the Privy Council decision in *Stollmeyer v Trinidad Lake Petroleum Co Ltd* [1918] AC 485 and the House of Lords decision in *John Young & Co v Bankier Distillery Co* [1893] AC 691. *Hill v O’Brien* (1938) 61 CLR 96, 112 (McTiernan J), citing the English decision of *Wood v Waud* (1849) 3 Ex 748, 755; 154 ER 1047, 1058.
If in dry season the volume of water is diminished, the stream cannot be used if the effect would be that people higher up would take all the water.\footnote{Lomax v Jarivs (1885) 6 NSWR 237, 244.}

This statement might be seen as an acknowledgement that the Australian conditions required a tighter regulation of the taking of water from rivers to ensure that the rights of downstream proprietors were protected. Ensuring that upstream domestic water uses do not affect the downstream proprietors might be seen as one way of ensuring that is the case. One potential problem with the riparian rights doctrine was that it did not limit the amount of water that could be taken for watering cattle or domestic use. If the English doctrine was strictly applied, even in a dry year a riparian proprietor could not be made to reduce the amount of water taken for these purposes, irrespective of the detriment that this might cause downstream users, so long as the proprietor was not taking an unreasonable amount having regard to what the water was being used for.

In \textit{Lomax} it was also necessary for the Court to consider whether the provisions of the \textit{Mining Act} abolished the riparian rights doctrine. All three members of the Court concluded that the Act did not abolish the doctrine.\footnote{Ibid 244 (Martin CJ), 246 (Faucett J), 246 (Innes J).} In the course of considering this question, Faucett J, agreeing with the Chief Justice, noted that with respect to the application of the riparian rights doctrine ‘there may be some difference with respect to streams which are intermittent, or which are dry during some portions of the year.’\footnote{Ibid 246. Faucett J noted that in the pleadings ‘the stream is treated as one constantly flowing.’: at 246. The issue of whether riparian rights could attach to intermittent streams was also considered by the County Court of Victoria in 1887. In the case of \textit{Newstead v Flannery} (1887) 8 ALT 178 the Court noted (at 180) that ‘there would be riparian rights in few rivers in Australia if no such rights could be acquired in an intermittent stream.’} It was unnecessary for his Honour to explain what those differences in application might be. However, it raised the question of whether the riparian rights doctrine applied to intermittent streams and, more broadly, whether the doctrine was to be applied differently in Australia to take into account the different environmental conditions. While the case raises some important questions with respect to the application of the riparian rights doctrine in Australia, it failed to provide answers to those questions.

The case of \textit{Lyons v Winter}, argued before the Supreme Court of Victoria in 1899 highlighted a further problem with attempting to apply the riparian rights doctrine in Australia: identifying what was a river. In that case a dispute arose as to whether the
‘natural gully or depression’ that formed over both the plaintiff’s and defendants’ land was in fact a ‘watercourse’. The plaintiff contended that the depression in the land constituted a watercourse and as such, as a riparian proprietor, he was entitled to a share of the water. The defendants had constructed a dam on the edge of their property which prevented the water from flowing onto the plaintiff’s land. The trial judge held that while a ‘stream may be very small, and need not always run, nor need the banks be clearly or sharply defined ... there must be a course, marked on the earth by visible signs, along which water usually flows, in order to constitute a watercourse such as creates riparian rights.’ The judge held that in this case the facts did not support a conclusion that the depression was a ‘watercourse’. The plaintiff subsequently appealed to the Full Court. On appeal the plaintiff argued that the ‘different circumstances’ in the Australian colonies meant that English cases did not assist. The plaintiff submitted that while in Australia a river or stream may be dry for extended periods of time, it did not preclude the land from being a watercourse. The Full Court upheld the trial judge’s definition of a watercourse and, after inspecting the site for themselves, agreed that the area of land in question did not constitute a ‘watercourse’.

More recent Australian decisions have followed the English doctrine requiring the preservation of the natural flow. In the 1950 case of *H Jones & Co Pty Ltd v Kingborough Corporation* Fullagar J reviewed the earlier English decisions and summarised the doctrine in this way:

> The cases which I have cited seem to me to establish clearly two things. The first is that ... the proprietor of land on the bank of the river ‘has, as incident to his property in the land, a proprietary right to have the stream flow in its natural state, neither increased nor diminished.’ And the second is that this right involves ... the ‘right to make all the use he can, to derive every benefit he can, from the stream, provided he does not abstract so much as prevents other people from having equal enjoyment with himself.'

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151 Ibid 465 (Hood J).
152 Ibid 466-7 (Hood J).
153 Ibid 469 (during argument).
154 Ibid 471.
155 Ibid 471 (Williams J on behalf of the Court).
156 See above n 146.
157 *H Jones & Co Pty Ltd v Kingborough* (1950) 82 CLR 282, 344.
The other members of the Court made remarks to similar effect. There was no suggestion that the natural flow of the river could be interfered with. One of the difficulties for the application of the doctrine in Australia was that water taken for irrigation would be used up once diverted and could not be returned to the stream. If too much water was taken for irrigation it had the ability to affect the natural flow of the stream.

In contrast to the Australian position, in the United States the riparian rights doctrine was modified. The natural flow doctrine was not followed by American courts and alternative doctrines were developed that generally allowed greater volumes of water to be diverted from rivers. The approach taken by the State courts in the United States demonstrated that the English doctrine could be modified to take into account differences in local environmental conditions and water uses. I turn now to consider the developments in the States of the United States.

5.3.3 A Comparison with States in the United States

As I have explained above, while English courts drew upon the work of James Kent, there was a level of reluctance to embrace fully the American approach that had allowed for ‘a very liberal use’ of water from rivers. In this section I demonstrate how States have adopted different water regulation regimes to take into account variations in water use and climate. I show that courts in a number of States in the United States – predominantly in the east where water was plentiful – modified the English riparian rights doctrine into a doctrine of ‘reasonable use’; whereas other States – particularly those in the west where water was often scarce – abandoned the riparian rights doctrine altogether in favour of a doctrine of prior appropriation, which allocated water on a first-in-time basis.

159 See Chapter 5.3.1.a.
160 Embrey v Owen (1851) 6 Exch 353, 371; 155 ER 579, 586.
5.3.3.a Eastern United States – Doctrine of ‘Reasonableness’

In the eastern States, the strict English position that required the natural flow of the river to be preserved was modified in most States. The eastern States adopted an approach based on reasonableness. Every riparian proprietor was entitled to the reasonable use of water so long as their use was ‘not positively and sensibly injurious’. Thus, unlike the Australian cases, which maintained the natural flow approach, the American decisions modified the English doctrine.

In explaining the role that the concept of reasonableness played in the riparian doctrine in America, James Kent cited the decision of Story J in *Tyler v Wilkinson*. Story J’s approach was not to deny water uses merely because they would affect the natural flow of the stream:

> When I speak of this common right, I do not mean to be understood, as holding the doctrine, that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would deny any valuable use of it.

Story J stated that the use must be ‘reasonable’ and explained the concept of ‘reasonableness’ in the following way:

> The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or retardation or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream.

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162 Sax et al, above n 161, 47.
165 *Tyler v Wilkinson*, 24 Fed Cas 472, 474 (1827).
166 *Tyler v Wilkinson*, 24 Fed Cas 472, 474 (1827).
As American scholar T E Lauer noted, ‘[t]aken together, then, Story’s opinion and Kent’s treatise mark the inception of the “reasonable use” doctrine of riparian rights in American law.’

The fundamental principle behind the English natural flow doctrine and the American reasonable use doctrine was that all proprietors along the river were entitled to use the flow of the stream. However, the effect of the reasoning adopted by Story J and James Kent was to add a higher degree of flexibility in the application of the doctrine: the diversion by a riparian proprietor did not need to maintain the natural flow and it would ultimately be for the court to balance the interests of riparian proprietors and determine what constituted a ‘reasonable’ use.

In contrast, faced with drastically different environmental conditions, the States in the western United States abandoned the principle that all proprietors had a right to the flow altogether.

5.3.3.b Western United States – Prior Appropriation

The 100th meridian approximates the divide between the drier western States and the wetter eastern States of the United States. The 100th meridian passes through North Dakota, South Dakota, Nebraska, Oklahoma, Kansas and Texas. States to the east of the 100th meridian typically receive more than 20 inches (approximately 500 mm) of precipitation annually; whereas most of the region to the west receives less than 20 inches. The lack of rainfall in the west meant that large tracts of land could not be farmed without irrigation. The difference in rainfall between the east and the west influenced the development of water regulation in the United States. The question for

168 Cf the English riparian doctrine, which emphasised the maintenance of the natural flow: see Chapter 5.3.1.

It is doubtless more or less meandering in its course throughout its whole extent from south to north, being affected by local conditions of rainfall, as well as by the general conditions above mentioned; but in a general way it may be represented by the one hundredth meridian, in some places passing to the east, in other to the west, but in the main to the east. (emphasis added). See generally John Wesley Powell, The Exploration of the Colorado River and Its Canyons (Penguin Books, first published 1875, 1987 ed); Wallace Stegner, Beyond the Hundredth Meridian (Penguin Books, first published 1954, 1992 ed)
170 The obvious exceptions to this general rule are parts of Oregon and Washington in the northwest.
courts in the western United States was whether the ‘reasonable use’ doctrine could be applied in the west where significant amounts of water was being diverted for mining and irrigation.

In the 1850s during the gold rush, the case of *Irwin v Phillips* squarely raised the question whether the riparian rights doctrine was to apply in California.\(^\text{171}\) The appellant, Irwin, diverted water from a stream for his mining operations. The respondent, Phillips, a downstream proprietor, argued that all land owners along the river were entitled to the riparian rights of the stream and thereby entitled to ‘the use of water in its pure and natural condition’.\(^\text{172}\) The Supreme Court of California concluded that it was necessary to protect the rights of miners and therefore found in favour of Phillips. The Californian Supreme Court held that a prior appropriation of water must not be interfered with so long as the water was being put to a legitimate use, which in this case was mining.\(^\text{173}\) In reaching this conclusion, the Californian Supreme Court held that it was ‘bound to take notice of the political and social condition of the country’.\(^\text{174}\) A large part of the State consisted of ‘mineral lands’ and water was essential for these areas to be developed.\(^\text{175}\) A doctrine of prior appropriation created certainty for existing miners. As between miners, disputes over priority were to be determined on a first-in-time basis:

> Among these [rights] the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. ... [H]owever much the policy of the State, as indicated by her legislation, has conferred the privilege to work the mines, it has equally conferred the right to divert the streams from their natural channels, and as these two rights stand upon an equal footing, when they conflict, they must be decided by the fact of priority upon the maxim of equity, *qui prior est in tempore potior est injure*.\(^\text{176}\) The miner, who selects a piece of ground to work, must take it as he finds it, subject to prior rights, which have an equal equity, on account of an equal recognition from the sovereign power. If it is upon a

\(^{171}\) *Irwin v Phillips*, 5 Cal. 140 (1855).
\(^{172}\) Ibid 145.
\(^{173}\) Ibid 146.
\(^{174}\) Ibid.
\(^{175}\) Ibid.
\(^{176}\) This translates to first in time has the stronger right.
stream the waters of which have not been taken from their bed, they cannot be taken to his prejudice; but if they have been already diverted, and for as high, and legitimate a purpose as the one he seeks to accomplish, he has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection.177

In rejecting the orthodox riparian rights doctrine – which severely restricted the amount of water that could be taken from the stream and sought to preserve the natural flow of the river – in favour of a doctrine of prior appropriation, courts in the western States took into account not only the differences in environmental conditions but also the change in water use. Unlike the English riparian rights doctrine, the prior appropriation doctrine was not concerned with preserving the natural flow of the stream. As a consequence, the doctrine allowed a greater amount of water to be taken from a river than would otherwise be permitted under the riparian rights doctrine.

The judgment in Irwin v Phillips reinforced the principle that miners were to take the land and rivers as they found them. A similar approach was also adopted a few years later in Colorado.

Not long after Colorado joined the Union in 1876, the Supreme Court of Colorado, in the case of Coffin v Left Hand Ditch Company,178 considered the question whether the prior appropriation doctrine was to apply in that State. The appellant, Coffin, was the owner of land adjoining the stream, the St Vrain. Prior to Coffin seeking to use the water from the St Vrain, the respondent, Left Hand Ditch Company, had diverted water from the St Vrain via a ditch to James Creek, which then flowed into Left Hand Creek.179 Left Hand Ditch Company used this water to irrigate land adjacent Left Hand Creek. The dispute over the water of the St Vrain was brought to a head when Coffin removed part of Left Hand Ditch Company’s dam. The question for the Supreme Court of Colorado was whether Coffin had a riparian right to the water of the St Vrain, or whether the waters were to be allocated on a first-in-time basis, which would entitle Left Hand Ditch Company to dam the stream and divert the water.

177 Irwin v Phillips, 5 Cal. 140, 146-7 (1855).
178 6 Colo 443 (1882).
179 A ditch is an open channel used to divert water from one location to another using the gravitational flow of the water.
Unlike any of the Australian State Constitutions, the *Colorado Constitution* expressly recognised the prior appropriation doctrine:

The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied.
Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.  

While the *Colorado Constitution* gave priority to domestic purposes where there was insufficient water, domestic uses were relatively minor compared to agricultural uses. The *Colorado Constitution* also recognised agricultural uses over manufacturing. However, the real dispute was between water users seeking to use the water for agriculture. Were these users all to be given a share of the water or was water to be distributed on a first-in-time basis?

The *Colorado Constitution* did not resolve the matter between Coffin and Left Hand Ditch Company, as the appropriation by the company occurred prior to the adoption of the *Colorado Constitution* in 1876. The appellants argued that prior to 1876 the common law riparian rights doctrine applied. The effect of that argument was to restrict the amount of water that Left Hand Ditch Company could divert from the stream. Under the riparian rights doctrine a riparian proprietor could not take water for irrigation, an ‘extraordinary use’, where that diversion would materially affect the flow of the water downstream. Under the prior appropriation doctrine water users were not required to maintain the natural flow of the river and could take as much water as they needed, so long as they were putting it to a beneficial use.

The Supreme Court of Colorado held that the prior appropriation doctrine applied in Colorado and ‘existed from the date of the earliest appropriations of water within the boundaries of the state.’ The Supreme Court of Colorado referred to the climatic conditions as well as the need to extract water for irrigation when interpreting the

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180 *Colorado Constitution* art XVI § 6.  
181 *Coffin v Left Hand Ditch Company*, 6 Colo 443, 446 (1882).  
182 Ibid.
territorial legislation in operation at the time of the appropriation to conclude that the riparian rights doctrine was inappropriate:

The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favoured sections, artificial irrigation for agriculture is an absolute necessity. Water in various streams thus acquires a value unknown in moister climates. ... It has always been the policy of national, as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built, and permanent improvements made; the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right by priority of appropriation, and a great part of the value of all this property is at once destroyed.183

Where there was any ambiguity in the legislation it was interpreted to give effect to the operation of the prior appropriation doctrine in Colorado.

Whereas the riparian rights doctrine places a value on maintaining the natural flow of the stream and ensuring all users have access to the natural flow, the prior appropriation doctrine recognises that some water users may need to extract water from the river permanently. This was especially true for the irrigators and miners in the western United States.

The rejection of the riparian rights doctrine by courts in the western States of the United States was not based solely on the drier climatic conditions. At the time when the prior appropriation doctrine was adopted in western States such as California and Colorado, the States had only relatively recently been settled. The adoption of the prior appropriation doctrine was intended to encourage development in the west. Water was essential for mining and agriculture and the courts had regard to these needs in adopting the prior appropriation doctrine. Providing certainty for farmers (in the case of Colorado) and miners (in California) who were already using the water played an important part in the courts’ decisions and was essential for the development of these settlements.

These cases demonstrate the fundamental difference between the English natural flow doctrine or the reasonableness doctrine on the one hand, and the doctrine of prior

183 Ibid (emphasis added).
appropriation on the other. Prior appropriation places little or no value on maintaining the natural flow of the river. Instead, the emphasis is placed on putting the water to a beneficial use; so long as the water is being put to a beneficial use (and is not being wasted), the earlier proprietor will have a priority to the water over a subsequent water user.

The cases show that, unlike in Australia, courts in the United States were willing to deviate from English common law doctrine in an attempt to find an approach for allocating water that was suitable for local conditions. The difficulty in applying the riparian rights doctrine in the Australian conditions was acknowledged by the Australian colonial courts, but the problem was not addressed. This position can be contrasted with the approach taken by the State Supreme Courts in the United States, which took a more progressive approach to developing doctrines suitable for the local conditions and water uses. In addition, the fact that the State Supreme Courts were not bound by the decisions of the Privy Council (as was the case in Australia) provided greater flexibility in developing new doctrines. Ultimately it was for the legislators in the Australian colonies (and later States) to address the problem of developing a regime that recognised local conditions and uses.

5.3.4 Australian State Legislatures Abolish the Riparian Rights Doctrine

The unsuitability of the riparian rights doctrine for the Australian conditions and the inability or reluctance of the Australian judiciary – unlike in the United States – to modify the doctrine meant that it was left to legislatures to regulate the taking of water from Australian rivers. Australian politicians were well aware of the need to regulate water for conservation and irrigation. George Reid from New South Wales summarised the position best when he explained that parts of inland Australia were so dry that ‘scarcely a kangaroo could live without certain water conservation.’

In developing legislation to regulate water use within New South Wales, the Parliament was aware of the need to create a scheme that had regard for existing common law riparian rights, while also allowing development of the waterways so that the water could

184 New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 July 1896, 1542. The word ‘conservation’ was used in this context to mean the storage of water.
be more effectively utilised. In 1896 the New South Wales Parliament passed legislation vesting the right to the use, flow and control of water of rivers in the Crown. The Water Rights Act 1896 (NSW) provided

The right to the use and flow and to the control of the water in all rivers and lakes which flow through or past or are situate within the land of two or more occupiers, and of the water contained in or conserved by any works to which this Act extends shall, subject only to the restrictions hereinafter mentioned, vest in the Crown.  

The Act provided a limited right to occupiers of land along the banks of a river, which did not require the occupier to obtain a licence. That right was as follows:

The right to use the water then being in the river or lake for domestic purposes and for watering cattle or other stock, or for gardens not exceeding five acres in extent used in connection with a dwelling-house, and it shall not be necessary for the occupier to apply for or obtain a license for any work used solely in respect of that right. Beyond that limited right, the occupier would need to apply for a licence. That Act was repealed in 1902 and the Water Rights Act 1902 (NSW) was enacted in its place. The Water Rights Act 1902 maintained the position that right to the use, flow and control of the water of rivers were vested in the Crown in identical terms. Subsequent legislation in 1912 and 1930 did not substantially change that position.

The early Victorian position was even less clear as to whether it was attempting to maintain the common law doctrine. The Irrigation Act 1886 (Vic) provided:

The right to the use of all water at any time in any river ... shall for the purposes of this Act in every case be deemed to be vested in the Crown until the contrary be proved by establishing any other right than that of the Crown to the use of such water, and save in the exercise of any legal right existing at the time of such diversion or appropriation no person shall divert or appropriate any water from any river ... excepting under the

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185 As Mr S Smith, Secretary for Mines and Agriculture, noted: there were only three ways of dealing with this matter, either to deal with it in the way proposed or allow the people to have their common-law rights, which would enable anyone below to have a grievance against the persons constructing any works to interfere with the flow of the water, or they could be left to do whatever they like with all the works which they constructed. New South Wales, Parliamentary Debates, Legislative Assembly, 8 July 1896, 1412.  
186 Water Rights Act 1896 (NSW) s 1(I).  
187 Ibid s 2.  
188 The limited exception for domestic purposes on 5 acres was also maintained: Water Rights Act 1902 (NSW) s 5.  
189 Water Act 1912 (NSW) s 7 and the Water (Amendment) Act 1930 (NSW) s 2.
provisions of this Act or of some other Act already or hereafter to be passed, except in the exercise of the general right of all persons to use water for domestic and stock supply from any river ... vested in the Crown.\textsuperscript{190}

The use of the phrase ‘until the contrary be proved by establishing any other right’ appears to be an attempt to ensure existing water users could maintain their right, while also making sure that future users were regulated by the legislative scheme. However, in 1905 the Victorian Parliament passed legislation in substantially the same terms as the New South Wales legislation, vesting the right to the use and flow in the Crown.\textsuperscript{191}

The question remained whether the State legislation by vesting the use and flow in the Crown had extinguished the riparian rights doctrine \textit{within} the States along the rivers to which the legislation applied. In \textit{Hanson v The Grassy Gully Gold Mining Co} the Supreme Court of New South Wales considered whether the \textit{Water Rights Act 1896} (NSW) abolished the common law riparian rights doctrine.\textsuperscript{192} In his judgment Stephen J acknowledged the problems in applying the riparian rights doctrine in Australia:

\begin{quote}
It cannot be denied that for years and years past the question of the rights of riparian owners in this country, where the conditions are so totally different from the condition of things in England, has been a source of almost insuperable difficulty. There has been a great deal of expensive litigation and I suppose, for that reason, the Legislature passed this Act, in order to prevent riparian owners above and below from bringing actions against one another. If this Act does not aim to take the old common law rights from the riparian owners and vest them in the Crown, then I do not know what it was passed for nor what it means. It was passed in the public interest to prevent litigation and to determine rights which up to the time of the passing of the Act it was almost impossible for the best lawyers to determine.\textsuperscript{193}
\end{quote}

While there was no provision expressly ‘divesting’ the rights of the riparian proprietors, the fact that the Act ‘vested’ the right in the Crown was, in Stephen J’s opinion, sufficient to divest owners or occupiers of their riparian rights.\textsuperscript{194}

In contrast, Fullagar J in \textit{Thorpes Ltd v Grant Pastoral Co Pty Ltd} thought that the New South Wales legislation did not abolish, but rather created new rights:

\begin{flushleft}
\textsuperscript{190} \textit{Irrigation Act 1886} (Vic) s 4.
\textsuperscript{191} \textit{Water Act 1905} (Vic) s 4.
\textsuperscript{192} \textit{Hanson v The Grassy Gully Gold Mining Co} (1900) 21 LR (NSW) 271.
\textsuperscript{193} Ibid 275.
\textsuperscript{194} Ibid.
\end{flushleft}
The view which I am disposed to take is that the Act does not directly affect any private rights, but gives to the Crown new rights – not riparian rights – which are superior to, and may be exercised in derogation of private riparian rights, but that, until those new and superior rights are exercised, private rights can and do co-exist with them. However, the question of the correctness of Hanson’s Case was not fully argued, and it is perhaps better not to express a concluded opinion upon it in a case in which it is not strictly necessary to do so.\(^\text{195}\)

However, the approach in Hanson was recently approved by the High Court in ICM Agriculture Pty Ltd v Commonwealth.\(^\text{196}\) In ICM Agriculture, French CJ, Gummow and Crennan JJ stated that the reasoning ‘that the 1896 Act vested in the Crown the common law rights of riparian owners, is to be preferred to the slightly delphic observation of Fullagar J in Thorpes Ltd v Grant Pastoral Co Pty Ltd.’\(^\text{197}\)

Early South Australian legislation took a slightly different approach by vesting the Crown with the ‘property in ... the water’ of a river:

(1) The property in, and the right to the use and flow and to the control of, the water at any time in any watercourse to which this Act applies shall, until appropriated by other persons under this Act or some other Act, vest wholly in the Crown, subject only –

(a) to the rights by or under this Act reserved or granted to other persons, and

(b) to any rights therein, or to the use thereof, inconsistent with the right of the Crown which may be established by or under any Act.

(2) This section shall not operate so as to prevent any person from draining any land, or making any dam or tank upon land, of which he is the owner: Provided that the flow of any portion of the waters in any watercourse to which this Act applies is not thereby sensibly diminished.\(^\text{198}\)

The Act maintained the right of the riparian proprietor to use water for domestic purposes:

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\(^\text{195}\) Thorpes Ltd v Grant Pastoral Co Pty Ltd (1955) 92 CLR 317, 331. Webb J agreed with Fullagar J (at 326). McTiernan J did not decide the point (at 325-6) and Dixon CJ (at 324) and Kitto J (at 333) expressly stated that the point should not be decided in that case.

\(^\text{196}\) (2009) 240 CLR 140.

\(^\text{197}\) Ibid 172-3 [54]. Hayne, Kiefel and Bell JJ agreed that the approach in Hanson should be preferred: at 192 [116].

\(^\text{198}\) Control of Waters Act 1919 (SA) s 4.
All owners or occupiers of any land through or contiguous to which passes any watercourse to which this Act applies, or contiguous to which is wholly or partly situate any such watercourse shall, by virtue of their ownership or occupation of such land, have the right to take, without charge, water from such watercourse for the use of themselves and their respective families and servants for domestic purposes.\textsuperscript{199}

However, subsequent legislation – the Water Resources Act 1976 (SA) – removed any reference to the property in water and vested the right in the Crown in a similar way to the legislation in New South Wales and Victorian:

The right to the use and flow and to the control of all waters in the State shall, subject to this Act, be vested in the Crown and shall be exercised by the Minister in the name of and on behalf of the Crown.\textsuperscript{200}

Similar questions regarding the abolition of riparian rights arose with respect to the South Australian legislation. The South Australian Supreme Court rejected the argument that the vesting clause in s 6 of the Water Resources Act 1976 (SA) abolished riparian rights across the entire State, and held that it had a more limited effect over the rivers that the Act was controlling.\textsuperscript{201} The South Australian legislation was subsequently amended in 1990. The Water Resources Act 1990 (SA) defined the rights of the Minister to take water and appeared expressly to acknowledge that riparian rights continued to exist, but were subject to the legislative regime and limited to domestic purposes.\textsuperscript{202}

\begin{itemize}
\item \textsuperscript{199} Control of Waters Act 1919 (SA) s 7.
\item \textsuperscript{200} Water Resources Act 1976 (SA) s 6. In addition, the Water Resources Act 1976 (SA) allowed for a similar use for domestic purposes for rivers that were defined as ‘proclaimed watercourses’ and therefore within the control of the statutory scheme: s 28.
\item \textsuperscript{201} Reid v Chapman (1984) 37 SASR 117. In this case the river in question was an ‘unproclaimed watercourse’ and as such was not the subject of regulation of the Water Resources Act 1976. As a consequence, the majority held that the vesting provision did not deprive the landowner on an unproclaimed watercourse of their riparian rights.
\item \textsuperscript{202} Water Resources Act 1990 (SA) ss 31 and 32. From a practical perspective, while the legislation declared the continued existence of riparian rights, the qualifications placed on that statement by the sub-sections that followed clearly limited the right. Sections 31 and 32 state:
\begin{enumerate}
\item The Minister may take water from any watercourse, lake or well notwithstanding that the right of any other person to take water from that or any other watercourse, lake or well is prejudicially affected.
\item The Minister must endeavour, as far as practicable, to avoid prejudicially affecting the right of a person to take water for domestic purposes or for the purposes of providing stock (other than stock for intensive farming) with drinking water.
\end{enumerate}
\item Riparian rights in respect of surface and underground water continue in existence but –
\begin{enumerate}
\item are subject to the right of the Minister to take such quantities of water as he or she thinks fit and to the right of any other person to take water pursuant to a water recovery licence; and
\end{enumerate}
\end{itemize}
However, more recent legislative developments in New South Wales, Victoria and South Australia have perhaps clarified the position. The legislation in New South Wales was again amended by the *Water Management Act 2000* (NSW), which maintained the position that the rights to the use of the water were vested in the State:

(1) For the purposes of this Act, the rights to the control, use and flow of:

(a) all water in rivers, lakes and aquifers, and

(b) all water conserved by any works that are under the control or management of the Minister, and

(c) all water occurring naturally on or below the surface of the ground,

are the *State’s water rights*.

(2) The State’s water rights are vested in the Crown, except to the extent to which they are divested from the Crown by or under this or any other Act.  

The *Water Management Act 2000* (NSW) went further to remove any doubt that the legislation abolished the common law riparian rights doctrine with respect to rivers controlled by the legislation:

Any right that the owner of riparian land would, but for this section, have at common law with respect to the flow of any river, estuary or lake through or past the land, or to the taking or using of water from any such river, estuary or lake, is hereby abolished.  

Similar express provisions can be found in the Victorian and South Australian legislation.

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(b) in the case of water taken from a proclaimed watercourse, lake or well, are limited to taking water for domestic purposes or to water stock kept on land adjacent to the watercourse, lake or well.


204 Ibid.

205 *Natural Resources Management Act 2004* (SA) s 124(8). Section 124(8) states: ‘Rights at common law in relation to the taking of naturally occurring water are abolished’; *Water Act 1989* (Vic) s 8(7). Section 8(7) states:  

The rights to water conferred by or under this Act on a person who has an interest in land replace any rights –

(a) to take or use water; or

(b) to obstruct or deflect the flow of water; or

(c) to affect the quality of any water; or

(d) to receive any particular flow of water; or

(e) to receive a flow of water of any particular quality—

that the person might otherwise have been able to enforce against the Crown or any other person because of, or as an incident to, that interest.

See also s 7 of the *Water Act 1989* (Vic), which continues the right of the Crown to the use, flow and control of water in waterways and groundwater. For the legislation predating the *Water Act 1989* (Vic) see: *Water Act 1928* (Vic) ss 4-7 and *Water Act 1958* (Vic) ss 4-7.
In summary, the early legislation regarding regulation of water was perhaps unclear as to whether by vesting the use and flow of rivers in the Crown such legislation also abolished riparian rights within the respective States. More recent legislation has removed that uncertainty by expressly stating the abolition of riparian rights.

5.4 Conclusion

In this chapter I have examined international law and the common law riparian rights doctrine to identify the key principles of water regulation in each body of law.

By examining the law that would be relied upon in the analogy arguments I have demonstrated that the arguments did not always accurately state the law from which the analogy was sought to be drawn. At international law, the principle of equitable and reasonable use has started to guide the sharing of water between nations along international transboundary rivers. However, that principle is not so widely accepted that it represents customary international law. Further, at the time that the analogy was made with international law to resolve disputes between the colonies, international law focused on disputes over navigation of international transboundary rivers. International legal norms to resolve non-navigational uses were yet to be developed at that time. I concluded in the first part of this chapter that international law will be of limited assistance in developing a solution to the transboundary river problem.

In the case of the riparian rights doctrine, the South Australian delegates characterised the doctrine as one centred on the concept of reasonableness. However, while ‘reasonableness’ played an important part in the doctrine, that characterisation failed to recognise that the common law riparian rights doctrine in Australia required the preservation of the natural flow of the stream. The doctrine proved largely unsuitable for the Australian conditions and, as a consequence, State Legislatures implemented licensing schemes that abolished the riparian rights doctrine in the vast majority of river systems. Of course, these legislative changes dealt with the intrastate rights to water, and did not deal with the issue of transboundary water allocation.

Emphasising the element of ‘reasonableness’ in the riparian rights doctrine and ignoring or downplaying the fact that the doctrine required the maintenance of the natural flow was an attempt by the South Australians to bring about a resolution between the colonies (and later States). The characterisation of the riparian rights doctrine as one based only on the
concept of reasonableness perhaps more accurately reflected the doctrine that was applied in many of the eastern States of the United States.

By examining the development of the common law in England and also in the United States I have shown that when courts have decided to develop the riparian rights doctrine it has often been in response to different local conditions and changes in water use. While the Australian courts have never been confronted with the question of deviating from the English common law, this analysis shows that should Australian courts be required to do so, it might be necessary to take into account environmental conditions and local water uses in developing the riparian rights doctrine in this country. As is explained in the next chapter, this issue becomes important in considering whether the common law may be developed to resolve transboundary river disputes.

The common law riparian rights doctrine deals with disputes between *individuals*. In contrast, this thesis is concerned with disputes between *States*. The critical issue to be examined is not whether the common law riparian rights doctrine can apply across State borders as between individuals from different States, as the rights of individual water users are governed by the internal water law (be it the common law or a statutory scheme) that operates *within* the particular State. Instead, the question to be considered in the following chapter is whether the riparian principles that previously applied to individuals can be developed in a manner to regulate disputes between States.

In Chapter 6 I turn to consider whether the riparian rights doctrine can be used to develop the common law to provide legal principles for resolving disputes between States over the allocation of water from transboundary rivers.
CHAPTER 6: THE DEVELOPMENT OF THE COMMON LAW

6.1 Introduction

In the introduction to this thesis I explained that the purpose of this enquiry was to find the best solution to a dispute between two States over the use of the waters from a transboundary river by one State to the detriment of another State (‘the transboundary river problem’). As I explained in Chapter 1, by ‘best solution’, I mean the approach that provides the most coherent legal solution that is consistent with existing legal doctrines. In identifying the ‘best solution’, I am seeking to anticipate how the High Court might approach the problem, based on the current state of the law. As I demonstrate in this chapter and the following chapter, there is no simple, perfect solution to the problem. Complex problems rarely have a perfect solution. Some of the postulated solutions to the transboundary river problem require jumps in legal reasoning that might be viewed from a theoretical perspective as unsatisfying, while other solutions might not produce the desired practical outcome from the perspective of one or more of the parties. The fact that there is no perfect solution to the problem is a function of the problem not being resolved at the time of drafting the Australian Constitution. There is no s 100A of the Constitution that defines the ‘rights’ of the States with respect to each other for the sharing of the waters from transboundary rivers.

In this chapter I analyse the arguments regarding the development of an ‘interstate common law’ to resolve the transboundary river problem. The first question for the High Court in resolving a transboundary river problem would be whether it has jurisdiction to hear and determine a dispute between States over the sharing of water from a transboundary river. The analysis of the jurisdiction question in this chapter reveals that the High Court will have jurisdiction so long as there are recognised principles of law upon which the problem can be resolved. Therefore, in this case, the threshold question of jurisdiction and the substantive legal question will be resolved together if there are principles of law capable of resolving the problem.

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1 See Chapter 1.5.
2 There is a degree of circularity in this question. It is, perhaps, the legal equivalent of the ‘chicken and the egg’ conundrum.
After examining the threshold question of jurisdiction, I turn to consider whether a solution can be found by developing the common law. In the early 20th century, the United States Supreme Court considered this very problem with respect to transboundary rivers in that country. The Supreme Court resolved the problem by creating a ‘federal common law’, which applied between the States of the United States. Examining the United States jurisprudence provides a useful case study of how a court could develop the common law. However, as I demonstrate in this chapter, any application of a similar doctrine in Australia must be examined in the context of the Australian Constitution.

In the 1970s, Ian Renard argued that an ‘interstate common law’ could be developed in Australia to resolve the transboundary river problem. Renard labelled the common law doctrine that he developed the ‘doctrine of reasonable sharing’. In this chapter I analyse the argument that was made by Renard in support of the development of an ‘interstate common law’. I show that a common law solution is problematic. One of the major limitations with developing a common law solution is that, depending on how the solution is framed, it potentially creates a body of common law that ‘trumps’ or limits State legislative power. It also raises a further difficulty: who can modify the interstate common law? I conclude that the development of an interstate common law does not provide the best solution to the transboundary river problem and is, accordingly, unlikely to be adopted by the High Court.

In Chapter 7, I propose what I consider to be the best solution to the problem. This approach is grounded in constitutional principles.

6.2 Does the High Court Have Jurisdiction?

Does the High Court have jurisdiction to resolve disputes between States and, if so, what are the limits of that jurisdiction? The mere fact that there is a dispute between States will not automatically bring the dispute within the jurisdiction of the High Court. The jurisdiction of the High Court is defined by Chapter III of the Constitution and the Court

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3 As has been suggested on a number of occasions in the past: see, eg, Isaac A Isaacs, Re Waters of the Murray River and its Tributaries and Interstate Rights to Divert Them (Opinion, 22 March ‘1906) (a copy of the legal opinion can be found in the South Australian Parliamentary Library); Ian A Renard, ‘The River Murray Question: Part III – New Doctrines for Old Problems’ (1972) 8 Melbourne University Law Review 625. While taking different approaches to developing the common law, both Isaacs and Renard have argued a solution to the transboundary river problem lies in the common law.
can only exercise judicial power. The judicial power of the Court is limited to the
determination of ‘matters’. The threshold question in this analysis is whether a dispute
involving the allocation of water between States from a transboundary river would
constitute ‘a matter’.

6.2.1 Establishing Jurisdiction: Is There a ‘Matter’?

Sections 75 and 76 of the Constitution define the original jurisdiction of the High Court. Of particular relevance to the resolution of transboundary river disputes is s 75(iv), which provides: ‘In all matters … between States … the High Court shall have original
jurisdiction’. In Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd Gummow J stated that there are three broad categories of ‘matters’:

The nine heads of ‘matter’ specified in ss 75 and 76 of the Constitution are identified (a) as to some (eg, s 75(ii), (iii), (iv)) by the identity of the parties not by the source of the
rights and liabilities in question or the remedy sought; (b) as to others (eg, ss 75(i), 76(ii),
(iii)) by the source of those rights and liabilities; or (c) by the nature of the remedy sought against a party who answers a particular description (as in s 75(v)).

Quick and Garran noted that the purpose of s 75(iv) was simply to grant the High Court jurisdiction in matters that involved parties from different States:

It is submitted that … this sub-section only confers a jurisdiction, and not a right of action
where no right of action existed before; that it does not extend the category of cases in

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4 R v Kirby; Ex parte Boilermakers Society of Australian (1956) 94 CLR 254, 271-2 (Dixon CJ,
McTiernam, Fullagar and Kitto JJ) (‘Boilermakers Case’).
5 Australian Constitution ss 75 and 76.
6 Section 75 states:
   In all matters:
   (i) arising under any treaty;
   (ii) affecting consuls or other representatives of other countries;
   (iii) in which the Commonwealth, or a person suing or being sued on behalf of the
   Commonwealth, is a party;
   (iv) between States, or between residents of different States, or between a State and a resident of
   another State;
   (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the
   Commonwealth;
the High Court shall have original jurisdiction.
Section 76 states:
The Parliament may make laws conferring original jurisdiction on the High Court in any matter:
(i) arising under this Constitution, or involving its interpretation;
(ii) arising under any laws made by the Parliament;
(iii) of Admiralty and maritime jurisdiction;
(iv) relating to the same subject-matter claimed under the laws of different States.
7 (2000) 200 CLR 591, 624 [86].
which a State, or a resident of a State, may be sued, but merely enables certain suits, which might otherwise have been brought in some other court, to be brought in the High Court.  

As a consequence, the ‘source of the rights and liabilities in question’ must be found elsewhere; that is, beyond s 75(iv). In this chapter I examine the argument that the common law can be developed to provide the source of these rights.

For there to be a ‘matter’ the controversy must be capable of a judicial – as opposed to a political – solution.  

James Stellios has identified a number of types of disputes that might fall into that category:

First, ... those constitutional questions that fall exclusively to Parliament, including those arising from s 53 of the Constitution or s 81 of the Constitution; or dealing with the privileges of Parliament. It also includes circumstances where the actions of the executive are considered to be beyond judicial competence.  

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8 John Quick and Robert Randolph Garran, The Annotated Constitution of the Australian Commonwealth (Angus & Robertson, 1901) 774. Section 75(iv) was inserted very late in the debate during the Melbourne Convention in 1898. The amendment was moved by Mr O’Connor of New South Wales. The purpose of the amendment was not to take jurisdiction away from the local courts within each State, but merely to allow a litigant also to commence an action in the High Court in the first instance: see Official Record of the Debates of the Australasian Federal Convention, Melbourne, 4 March 1898, 1894.

9 As Griffith CJ stated (at 674-5) in South Australia v Victoria (1911) 12 CLR 667 (‘Boundary Dispute Case’): ‘The jurisdiction of the High Court, if any, is judicial and not political. So far, therefore, as a controversy requires for its settlement the application of political as distinguished from judicial considerations, I think that it is not justiciable under the Constitution.’


Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law. The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government. The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people. The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications. Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

Section 81 of the Constitution establishes the Consolidated Revenue Fund. Section 81 provides:

All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the
Stellios gives *South Australia v Victoria* (‘Boundary Dispute Case’)\(^\text{11}\) as one example of executive actions that do not fall within the jurisdiction of the Court.\(^\text{12}\) In that case, a dispute over the location of the boundary between South Australia and Victoria could only be resolved by further agreement between the States or by the prerogative power of the sovereign. The *Boundary Dispute Case* is one of the few intergovernmental disputes between States that has been litigated before the High Court.\(^\text{13}\) Given the significance of the *Boundary Dispute Case*, it is worthwhile briefly considering the litigation and its impact on the threshold question of jurisdiction.

### 6.2.2 The South Australian-Victorian Boundary Dispute

The *Boundary Dispute Case* was heard by the High Court in 1911 and involved a long-running dispute between South Australia and Victoria as to the precise location of the border between the two States.\(^\text{14}\) South Australia contended that the boundary had been incorrectly marked and that the true boundary was about two miles east of the existing boundary.

The colony of South Australia was created by the *South Australia Act 1834* (Imp) 4 & 5 Wm 4, c 95 and the Letters Patent, which defined the boundary of the colony as:

> that part of Australia which lies between the Meridians of the one hundred and thirty second and one hundred and forty first Degrees of East Longitude and between the Southern Ocean and twenty six Degrees of South Latitude together with the Islands adjacent thereto consists of Waste and unoccupied Lands which are supposed to be fit for the purposes of Colonization.\(^\text{15}\)

In 1839 the Governor of New South Wales sent Mr Charles Tyers, a surveyor, to ascertain the precise location of the boundary between South Australia and the District of

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\(^\text{11}\) (1911) 12 CLR 667.  
\(^\text{12}\) Stellios, above n 10.  
\(^\text{13}\) The vast majority of the intergovernmental decisions of the High Court have involved the Commonwealth as a party to the proceedings.  
\(^\text{14}\) The case was appealed to the Privy Council and the appeal was dismissed: see *South Australia v Victoria* (1914) 18 CLR 115; [1914] AC 283.  
\(^\text{15}\) See *South Australia Act 1834* (Imp) 4 & 5 Wm 4, c 95 and the Letters Patent establishing the Province of South Australia (19 February 1836).
Port Phillip. Tyers went about determining the location of the boundary – the 141st meridian – which intersected the southern coast of Australia near the mouth of the Glenelg River. In 1847 Mr Wade, a surveyor, along with his assistant, Mr White, used Tyers’ earlier markings to measure the boundary for about 123 miles north from where the 141st meridian intersected the southern coast of Australia. That line was accepted by the Governments of both New South Wales and South Australia at the time to mark the border between the two colonies and proclaimed in the South Australian Government Gazette. In 1850 the District of Port Phillip became the colony of Victoria. In 1869 the Chief Secretary of South Australia wrote to his Victorian counterpart advising that the boundary marked in 1847 was about two miles to the west of the 141st meridian and suggesting that further measurements be taken to determine accurately the boundary between the two colonies. Needless to say, Victoria was not agreeable to a re-drawing of the boundary.

Over the next sixty years South Australia made a number of unsuccessful attempts to have the boundary moved east so that it was on the line of the 141st meridian as defined in the Imperial Statute and the Letters Patent. In 1876 South Australia drafted a petition to the Queen in Council. The matter went no further as the Colony of Victoria would not agree to the matter being put before the Queen in Council. In 1894 the Governor of South Australia requested that the Imperial Parliament pass legislation to resolve the matter. The Secretary of State for the Colonies would not agree to that course without the consent of Victoria. The Secretary of State suggested that the matter could be referred to the Judicial Committee of the Privy Council; however, this alternative would also require the consent of the Victorian Government. As I explained in Chapter 2, there was also some

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16 See Boundary Dispute Case (1911) 12 CLR 667, 679 (Griffith CJ). Griffith CJ’s judgment provides a detailed history of the dispute.
17 Tyers marked the 141st meridian with limestone blocks and placed a number of markers north and south of that point to denote the boundary between the colony of South Australia and the district of Port Phillip. Upon his return from the exhibition Tyers made further calculations to determine the position of the boundary: see ibid 680 (Griffith CJ).
18 Ibid 697 (Griffith CJ).
19 Australian Constitutions Act (Imp) 13 & 14 Vic, c 95. Prior to 1850 the Superintendent of the district of Port Phillip, Mr Latrobe, had been largely kept informed of the discussions between New South Wales and South Australia regarding the location of the boundary: see ibid 681-5 (Griffith CJ).
20 Boundary Dispute Case (1911) 12 CLR 667, 696 (Griffith CJ).
21 Ibid 697 (Griffith CJ).
22 Ibid 698 (Griffith CJ).
uncertainty as to whether the Judicial Committee of the Privy Council was acting in its judicial capacity in resolving these intercolonial disputes.\(^{23}\)

After Federation (and critically with the establishment of the High Court), South Australia now had a forum in which it could argue its case without the acquiescence of Victoria. The first question that the Court was faced with was whether the boundary dispute constituted a ‘matter’ for the purposes of determining whether the High Court had jurisdiction in accordance with Chapter III of the Constitution. Griffith CJ, with whom Barton J agreed,\(^{24}\) identified two requirements for a dispute between States to be justiciable:

> In my opinion a matter between States, in order to be justiciable, must be such that a controversy of a like nature could arise between individual persons, and must be such that it can be determined upon principles of law.\(^{25}\)

The other members of the Court agreed with Griffith CJ’s second requirement – that the dispute can be determined upon principles of law.\(^{26}\)

In the *Boundary Dispute Case* the High Court held that it had jurisdiction to the extent that it was necessary to determine whether the dispute was capable of judicial solution. As Isaacs J noted, ‘the Court has always jurisdiction to determine in the first place whether the standard is political or legal.’\(^{27}\) Where the Court determines that the dispute ‘can be determined upon principles of law’\(^{28}\) it will be necessary for the Court to go on and apply those principles.

\(^{23}\) See Chapter 2.4.3. However, whether exercising judicial capacity or not, from a practical perspective it would have been difficult for the Judicial Committee of the Privy Council to ignore an application where both colonies had requested the resolution of a dispute.

\(^{24}\) *Boundary Dispute Case* (1911) 12 CLR 667, 706.

\(^{25}\) Ibid 675.

\(^{26}\) O’Connor J stated (at 709) that, in determining whether a dispute between States was justiciable, it was necessary to consider whether the dispute was ‘capable of being determined on recognised legal principles’. O’Connor J held (at 710) that the determination of the boundary line between the two colonies was a matter of interpretation of the Imperial Statute, which was clearly a matter capable of determination by ‘recognised legal principles’. Isaacs J held (at 715) that the definition of ‘matter’ was limited to ‘claims resting upon an alleged violation of some positive law to which the parties are alike subject, and which therefore governs their relations, and constitutes the measure of their respective rights and duties’; it did not include political disputes between the States. As this dispute involved the interpretation of the Imperial Statute and the Letters Patent, Isaacs J stated (at 716) that the matter was, therefore, justiciable.

\(^{27}\) Ibid 721.

\(^{28}\) Ibid 675 (Griffith CJ).
In principle, boundary disputes could be justiciable. However, in that case the Court held that the agreement reached between the colonies in 1847 was political and therefore was beyond the jurisdiction of the High Court. Griffith CJ explained:

The plaintiff State [South Australia] had not, therefore, in 1869, or at any later time, any right to invoke the judicial power of the realm in order to revise the settlement of 1847. This Court, although it has jurisdiction to entertain the complaint in the present case, regarded as a complaint of invasion of territory, cannot give effect to any other than legal rights, and must give effect to the legal rights of the defendant State [Victoria]. It follows that, since the boundary of 1847 is valid until set aside by competent authority, and since the claim to have that boundary rectified is not a cause of action capable of judicial decision, the plaintiff State has no right of which this Court can take cognizance. The suit, therefore, fails and must be dismissed.29

Griffith CJ had reviewed carefully the facts of the case and noted that the process for defining the boundary had been agreed between the colonies:

It is sufficient ... that the Governors and the Secretary of State should have honestly adopted what they thought under all the circumstances of the case, of which they were better judges than we are, was the best course to adopt. That they did so is incontrovertible.30

Furthermore, there was no suggestion that the demarcation was to be temporary until a more accurate process was developed.31

6.2.3 An Analogy with the Rights of IndividualPersons

O’Connor and Isaacs JJ made no reference to Griffith CJ’s first requirement – that the controversy must be of a similar nature to a dispute that could arise between individuals. However, Higgins J appeared to agree with the Chief Justice’s analogy with a dispute between individuals. Higgins J noted that ‘under the Constitution, it is our duty to give relief between States in cases where, if the facts had occurred as between private persons, we could give relief on principles of law; but not otherwise.’32 The use of the phrase ‘under the Constitution’ by Higgins J might suggest that the analogy between interstate disputes and the rights of individual persons arises from the Constitution; however, his

29 Ibid 706.
30 Ibid 701.
31 Ibid 701 (Griffith CJ), 711-2 (O’Connor J), 725 (Isaacs J).
32 Ibid 742.
Honour did not explain where such a ‘duty’ is to be found. As I have explained above, s 75(iv) defines the scope of the High Court’s jurisdiction to include disputes between States, but does not create substantive ‘rights’ between States. It is not that the High Court’s jurisdiction must include the settlement of all interstate disputes that are similar to disputes between individuals for s 75(iv) to serve a purpose. There are other constitutional provisions, for example s 92, that could give rise to a ‘matter between States’ and would fall within the Court’s jurisdiction granted by s 75(iv).

Griffith CJ’s statement that a boundary dispute was analogous to an action between individuals regarding a trespass, equates private law proprietary rights with the sovereign ‘rights’ of a State. The requirement by Griffith CJ and Higgins J that an action between States must be similar to an action between individuals is open to question and has since been criticised by a number of legal scholars. Ian Renard explained the difficulty with Griffith CJ’s analogy in this way:

In *South Australia v Victoria*, the boundary dispute was characterized by analogy as an action in trespass but in fact the action was substantially different to a trespass suit between private litigants. For this action challenged the quasi-sovereign rights of Victoria to exercise territorial jurisdiction over a particular tract of land: ‘property’ rights are quite distinct from the territorial or ‘sovereignty’ rights of a State.

Furthermore, as Geoffrey Lindell has argued, it would be difficult to treat an action commenced by a State challenging the validity of legislation of either another State or the Commonwealth as similar to an action between individuals:

the formulation of the test of what constitutes a ‘matter’ in the terms suggested by Sir Samuel Griffith does not appear to be sufficiently comprehensive to explain the essentially governmental nature of the standing accorded to States for the purpose of challenging the validity of federal legislation. It is difficult to treat an action commenced

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33 Alternatively, Higgins J was merely acknowledging that the Court has a duty to determine a matter where the Court’s jurisdiction is properly engaged. If that is so, Higgins J provides no guidance as to why an analogy must be drawn between the ‘rights’ of States and those of private persons.

34 Ibid 675.

35 Ian Andrew Renard, *Australian Interstate Rivers – Legal Rights and Administration* (LLM Thesis, University of Melbourne, 1971) 129. As Renard has noted elsewhere, the requirement that the action between States be equivalent to an action between individuals ‘does not appear to have been borne out in the subsequent history of the Court’: see Renard, ‘The River Murray Question: Part III – New Doctrines for Old Problems’, above n 3, 637. The approach has also been questioned by Harrison Moore: see Sir W Harrison Moore, ‘The Federations and Suit Between Governments’ (1935) 17 *Journal of Comparative Legislation and International Law* 163, 172.
by an Attorney-General of a State for the purpose of challenging the validity of legislation enacted by the Commonwealth Parliament or indeed of a State Parliament as well, especially in circumstances where no individual would have the necessary standing to maintain such an action, as being a controversy of a like nature to that which could arise between ordinary individuals.\(^{36}\)

Lindell highlights that it is not possible to draw a simple analogy between every type of interstate action and the rights of individuals. There are some differences that make the use of the analogy inappropriate. Professor Enid Campbell has contended that, while some suits between governments are similar to ordinary suits between individuals or between the Crown and individuals, disputes over transboundary rivers ‘bear a much closer resemblance to disputes between sovereign states’.\(^{37}\)

Griffith CJ’s and Higgins J’s remarks must now also be read in light of Gummow J’s judgment in *Truth About Motorways*. In that case his Honour expressly recognised that actions between States are, by their very nature, different to actions between individuals:

> To some extent, for example, for matters arising under the Constitution or involving its interpretation (s 76(i)), and *actions between States (s 75(iv))*, the subject of the litigation has no counterpart in the private law rights and liabilities disputed in common law actions.\(^{38}\)

In light of that statement, the additional requirement of an analogy with a private right by Griffith CJ and Higgins J must be open to serious question. The analogy is unnecessary in light of the other requirement identified by the Court: there must be principles of law capable of determining the dispute. This is the real question.\(^ {39}\) In this chapter I demonstrate that in the context of the transboundary river problem, it is not possible to equate the rights of individuals with the ‘rights’ of the States. As I explain in this chapter and also in Chapter 7, a more logical approach is to examine the limits on State legislative and executive power.


\(^{38}\) *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 624 [87] (emphasis added).

\(^{39}\) In some circumstances equating the rights of individuals with those of the States might assist in the determination of the content of the principles of law applicable between the States. However, this will not be the case in all instances.
6.2.4 Summary

A dispute between States over the water from transboundary rivers will be justiciable, and therefore ‘a matter’, if the High Court determines that there are recognised principles of law governing such a dispute. Whether the High Court has jurisdiction over a transboundary river dispute will depend on the nature of the dispute and the law in question. If the dispute involves the interpretation of a section of the Constitution – such as s 92\textsuperscript{40} – then the High Court would clearly have jurisdiction over such a dispute.\textsuperscript{41} In these cases the Court would also have jurisdiction under s 76(i).\textsuperscript{42} While s 75(iv) does not create any substantive rights, there is an inter-relationship between the question of jurisdiction and substantive right: once the principles of substantive law are identified, the threshold question of jurisdiction is easily resolved.

In resolving a transboundary river dispute in the absence of an intergovernmental agreement, the critical question for the High Court is whether there are recognised principles of law capable of resolving the dispute. In this chapter I examine whether the common law can develop such principles. The challenge is determining when and to what extent the Court could develop the common law. While the Australian High Court is yet to confront these challenges in the context of a transboundary river dispute, similar issues have been litigated and resolved by the United States Supreme Court. Consequently, the United States jurisprudence dealing with the allocation of water between States through which a transboundary river flows provides an important case study of how a court can develop the common law to deal with new problems involving transboundary rivers.

\textsuperscript{40} The interpretation of s 92 could also be applicable in a dispute between States over water. In 2009, South Australia commenced proceedings against Victoria alleging that the Victorian water trading rules, which restricted the amount of water that could be traded outside of water districts, were an impermissible restriction on interstate trade and commerce, and therefore offended s 92 of the Constitution. The action settled: Government of South Australian and Government of Victoria, ‘Joint Statement from Victorian and South Australian Governments’ (Media Release, 14 June 2011) <http://www.water.vic.gov.au/__data/assets/pdf_file/0009/116568/110614-Joint-statement-from-Victorian-and-South-Australian-Governments.pdf>; Jason Murphy and Matthew Dunckley, ‘Constitutional Challenge off as SA and Vic Settle’, Australian Financial Review (Sydney), 15 June 2011, 8.

\textsuperscript{41} In the remainder of this chapter and in Chapter 7 the possible sources of substantive law governing disputes between States over water from interstate rivers will be considered.

\textsuperscript{42} Section 76(i) of the Constitution provides the Court with original jurisdiction over any ‘matter arising under this Constitution, or involving its interpretation.’ See also s 30 of the Judiciary Act 1903 (Cth), which confers that jurisdiction on the High Court. In the absence of s 30, a State could still rely on s 75(iv) of the Constitution.
At this point, a cautionary note must be raised. In examining the development of the law in the United States with a view to determining whether a similar approach can be adopted in Australia, regard must be had to the different constitutional settings in the two countries. It is not a matter of examining the position in the United States and attempting to apply the same (or similar) doctrines in Australia. Any development of the law in Australia must conform to the Australian Constitution.

### 6.3 The Development of a ‘Federal Common Law’ in the United States

#### 6.3.1 Introduction

In the United States of America, transboundary river disputes are resolved in one of three ways: by interstate compact (which also requires congressional approval);[^43] by congressional apportionment of the waters using the commerce clause in the United States Constitution;[^44] or by litigation before the United States Supreme Court.[^45] The third mechanism – litigation – has provided a method of resolution that requires neither cooperation between State Governments nor the approval of Congress. Unlike in Australia, there have been a number of occasions on which States of the United States have litigated in an attempt to resolve transboundary river disputes. In this section I examine the approach that the United States Supreme Court has developed to resolve transboundary river disputes with a view to considering whether a similar approach could be adopted by the High Court.

Earlier in this chapter I explained that the first question that the High Court will have to consider in resolving a transboundary river dispute in Australia is the threshold question of jurisdiction. Similarly, in the United States, the threshold legal issue that the Supreme

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[^43]: *United States Constitution* art 1 § 10. See, eg, *Colorado River Compact* (1922) between the States of Colorado, New Mexico, Utah, Wyoming, Nevada, Arizona and California and the *Red River Compact* (1978) between the States of Arkansas, Louisiana, Oklahoma and Texas. This is what we would describe in Australia as an ‘intergovernmental agreement’. For examples of Australian intergovernmental agreements see: *River Murray Waters Agreement* (9 September 1914) or *Intergovernmental Agreement on a National Water Initiative* (25 June 2004).

[^44]: *United States Constitution* art 1 § 8.

Court had to consider was whether the Court had jurisdiction over transboundary river disputes. The first part of this section examines briefly this preliminary issue.

After resolving the question of jurisdiction in the affirmative, the United States Supreme Court developed the common law to create a doctrine of ‘equitable apportionment’ to settle the substantive legal question – the allocation between States of the water from transboundary rivers – I explain the reasoning behind the development of the common law and the creation of the equitable apportionment doctrine. Important in this discussion are the fundamental principles upon which the Court’s decision is based; that is, the Court’s justification for the existence of an interstate water ‘right’. I explain that in the United States some concern has been expressed over the theoretical basis for developing the common law in this way.

The final part of this case study explains the factors that are taken into account when making an ‘equitable apportionment’ of the waters of transboundary rivers. I highlight the complexity of resolving transboundary river disputes by litigation and explain that there are a number of practical lessons that Australian States can take from the United States experience.

### 6.3.2 The Preliminary Jurisdiction Question in the United States

In the early 20th century, the State of Kansas commenced the first litigation in the United States between States over the allocation of waters from a transboundary river. The dispute involved the allocation of water from the Arkansas River between Kansas and Colorado. The Arkansas River is a tributary of the Mississippi River and its head waters are in eastern Colorado. From Colorado, the Arkansas River flows east through Kansas and then south through Oklahoma and Arkansas where it meets the Mississippi River.

Before 1885 very little water was extracted from the Arkansas River. However, in the last 15 years of the 19th century large scale irrigation works were established in Colorado. The increase in irrigation in the region corresponded to a rapid growth in population in eastern Colorado. In the region of eastern Colorado through which the Arkansas River flows the cultivation of crops without irrigation was more difficult due to differences in environmental and climatic conditions. In Colorado, ditches were used to divert water

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46 *Kansas v Colorado*, 206 US 46, 107-8 (1907) (*Kansas v Colorado (No 2)*).
from the River to irrigate surrounding land, and dams were put in place to capture the increase in water from the late-spring snow melt. From 1890 to 1900 the volume of water taken by Coloradan irrigators increased, increasing crop yields as a result. Kansas complained that Colorado was withholding water upstream and thereby diminishing the flow of the Arkansas River through its territory.

The case was first brought before the Court in 1902 after Colorado filed a demurrer in response to Kansas’ claim. Colorado’s initial claim was that the United States Supreme Court did not have jurisdiction to hear the matter because the dispute did not constitute a ‘controversy’ between the States and was therefore beyond the Court’s jurisdiction. Colorado sought to draw an analogy with nation states at international law. One of the arguments put forward by Colorado was, in short, that it was a ‘sovereign and independent State’ and, therefore, may ‘absolutely and wholly deprive Kansas and her citizens of any use of or share in the waters of that river.’ Colorado’s argument raised the question whether the Supreme Court had jurisdiction to resolve these disputes. To resolve the dispute, the Court first had to address this threshold issue.

The United States Constitution vests the Supreme Court with the judicial power of the United States, and art III § 2 expressly states that the judicial power of the Supreme Court ‘shall extend to all cases in law and equity, arising under this Constitution … to all controversies between two or more states’. Like s 75(iv) of the Australian Constitution,

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48 Ibid 108.
49 Ibid 106.
50 The United States Government Printing Office designates that natives of the State of Colorado should be described as ‘Coloradans’: United States Government Printing Office, Style Manual – An Official Guide to the Form and Style of Federal Government Printing (16 September 2008) <http://www.gpo.gov/fdsys/pkg/GPO-STYLEMANUAL-2008/content-detail.html>. However, that view is not universally accepted within the State of Colorado, with the most obvious exception being the local newspaper of Fort Collins, the Fort Collins Coloradoan: see Ed Quillen, ‘Coloradan or Coloradoan?’, The Denver Post (online), 18 March 2007 <http://www.denverpost.com/opinion/ci_5447358>.
51 Over the same period crop yields in Kansas decreased. The Court explained that this was not necessarily a consequence of Colorado taking more water; during this period Kansas had been through an economic depression and crop yields were down across the State (not just in the Arkansas River basin): Kansas v Colorado (No 2), 206 US 46, 112 (1907). Furthermore, Oklahoma, the State immediately to the south of Kansas, had been opened up to development in 1889 and had attracted a large number of migrants from Kansas: at 112-13.
52 The jurisdiction of the United States Supreme Court is limited to ‘controversies’: see United States Constitution art III § 2.
53 Kansas v Colorado, 185 US 125, 143 (1902) (‘Kansas v Colorado (No 1)’).
54 The case has been described as a ‘pioneer in its field’: Wyoming v Colorado, 259 US 419, 464 (1922).
55 Art III § 1 of the United States Constitution provides: ‘The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.’
art III § 2 grants the Supreme Court original jurisdiction to deal with interstate disputes without defining the substantive law to be applied in the resolution of the interstate dispute.\(^{56}\) The similarities between art III of the *United States Constitution* and Chapter III of the *Australian Constitution* are a function of the framers of the *Australian Constitution* drawing on the *United States Constitution* during the drafting process.\(^{57}\)

In *Kansas v Colorado (No 1)* Fuller CJ, writing the opinion for the Court, rejected the argument that the Supreme Court did not have jurisdiction and that the rights of the States were akin to nation states at international law. Fuller CJ explained there were some fundamental differences between States within the Union and nation states:

> The States of this Union cannot make war upon each other. They cannot ‘grant letters of marque and reprisal.’ They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties.\(^{58}\)

The demurrer was overruled and the Court held that it had jurisdiction to hear the dispute.\(^{59}\)

In 1906 the Supreme Court heard the substantive arguments of the parties. Justice Brewer, writing the opinion for the Court in *Kansas v Colorado (No 2)*, restated that the Court had jurisdiction to hear such disputes. He explained that the dispute between Kansas and Colorado was ‘clearly’ justiciable for ‘[t]he right to the flow of a stream was one recognized at common law, for a trespass upon which a cause of action existed.’\(^{60}\) In Australia, a similar approach of drawing an analogy with the rights of individuals at common law for the purposes of explaining the scope of the Australian High Court’s jurisdiction was also adopted by Griffith CJ and Higgins J in the *Boundary Dispute*

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\(^{56}\) The second paragraph of art III § 2 of the *United States Constitution* states: ‘In all cases... in which a state shall be party, the Supreme Court shall have original jurisdiction.’


\(^{58}\) *Kansas v Colorado (No 1)*, 185 US 125, 143 (1902). The Chief Justice drew a conclusion similar to the argument made by Inglis Clark in the Australian context: see Chapter 4.3.2.

\(^{59}\) Ibid 147.

\(^{60}\) *Kansas v Colorado (No 2)*, 206 US 46, 85 (1907). In *Missouri v Illinois*, 200 US 496 (1906) Holmes J explained (at 518) that the jurisdiction of the Court is ‘no longer in doubt’.

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However, as I explained earlier in this chapter, it seems unlikely that this analogy is still necessary to enliven the High Court’s jurisdiction.

6.3.3 The United States Supreme Court Develops a ‘Federal Common Law’

After accepting jurisdiction, the next task for the Supreme Court was to identify the principles on which the matter would be resolved. In *Kansas v Colorado (No 2)*, Justice Brewer, acknowledged the complexity of the transboundary river dispute, while at the same time recognising that from a practical perspective a solution to the conflict needed to be found:

Controversies between the States are becoming frequent, and in the rapidly changing conditions of life and business are likely to become still more so. Involving as they do the rights of political communities, which in many respects are sovereign and independent, they present not infrequently questions of far-reaching import and of exceeding difficulty.

The relative frequency of interstate disputes (or the belief that these disputes would become more frequent in the future) was given as a further reason for a solution to be found. Those concerns were well-founded as the Supreme Court has had to resolve a number of transboundary river disputes since the decision in *Kansas v Colorado (No 2)*.

In contrast, in Australia the High Court has had to resolve comparatively few cases solely between States (and not involving the Commonwealth), and no cases involving the sharing of water from transboundary rivers between States.

Justice Brewer referred to the position at international law as well as to the common law riparian rights doctrine. Taking a very practical view of the matter, Brewer J noted that ‘if the two States were absolutely independent nations [a transboundary river dispute] would

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61 Reference was made to *Kansas v Colorado (No 1)*, 185 US 125, 147 (1902) and *Kansas v Colorado (No 2)*, 206 US 46, 85 (1907) during argument before the High Court: see *Boundary Dispute Case* (1911) 12 CLR 667, 670 (Sir Josiah Symon KC), 672 (Mitchell KC) (during argument).

62 See Chapter 6.2.3.

63 *Kansas v Colorado (No 2)*, 206 US 46, 80 (1907).


65 Notable exceptions being, for example, the *Boundary Dispute Case* (1911) 12 CLR 667; *Tasmania v Commonwealth and Victoria* (1904) 1 CLR 329, although the latter case also involved the Commonwealth. In 2009 South Australia commenced legal proceedings against Victoria with respect to Victoria’s water trading rules, alleging that the rules offended s 92 of the *Constitution*: see above n 40.
be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court.\(^66\)

Justice Brewer also explained that the *United States Constitution* must be interpreted in the context of the common law. With respect to the riparian rights doctrine Justice Brewer explained:

> [Each state] may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. ... It is undoubtedly true that the early settlers brought to this country the common law of England, and that that common law throws light on the meaning and scope of the Constitution of the United States, and is also in many States expressly recognized as of controlling force in the absence of express statute.\(^67\)

Within each State different regulatory regimes applied; in Colorado the appropriation doctrine had existed ‘from the date of the earliest appropriations of water’,\(^68\) whereas in Kansas water regulation drew upon riparian rights principles.\(^69\) The Supreme Court held that neither State could attempt to impose its own regime on the other and, consequently, that the matter must be resolved by the Court.\(^70\) If a solution was to be found from within the common law, it was not to be found by simply applying the riparian rights doctrine as it applied in one State (in this case, Kansas) and attempting to apply it across State boundaries. The Court explained that this approach would have been inconsistent with the regime in Colorado.\(^71\)

The differences between the *intrastate* regimes did not preclude a separate set of common law principles operating as between States. Brewer J concluded that, despite the fact that there was no uniform common law across the United States – a point of difference with Australia\(^72\) – there must be an ‘*interstate common law*’\(^73\) – sometimes referred to as

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\(^66\) *Kansas v Colorado (No 2)*, 206 US 46, 98 (1907).

\(^67\) Ibid 94.

\(^68\) *Coffin v Left Hand Ditch Company*, 6 Colo 443, 449-50 (1882).

\(^69\) *Kansas v Colorado (No 2)*, 206 US 46, 95 (1907).

\(^70\) Ibid 95-6. Brewer J stated ‘Indeed, the disagreement, coupled with its effect upon a stream passing through the two States, makes a matter for investigation and determination by this court.’

\(^71\) Ibid.

\(^72\) There is ‘but one common law’ in Australia: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 (The Court).

\(^73\) *Kansas v Colorado (No 2)*, 206 US 46, 98 (1907).
‘federal common law’ – applicable to cases such as this. Brewer J first examined the nature of the common law and recognised that the development of any new common law doctrine must inevitably start with a single case. He explained that the common law does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes.

The declaration that each State had a ‘right’ to water was not something that could be done incrementally – there needed to be a ‘first statement’ declaring the existence of the right. Subsequent cases could then develop and refine the doctrine.

Another consideration in the Court’s decision was the fact that Congress was not in a position to resolve the dispute. Before determining whether the Court must resolve this dispute, Brewer J explained that while the ‘National Government’ was not ‘entirely powerless’ in these matters, Congress did not have express power to determine the rules by which water was to be shared between two States. As a result, this was not an instance where, if the Court declined to resolve the dispute, Congress could step in.

The common law was sufficiently flexible to be applied in the resolution of transboundary water disputes by the creation of an ‘interstate common law’. In developing principles by which transboundary river disputes could be resolved, the Supreme Court was not adapting existing common law riparian rights principles. Rather, it was developing a new body of law that could be applied to transboundary river disputes. The effect of the creation of an interstate common was to develop a separate body of common law principles that was protected from legislative amendment. In the following section I examine how the United States Supreme Court developed the doctrine in the constitutional context of that country.

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74 Colorado v New Mexico, 459 US 176, 183 (1982) (‘Colorado v New Mexico (No 1)’).
75 Kansas v Colorado (No 2), 206 US 46, 96-7 (1907).
76 Brewer J noted that there were certain circumstances in which the ‘National Government’ could acquire land and regulate the use of water on that land: ibid 92.
77 Ibid 95. See United States Constitution art I.
6.3.4 An Equality of Right between States

Brewer J gave two reasons for the need to create an interstate common law. First, the resolution of such disputes by force under the system of government established by the United States Constitution was not possible and ‘[t]he clear language of the Constitution vests in this court the power to settle those disputes.’ Second, the ‘cardinal rule’ was that of ‘equality of right’ between the States:

Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever … the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

‘Equality of right’ did not mean that each State was entitled to the same amount of water, but rather, as was explained in the later case of Wyoming v Colorado, there was to be an ‘equal level or plane on which all the States stand, in point of power and right, under our Constitutional system.’ By identifying these two principles the Court was taking into account not only the express provisions of the United States Constitution that granted the Court jurisdiction over interstate disputes, but also what it believed to be broader principles or assumptions underlying the Constitution. The notion that there is an ‘equality of right’ between States is not expressly provided for in the United States Constitution. However, the Court recognised that the Constitution not only created a new ‘political body’ but also changed the nature of sovereignty and the relationship between the States. The Court relied on these changes as an underlying principle rather than identifying specific constitutional provisions that supported the argument that there was an ‘equality of right’ between States.

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78 Ibid 97-8.
79 Ibid.
81 Ibid 465.
82 In Kansas v Colorado (No 2), 206 US 46 (1907) Brewer J cited (at 81) Dred Scott v Sandford, 60 US 393; 19 How 393, 441 (1857). In that case, Chief Justice Taney acknowledged that the adoption of the United States Constitution created a new ‘political body’ and also changed the nature of sovereignty within the nation.
One problem that this analysis faces is that by not delving into the detail of the *United States Constitution* to find a justification for the ‘equality of right’, the Court leaves open the question of why equality of right is to be the determining factor over other principles. The ‘changed nature of sovereignty within the nation’ could equally support the adoption of a different principle for the distribution of water. For example, the changed nature of sovereignty could support a principle that each State could not destroy or cause serious harm to another State. Such an approach would provide the Court with a more limited jurisdiction over transboundary river disputes and might not necessarily result each State receiving an equitable share. Such a principle would only assist in the most extreme situations.

Ultimately, the Court took the view that it was a matter of balancing the interests of the two States. In searching for a solution Brewer J stated that:

> We must consider the effect of what has been done upon the conditions in the respective States and so adjust the dispute upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream.\(^83\)

The Court in *Kansas v Colorado (No 2)* rejected the argument that Colorado, the upstream State, had the sovereign right to deplete the waters of the River as it saw fit. However, the Court held that while the water taken for irrigation in Colorado had caused some reduction to the flow of the Arkansas River, it did not call for the relief sought by Kansas:

> When we compare the amount of ... detriment [to Kansas] with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two States forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.\(^84\)

However, the Court warned that if Colorado were to increase the amount of water it took from the River, it would be open to Kansas to commence fresh proceedings.\(^85\) What the Court appeared to be doing here was balancing the respective detriments and benefits that

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\(^83\) *Kansas v Colorado (No 2)*, 206 US 46, 100 (1907).

\(^84\) Ibid 114.

\(^85\) In any subsequent proceedings it would then be for Kansas to show that the increase in water taken caused harm to the ‘substantial interests of Kansas’: ibid 118.
the existing allocation would cause. It appears to be an attempt to find some palatable middle-ground.

In the 1931 decision of *New Jersey v New York*, Holmes J explained that the rights of the ‘quasi-sovereignties bound together in the Union’ were similar to those of ‘independent sovereigns’.  However, there was an important difference between the States and sovereign nations: there were additional limits of the power of the State as a result of the *United States Constitution* and the federal system that it created. In this case, New York, the upstream State, sought to divert water from the Delaware River and its tributaries into the Hudson River. The riparian rights doctrine applied within both states and New Jersey, as the downstream State, claimed that same doctrine ought to apply *between* the States. Holmes J explained that resolving these interstate disputes required a balancing of the interests of the States:

> A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the waters within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of the lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be. The different traditions and practices in different parts of the country may lead to varying results, but the effort always is to secure an equitable apportionment without quibbling over formulas.

The Court allowed New York to divert the water from the Delaware River on the ground that it would not materially affect the flow or water quality. The decision turned largely on the facts of the case; determining whether the diversion by New York materially affected New Jersey was essentially a question of fact. More important than the precise result is the recognition by Holmes J of the importance of the Delaware River to both States. Holmes J explained that one State must not have the power to cause destruction to the other by cutting off all water. However, Holmes J did not explain why the water must be equitably apportioned to prevent such destruction; his Honour merely applied the

87 Ibid.
88 However, the State was restrained from taking more than that amount: ibid 346.
equitable apportionment doctrine as first explained in *Kansas v Colorado (No 2)*. There is a fundamental difference between preventing destruction to the downstream State and ensuring that the downstream State has an equitable share. Merely preventing destruction to the downstream State may allow an upstream State to retain a greater amount of water from the transboundary river. The reliance that each State placed on the waters also played an important part in the reasoning; like the reasoning of Brewer J in *Kansas v Colorado (No 2)*, Holmes J’s judgment arguably recognises the practicalities of the situation.

### 6.3.5 Factors Determining an Equitable Apportionment between States

After *Kansas v Colorado (No 2)*, the United States Supreme Court spent the next 40 years developing the principles by which transboundary river disputes were to be decided.\(^{89}\) The equitable apportionment doctrine has been described by the Court as a ‘flexible doctrine’\(^{90}\) that requires the balancing of a number of competing factors in an attempt to secure a ‘just and equitable’ allocation between the States.\(^{91}\) One of the benefits of the flexibility of the common law is its ability to adapt to new factual situations as they arise. In *Nebraska v Wyoming* the Court summarised the factors to be taken into account in allocating water from transboundary rivers. The list of factors included:

- physical and climatic conditions,
- the consumptive use of water in the several sections of the river,
- the character and rate of return flows,
- the extent of established uses,
- the availability of storage water,
- the practical effect of wasteful uses on downstream areas, [and]
- the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.\(^{92}\)

The Court has also recognised that in some circumstances it may be relevant to consider proposed *future* uses as well as *current* water uses.\(^{93}\) The factors of relevance will depend

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89 For an overview of the develops of the law see: Tarlock, ‘The Law of Equitable Apportionment Revisited, Updated and Restated’, above n 64.

90 *Colorado v New Mexico (No 1)*, 459 US 176, 183 (1982).

91 *Nebraska v Wyoming*, 325 US 589, 618 (1945).


93 *Colorado v New Mexico (No 1)*, 459 US 176, 183 (1982).
on the facts of each case. As a consequence, the relative weight that the Court gives to each factor will vary from case to case.

How the river is regulated within each State may also be a relevant factor, although it is unlikely to be the determining factor. In *Nebraska v Wyoming* it was explained that, where both States apply the prior appropriation doctrine, ‘priority becomes the “guiding principle” in an allocation between competing States.’ In the case of *New Jersey v New York*, the Supreme Court had regard to the fact that both States were ‘riparian States’. However, even in circumstances where both States apply the same principles in *intrastate* water regulation, the Supreme Court will not strictly apply that doctrine. Instead, as American legal scholar, Dan Tarlock, has explained, the Supreme Court will ‘rub off its rough edges in situations where substantial prejudice to another State would result from the application of a local law, even if both states follow the same rule.’ Ultimately, the driving principle behind balancing the different interests of the States remains an attempt to ensure ‘equality of right’ between States and this principle is independent of the internal water regulatory regimes within States.

More recently, the Court has held that efficiency of use is also to be taken into account. In 1982, in the case of *Colorado v New Mexico (No 1)* Marshall J, delivering the opinion of the Court, explained:

> Wasteful or inefficient uses will not be protected. Similarly, concededly senior water rights will be deemed forfeited or substantially diminished where the rights have not been exercised or asserted with reasonable diligence. ... We have invoked equitable apportionment not only to require the reasonable efficient use of water, but also to impose on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream.

Marshall J explained that in taking the water it was necessary for Colorado to have ‘undertaken reasonable steps to minimize the amount of diversion that will be required’

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94 Ibid 188.
97 By ‘riparian States’ I mean States in which the *intrastate* water rights largely followed the riparian rights doctrine as opposed to the doctrine of prior appropriation.
100 *Colorado v New Mexico (No 1)*, 459 US 176, 184-5 (1982).
and that it was also necessary to take into account whether there were any steps that New Mexico could take to conserve water and offset Colorado’s proposed diversion.\textsuperscript{101}

The process that underpins the equitable apportionment decisions is the balancing of the harms and benefits that each State has incurred (or will incur in the future)\textsuperscript{102} as a result of a particular allocation of water from a transboundary river. For example, in \textit{Kansas v Colorado (No 2)} the Court acknowledged that Colorado’s diversion would harm water users in Kansas, but declined to grant relief on the basis that the diversion was of greater benefit in Colorado than the detriment it caused in Kansas.\textsuperscript{103}

While some general principles can be set down to guide this process, each case will turn on the individual circumstances of the dispute. As a consequence, the quality and detail of the evidence before the Court will play an important part in the process. While the Court has set out only broad principles by which these disputes will be resolved, the fact that it has not been overly prescriptive in developing the doctrine may be a strength from a practical perspective. The doctrine provides the Supreme Court with a degree of flexibility in dealing with cases where each set of facts is not only complex, but also unique.

\subsection*{6.3.6 The Complexities of Transboundary Disputes}

Unsurprisingly, the evidence in a transboundary river dispute can be lengthy and complex. Consequently, the Supreme Court does not hear the fact-heavy evidence, but instead appoints a Special Master to hear the case and make findings and a final recommendation. The Special Master will usually be a lawyer, academic or judge with significant expertise in water law.\textsuperscript{104} The Master’s report is filed with the Court and the decision of the Special Master is then reviewed by the Court. It is then for the Court to

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{101} Ibid 186. In the Australian context, it is often claimed by South Australian irrigators that they have had to become more efficient in their use of water because of the upstream users taking too much water. If this claim can be substantiated, it would be one factor that South Australia would want taken into account if an Australian court is to determine the allocation of water between States from a transboundary river.
\item\textsuperscript{102} See, eg, \textit{Colorado v New Mexico (No 1)}, 459 US 176, 190 (1982); \textit{Nebraska v Wyoming}, 325 US 589, 609 (1945).
\item\textsuperscript{103} \textit{Kansas v Colorado (No 2)}, 206 US 46, 100-1, 113-4 (1907).
\item\textsuperscript{104} The process for appointing a Special Master is dealt with in \textit{Federal Rules of Civil Procedure} r 53, which apply by virtue of r 17(2) of the \textit{Supreme Court Rules}. For the procedures regarding the appointment of a Special Master see Joseph F Zimmerman, \textit{Interstate Disputes – The Supreme Court’s Original Jurisdiction} (State University of New York Press, 2006) ch 3.
\end{enumerate}
\end{footnotesize}
determine whether it will approve the decision of the Master and the Court is not bound by the Master’s decision.\textsuperscript{105}

The hearings can involve hundreds of documents and thousands of pages of testimony from experts. For example, in \textit{Arizona v California} the trial before the Special Master lasted for just over two years; the evidence of 340 witnesses was put before the Master; thousands of exhibits were tendered; and the transcript of the proceedings was over 25,000 pages. The report of the Special Master was over 400 pages.\textsuperscript{106}

In \textit{Kansas v Colorado (No 2)} extensive evidence regarding water use in both Colorado and Kansas in the 20-year period prior to the hearing was put before the Court. The evidence included 8559 pages of testimony from 347 witnesses and 122 exhibits.\textsuperscript{107}

The resolution of interstate water disputes in the United States is thus complex. While the Supreme Court has provided an extensive list of the factors to be taken into account, providing evidence of these issues is more difficult. For example, providing the Court with sufficient information to understand the existing water uses along a transboundary river within each State is no simple task. The other challenge for the Court (and the Master) is determining the relative weight to be given to each factor.

The complexities of the transboundary river disputes has resulted in litigation that has dragged on for many years. The Supreme Court has even opined that resolution of these disputes by agreement might be preferable to litigation.\textsuperscript{108}

\textbf{6.3.7 Commentary on the Equitable Apportionment Doctrine}

Justice Brewer’s decision in \textit{Kansas v Colorado (No 2)} was a significant development in the common law in the United States. However, understanding the basis for the decision is difficult. As Dan Tarlock explained:

\textit{The opinion [of Justice Brewer] does not positively identify the source of the legal rules governing interstate resource disputes. When one probes the basis of the decision, a mass of contradictory principles and doctrines emerges.}\textsuperscript{109}

\textsuperscript{105} The Master’s decision will ordinarily be approved by the Court, but can be varied: see, eg, \textit{New Jersey v New York}, 283 US 336, 345-8 (1931). For some discussion of how the Court varied the Master’s decision see: Tarlock, ‘The Law of Equitable Apportionment Revisited, Updated and Restated’, above n 64, 397.

\textsuperscript{106} \textit{Arizona v California}, 373 US 546, 551 (1963).

\textsuperscript{107} \textit{Kansas v Colorado (No 2)}, 206 US 46, 105-6 (1907).

\textsuperscript{108} \textit{Colorado v Kansas}, 320 US 383, 392 (1943).
While conceding that the United States Supreme Court ‘has never been very precise about the source of the law of equitable apportionment’, Tarlock sought to explain the basis for the equitable apportionment doctrine as a necessary corollary of the grant of jurisdiction; without it, ‘one state could use its law to gain an unfair advantage over another.’ However, what constitutes unfairness depends upon the principles employed to assess the conduct of the States. For example, if the Court was to adopt a doctrine of prior appropriation to resolve transboundary river disputes there may be no ‘unfairness’ in an upstream State retaining significant amounts of water if they had done so before the downstream State.

The difficulty with the approach that the United States Supreme Court has taken is that the Court has failed to explain from where the principle of equality between States is derived, beyond a general notion that federalism arguably encapsulates an equality between States. While Brewer J first explained that art III § 2 of the United States Constitution granted the Court jurisdiction over interstate disputes, no further reference is made to the text or structure of the Constitution to support the ‘cardinal rule’ that there exists an ‘equality of right’ between the States. If this principle is implicit from the Constitution, the basis for such an implication is not fully articulated. The argument is made at a high level of generality without descending into the specific provisions of the Constitution that may support the principle. As I explain later in this chapter, in Australia, the foundation for the principle of equality between States is important because the source of the principle may dictate the nature of the right. One question that must be examined in the Australian context is whether a similar principle can be supported at such a high level of generality and without the support of specific constitutional provisions.

While Brewer J stated that the common law ‘throws light’ on the United States Constitution, precisely how it does so is less clear from the judgment. The Supreme Court drew upon the fact that the United States Constitution granted jurisdiction to the Court in interstate disputes, the notion of equality between States and the flexibility of the common law to create a new body of law. In these circumstances, perhaps this is in fact

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110 Ibid, 394.
111 Ibid. Primarily, that will be the upstream State preventing water from flowing into the downstream States.
112 Kansas v Colorado (No 2), 206 US 46, 97 (1907).
113 Ibid 94.
an instance of the *Constitution* ‘throwing light’ on the development of the common law as opposed to the other way around. If that is so, it raises the question of whether the development of the common law is in fact based upon a constitutional implication. As I explain later in this chapter, if an approach that relies upon the common law is to be adopted in Australia – and I conclude that this is not the best solution – understanding the interaction between the *Australian Constitution* and the common law is an important aspect of resolving the dispute in this country.

The creation of the equitable apportionment must be situated in the context of the Supreme Court’s earlier decisions. The timing of the decision was important in the development of the equitable apportionment doctrine. At the time of the decision in *Kansas v Colorado (No 2)*, the Supreme Court had accepted the proposition that there was a common law separate from the common law of each of the respective States that could be applied by the federal courts.\(^\text{114}\) While the notion of a general federal common law was rejected subsequently by the Court,\(^\text{115}\) the principle that the common law can be used to resolve interstate disputes over matters such as transboundary rivers and boundaries has not been questioned.\(^\text{116}\)

The effect of the approach taken by the Supreme Court in the United States was to develop a separate body of common law principles that was protected from legislative amendment. While States were free to enter into intergovernmental agreements with respect to the allocation of water between the States, the equitable apportionment doctrine would operate in the absence of an agreement and could not be abolished. The effect of the equitable apportionment doctrine is to create an aspect of the common law that limits State legislative power and cannot be modified by the States. It appears – although it is not expressly stated – that the *United States Constitution* protected the common law, as for the common law doctrine to be effective it needed to be protected from modification by the States.\(^\text{117}\) One of the important issues that must be determined in the Australian context is whether an ‘interstate common law’ could be developed that, in effect, ‘trumps’

\(^{114}\) *Swift v Tyson*, 41 US 1 (1842).
\(^{115}\) *Erie Railroad Co v Tompkins*, 304 US 64 (1938).
\(^{117}\) See above Chapter 6.3.3 (and especially at n 66-70).
State legislative power. How such a doctrine would sit within the Australian constitutional landscape is yet to be fully explained.

In summary, an examination of the United States jurisprudence shows that the Supreme Court in that country developed a solution to transboundary rivers disputes between States based upon a principle of equality, providing a case study of one approach that the High Court could take to resolve the transboundary river problem in Australia. However, how such an approach might fit within the existing Australian legal framework requires further and close attention and will be examined in this chapter. Faced with no easy or express solution within the United States Constitution the Supreme Court took a practical approach to develop the common law in a way that provided a mechanism for the resolution of transboundary river disputes between States. The United States Constitution and the federal system of government that it created was influential in the development of the ‘federal common law’, although this aspect of the reasoning is not clearly developed. In the period immediately after Federation in Australia, the United States experience might well have been influential in any High Court decision. While it could still provide some guidance to the High Court, the Court will now be influenced primarily by the jurisprudence that it has developed over the last 100 years.

6.4 An ‘Interstate Common Law’ in Australia?

6.4.1 Courts Developing the Common Law

The common law is constantly being applied to new factual situations. Each set of factual circumstances will be unique and, in a sense, each time the common law is applied to a new set of facts the law is slowly being developed. Where the facts of the case before a court are similar to previous actions the application of the common law to the present facts is not a difficult task. However, the more difficult situation arises where the dispute before a court is distinct from previous decisions and a court is being asked to develop the common law in uncharted territory. Modifying the common law in such a case is more difficult as there is less to guide a court’s reasoning.

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118 Australians were certainly aware of the United States Supreme Court decisions: see Chapter 4.3 and 4.5.
Identifying exactly when a court will develop the common law is difficult. As Lord Walker candidly acknowledged, ‘[a] lot seems to depend on judicial intuition’. 119 However, that is not to say that judges have made no attempt to identify the principles that may guide the development of the common law. Justice Oliver Wendell Holmes in Southern Pacific Co v Jensen explained the process in this way:

I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, ‘I think the doctrine of consideration a bit of a historical nonsense and shall not enforce it in my court.’ 120

O W Holmes J’s declaration that judges ‘legislate’ must be read in the context of the rest of that sentence: judges do make law; however, these developments will be in small, incremental steps to fill any lacuna in the law. It is, as Mason J described it in Australian Conservation Foundation Inc v Commonwealth, an ‘evolutionary and continuing process’. 121

One of the virtues of the common law is its flexibility to respond to new circumstances that might not have been previously envisioned in earlier cases. Sir Owen Dixon explained that the judicial method allowed for the development of the common law in a logical way by examining the existing fundamental principles of a particular aspect of the law and applying it to new circumstances:

it is an error, if it is believed that the technique of the common law cannot meet the demands which changing conceptions of justice and convenience make. The demands made in the name of justice must not be arbitrary or fanciful. They must proceed, not from political or sociological propensities, but from deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice. Impatience at the pace with which legal developments proceed must be restrained because of graver issues. For if the alternative to the judicial administration of the law according to a received technique and by the use of the logical facilities is the abrupt change of conceptions according to personal standards or theories of justice and convenience which the judge

120 Southern Pacific Co v Jensen, 244 US 205, 221 (1917)
121 Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493, 552.
sets up, then the Anglo-American system would seem to be placed at risk. The better judges would be set adrift with neither moorings nor chart.122

Dixon’s statement is a cautionary note that the common law must be developed in a logical manner.123

In OBG Ltd v Allan Baroness Hale explained the ability of the common law to adapt in the following way:

The great strength of the common law is that the judges are free to develop it on a case by case basis as new factual situations arise. There comes a point when, as Scrutton LJ once said, ‘If there is no authority for this it is time that we made one’. … But on what basis do the judges decide to make authority where there was none before? Or to modify or adapt such authority as there is? There is no easy answer to this. Whatever we do must be consistent with the underlying principles and policy of the law. It must not overstep that indefinable line between the development and elaboration of existing principles and the making of brand new law which is unquestionably the province of Parliament. It must work with, rather than against, the grain of legal policy. It must go forward when the law is going forward and draw back when the law is drawing back.124

Critical here is that the development of the common law must be consistent with the existing legal principles. In addition, as Lord Walker has explained, developments in the law that have ‘large social and economic consequences’ are usually best left to Parliament.125


123 The common law develops incrementally as new cases come before the court. In PGA v The Queen (2012) 245 CLR 355, quoting from Sir Owen Dixon’s address ‘Concerning Judicial Method’, above n 122, the majority (at 373) noted that the development of the common law included: ‘extending “the application of accepted principles to new cases”; (ii) reasoning “from the more fundamental of settled legal principles to new conclusions”; and (iii) deciding “that a category is not closed against unforeseen instances which in reason might be subsumed thereunder”.’ Each case requires the court to apply the law to a new set of facts and to develop and refine the law. Critical to this process is the court explaining the fundamental principles upon which they embark on the development of the law.

124 OBG Ltd v Allan [2008] 1 AC 1, 86 [305] (citations omitted).

125 Walker, above n 119, 250.
There might be occasions when Parliament declines to act or is unable to act and in these circumstances the Court is left to develop the law as best it can. In this respect, a dispute between States over the sharing of water from a transboundary river is unique. As I explained in Chapter 3, while the Commonwealth Parliament has power to make laws with respect to interstate trade and commerce, which may include river navigation, the Constitution does not expressly provide the Commonwealth with the power to define the share of the water that each State shall receive from a transboundary river. Furthermore, while developing the common law to resolve a transboundary river dispute would have ‘large social and economic consequences’, there will be significant social and economic consequences no matter what the Court decides. The critical factor in a transboundary river dispute is not the consequences, but the fact that there may be no other body to resolve the dispute. The recurring question since Federation has been: if not the High Court, who is to resolve the transboundary river problem?

Perhaps the attraction to the common law in finding a solution to the transboundary river problem was the flexibility it provides the Court in drafting a solution. One can especially see the appeal of using the common law as the foundation to a solution to the problem in the period immediately after Federation in circumstances when the High Court was yet to develop a body of constitutional jurisprudence.

While the ability of the common law to develop to find solutions to new problems is one of its defining attributes, its development must also have regard to the constitutional setting within which it operates. In developing a common law solution to the transboundary river problem in Australia, the United States jurisprudence demonstrates the importance of situating any ‘federal common law’ or ‘interstate common law’ within

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126 This may be because, for example, of a lack of consensus or because the development might be seen as a ‘vote-loser’: see Walker, above n 119, 250-1. For discussion of the role of the courts in developing the law see generally: Lord Reid, ‘The Judge as Law Maker’ (1972) 12 Society of Public Teachers of Law 22; Sir Anthony Mason, ‘The Judge as Law-maker’ (1996) 3 James Cook University Law Review 1; Sir Anthony Mason, ‘The Use and Abuse of Precedent’ (1988) 4 Australian Bar Review 93.

127 Granting the Commonwealth power to determine the share of water as between the States was expressly rejected during the Convention debates: Chapter 3.2. I consider later in this Chapter whether the ‘nationhood’ power provides the Commonwealth with the ability to modify an ‘interstate common law’: see Chapter 6.4.5.

128 Declining to develop the law could equally have the same consequences. For example, suppose New South Wales held back a large volume of the water from the River Murray. Declining to develop the common law in these circumstances could have significant social and economic consequences for South Australia.
the constitutional setting. It is well established that the common law will inform constitutional interpretation. However, it is the converse – the influence that the Constitution has on the development of the common law – that is most relevant to the present problem.

The interaction between the Constitution and the common law was considered by the High Court in Lange v Australian Broadcasting Corporation. In Lange, the question for consideration was whether the common law defamation defence of qualified privilege could be diminished or abolished such that it would not protect what the Court had identified in the text and structure of the Constitution as an implied freedom of political communication. Four important principles emerge from that case. First, the Court stated that the interpretation of the common law must be consistent with the text of the Constitution. Secondly, the Court noted that since 1901 there had been only one common law of Australia. This position can be contrasted with the United States where the common law of each State in the United States is unique. Despite that fact, and largely for practical reasons, the United States Supreme Court developed a ‘federal common law’ to resolve transboundary river disputes. Thirdly, the common law may respond to changing conditions. Fourthly, the common law operates within a federal

129 As Sir Owen Dixon explained: ‘In the working of our Australian system of Government we are able to avail ourselves of the common law as a jurisprudence antecedently existing into which our system came and in which it operates’. Sir Owen Dixon, ‘The Common Law as an Ultimate Constitutional Foundation’ (1957) 31 Australian Law Journal 240, 240. The Constitution must be interpreted in the context of the ‘whole law’, which includes the common law: ‘To me the lesson of all this appears to be that constitutional questions should be considered and resolved in the context of the whole law, of which the common law, including in that expression the doctrines of equity, forms not the least essential part.’ See also Sir Owen Dixon, ‘The Common Law as an Ultimate Constitutional Foundation’ in Severin Woinarski (ed), Jesting Pilate – And Other Papers and Addresses (Lawbook, 1965).

130 (1997) 189 CLR 520.

131 The Court went on to consider whether s 22 of the Defamation Act 1974 (NSW) abolished or diminished the common law defence of qualified privilege: ibid 566, 569-75.

132 The Court explained: ‘Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives. The common law and the requirements of the Constitution cannot be at odds’: Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 566.

133 The Court stated: ‘There is but one common law in Australia which is declared by this Court as the final court of appeal, ... [T]he common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to difference authoritative interpretations’: Ibid 563.

134 See Chapter 6.3.7. While not expressly stated, the relationship between the United States Constitution and the common law of the States in that country was important in the development of the equitable apportionment doctrine: Chapter 6.3.3 and 6.3.7.

135 See Chapter 6.3.3

136 The Court explained this in the following way:
The first of these factors – that the common law must conform to the Constitution – was a critical factor in the Court developing the implied freedom of political communication.

In *Lange* the Court examined the text of the *Constitution* to show that the document established a system of representative and responsible government in Australia. The Court concluded that the implied freedom of political communication was an ‘indispensable incident’ of and ‘central to’ the principle of representative government, which is established by the text of the *Constitution*. The effect of the decision was that the implication derived from the *Constitution* placed a limitation on the common law. The common law doctrine of qualified privilege had to be consistent with the implied freedom of political communication. Similarly, the legislation of the Commonwealth and the States must also conform to the implied freedom. The Court in *Lange* was not creating a ‘constitutional defence’ which could be derived from the document itself, but it was instead explaining how the common law must conform to the *Constitution*.

Since 1901, the common law – now the common law of Australia – has had to be developed in response to changing conditions. The expansion of the franchise, the increase in literacy, the growth of modern political structures operating at both federal and State levels and the modern development in mass communications, especially the electronic media, now demand the striking of a different balance from that which was struck in 1901.


The Court stated: ‘that one common law operates in the federal system established by the Constitution. ... The Constitution, the federal, state and territorial law and the common law of Australia together constitute the law of this country and form “one system of jurisprudence”: ibid 563-4. See also *R v Kirby; Ex Parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 267-8 (“Boilermakers’ Case”).

*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 558. The Court noted that ‘[t]he effect of ss 1, 7, 8, 13, 24, 25, 28 and 30 therefore is to ensure that the Parliament of the Commonwealth will be representative of the people of the Commonwealth’: at 558. The Court also made reference to ss 6, 83, 62, 64, 49, 128 in showing that ‘other sections of the Constitution establish a formal relationship between the Executive Government and the Parliament and provide for a system of responsible ministerial government’: at 558-9.

Ibid 559.

Ibid 560.

The Court stated that ‘the common law may be developed to confer a ... privilege in terms broader than those which conform to the constitutionally required freedom, but those terms cannot be any narrower’: ibid 566.

The Court held that ‘Laws made by Commonwealth or State Parliaments or legislatures of self-governing territories cannot derogate from the common law to produce a result which diminishes the extent of the immunity conferred by the Constitution’: ibid.

Ibid 570. In explaining the modification of the common law in Australia, the High Court stated:

The common law doctrine as expounded in Australia must now be seen as imposing an unreasonable restraint on that freedom of communication, especially communication concerning government and political matters, which ‘the common convenience and welfare of society’ now
As I explain in the following sections, in proposing a common law solution to the transboundary river problem, regard has not always been had to the Constitution. I evaluate whether the proposed interstate common law solution is consistent with the Constitution.

6.4.2 Ian Renard’s ‘Interstate Common Law’

In 1971, Ian Renard, in a thesis submitted for the degree of Masters of Law at the University of Melbourne, examined the legal ‘rights’ associated with the waters of transboundary rivers in Australia.\textsuperscript{144} Renard’s thesis and associated publications\textsuperscript{145} were the first detailed consideration given to the issue of allocating water from transboundary rivers between States.\textsuperscript{146} He argued that as Imperial, Commonwealth and State legislation did not resolve the problem, it was for the common law to develop a solution as to how to share between States the water from transboundary rivers. Renard labelled his approach the ‘doctrine of reasonable sharing’. After setting out the doctrine and explaining its foundation, I critique the approach and identify its limitations. The primary difficulty with the approach developed by Renard is that it fails to explain adequately how the common law can be used to place a limit on State legislative and executive power.

The critique of Renard’s approach is informed by an additional 40 years of constitutional jurisprudence. As a consequence, the criticisms that are made of Renard’s work are largely a product of the more recent developments in Australian constitutional law; specifically, the High Court’s description of the interaction between the Constitution and the common law and the explanation of a number of implications that can be drawn from

\textsuperscript{144} Renard, \textit{Australian Interstate Rivers – Legal Rights and Administration}, above n 35.


the text and structure of the *Constitution*. Renard’s work was an important contribution to the academic literature and obviously did not have the benefit that this thesis has of the more recent shifts in constitutional doctrine.

Renard explained that in a transboundary river dispute the High Court would be faced with two alternatives: either accept that there is a lacuna in the law or develop a new body of common law to resolve these disputes. This starting premise is open to question: the ‘gap’ exists only because the Court is yet to pronounce on how to determine the resolution of such disputes; the gap will be closed (irrespective of the doctrine developed by the Court) once the Court has determined the principles upon which such disputes are to be resolved. Further, whether there is a ‘gap’ depends upon how the problem is framed. If one contends – as Renard does – that each State is entitled to a share of the water from a transboundary river then, as the law currently stands, there is no law dealing with how to share the water and, in that sense, there is a ‘gap’. However, if it is reasoned that there are no limits on the legislative power of an upstream State, then there is no ‘gap’ in the law; the upstream State is able to regulate the waters of the transboundary river within its territory as it sees fit and the downstream State is entitled to whatever water (if any) remains. Renard’s argument that there is a ‘lacuna’ in the law is a function of the assumptions upon which his analysis is based. In this section I analyse those assumptions.

Renard rejected the argument that a direct analogy could be drawn between the ‘rights’ of the States with respect to transboundary rivers and the riparian rights doctrine. He explained:

> The existing common law, however, has set up a barrier against substantial diminution or alteration in the flow, independent of the reasonableness of that use, and this rule renders the doctrine quite inappropriate to inter-State river management.147

In Chapter 5, I reached the same conclusion.148 While Renard concluded that the riparian rights doctrine was unsuitable to resolve the transboundary river problem, he argued that a solution could still be founded in the common law. He labelled that solution the ‘doctrine of reasonable sharing’, which he described in the following way:

> [The doctrine] is based on the assumption that the flow in an interstate river is not the sole preserve of the State through which, at any given time, it passes, but must be shared

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148 Chapter 5.4.
between all riparian States. The proportion of water which may be shared is determined upon what, in the light of the facts, is reasonable. Similarly, it is assumed that some pollutants will inevitably find their way into an interstate river, and a State can neither be allowed to pollute at will, nor be held liable if even a minimal degree of pollution (be it bacteria, salinity or solids) reaches the watercourse. Some middle ground between these two extremes must be found, and again a test of reasonableness would meet this requirement.149

The basis for Renard’s approach is that the water from a transboundary river must be shared between all States. That assumption flows from the premise that no State is entitled to legislate so as to deprive completely the other State of a share of the water because of an ‘equality of States’.150 Is this a permissible constraint on legislative power? Renard’s bold founding assumption requires further examination.

6.4.3 Can the Common Law Limit State Legislative and Executive Power?

Renard’s doctrine was based upon the presumption that States cannot legislate so as to cause harm in the territory of another State.151 In reaching this position, Renard drew upon decisions of foreign courts in other federal systems to support this underlying principle of equality, which he argued is an essential element of any federation:

In every instance where both parties to a dispute have been governments and where actions undertaken in the territory of one have caused damage to the territory or inhabitants of the other, it has been held by the United States Supreme Court and the Swiss Federal Tribunal that the legislation of neither State could create or destroy liability. The reason is simply stated: Governments in a federation must be treated as equals before the Court and accordingly the statute of one could not be held to bind the other when the facts involve the territory of both. … In a dispute between States or the Commonwealth before the High Court, the arguments which the United States and Swiss courts found irresistible would seem to be directly applicable. The doctrine of equality is not based on particular constitutional provisions, but is rather a result of the very nature of a federation. … The notion of equality of States is an essential attribute of federation and the express constitutional provision for settlement of ‘matters’ between States leads to the seemingly inescapable conclusion that no government, simply by the authority of its own

149 Renard, Australian Interstate Rivers – Legal Rights and Administration, above n 35, 203.
150 Ibid 645.
151 Ibid 644.
legislative power, may use its territory quite regardless of the damage that this use may cause to the territory of another state.\textsuperscript{152}

Courts in other federal systems, such as the United States, have found notions of equality an ‘irresistible’ basis upon which to place a limit on the legislative power of the States. However, whether that same approach can be adopted in Australia must be determined in the context of the Australian legal system and existing legal principles.

The effect of creating an ‘interstate common law’ as Renard advocated is to develop the common law so that it limits the legislative and executive power of the States. The High Court has not accepted the argument that there may be some fundamental aspects of the common law that can limit the legislative power of the States.\textsuperscript{153} The declaration by the Court of an ‘interstate common law’ in the manner proposed by Renard could be at odds with the principle of parliamentary supremacy.

One of the difficulties with a common law solution as proposed by Renard is that it fails to explain how the common law can limit (or ‘trump’) the legislative and executive power of the States,\textsuperscript{154} and fails to situate the ‘interstate common law’ within the Australian constitutional framework. The \textit{Australian Constitution} provides for the continuance of the State Constitutions after Federation.\textsuperscript{155} Importantly, s 107 of the \textit{Constitution} provides that the power of the colonial legislatures continued after Federation ‘unless it is by [the] Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State’.\textsuperscript{156} Those powers ‘withdrawn’ from the State include not only those expressly withdrawn, but also where there is a limit on power as a consequence of a constitutional implication derived from the text and structure of the document. As McHugh J explained in \textit{Coleman v Power}:

\begin{itemize}
  \item \textsuperscript{152} Ibid 644-5. The argument that the doctrine of equality of states is a ‘result of the very nature of federation’ is similar to the question put by Inglis Clark in 1901: whether the fact that ‘the States of the Commonwealth are constituent parts of the same nation’ can require the development of a solution to the transboundary river problem. Cf A Inglis Clark, \textit{Studies in Australian Constitutional Law} (Charles F Maxwell, 1901) 110
  
  \item \textsuperscript{153} In \textit{Union Steamship v The King} (1988) 166 CLR 1, the Court (at 10) stated: ‘Whether the exercise of [State legislative power] is subject to some restraints by reference to rights deeply rooted in our democratic system of governmental and the common law ..., a view which Lord Reid firmly rejected in \textit{Pickin v British Railways Board}, is another question which we need not explore’. See also \textit{Pickin v British Railways Board} [1974] AC 765, 782 (Lord Reid).
  
  \item \textsuperscript{154} Of course, if it does not have this consequence then the States could simply legislate to achieve the outcome they desire.
  
  \item \textsuperscript{155} \textit{Australian Constitution} s 106.
  
  \item \textsuperscript{156} \textit{Australian Constitution} s 107.
\end{itemize}
And the powers of a State continued under s 107 do not extend to those ‘withdrawn from the Parliament of the State’. Those withdrawn from the State include not only those powers expressly withdrawn from the States such as those referred to in ss 51 [sic] and 90 but those powers which would entrench on the zone of immunity conferred by s 92 and the implied freedom of communication on political and governmental matters. The constitutional immunity is the leading provision; the sections give way to the constitutional immunity. To the extent that the exercise of legislative or executive powers, conferred or saved by the Constitution, interferes with the effective operation of the [implied freedom of political communication] the exercise of those powers is invalid.\footnote{157}

Therefore, while s 107 preserves the legislative and executive power of the States after Federation, that power is subject to the Constitution, including any implication derived from it. Renard’s doctrine prevents a State from either taking more than a reasonable share, or permitting or authorising the taking of more than a reasonable share of the waters from a transboundary river. The effect of the doctrine is, therefore, to place a limit on State legislative and executive power that is not expressly provided for in the Constitution or supported by a constitutional implication. Renard did not state that the foundation for the doctrine of reasonable sharing was similar to, for example, the implied intergovernmental immunities doctrine, an implication derived from the structure of the Constitution.\footnote{158} Instead, he argued that it was simply an ‘essential attribute’ of Federation

\footnote{157} Coleman v Power (2004) 220 CLR 1, 49 [90] (McHugh J). Although McHugh refers to s 51, it would appear that this is a slip and should be a reference to s 52. \footnote{158} In support of the argument, Renard stated that the High Court has ‘derived a rule of law governing relations between the States and the Commonwealth from the very nature of the Australian federal system’, citing Essendon Corporation v Criterion Theatres Ltd (1947) 74 CLR 1: see Renard, Australian Interstate Rivers – Legal Rights and Administration, above n 35, 187. In Essendon Corporation, the question arose as to whether a State could impose directly a tax on the Commonwealth ‘in respect of the execution of its duties or exercise of its functions’: at 17. Importantly, this limitation is an implication derived from the Constitution. As Dixon J explained (at 22) in Essendon Corporation: ‘To my mind the incapacity of the States directly to tax the Commonwealth in respect of something done in the exercise of its powers or functions is a necessary consequence of the system of government established by the Constitution’ (emphasis added). A State law purporting to restrict the capacity of the Crown in right of the Commonwealth will not bind the Commonwealth in respect of something done in the exercise of its powers or functions is a necessary consequence of the system of government established by the Constitution. Without these limitations the capacity of the bodies politic to function would be impaired. The rules governing the relations between the Commonwealth and States to which Renard refers are a necessary implication derived from the
and did not go so far as to suggest it was a constitutional implication.\(^{159}\) As a consequence the basis for the doctrine is open to question.

In summary, if a limit is to be placed on State legislative and executive power, that limit must come from the \textit{Constitution} and not the common law. If the foundation for the doctrine of reasonable sharing is equality between States, the question that must be answered is: does the text and structure of the \textit{Constitution} support an implication of equality between States? In Chapter 7 I return to this question and examine whether the \textit{Constitution} places such a limit on State legislative and executive power.\(^{160}\)

However, before examining that question, I identify two other difficulties with a common law solution: first, the reasoning as to why ‘reasonableness’ is to be the guiding principle in resolving transboundary river disputes; and secondly, if an ‘interstate common law’ could exist, who can modify the interstate common law?

**6.4.4 The Reasoning behind ‘Reasonableness’ as the Guiding Principle in an Interstate Common Law**

\textit{6.4.4.a Renard’s ‘Reasonable Sharing’ Doctrine}

Even if a court were to accept the existence of an interstate common law, the next question is: what content can be given to that doctrine to resolve a transboundary river dispute? Renard’s argument is that a common law principle based on the notion of ‘reasonableness’ could be developed. A further difficulty with Renard’s approach is understanding the origins of the guiding principle of ‘reasonableness’:

The application of reasonableness to water disputes is also a natural and logical development of a principle known to the common law and in particular, fundamental to the law of nuisance.\(^{161}\)

Renard stated that the ‘common denominator’ between all areas of law to which the High Court could refer – the \textit{Constitution}, the common law riparian rights doctrine and international law – was the concept of reasonableness. However, as I have already

\textit{Constitution}. While it is correct to say that the High Court has developed rules governing the relationships between governments within a federation, these principles are supported by the \textit{Constitution}. Renard did not suggest that the doctrine of reasonable sharing is supported by a constitutional implication.


\(^{160}\) See Chapter 7.4.

explained, with respect to the *Constitution*, the fact that s 100 uses a standard of reasonableness provides little support for how to determine the allocation of water from a transboundary river between States.\textsuperscript{162}

Equally, Renard’s reliance on the riparian rights doctrine might be difficult to reconcile with the fact that he rejected the riparian rights doctrine as a suitable analogy to resolve transboundary river disputes. After rejecting the doctrine as a suitable analogy, he then relied on the fact that ‘reasonable use … is a vital element in the common law doctrine of riparian rights’ and argued that this lends some support to ‘reasonable use’ being used as the guiding factor in the sharing of water from transboundary rivers.\textsuperscript{163} The fact that ‘reasonable use’ is a ‘vital element’ in a doctrine that Renard rejected as being unsuitable to apply as between States casts doubt on the utility of the comparison.

Further, Renard also noted that the Helsinki Rules developed by the International Law Association relied upon the principle that each State was entitled to a ‘reasonable and equitable share’. However, as I explained in Chapter 5, the influence that international law might have in developing the common law in the area is likely to be minimal.\textsuperscript{164}

\textit{6.4.4.b An Alternative: Modifying the Riparian Rights Doctrine}

An alternative argument is that the common law riparian rights doctrine can be drawn upon to develop the content of an interstate common law, but that it must be modified to take into account the Australian conditions.

In Chapter 5 I demonstrated that the riparian rights doctrine was unsuitable for Australian conditions. That fact is documented in the decisions of the State Supreme Courts at the end of the 19\textsuperscript{th} century and was also acknowledged during the Parliamentary Debates in the respective States at the time that State Parliaments implemented statutory schemes to regulate the allocation of water from rivers.\textsuperscript{165}

Modifying the riparian rights doctrine to take into account local conditions is not a new phenomenon. State Supreme Courts developed the riparian rights doctrine in the United States in precisely this way. Further, in Australia the High Court has recognised the need

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\textsuperscript{162} It might be consistent with a ‘right’ but s 100 does not create such a ‘right’. See Chapter 3.2.7 and 3.4.

\textsuperscript{163} Ibid 661.

\textsuperscript{164} Chapter 5.2.4

\textsuperscript{165} Chapter 5.3.4.
for the common law to develop ‘in response to changing conditions’.\textsuperscript{166} Previously, the colonial Supreme Courts were bound by the decisions of the Privy Council and were reluctant to deviate from the English law even where permitted to do so. However the High Court is no longer bound by decisions of the Privy Council and can develop the common law in Australia in a manner that is appropriate to this country.\textsuperscript{167}

The riparian rights doctrine was developed for different environmental conditions and did not adequately take into account the Australian environmental conditions and the way in which the rivers have been used in this country.\textsuperscript{168} Ever since the Chaffey brothers’ settlements were established in South Australia and Victoria, irrigation has been an important water use in south eastern Australia.

However, just as the riparian rights doctrine developed in England during the 19\textsuperscript{th} century sought to preserve the natural flow in response to the needs of mill owners, one might argue that the common law in Australia must develop to take into account the local conditions and water uses. When the English courts referred to the decisions of the American courts, the English courts acknowledged that the extent to which the natural flow must be preserved is ‘entirely a question of degree’.\textsuperscript{169} The local conditions and water uses will have some impact on where that line is drawn.\textsuperscript{170} The notion that the ‘natural flow of the river’ should be maintained is inconsistent with the physical reality of Australian rivers: rivers in Australia do not always flow. In the case of the River Murray, for example, the flow of the River is controlled by a series of locks and weirs.\textsuperscript{171} Prior to the construction of these locks and weirs, even the Murray dried up completely in times of severe drought.\textsuperscript{172}

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{166}]
\item \textit{Lange v Australian Broadcasting Corporation} (1997) 189 CLR 520, 565.
\item The right to appeal to the Privy Council was gradually abolished in Australia during the 1960s to the 1980s: see \textit{Privy Council (Limitations of Appeals) Act 1968} (Cth) ss 3 and 4; \textit{Privy Council (Appeals from the High Court) Act 1975} (Cth) s 3; \textit{Australia Acts 1986} (Cth) s 11.
\item Also, Australian courts failed to make modifications to the doctrine that adequately took into account these differences in environmental conditions: see Chapter 5.3.2. However, that is not to say that Australian courts could not develop the riparian rights doctrine in a manner that takes into account natural conditions.
\item \textit{Embrey v Owen} (1851) 6 Exch 353, 372; 155 ER 579, 587.
\item It would be a strange result if the doctrine required the preservation of the natural flow of a river that had no water due to drought. Local conditions and water uses have influenced the development of the law in the United States and England: see Chapter 5.3.3 and 5.3.1 respectively.
\item Chapter 2.2.3.
\end{enumerate}
\end{footnotesize}
The fundamental tenet of the riparian rights doctrine is that water must be shared between all users and that no one user has a monopoly on the waters of a river in its natural state. One way to achieve this, while still recognising the need to develop the doctrine for the Australian conditions, would be for the Court to remove the requirement that riparian proprietors maintain the natural flow of the river, and to use reasonableness as the sole criterion upon which competing claims to water are determined. Such an approach, which has been adopted in States in the eastern United States, allows riparian proprietors to divert water from the stream even if that use would disturb the natural flow. However, the diversion must still be reasonable and the court will examine the effect that the diversion has on other riparian proprietors to determine what constitutes a reasonable use.

The effect of developing the common law riparian rights doctrine in this way and applying it between States would yield a similar result as the doctrine developed by Ian Renard: a solution to transboundary river disputes based upon allocating water on the basis of ‘reasonableness’. However, one of the possible limitations of Renard’s approach is understanding the theoretical underpinnings for ‘reasonableness’ being the guiding principle in the solution. Developing the existing doctrine in this way and then applying it (with some modifications) as between States provides an explanation for why ‘reasonableness’ is to be the guiding principle in developing the interstate common law. While the same conclusion might be reached in both approaches, the reasoning behind each approach is different. One difference between the ‘reasonableness’ approach developed by Renard and this modified common law approach is that Renard’s approach was not capable of statutory amendment. In the following section, I examine the question of who could potentially modify an interstate common law.

One difficulty in drawing an analogy with the riparian rights doctrine is that the doctrine applies along a watercourse and does not take into account the fact that the river might be part of a larger river basin. In determining the needs of a State it would make more sense

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173 See Chapter 5.3.1.
174 See Chapter 5.3.3.a.
175 Developing the interstate common law in this way would leave open the question of whether the riparian rights doctrine (in the absence of legislation) should also be modified with respect to its application to individuals in Australia. That is a separate question that the Court would not need to answer in developing an interstate common law and could leave for another day.
176 See Chapter 6.4.5
to look at the basin as a whole, examining a State’s water extractions from both intrastate and transboundary rivers within the basin. A further difficulty is the fact that the common law doctrine has been abolished or altered by statute within each State. This raises a further question as to whether there is even a riparian rights doctrine available for modification in the manner proposed as between States.

A doctrine based on reasonableness also has some practical difficulties. Determining what constitutes a ‘reasonable use’ of water as between two riparian proprietors may be a relatively easy task of balancing the interests of the respective parties. However, when a dispute involves States and a river as long as the River Murray, the task of determining what constitutes a ‘reasonable share’ is a difficult task. A significant investigation would be required and, as the United States cases demonstrate, such an investigation can be timely and complex.

### 6.4.5 Who Can Modify the Interstate Common Law?

Assuming for a moment that the High Court was to accept the existence of an interstate common law, could the interstate common law be amended by legislation?

It would, of course, be a strange result if the interstate common law was created and could be modified or abolished immediately by a State. That would defeat the purpose of the interstate common law. However, if the interstate common law cannot be modified or abolished by a State, the problem again arises that the common law is placing a limit on State legislative power, which limitation is not derived (either expressly or by implication) from the Constitution.

From a practical perspective, the presence of an intergovernmental agreement means that States will not litigate to enforce their common law ‘rights’ to water from transboundary rivers. However, from a legal perspective, the existence of an intergovernmental agreement does not modify the common law; the interstate common law rights still exist, it is just that the States have chosen not to enforce them. The argument that an intergovernmental agreement abolishes the common law ‘right’ is inconsistent with the general principle that it is for the Legislature to modify or abolish the common law. Where an intergovernmental agreement is made between the States, that agreement is often implemented by each State passing identical or similar legislation in their respective

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177 See Chapter 5.3.4.
Parliaments. The existence of an intergovernmental agreement raises a further difficulty: what is the legal effect of the intergovernmental agreement? And might this give rise to an estoppel if the transboundary river problem is subsequently litigated? This further highlights the difficulties in equating the ‘rights’ of the States with common law rights and remedies of private citizens.

If the interstate common law is not immune from legislative modification, perhaps the most logical solution is that the Commonwealth Parliament has the power to modify the common law. However this solution is not without difficulty. The challenge would be to identify the source of the Commonwealth’s legislative power to amend the ‘interstate common law’. One approach would be to concentrate on whether s 61 in conjunction with s 51(39) provides the Commonwealth with the necessary legislative power. Section 61 of the Constitution defines the executive power of the Commonwealth and has been held to include an ability to engage in activities unique to the Commonwealth Government and necessary for the nation as a whole, which is often referred to as the ‘nationhood power’. In the AAP Case Jacobs J explained that the ‘nationhood power’ was necessary for the ‘maintenance’ of the Constitution in the following way:

Within the words ‘maintenance of this Constitution’ appearing in s 61 lies the idea of Australia as a nation within itself and in its relationship with the external world, a nation governed by a system of law in which the powers of government are divided between a government representative of all the power of Australia and a number of governments each representative of the people of the various States.

As French CJ noted in Pape v Federal Commissioner of Taxation, the precise scope of the nationhood power is unclear. However, perhaps the most helpful general statement of the concept is Mason J’s explanation of the ‘nationhood power’ in the AAP Case:

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178 See, eg, River Murray Waters Act 1915 (NSW), River Murray Waters Act 1915 (SA), River Murray Waters Act 1915 (Vic). That legislation would need to be consistent with any constitutional implication.


180 Ibid 406.

But in my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(.xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.  

In one sense the Commonwealth may be well placed to modify the interstate common law, as this may be precisely the sort of national issue, spanning across State borders, that must be left to a federal government. However, the mere fact that the issue may be of national importance does not in itself expand the Commonwealth’s legislative power. As the joint judgment in *R v Hughes* cautioned:

> It is plain enough that s 51(.xxxix) empowers the Parliament to legislate in aid of an exercise of the executive power. However, it would be another matter to conclude that this means that the Parliament may legislate in aid of any subject which the Executive Government regards as of national interest and concern.

One important factor in the Court’s determination of this question might be whether the ‘nationhood power’ is being used solely in an attempt to expand the scope of Commonwealth power. The Commonwealth Parliament having the ability to modify any common law that exists between States could be viewed as a somewhat unusual result in light of the history of the River Murray dispute. As I explained in Chapter 3, providing the Commonwealth with power to regulate transboundary rivers was expressly rejected during the Federal Conventions. However, that would not necessarily prevent the Court from holding that the Commonwealth has the requisite legislative power. For example, despite the fact that the industrial relations power vested in the Commonwealth by s 51(.xxxv) was restricted to ‘industrial disputes beyond the limits of any one State’, the interpretation of this head of power, as well as the broad interpretation given to the corporations power (s 51(xx)), has greatly expanded the scope of the Commonwealth’s

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184 See Chapter 3.2.


186 *New South Wales v Commonwealth* (2006) 229 CLR 1, 114 (Gleeson, Gummow, Hayne, Heydon and Crennan JJ) (‘Work Choices Case’).
ability to regulate industrial relations. The *Constitution* has, on occasions, been interpreted in a manner that was not envisioned by the framers.

The question of who can modify the interstate common law illustrates one of the conceptual difficulties in finding a common law solution. On the one hand there is a desire to develop a solution that creates certainty for the States by creating a doctrine that cannot be defeated (particularly by an upstream State). On the other hand, it is a fundamental principle of parliamentary supremacy that the common law can ordinarily be modified by the Legislature. The difficulty is (at least in part) due to the fact that the creation of an interstate common law is an attempt to equate private law rights with the ‘rights’ of the States. Such an approach ignores the role of the *Constitution* in resolving this problem and fails to acknowledge that there are fundamental differences between the rights of individuals and the scope of State legislative and executive power.

As I explain in Chapter 7, the best solution to the transboundary river problem involves examining the limits on State legislative and executive power that are founded on an implication derived from the text and structure of the *Constitution*.

### 6.5 Conclusion

This chapter commenced by explaining that for the High Court to have jurisdiction over an interstate dispute pursuant to s 75(iv) of the *Constitution* there must be substantive principles of law governing the resolution of the dispute. The question of jurisdiction and the determination of the substantive legal principles upon which this problem is to be resolved are interrelated.

The development of the equitable apportionment doctrine by the United States Supreme Court provided a useful case study in how a court can develop a body of law for resolving transboundary river disputes. One of the difficulties with the Supreme Court’s approach is understanding the reasoning behind the Court’s development of the equitable apportionment doctrine. The effect of the Court’s decision is to create a body of common law that is constitutionally protected that cannot be modified by the States. The reasoning in the United States Supreme Court’s decisions is driven by a practical desire to provide a mechanism by which interstate disputes can be resolved with less emphasis on the underlying reasoning for the decision. While there is a degree of pragmatism in this approach, any solution that the High Court of Australia develops must also have regard to
the existing body of constitutional jurisprudence as well as the pragmatic and practical reality of the situation.

The chapter then examined when courts in Australia will modify the common law. A court is unable to choose the matters that come before it and is required to decide the legal issues that are directly raised by the case; courts are often required to resolve matters where the legislature is unable or unwilling to act. Clearly, the attraction to the common law to resolve the transboundary river problem was a function of the flexibility of the common law and the fact that the common law had already developed the riparian rights doctrine for resolving disputes between individuals. This must have been particularly so in the early years after Federation when the High Court was yet to develop an extensive body of constitutional law.

The challenge for the High Court is in developing the best legal solution from the various approaches that have been proffered since before Federation. I commenced with an analysis of Ian Renard’s proposed doctrine of reasonable sharing. The doctrine is based on the principle that there is equality between States in Australia. I identified a number of conceptual problems with the development of an interstate common law to resolve the transboundary river problem. Most critically, the creation of an interstate common law results in the common law ‘trumping’ the legislative power of the States. This is inconsistent with the legislative power of the State to modify or abolish the common law. State legislative power is subject to the Constitution, however no constitutional basis is provided for the ability of the interstate common law to trump State legislative power. An alternative approach, which is considered in Chapter 7, would be to examine whether the text and structure of the Constitution supports an implication of an equality between States as a basis for a solution to the transboundary river problem.

If the Court is going to adopt a common law solution, I argued that modifying the riparian rights doctrine can provide the basis for developing an approach based on ‘reasonableness’. If this approach is adopted the Court must confront the issue that the riparian rights doctrine as it was developed in England was (and still is) largely unsuitable for the Australian conditions and water uses, which led to States introducing legislative regimes to abolish it within the States. The Court can draw comfort from the fact that State Supreme Courts in the United States have departed from the English doctrine to take into account local water uses and conditions. The doctrine can be modified so that
reasonableness – rather than preserving the natural flow – is given greater emphasis in balancing competing claims to water. The end result may be the same as Renard’s analysis; however the steps in the reasoning are different. Modifying the riparian rights doctrine provides some rational basis for why ‘reasonableness’ is to be the guiding principle. However, even this approach would require the Court to make a number of significant steps into uncharted waters: first, it would still require the acceptance of the existence of an interstate common law; and secondly, it would require a re-examination and modification of the riparian rights doctrine (at least to the extent to which it was to apply between the States as part of an interstate common law).

A further and unanswered question that the interstate common law solution raises is: who can modify the ‘interstate common law’? One possible answer is that the ‘nationhood’ aspect of the Executive power of the Commonwealth in conjunction with s 51(33xxix) might permit the Commonwealth modifying the interstate common law.187

In summary, the difficulties associated with the interstate common law approach is a product of thinking in terms of the ‘rights’ of the States and attempting to equate the ‘rights’ of the States to those of individuals. It is this thinking, coupled with the development of a federal common law in the United States to resolve similar transboundary river problems, that perhaps caused an attraction to the creation of an interstate common law. However, this approach fails to explain how an interstate common law can ‘trump’ State legislative power. As I have demonstrated in this chapter, the solution lies not within the common law, but within the Constitution and an examination of the limits on State legislative and executive power.

In the final substantive chapter of this thesis I seek to depart from conceptualising this problem in terms of an interstate common law ‘right’ to water. I reformulate the problem in terms of limits on State legislative and executive power.

187 Given the drafting history surrounding s 100, it might be viewed as a strange result if the Commonwealth was in the position that it could modify the common law solution by using the ‘nationhood’ aspect of the Executive power of the Commonwealth in conjunction with s 51(33xxix). However, the drafting history has not prevented some developments in constitutional interpretation that might appear to be at odds with the views of the framers. Section 101, for example, provides that there shall be an Inter-State Commission. However, the High Court’s decision in New South Wales v Commonwealth (1915) 20 CLR 54 (‘Wheat Case’) has meant that the Commission did not to have the power intended by the framers and has now ceased to exist.
CHAPTER 7: RECONCEIVING THE PRINCIPLES: LIMITS ON STATE POWER

7.1 Introduction

As the history of the dispute as to how the High Court might determine the allocation between States of water from the River Murray in the absence of an intergovernmental agreement demonstrates, the debate has consistently been phrased in terms of the ‘rights’ of the States.¹ The expression ‘a State’s right to water’² is as old as the States themselves. In the previous chapter I examined the argument that there exists an ‘interstate common law’ as between the States and explained the limitations of adopting this approach. In this chapter I provide an alternative solution for resolving transboundary river disputes in Australia, reconceiving the solution as one of limits on State power.

The analyses of the problem to date have framed the problem in terms of the ‘rights’ of the States. In the first part of this chapter I re-examine how this problem can be conceptualised and consider what is meant by the term ‘a State’s right to water’. I argue that the more helpful approach is to understand the problem in terms of limits on State power; doing so avoids the temptation to draw an analogy with the private ‘rights’ of individuals – which I have already shown is largely unhelpful – and produces a solution that is coherent with existing doctrines and consistent with the constitutional structure.

The second and third parts of this chapter examine the potential sources of limits on State power. In the second part I examine the limits on the extraterritorial operation of State power and the resolution of inconsistencies between the laws and regulations of different States. In the third part of the chapter I then consider whether the text and structure of the Constitution impliedly provide a limitation on the power of the States with respect to regulating the waters of transboundary rivers. I examine two alternatives: first, whether the Constitution supports a principle of an equality between States that might assist in the resolution of transboundary river disputes; and secondly, whether a solution can be found by extending the implied intergovernmental immunities doctrine.

I argue that the immunities doctrine can be extended where the actions of one State would cause significant harm to the geographical area or the community within another State

¹ See Chapter 2.4 and Chapter 4.
² Or phrases to that effect. Before Federation similar phrases were used with respect to a colony’s right to water: see Chapter 2.3 and 2.4.
such that it would deprive the communities within the State of sufficient water to meet critical human needs. I contend that this approach is the preferred solution as it conceptually fits within the existing body of constitutional law.

7.2 Conceptualising Interstate Disputes

One of the challenges in resolving a transboundary river dispute is conceptualising the problem and framing the questions that must be answered. As this thesis has demonstrated, from colonial times, the central question has always been phrased in terms of the ‘rights’ of the colonies (and later States). This central question is invariably put in this way: Does a State have a right to water from a transboundary river? In this section I show that the problem is one that must be solved by examining the limits on State legislative and executive power (as opposed to conceptualising the problems more generally in terms of the ‘rights’ of the States).

7.2.1 What is Meant by a ‘State’s Right to Water’?

The difficulty with the use of the word ‘right’ is that it can have a variety of meanings. The word can be used to refer to both legal and moral obligations. John Stuart Mill drew important distinction between an ‘imperfect’ and ‘perfect’ obligations, with the former merely moral obligations and the latter an obligation recognised by law and enforceable in a court. In this thesis, it is the legal obligations that are of interest.

Very little consideration has been given to what is meant by the word ‘right’ in this context of transboundary rivers in Australia. American scholar Wesley Hohfeld argued that ‘right’ was often used ‘indiscriminately’ to refer to a wide variety of legal relations without any attempt to distinguish between them. Hohfeld’s work attempted to separate out different types of legal relations that are sometimes collectively referred to as rights.

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Hohfeld explained that the term ‘right’ is used to define legal relations that might be more accurately described as ‘privileges’, ‘powers’ or ‘immunities’.6

A Hohfeldian analysis of the transboundary river dispute would characterise the problem in terms of South Australia having an immunity if and only if New South Wales lacks the ability to alter South Australia’s position.7 They are two sides of the same coin. In that way, South Australia’s immunity correlates with a lack of ability on the part of New South Wales legislature and executive to take ‘too much’ water from the River Murray. What constitutes ‘too much’ water will depend on the extent of the immunity. Characterising the problem in this way avoids the broad ‘rights’ description and distinguishes between the rights of individuals and limits on legislative and executive power.

Merely labelling or categorising the legal relations by way of the Hohfeldian system of rights does not in itself provide an answer to the transboundary problem. However, it does illustrate that the use of the word ‘right’ may not accurately characterise the true nature of legal relations. It also emphasises the point that to focus only on the position of South Australia ignores the correlative position of the other States; an immunity for South Australia provides a corresponding disability on New South Wales.

To understand the legal relations between the States it is necessary to examine their interaction within the Australian constitutional framework. For the reasons expressed below, I suggest that characterising the right in this way is useful because it brings into focus the correlative disability on New South Wales. I propose that in the Australian constitutional setting, focusing on the problem from this perspective provides a more fruitful analysis. Having outlined the need to reconsider the nature of the inquiry, I briefly show how the ‘rights’ discourse has been unhelpful in framing the problem.

7.2.2 Historical Transboundary River ‘Rights’ Discourse

The earlier chapters of this thesis demonstrate that the word ‘right’ has been used in a variety of ways in the context of the River Murray dispute. The term has also been used in both a legal and a moral sense, often with very little acknowledgment of the distinction.

7 In Hohfeld’s language, New South Wales’ position might be described as having a ‘disability’.
As I explained in Chapter 2, when South Australia first claimed a ‘right’ to the water there was some uncertainty as to whether a legal right existed, but it was not in its interest to draw this to the attention of the other States. The claim that the colonies had a ‘right’ to a share in the water was as much a moral claim as it was legal and became an important part of the negotiation process. The ‘rights’ assertion was a shorthand way of making a claim to a share of the waters of the River. Muddying the waters by failing to draw a clear distinction between moral and legal rights probably did not, from a practical perspective, harm the South Australian cause. In addition, the use of the word ‘right’ at international law in the context of international transboundary rivers has sometimes been unclear, with the terms ‘imperfect’ and ‘perfect’ rights being used without any clear explanation of the distinction that was sought to be drawn.

The analogies with the riparian rights doctrine were not coupled with any consideration of the fundamental differences between the riparian rights of individual proprietors and the ‘rights’ of the States. One obvious difference was the geographical operation of the ‘right’. Riparian rights were associated with the use of the water on the riparian tenement. No consideration was given to how or why the ‘State’s right to water’ extended beyond the riparian tenement. This is an important issue in the context of the River Murray dispute given that in South Australia there are pipelines that transport water a great distance from the River.

The use of the word ‘right’ in s 100 may not reflect the true operation of the section. As I explained in Chapter 3, s 100 is a limitation on the Commonwealth’s trade and commerce power with respect to s 51(i). That is not to suggest that the text can be ignored, but merely that the use of the word ‘right’ can mean a myriad of things in a variety of

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8 See Chapter 2.4.2.a.
9 See Chapter 2.4.2.
10 See Chapter 2.4 and Chapter 4.
11 See Chapter 2.4 and Chapter 4.
12 Attwood v Llay Main Collieries Ltd [1926] 1 Ch 444, 459; Swindon Waterworks Co Ltd v Wiltshire & Berkshire Canal Navigation Co (1875) LR 7 HL 697, 704.
13 For example, the Mannum-Adelaide pipeline (60 km), Tailem Bend-Keith pipeline (143km) and the Morgan-Whyalla pipeline (379km): SA Water, Pipelines <http://www.sawater.com.au/sawater/education/ourwatersystems/pipelines.htm>.

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contexts. The word ‘right’ in s 100 is an ‘immunity right’ in that it places a limit on the legislative power of the Commonwealth.\textsuperscript{14}

7.2.3 Reframing the Problem

When representatives from South Australia claim that the State has a ‘right’ to the waters of the River Murray they are asserting an entitlement to a certain volume and flow of water from the River as it enters the downstream State. Implicit in the claim of a ‘right’ is the contention that there is a correlative \textit{limitation} on how the upstream States can regulate the waters of the Murray. Suppose, for example, the Government of New South Wales wanted to build a dam across the River Murray and, as a result, the flow of the River was stopped entirely. The Parliament of New South Wales might need to pass legislation allowing for the construction of the dam or the responsible Minister may need to take the necessary steps to authorise the construction of the dam.\textsuperscript{15} If South Australia can expect the waters of the Murray to continue to flow, there would need to be a corresponding \textit{limit} on the legislative and executive power of New South Wales to prevent the authorisation of the construction of the dam.

The question as to whether there are limits on the legislative and executive power of New South Wales would also arise in examining the effect that a water licensing scheme has on a downstream State. Suppose New South Wales establishes a new water licensing scheme (or amends the existing scheme) for regulating water within that State and the scheme significantly reduces the flow of the water from the River Murray into South Australia.\textsuperscript{16} If it is true that South Australia has a right (an \textit{immunity} right) and it can expect the waters of the Murray to continue to flow, there must be a limitation on the legislative and executive power of New South Wales to effect the water licensing scheme where the consequence of such a scheme would be to reduce the amount of water that reaches South Australia. The result of any such limitation would be to ensure a particular amount of water flows into the downstream State; or, as it has often been described, to provide South Australia with a ‘right’ to a particular amount of water. When understood

\textsuperscript{14} This is not dissimilar to the use of the word ‘invalid’ in s 109 of the \textit{Constitution}. The legislation offending s 109 in that context is ‘inoperative’. The words must be understood in their context.

\textsuperscript{15} Or alternatively, the relevant department may have authority to carry out the construction under existing legislation

\textsuperscript{16} Or the Executive, in the execution of an existing scheme, takes a different approach in exercising a discretion, the effect of which is to reduce the water in the River.
in this way, the ‘right’ that representatives of South Australia speak of is a consequence of any limitation that may exist on the legislative or executive power of the upstream States; any ‘right’ that South Australia has goes hand-in-hand with any limit on the legislative and executive power of New South Wales. Focusing on the limits on State power rather than the ‘rights’ of the States avoids what has historically been the instinctive response: to equate the ‘rights’ of the States with the rights of individuals or to assert a legal basis for what may be only a moral claim.

Next, it is necessary to consider the potential sources of a limit on State legislative power. There are two separate scenarios that could potentially give rise to a dispute between States over the waters of a transboundary river. For ease of description, I will describe the issues as if they were to arise between South Australia (as a downstream State) and New South Wales (an upstream State) with respect to the waters of the River Murray (a transboundary river). The first situation has already been identified in this section: New South Wales taking legislative or executive action that severely limits the amount of water that flows into South Australia. This could be as a consequence of, for example, issuing too many water licences or constructing a dam that holds back too much water upstream. In short, in this first situation, it is the legislative or executive actions of New South Wales that are affecting South Australia. The second situation where a transboundary river dispute might arise is where the legislative or executive actions of South Australia purport to affect New South Wales and its residents. Could South Australia, for example, pass legislation that prevents New South Wales issuing additional water licences or restrict New South Wales water licence holders from taking more than a specified amount of water?18

Having now reconceived the problem as one involving limitations on legislative and executive power and identifying the two central scenarios for examination, in the following section I examine the potential limits on power.

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17 Whether these ‘limits’ have been crossed will be a question of degree and will be determined by a careful examination of the facts. The potential sources of limits on legislative and executive power are discussed below: see Chapter 7.3 and 7.4.
18 There are other transboundary water issues that could arise, such as South Australia building a dam and flooding New South Wales, but this is not relevant for answering the central question posed in Chapter 1 of the thesis: see Chapter 1.1.
7.3 Potential Limits on Legislative and Executive Power

Prior to Federation the colonial legislatures were granted power to make ‘Laws for the Peace, Welfare, and good Government of [their respective] Colonies’. The Imperial Parliament could still make laws with respect to the colonies, however, in doing so the intention of the Imperial Parliament had to be expressly stated. Since at least 1986, the ability of the Imperial Parliament to legislate with respect to the States has no longer existed.

The two scenarios identified in the previous section raise three issues that could potentially limit the legislative or executive power of a State. First, there is the question as to the extent to which the States can regulate matters extraterritorially. Secondly, these scenarios raise the issue of a potential inconsistency between the legislation of two States. Finally, there is the question of whether the Constitution places an immunity or restriction on the legislative or executive power of the States that may affect the State’s use of water from transboundary rivers. In this section I examine these potential limitations. I demonstrate that while a State may legislate extraterritorially, where there is an inconsistency between the legislation of two States, the legislation of the State with the ‘predominant territorial concern’ is likely to prevail. A downstream State seeking to legislate extraterritorially in an attempt to preserve the amount of water it will receive may be defeated by the upstream State. Consequently, it is the question whether the Constitution places an immunity on the legislative and executive power of States that becomes most critical, which is considered later in this chapter.

7.3.1 The Scope of State Legislative Power and Extraterritorial Effect

Unlike the scope of Commonwealth legislative power, which is enumerated by subject matter and purpose, the scope of State legislative power is plenary. The power of the colonial legislatures continued after Federation ‘unless it is by [the] Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the

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19 Australian Constitutions Act 1850 (Imp) 13 & 14 Vict, c 59, s 14.
21 Australia Act 1986 (Cth) s 1. Similar legislation was passed by the Parliament at Westminster: Australia Act 1986 (UK) s 1. Even if the Parliament of the United Kingdom were to repeal s 1 if the Australia Act 1986 (UK), Australian Courts ‘would be obliged to give obedience to s 1 [of the Australia Act 1986 (Cth)]: Sue v Hill (1999) 199 CLR 462, 492 [64] (Gleeson CJ, Gummow and Hayne JJ).
22 Chapter 7.4.
Parliament of the State’. Aside from the limitations expressed in the *Commonwealth Constitution*, the States may legislate for ‘peace, order and good government’. The argument that these words provide ‘some restraints by reference to rights deeply rooted in our democratic system of government and the common law’ is yet to find favour with the High Court.

States will usually legislate in such a way that the legislation is directed to apply within the territory of the State. However, State legislation can have extraterritorial effect. Section 2(1) of the *Australia Act 1986* (Cth) provides:

> It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation.

In *Union Steamship v King*, Brennan CJ, Dawson, Toohey and Gaudron JJ acknowledged that it was necessary for there to be some limit on State legislative power:

> And, as each State Parliament in the Australian federation has power to enact laws for its State, it is appropriate to maintain the need for some territorial limitation in conformity with the terms of the grant, notwithstanding the recent recognition in the constitutional rearrangements for Australia made in 1986 that State Parliaments have power to enact laws having an extraterritorial operation: see *Australia Act 1986* (Cth), s 2(1); *Australia Act 1986* (UK), s 2(1).

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23 *Australian Constitution* s 107 (emphasis added).
24 See, eg, *Australian Constitution* ss 90, 92, 117.
25 *Australia Act 1986* (Cth) s 2(1).
26 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (The Court).
27 Although the question has been left open: *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (The Court); *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 410 [14] (Gaudron, McHugh, Gummow and Hayne JJ), 424-5 [55] (Kirby J); see also *Momcilovic v Queen* (2011) 245 CLR 1, 215-6 [562]-[563] (Crennan and Kiefel JJ). In the South Australian Supreme Court case of *Grace Bible Church v Reedman* (1984) 68 SASR 200, White J (at 210) rejected the argument that those words provided a limitation on the legislative power of the South Australian Parliament. See generally Anne Twomey, ‘Fundamental Common Law Principles as Limitations Upon Legislative Power’ (2009) 9 *Oxford University Commonwealth Law Journal* 47; Anne Twomey, ‘Future Directions in Federalism – Where will the High Court Go?’ (2011) 6 *Public Policy* 133, 148.
28 There is a statutory presumption that legislation will apply within its territorial limits: *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309, 363 (O’Connor J).
Where a State passes legislation that will have extraterritorial effect, there must be a ‘relevant connexion between the circumstances on which the legislation operates and the State’; although, a ‘remote and general connexion’ is sufficient.\(^{30}\)

The issue of extraterritoriality of State legislation has arisen with respect to water pollution of transboundary rivers in Australia. In *Brownlie v State Pollution Control Commission* the New South Wales Court of Appeal was required to consider the extraterritorial application of the *Clean Waters Act 1970* (NSW).\(^{31}\) The appellant, a resident of Queensland, sprayed an insecticide on his land. After heavy rains, the insecticide ran into the Barwon River, the midpoint of which forms the boundary between Queensland and New South Wales. While the pollution had first entered the waterways in Queensland, the New South Wales Pollution Control Commission commenced proceedings against the appellant, Brownlie, in the Land and Environment Court of New South Wales. Brownlie was charged and convicted of polluting the waterways in contravention of s 16 of the *Clean Waters Act 1970* (NSW). The appellant submitted that the *Clean Waters Act 1970* (NSW) did not apply to him as a resident of Queensland.

In rejecting the appellant’s argument, Gleeson CJ first explained that it was intended that the *Clean Waters Act* apply to the pollution of the waters of New South Wales irrespective of the source of that pollution:

> What the *Clean Waters Act* is concerned with is pollution of New South Wales waters. It is obvious that in some circumstances such pollution may occur as a result of conduct that takes place wholly or partly outside New South Wales. A person who stands on the southern bank of the Murray River, in Victoria, and throws polluting material into the river (which in that case is wholly within New South Wales) provides a simple example. So also does a person who sits in a boat in the northern half of the Barwon River and throws polluting material into the southern half. As a matter of statutory interpretation, it is not easy to accept that the New South Wales legislation was not intended to cover such obvious examples of pollution of New South Wales waters.\(^ {32}\)

While there was legislation in Queensland regulating water pollution in that State, the Queensland legislation did not prohibit the pollution of the waters of New South Wales. Therefore, there was no direct conflict or overlap between the legislation of the two

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\(^{30}\) *Union Steamship v King* (1988) 166 CLR 1, 14.

\(^{31}\) *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78.

States. The sole question was whether the New South Wales legislation could apply to a polluter situated outside the legislating State. As Gleeson CJ stated:

There is nothing inherently surprising about the idea that a person who carries on agricultural or industrial activities on the border of Queensland and New South Wales may need to be concerned with the anti-pollution legislation of both of those States. ... [T]here are activities which cannot be assigned exclusively to the area of legislative competence of only one State, and it is difficult to think of a clearer example than a case such as the present. Furthermore, even if there were inconsistency in a relevant sense between the laws of Queensland and New South Wales, there would be much to be said for the proposition that, in so far as the focal point of the New South Wales law is actual or potential pollution of New South Wales, then a test of predominant territorial nexus would be satisfied.\textsuperscript{33}

The law of New South Wales applied to a polluter in Queensland so long as there was a ‘relevant consequence in New South Wales’.\textsuperscript{34} It was not that the New South Wales legislation directly prohibited the Queensland polluter from releasing a pollutant into the river within Queensland territory, but if that pollutant reached the waters of New South Wales, then the Queensland polluter was subject to the legislation of New South Wales and had committed an offence. The problem would have been more complex if there had been Queensland legislation permitting the pollution while, at the same time, the New South Wales legislation prohibited such acts. In the next section I deal with the question of how to resolve such conflicts.

In the scenario posed earlier of South Australia attempting to regulate the volume of water in the River Murray that it receives from the upstream States, the position is slightly different to the case of \textit{Brownlie}. In the case of regulating water \textit{quality} – as in \textit{Brownlie} – it is easy to list prohibited pollutants and identify the water user who is adding a prohibited pollutant to a watercourse. Further, in \textit{Brownlie} the offence occurred only when the pollutant entered the waters of the legislating State. The regulation of water \textit{quantity} produces different problems. Suppose, for example, South Australia were to declare that a specific volume of water (or water level) must be present at the point where the waters of the Murray enter South Australia. Such legislation may have a ‘sufficient connection’ to the legislating State in that it seeks to regulate the quantity of water that

\textsuperscript{33} Ibid 87.
\textsuperscript{34} Ibid 88.
flows into its territory, however, it may face practical problems. How would upstream water users as a collective comply with the legislation? Would each water user be required to reduce their extraction by a particular percentage? Unlike water pollution, a lower water level may be the cumulative effect of all water users rather than a single user.

This problem could be avoided if the South Australian Parliament legislated to limit directly the water use of each licence holder in New South Wales to a particular volume. However, unlike in the case of Brownlie, an attempt to regulate water use outside the territory of the legislating State is likely to result in a conflict between State laws. In this instance, there would be an inconsistency between the legislation of South Australia and New South Wales: the New South Wales Government granting water licences for a particular amount of water and the South Australian Parliament attempting to limit that licence. The first issue would be whether the South Australian law has a sufficient connection to the legislating State. If the South Australian legislation were limited to water users along the Murray in the upstream States or to those along transboundary rivers that flow through South Australia, it may be able to demonstrate a sufficient connection to South Australia. It would then be a question of how to resolve the potential inconsistency between the legislation of New South Wales and South Australia.

7.3.2 Inconsistency between State Laws and Regulations

In the previous section, I identified two scenarios: first, New South Wales, by either legislation or regulation, taking water (or permitting water to be taken) from the Murray and second, South Australia attempting to legislate so as to restrict the amount of water that can be taken up by water users in the upstream State. Assuming that the South Australian legislation can have extraterritorial effect, there is an inconsistency between the legislation of both States if the volume of water is insufficient to satisfy both. How is this conflict to be resolved?

Unlike inconsistencies between Commonwealth and State legislation, which are dealt with by s 109 of the Constitution, there is no express provision in the Constitution dealing with inconsistencies between legislation of two States. Inconsistencies between State

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35 One way might be for the downstream state to attempt to restrict the regulator from issuing additional water licences.

36 In the case of inconsistencies between Commonwealth legislation and that of a State, the Commonwealth law will prevail: see Australian Constitution s 109.
legislation are generally uncommon because most State legislation does not purport to operate beyond the geographical limits of the State. However, a transboundary river dispute in which one State seeks to have its legislation operate in the geographical area of another State is one instance in which such an inconsistency could occur.

One solution would be for the Commonwealth to enact legislation providing a mechanism for resolving such inconsistencies. The power to enact such legislation could be found in ss 51(xxv) and 51(xxxix) of the Constitution. However, in the absence of a Commonwealth legislative regime, Geoffrey Lindell and Sir Anthony Mason have argued that an implication can be drawn from ss 106-8 and 122 of the Constitution as well as covering clause 5. They submitted that:

[T]he main solution which we favour is to allow a State to legislate with extraterritorial effect in another State but accord primacy in case of inconsistency (... including indirect inconsistency) to the legislation of the State which has competence to legislate in the geographical area where the law of the former State purports to operate. ... This solution would have the effect of restoring primacy to the ‘predominant territorial concern of the statutes of State legislatures’ without seeking to reverse the developments which have acknowledged the ability of the States to legislate in each other’s territory provided a weak connection is satisfied.

This approach is also consistent with the obiter remarks of Gleeson CJ in Brownlie. This approach sensibly gives paramountcy to the legislature of the territory in which the conflict appears to operate; it also accords with the practical reality that most State legislation is to operate within the territory of the legislating State.

38 Ibid 408. Section 51(xxv) provides the Commonwealth with power to make laws with respect to ‘the recognition throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States’. However, this point is yet to be decided by the High Court: see Breavington v Godleman (1988) 169 CLR 41, 79, 83 (Mason CJ), 96 (Wilson and Gaudron JJ).
39 Ibid 399.
40 Brownlie v State Pollution Control Commission (1992) 27 NSWLR 78, 87. In offshore areas the High Court has suggested (in obiter) that the test might be one of determining which State has the stronger nexus: Port MacDonnell Professional Fishermen’s Association Inc v South Australia (1989) 168 CLR 340, 374. However, the Court made no reference to dealing with conflicts between State laws on the mainland.
The alternative would be to develop a test that evaluates which legislation has a ‘closer connection’ to the factual situation that gives rise to the potential conflict. The difficulty with that approach is developing criteria upon which the ‘closer connection’ can be evaluated. Adopting an approach that gives primacy to the legislating State that has territorial primacy provides an objective measure for resolving such conflicts.

In accordance with a test based upon the predominant territorial concern, a conflict between South Australian legislation and New South Wales legislation attempting to regulate water use in New South Wales would be resolved in favour of the New South Wales law as it has the ‘predominant territorial concern’. As this analysis demonstrates, attempting to resolve a transboundary river dispute in terms of an inconsistency between State laws does not provide the downstream State with any relief against the perceived unreasonable actions of an upstream State with respect to the taking of water from a transboundary river.

In summary, while a State can legislate extraterritorially, if another State also passed legislation regulating the use of the same water within its own territory, that State’s legislation is likely to prevail. In the context of the transboundary river dispute, if the South Australian Parliament were to pass legislation that purported to have an extraterritorial effect, such legislation would likely be invalid to the extent of the inconsistency with New South Wales legislation. Such a course would, therefore, not assist South Australia in establishing an entitlement to a share of the water from the River Murray. The consequence of this conclusion is that an upstream State can easily frustrate the downstream State’s desire for additional water. It will be recalled from Chapter 4 that the New South Wales delegates at the Federal Conventions asserted that they could use the water as they saw fit. It is the ghost of the decision not to settle this dispute at Federation that now influences this conclusion.

Despite the absence of an express solution within the Constitution, I now turn to consider whether limits on the legislative and executive power of the States with respect to transboundary rivers can be implied from the text and structure of the document.

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41 Port MacDonnell Professional Fishermen’s Association Inc v South Australia (1989) 168 CLR 340, 374. See also above n 40.

42 The same result may even be achieved under is a ‘closer connection test’ was adopted. Arguably New South Wales has a closer connection to the regulation of water within its own territory.

43 See Chapter 4.2.
7.4 Constitutional Implications and Limits on State Power

The first scenario identified earlier in this chapter – New South Wales stopping the flow of the Murray entirely or removing a high percentage of the water – raises the question of whether the Constitution provides any limits on the legislative or executive power of a State to regulate the taking of waters from a transboundary river. As I explained in Chapter 3, there is no express solution within the Constitution that specifies how the waters of a transboundary river should be allocated between States. If the Constitution places no express limitation on an upstream State’s use or control of water from a transboundary river, can such a limitation be implied from the text and structure?

The High Court has recognised implied rights within the Constitution that exist in parallel to the express provisions of the document. Such rights are supported by the text or structure of the document. While an implication can be drawn from either the text or structure, in Australian Capital Television Pty Ltd v Commonwealth Mason CJ stated:

[W]here the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that [constitutional] structure.

Importantly, constitutional implications are established with reference to the Constitution and not by reference to the assumptions or intentions of the framers. As Mason CJ also explained in Australian Capital Television Pty Ltd v Commonwealth:

It is essential to keep steadily in mind the critical difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution. The former is a term or concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside the instrument.

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46 Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106, 135. Mason CJ cited Dixon J in support of the first sentence: Australian National Airways Pty Ltd v The Commonwealth (1945) 71 CLR 29, 81. In the context of the implied freedom of political communication Mason CJ stated (at 135): ‘Thus, the founders assumed that the Senate would protect the States but in the result it did not do so. On the other hand, the principle of responsible government ... is not merely an assumption upon which the actual provisions are based; it is an integral element in the Constitution.’
That will not preclude the Court from referring to the Convention Debates and drafting history for the purpose of understanding the background to a particular constitutional provision, however, the views expressed by the Convention delegates cannot give rise to an implication. The views of one delegate do not necessarily represent those of the collective. Further, the view of the collective might have evolved in the course of the debate and the views expressed at one point during the Conventions are not necessarily consistent with the final text of the document. To use ‘over-arching’ or ‘under-lying’ principles that are not derived from the Constitution is to engage in top-down reasoning.

In this part of the chapter I examine two alternative arguments with respect to a constitutional implication resolving a transboundary river dispute. First, I consider whether there is an implication of an equality between States that would assist in the resolution of a transboundary river dispute. Secondly, I examine whether an extended intergovernmental immunities doctrine is capable of resolving a transboundary river dispute. I conclude that the latter argument is to be preferred.

7.4.1 An ‘Equality Between States’?

Claims that each State has a ‘right’ to a share of the water from a transboundary river in Australia are common (particularly from South Australians). In 2012, the South Australian Premier, Jay Weatherill, made such claims and declared that he would not rule out a High Court challenge to uphold these ‘rights’. Premier Weatherill stated:

We’ve made it clear to parliament that one of our claims is that all basin states are entitled to be regarded as equals when it comes to the river.

The basis for such a challenge has not been fully explained by the South Australian Government. Can a right of equality between States be found within the Constitution?

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47 Reference to the drafting history is not a new phenomenon: *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208. See above Chapter 3.2.


50 See, eg, Chapter 2.4.2.

As I explained in Chapter 6, while Renard argued that his interstate common law solution was founded on the ‘essential attribute of federation’ that the States were equal, he expressly disavowed any reliance on the text of the Constitution to support his conclusion.\textsuperscript{53} However, since Renard developed his doctrine of ‘reasonable sharing’, the High Court has developed a number of implied ‘rights’.\textsuperscript{54} These ‘rights’ find their source in the text and structure of the Constitution.\textsuperscript{55} It is important to acknowledge that the critique of Renard’s work in this thesis has had the benefit of the High Court’s development of a number of implied ‘rights’ and its explanation of the interaction between the Constitution and the common law, which were developments in constitutional jurisprudence unavailable to Renard.

Here an important distinction can be drawn between Renard’s doctrine of reasonable sharing and a constitutional implication of an equality between States. The former is a proposal for a common law doctrine that purports to place a limit on State legislative and executive power. The latter is a proposed limit on the legislative and executive power of the States derived from the text and structure of the Constitution.

The question whether a principle of equality between States can be drawn from the Constitution has not been considered by the High Court. However, the notion that the Constitution contains an implied right to legal equality with respect to individuals in different States was considered and rejected by a majority of the Court in Leeth v Commonwealth.\textsuperscript{56} Nevertheless, as I will explain in this section, there are some important differences between an equality between individuals (as was the unsuccessful argument made in Leeth) and an equality between States.

\textsuperscript{52} Elsewhere Premier Weatherill has asserted that ‘The States were created equal. We are not being treated as equals’: See Jay Weatherill, ‘Response to the revised Murray Darling Basin Plan’ (News Release, 28 May 2012).

\textsuperscript{53} Ian Renard noted that the doctrine ‘is not based on particular constitutional provisions’: Ian A Renard, ‘The River Murray Question: Part III – New Doctrines for Old Problems’ (1972) 8 Melbourne University Law Review 625, 645.


\textsuperscript{55} The emphasis on deriving these implications from the text and structure is presumably an attempt by the Court to distinguish this interpretation from the pre-Engineers reasoning that supported the now discredited reserved powers doctrine: see Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129.

\textsuperscript{56} (1992) 174 CLR 455.
The case of *Leeth* involved the sentencing of a prisoner who had been convicted of importing drugs under the *Customs Act 1901* (Cth). The *Commonwealth Prisoners Act 1967* (Cth) required that the prisoner’s non-parole period be set in accordance with the legislation of the State in which he or she was convicted. The effect of the legislation was that those convicted of the same Commonwealth offence in different States could be subject to different procedures in setting a non-parole period and could therefore receive different non-parole periods for the same offence in the same circumstances. One of the arguments made by the prisoner was that the *Constitution* prohibited this discrimination in that it did not allow for the ‘unequal treatment of equals’.57

In *Leeth*, Mason CJ, Dawson and McHugh JJ noted that aside from the implied intergovernmental immunities doctrine, ‘there are also specific provisions prohibiting discrimination or preference of one kind or another, but these are confined in their operation.’58 Their Honours stated that the express statements in ss 51(ii), 92, 99 and 117 supported the conclusion that the concept of equality was limited to those provisions.59 In dissent, Deane and Toohey JJ explained that the Preamble and covering clause 3 of the *Constitution* showed that the Federation was achieved with the ‘free agreement of “the people”’ and ‘implicit in that free agreement was the notion of the inherent equality of the people as the parties to the compact.’60 Deane and Toohey JJ referred to the express provisions, including ss 51(ii), 92, 99 and 117 in support of an implied right to legal equality; Mason CJ, Dawson and McHugh JJ used the same provisions to support the opposite conclusion. Deane and Toohey JJ explained that

the existence of a number of specific provisions which reflect the doctrine of legal equality serves to make manifest rather than undermine the status of that doctrine as an underlying principle of the Constitution as a whole.61

Their Honours drew an analogy with the implied immunities doctrine in that they noted that specific provisions of the *Constitution* ‘which reflect or implement’ the immunities

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57 Ibid 457 (D F Jackson QC) (during argument).
59 *Leeth v Commonwealth* (1992) 174 CLR 455, 467. Section 92 of the *Constitution* requires that trade and commerce between the States ‘shall be absolutely free’. In addition, s 99 of the *Constitution* prevents the Commonwealth Parliament giving preferential treatment to one State over another with respect to trade and commerce.
61 Ibid 487.
doctrine ‘are properly to be seen as a manifestation of it and not as a basis for denying its existence by invoking the inappropriate rule of expressio unius.’ The approach taken by Deane and Toohey JJ is yet to find support of a majority of the Court.

In 1997, the argument that the Constitution contained an implied right to substantive equality was again considered and rejected by the Court in *Kruger v Commonwealth*. In that case Dawson J explained:

An analogy for the doctrine of equality was, it was said, to be discerned in the implied prohibition against Commonwealth legislation which discriminates against the States or subjects them or their instrumentalities to special burdens or disabilities. It would be surprising, it was suggested, if the Constitution ‘embodied a general principle which protected the States and their instrumentalities from being singled out by Commonwealth laws for discriminatory treatment but provided no similar protection of the people who constitute the Commonwealth and the States.’ With respect, I do not find that situation surprising at all. The limitation upon the powers of the Commonwealth Parliament which prevent it from discriminating against the States is derived from different considerations entirely, which were articulated by Dixon J in *Melbourne Corporation v The Commonwealth* when he said:

The foundation of the Constitution is the conception of a central government and a number of State governments separately organised. The Constitution predicates their continued existence as independent entities. That principle does not spring from any notion of equality. Moreover the Constitution is in many respects inconsistent with a doctrine of legal equality.

In *McGinty* Dawson J stated that implications from the text and structure of the Constitution can only be drawn ‘where they are necessary or obvious.’

The approach taken by the United States Supreme Court was to rely on an ‘overarching’ principle of equality between States without identifying where such a principle is found

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62 Ibid 484-5.
63 [1997] 190 CLR 1
64 Ibid 63-4.
whether or not an implication is categorised as structural or not, its existence must ultimately be drawn from the text. One is brought back to the text in the end and the danger in speaking of structural implications is, it seems to me, that there is a temptation to include by implication as part of the relevant structure those values which the structure is capable of accommodating, but does not necessarily accommodate.
within the text and structure. Similarly, Renard’s argument that the doctrine of equality between States is ‘an essential attribute of federation’ arguably suffers from this same problem. Importantly, constitutional implications cannot be drawn from what might be referred to as ‘underlying’ principles. As McHugh J wrote:

I cannot accept … that a constitutional implication can arise from a particular doctrine that ‘underlies the Constitution’. Underlying or overarching doctrines may explain or illuminate the meaning of the text or structure of the Constitution but such doctrines are not independent sources of the powers, authorities, immunities and obligations conferred by the Constitution. Top-down reasoning is not a legitimate method of interpreting the Constitution. … [I]t is not legitimate to construe the Constitution by reference to political principles or theories that are not anchored in the text of the Constitution or are not necessary implications from its structure. I pointed out that the Engineers’ Case had made it plain that the Constitution was not to be interpreted by using such theories to control or modify the meaning of the Constitution unless those theories could be deduced from the terms or structure of the Constitution itself.

Brennan J issued a similar caution that implications must be drawn from the text and structure of the document.

However, as the case of Leeth demonstrates, it is not as simple as gathering constitutional provisions that support the particular argument. In that case the same provisions were used to support diametrically opposing views. In this section I examine whether the text and structure supports a constitutional implication of an equality between States.

There is an important distinction between the previous cases and the present transboundary river problem. In Leeth and McGinty the High Court was dealing with the questions of equality between individuals from different States as opposed to whether there was equality between the bodies politic of the States. While rejecting that the Constitution provided a broad protection of equality between individuals, the joint judgment of Mason CJ, Dawson and McHugh JJ expressly acknowledges that the Constitution provided States with a protection against Commonwealth legislation that

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66 Renard, above n 53, 644-5.
68 Brennan J explained that “[i]mplications are not devised by the judiciary; they exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis. No implication can be drawn from the Constitution which is not based on the actual terms of the Constitution or on its structure”: ibid 168.
impaired their capacity to function as a result of the implied intergovernmental immunities doctrine enunciated by Dixon J in *Melbourne Corporation* and developed in subsequent cases. 69 Their Honours made this important qualification in the following way:

There is no general requirement contained in the Constitution that Commonwealth laws should have a uniform operation throughout the Commonwealth. There is, of course, the implication drawn from the federal structure erected by the Constitution that prevents the Commonwealth from legislating in a way which discriminates against the States by imposing special burdens or disabilities upon them or in a way which curtails their capacity to exercise for themselves their constitutional function. 70

Importantly, the joint judgment, therefore, does not appear to rule out a doctrine that operates so as to provide an equality as between States.

There are provisions within the Constitution that provide for equality between the States in a variety of ways. The relevance of each of those to this dispute will now be examined.

Section 7 of the Constitution provides for equal representation of States in the Senate. 71 The Senate was considered the ‘States’ House’ and was to provide each State with equal representation within the Commonwealth Parliament. The intention was to ensure that the larger States could not dominate the small States when dealing with national issues in the Commonwealth Parliament. While the practical operation of the Senate, with Senators usually voting with their party, does not guarantee substantive equality between the States, equality between the States is still reflected in the composition of the Senate.

Section 92 of the Constitution is also premised upon equality between the States, albeit in a very different context. The underlying principle behind s 92 is to create one economic unit and ensure trade between the States ‘be absolutely free’, 72 as it prevents a

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71 Cf *Australian Constitution* s 24. (Each State is not equally represented in the House of Representatives.)

72 Section 92 of the Constitution states: ‘On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.’
discriminatory burden of a protectionist kind being placed on interstate trade. To do so, it places a limitation on State and Commonwealth legislative power.

Examples of the Constitution providing an equality between the States can also be found in ss 99 and 102. Sections 99 and 102 are intended to avoid the Commonwealth giving preference to one State over another with respect to trade and commerce. In *Fortescue Metals Group Ltd v Commonwealth*, French CJ explained the purpose of s 99 along with s 51(ii) – the taxation power – in the following way:

[T]he constraints imposed by ss 51(ii) and 99 of the Constitution serve a federal purpose – the economic unity of the Commonwealth and the formal equality in the Federation of the States inter se and their people.

While those specific sections may seek to establish equality between the States with respect to taxation, French CJ did not go so far as to suggest that the principle of equality between the States was a broader principle to be found within the text and structure of which ss 51(ii) and 99 were mere examples. French CJ’s decision in *Fortescue*, like the joint reasons of Mason CJ, Dawson and McHugh JJ in *Leeth* does not decide the question of whether there is a principle of equality as between States. The question remains a live issue that is of particular relevance to the resolution of a transboundary river dispute.

In *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* Latham CJ explained that the Constitution did not prevent discrimination at large. In that case the Commonwealth imposed an excise duty on flour. The excise was paid by millers in all

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74 Sections 99 and 102 of the Constitution respectively state:

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

102. The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connection with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.

75 *Fortescue Metals Group Ltd v Commonwealth* [2013] HCA 34 (7 August 2013) [49]. In addition, French CJ commenced his judgment (at [3]) by noting that:

The limitation on Commonwealth legislative power imposed by ss 51(ii) and 99 of the Constitution protect the formal equality in the Federation of the States inter se and their people, and the economic union which came into existence upon the creation of the Commonwealth.

76 *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735, 764.
States in the same way. The excise paid by the miller would then be passed on to consumers. The money was then distributed to the States and used to give ‘assistance and relief’ to wheat farmers. Very little wheat was grown in Tasmania and almost all of its wheat was imported. The effect of the Commonwealth legislation was that Tasmanians would be paying a higher price for bread, while its farmers would receive very little benefit from the excise. It was therefore agreed that a special payment was made to Tasmania that was not subject to any conditions and was to be used by the Tasmanian Government to refund millers in that State who had paid the Commonwealth excise duty. One of the questions that arose was whether the special grant of money pursuant to s 96 to Tasmania discriminated against the other States:

There is no general prohibition in the Constitution of some vague thing called ‘discrimination.’ There are the specific prohibitions or restrictions to which I have referred. The word ‘discrimination’ is sometimes so used as to imply an element of injustice. But discrimination may be just or unjust. A wise differentiation based upon relevant circumstances is a necessary element in national policy. The remedy for any abuse of the power conferred by sec. 96 is political and not legal in character.

Not only did Latham CJ accept that there was no prohibition against discrimination in s 96, but if there was an injustice in that discrimination, it was not for the Court to resolve the matter. The case was appealed to the Privy Council. While the Privy Council warned that s 96 should not be used as a mechanism by which the protection in s 51(ii) can be bypassed, there was no suggestion that there was some wider or over-arching principle of equality or fairness beyond what was expressly provided for in s 51(ii).

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77 Ibid 757 (Latham CJ).
78 Ibid 753, 757 (Latham CJ).
79 Ibid 764 (Latham CJ). Rich J (at 767) and McTiernan J (at 809) agreed.
80 W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW) (1940) 63 CLR 338; [1940] AC 838.
81 On appeal, the Privy Council issued a cautionary note that s 96 could not be used so as to defeat the prohibition in s 51(ii) that Commonwealth laws with respect to taxation must not discriminate between States:

their Lordships ... do not take the view that the Commonwealth Parliament can exercise its powers under sec. 96 with a complete disregard of the prohibition contained in sec. 51(ii), or so as altogether to nullify that constitutional safeguard. The prohibition is of considerable importance; and the Constitution should be construed bearing in mind that it is the result of an agreement between six high contracting parties with in some respects very different needs and interests. Cases may be imagined in which a purported exercise of the power to grant financial assistance under sec. 96 would be merely colourable. Under the guise or pretence of assisting a State with money, the real substance and purpose of the Act might simply be to effect discrimination in regard to taxation.
One of the difficulties with drawing an analogy with this case is that it deals with the specific prohibition in s 51(ii) and whether s 96 was being used by the Commonwealth to circumvent the protection provided in s 51(ii). Further, it is a case dealing with the exercise of Commonwealth power. One of the challenges in analysing the transboundary river problem is that most of the previous disputes involve the ‘vertical’ relationship between the Commonwealth and the States and the limits on Commonwealth legislative power. To date, there have been very few cases involving disputes between States.\(^{82}\)

Ian Renard argued that s 100 provided ‘indirect, but weighty support’ for the reasonable sharing doctrine.\(^{83}\) He explained:

> Though [s 100] is primarily directed to relations between the Commonwealth and a State, its implied acceptance of a general right of reasonable use possessed by the States may well affect legal relations between States. The existence of inter-State common law is a direct consequence of the creation by the Constitution of a federal system, and any guide in the Constitution to the content of that law must be treated with the utmost respect.\(^{84}\)

However, as I explained in Chapter 3, it must be remembered that s 100 is only a limit on the Commonwealth’s power with respect to s 51(i) and would not entitle the State to the reasonable use of water for conservation and irrigation if the Commonwealth was regulating water with respect to another head of Commonwealth legislative power. While s 100 does not provide a ‘right’ (or limit on State power), it would be consistent with the existence of a implication of an equality between States. The fact that s 100 speaks of ‘the right of a State’ might suggest that the *Constitution* implicitly accepts that there is to be a body of law to operate in the resolution of disputes as between the States. The wording of s 100 reflects the arguments that were being made at the time of the drafting of the *Constitution* – that the States had a right to water\(^{85}\) – but does not itself create an equality with respect to the sharing of the waters from transboundary rivers.

One of the arguments that Inglis Clark made was that within a federation disputes between States must be resolved by peaceful means.\(^{86}\) The argument that there is not to be

\(^{82}\) See above Chapter 6.3.3, n 65.
\(^{83}\) Renard, above n 53, 662.
\(^{84}\) Ibid.
\(^{85}\) See Chapter 3.2.
\(^{86}\) A Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, 1901) 110. See Chapter 4.3.2.
warfare between States is supported by the *Constitution*, as s 114 forbids States raising and maintaining a military force. Perhaps this gives some weight to the argument that States within the Commonwealth are to resolve their disputes by peaceful means and that the High Court can play some role in the resolution of transboundary river disputes; however, it does not provide guidance as to the principles upon which the disputes are to be resolved.

The fact that s 75(iv) provides the Court with jurisdiction to deal with disputes between States was also relied on by Renard.\(^87\) While s 75(iv) might provide some support for the argument that a legal solution to this problem exists, as Renard correctly suggests, it provides no direct guidance with respect to the principles to be used to allocate water between States.\(^88\)

Perhaps s 109 is also relevant, although not for what it states, but what it does not. Where the Commonwealth is exercising its legislative power and the legislation is in conflict with the law of a State, the law of the Commonwealth shall prevail. However, no mention is made of how to reconcile a conflict in the exercise of legislative power of two States. Where one State seeks to regulate the waters of a transboundary river to the detriment of another State’s ability to use that water, perhaps the absence of any equivalent to s 109 adds further support to the argument that there is an equality between the States.

In addition to examining the particular constitutional provisions it is also important to examine the structure of the document and the system of government that the *Constitution* creates as a whole. In *Commonwealth v Mewett*, Gummow and Kirby JJ explained that the common law may need to adapt to the changes made to the legal system in 1901:

> This new state of affairs, established by the Constitution, required adjustment to habits of thought formed in a common law system with a unitary structure of government.\(^89\)

The nature of the federal compact and the way in which it came about are perhaps equally important; as the preamble of the *Commonwealth of Australia Constitution Act 1900* states, the people of the States ‘agreed to unite in one indissoluble Federal Commonwealth’. There is no provision in the *Constitution* for secession, which supports

\(^87\) Ibid 653.

\(^88\) Aside from the fact that in exercising power, the Court could act in accordance with the requirements set out in Ch III of the *Constitution*.

\(^89\) *Commonwealth v Mewett* (1997) 191 CLR 471, 546.
the contention that interstate disputes must be resolved by other means and within the constitutional structure.\textsuperscript{90}

Also important in this context is the fact that the \textit{Constitution} requires the continued existence of the States.\textsuperscript{91} In the next section of this chapter I examine the implied intergovernmental immunities doctrine and its potential relevance to the transboundary river problem.\textsuperscript{92} The basis for that doctrine is the co-existence of the States and the Commonwealth and their continued existence.\textsuperscript{93} The question here is whether the \textit{Constitution} requires not just the existence of the polities of the States, but also an equality between States. The difficulty is taking the additional step and establishing a constitutional imperative based upon an equality between States.

While not exclusively, the focus of the \textit{Constitution} is on the relationship between the Commonwealth and the States. Consequently, there are very few constitutional provisions dealing with the relations between States.\textsuperscript{94} It is, therefore, more difficult to draw upon the text and structure of the \textit{Constitution} to craft an argument that the document supports an implication of an equality between States. The Australian federal system requires the existence of the States, but the States could exist without an equality as between States. In the context of sharing water from a transboundary river, if an upstream State took a volume of water that was deemed to be slightly more than an equitable share, it would not necessarily upset the federal system of government established by the \textit{Constitution}. As a consequence, it is more difficult to argue that a constitutional imperative establishes equality between States that would support an equitable distribution of water from a transboundary river. Perhaps here an important distinction can be drawn between the continued existence of the States (or ‘survival’) of the States – an implication that has been recognised to be supported by the text and structure of the \textit{Constitution} – and equality between States (in the sense of equal access to resources), which may be more difficult to derive from the document.

\textsuperscript{91} \textit{Melbourne Corporation v Commonwealth} (1947) 74 CLR 31, 82 (Dixon J).
\textsuperscript{92} See Chapter 7.4.2.
\textsuperscript{93} \textit{Melbourne Corporation v Commonwealth} (1947) 74 CLR 31, 82 (Dixon J).
\textsuperscript{94} For perhaps the obvious exceptions see \textit{Australian Constitution} ss 75(iv), 92.
In identifying provisions that are consistent with a principle of equality of States, one is faced with a similar problem to that which the majority dealt with in *Leeth*: while there are a number of sections that seek to achieve equality between the States, those provisions could equally be viewed as the limit of any principle of equality as expressed within the *Constitution*. It is at least arguable that a principle of equality between States could be supported by the text and structure of the *Constitution*. However, the primary difficulty with this approach is translating the principle into a meaningful and workable solution for a transboundary river dispute.

If a doctrine of equality between States does exist, when could one State enliven the doctrine to place a limit on the legislative or executive power of another State? It is giving content to this implication that is most difficult. The States are polities of equal standing *vis-à-vis* each other. As a general proposition, the bodies politic of each State have the ability to legislate and regulate within their law area (that is, within its territorial boarders).\(^95\) That general principle is reflected in the common law presumption that States do not intend to legislate extraterritorially.\(^96\) As I explained earlier in this chapter, States are permitted to legislate extraterritorially, however, it must be in clear and unambiguous terms.\(^97\) Perhaps where the legislation of one State starts to interfere with the enjoyment of another State to legislate within its own territory, that legislation would offend a principle of equality between States. Where the upstream State demands more water from a transboundary river be retained within its territory while, at the same time, the downstream State demands more water flow into its territory, how is this to be resolved?

This approach requires not just the acceptance that the States are of equal status, but also that resources that flow across or straddle State borders must be shared consistent with that principle. Would a doctrine based on prior appropriation be inconsistent with a doctrine of equality between States?\(^98\) Does equality between States require the volume of water from transboundary rivers to be distributed on a per capita basis? An alternative

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\(^95\) Subject, of course, to s 109 of the *Constitution*.


\(^97\) See Chapter 7.3.1.

\(^98\) Cf *Nebraska v Wyoming*, 325 US 589, 618 (1945). In that case the United States Supreme Court held that where both States have adopted the prior appropriation doctrine to regulate *intra*state water disputes, prior appropriation becomes the ‘guiding principle’ in resolving transboundary river disputes between those two States. See Chapter 6.3.5.
would be to divide the water on the basis of the proportion of the transboundary river (or river basin) within each State?

Alternatively, does a constitutional implication of equality between States require that each State have a ‘reasonable’ or ‘equitable’ share of the water from a shared water resource? What constitutes a ‘reasonable’ share might not be easy to determine when dealing with a complex river system such as the Murray-Darling Basin. As the United States cases dealing with transboundary rivers demonstrate, while not impossible, courts developing and applying such principles is neither a simple nor quick task. As I explained in Chapter 6, a doctrine based on ‘reasonableness’ would be difficult to apply across an entire river basin without a significant investigation.

In summary, whether the text and structure of the Constitution provides an implication of equality between States is at least arguable. However, the difficulty in this reasoning is translating such a principle into a meaningful and workable doctrine capable of resolving transboundary river disputes.

In the following section I propose what I consider to be the best solution to this problem. By ‘best solution’, I mean the approach that provides the most coherent legal solution that is consistent with existing legal doctrines.

7.4.2 An Extension to the Intergovernmental Immunities Doctrine?

The argument made in this section is that the implied intergovernmental immunities doctrine as first explained by Dixon J in Melbourne Corporation can be expanded so as to resolve transboundary river disputes. There are two aspects to the expansion of the doctrine: first, whether the doctrine can apply as between States; and secondly, whether the doctrine protects more than just the State as a polity. Before examining these two issues in detail, I briefly explain the basis for the implied intergovernmental immunities doctrine.

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99 Chapter 6.3.6.
100 Chapter 6.4.4.
101 See Chapter 1.5. In identifying the ‘best solution’, I am seeking to anticipate how the High Court might approach the problem, based on the current state of the law.
The Constitution creates a federal system. That system is founded in both the text and structure of the Constitution. As Quick and Garran explained:

The Federal idea, therefore, pervades and largely dominates the structure of the newly-created community, its parliamentary executive and judiciary departments.\textsuperscript{102}

Chapters I, II and III establish the Commonwealth Parliament, Executive and Judicature respectively. Chapter V deals primarily (although not exclusively) with matters relating to States. Most importantly within Chapter V, s 106 affirms the continued operation of State constitutions and s 107 maintains the legislative power of the colonies at the formation of the Commonwealth in 1901 (subject to the Australian Constitution).\textsuperscript{103} While the High Court in the Amalgamated Society of Engineers v Adelaide Steamship Co Ltd rejected the ‘implied immunities of instrumentalities doctrine’,\textsuperscript{104} the Court subsequently held that there were some functions of the State Governments that are immune from the laws of the Commonwealth. The rationale behind the doctrine is that there must be some aspects of the operation of the State (as a polity) that must be free from the interference of the Commonwealth, for if the Commonwealth were allowed to interfere in this way, it would put at risk the existence of the States. The foundation of the doctrine is the federal structure. The system established by the Constitution, as Gleeson CJ explained in Austin v Commonwealth, ‘involves the co-existence of national and state or provincial governments, with an established division of governmental powers; legislative, executive and judicial.’\textsuperscript{105}

\textsuperscript{102} John Quick and Robert Randolph Garran, The Annotated Constitution of the Australian Commonwealth (Angus & Robertson, 1901), 332.

\textsuperscript{103} Section 106 of the Constitution provides:

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

Section 107 of the Constitution provides:

Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

\textsuperscript{104} Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129 (‘Engineers Case’).

\textsuperscript{105} Austin v Commonwealth (2003) 215 CLR 185, 211 [17].
The Constitution assumes not only the co-existence of the Commonwealth and States, but also their continued existence. In *Melbourne Corporation v Commonwealth* Dixon J stated:

> The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities.\(^\text{106}\)

Dixon J explained that the ‘very frame of the Constitution’ required the separate governments to function independently.\(^\text{107}\) More recently, in *Clarke v Commissioner of Taxation*, French CJ referred to the Preamble, the covering clauses and Chapter V in support of the continued existence of the States:

> The Constitution assumes the continuing existence of the States, their co-existence as independent entities with the Commonwealth, and the functioning of their governments. This assumption is readily inferred from the reference to ‘one indissoluble Federal Commonwealth’ in the Preamble and the terms of ss 3, 5 and 6 of the *Commonwealth of Australia Constitution Act 1900* (Imp) and the provisions of Ch V of the Constitution itself.\(^\text{108}\)

Of particular relevance to this problem is *Commonwealth v Tasmania* (‘Tasmanian Dam Case’).\(^\text{109}\) In that case the High Court considered, amongst other constitutional issues, whether Commonwealth legislation and regulations preventing the construction of a dam by the Tasmanian Government offended the implied immunities doctrine.\(^\text{110}\) Tasmania argued that the *National Parks and Wildlife Conservation Act 1975* (Cth) and the *World

\(^{106}\) *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 (emphasis added).

\(^{107}\) Ibid 83. Dixon J stated:

> Accordingly the considerations upon which the States’ title to protection from Commonwealth control depends arise not from the character of the powers retained by the States but from their position as separate governments in the system exercising independent functions. But, to my mind, the efficacy of the system logically demands that, unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorizing the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority. In whatever way it may be expressed an intention of this sort is, in my opinion, to be plainly seen in the very frame of the Constitution.

\(^{108}\) *Clarke v Commissioner of Taxation* (2009) 240 CLR 272, 289. French CJ’s use of the word ‘assumption’ is not a reference to an assumption made by the framers, but an implication to be drawn from the Constitution. For a more recent discussion of the intergovernmental immunities doctrine see: *Fortescue Metals Group Ltd v Commonwealth* [2013] HCA 34 (7 August 2013) [133]-[137] (Hayne, Bell and Keane JJ).

\(^{109}\) *Commonwealth v Tasmania* (1983) 158 CLR 1 (‘Tasmanian Dam Case’).

\(^{110}\) The facts of the case are outlined at Chapter 3.3.3 in the context of the analysis of s 100.
Heritage Properties Conversation Act 1983 (Cth) and associated regulations and proclamations were invalid because they interfere with, inhibit, curtail or impair the legislative or executive functions of the State of Tasmania and the prerogative of the Crown in right of the State.\(^{111}\)

The effect of the legislation was to prevent the Tasmanian Government building the dam and undertaking associated construction works without the consent of the relevant Commonwealth Minister. The Wilderness National Parks established by the Commonwealth legislation occupied 11 per cent of the State.\(^{112}\)

All four members of the Court who considered the intergovernmental immunities argument rejected Tasmania’s submission.\(^{113}\) Murphy J, who described the argument advanced by the Tasmanian Government as ‘frivolous’, stated:

> The mere fact that the Acts impair, undermine, make ineffective or supersede various State functions or State laws is an ordinary consequence of the operation of Federal Acts and does not affect their validity.\(^{114}\)

Mason J drew the distinction between Commonwealth legislation that would impair ‘the capacity of the State to function as a government’ – which was impermissible – and legislation that would interfere or impair ‘any function which a State government undertakes.’\(^{115}\) The latter was merely a consequence of a federal system in which the legislative power is divided between the Commonwealth and the States. Brennan and Deane JJ each explained the problem in a similar way. Brennan J wrote:

> The consideration which, in my view, determines whether the Commonwealth measures invalidly trespassed upon the exercise of the executive authority of the State is to be found in the actual operation of those measures upon the functioning of the executive government of the State. ... The Commonwealth measures diminish the powers of the executive government but they do not impede the process by which its powers are exercised.\(^{116}\)

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\(^{111}\) Tasmanian Dam Case (1983) 158 CLR 1, 22 (Deane J) (during argument).

\(^{112}\) Ibid 281.

\(^{113}\) Ibid 139-41 (Mason J), 169 (Murphy J), 212-5 (Brennan J), 280-1 (Deane J).

\(^{114}\) Ibid 169.

\(^{115}\) Ibid 139.

\(^{116}\) Ibid 214. Brennan J went on to state (at 214-5):

> There is no foundation for attributing to the control of the mass of the wastelands of the State a special immunity from valid Commonwealth law. Wastelands of the state are to be administered by the executive government of the State according to the law which is binding upon it, including
Deane J stated that the legislation was valid on the basis that there was no ‘operative interference at all with the legislative or executive powers of Tasmania in respect of that land.’ While the Commonwealth legislation would cause particular State functions to be ineffective, it would not prevent the processes of the State Legislature or Executive from functioning. Brennan J noted that a successful intergovernmental immunities challenge might arise if the Commonwealth legislation were to apply ‘to the buildings that house the principal organs of a State.’ Brennan J’s remarks suggest that an extreme physical interference that, for example, cut off the water supply to the government buildings and offices could give rise to the intergovernmental immunities protection.

In the subsequent case of *Western Australia v Commonwealth* the Government of Western Australia argued that provisions within the *Native Title Act 1993* (Cth) offended the immunities doctrine. In short, the relevant provisions related to the regulation of future actions so as to protect native title. Western Australia claimed that the Act had a greater detrimental effect on that State than any other and that the Act ‘deprives the government of the State of the capacity to function as a government or burdens and impedes its function as a government.’ The argument was that the *Native Title Act* would interfere with its capacity to deal with public lands and associated agricultural and mining uses. While the Court acknowledged that the Act was likely to have a ‘different effect’ on Western Australia because of its history and geography and may complicate the administration of mining in that State, it did not give rise to an immunity from the Commonwealth legislation. The Court held that the effects [of the Act] touch upon the scope of State power and the difficulty of its exercise, not upon the machinery of the government of the State. They are, no doubt, of

the laws of the Commonwealth that bind the state. A restriction upon doing of specified acts in the exercise of an executive power to use and to control the use of wastelands is not an invalid intrusion upon the exercise of that power.

117 Ibid 281. His Honour concluded: ‘Nor, in my view, can the actual prohibitions and restrictions which the Act, Regulations and proclamations impose in respect of more limited areas properly be seen as in any way inconsistent with the continued existence of Tasmania or its capacity to function.’

118 That is, for example, the Parliament building or a courthouse: Ibid 214.

119 *Western Australia v Commonwealth* (1995) 183 CLR 373 (‘*Native Title Act Case*’).

120 Ibid 476, 478.

121 Ibid 478.


123 Ibid 478.

124 Ibid 480.
considerable political significance, for the effective scope of State powers and the efficiency of their exercise are the concern of the governments of the States.\textsuperscript{125}

The fact that the legislation may have made the execution of State powers more complicated or restricted their application was not relevant. The critical question was whether the Commonwealth legislation had impaired the capacity of the bodies politic of the State to function.\textsuperscript{126} The Native Title Act Case and the Tasmanian Dam Case highlight that a broad interpretation of the immunities doctrine as advocated by the respective States in those cases would create a tension with the wide interpretation that the Court has given to Commonwealth legislative power.

Given that the interpretation of the immunities doctrine to date has been limited to relations between the Commonwealth and States, and to the capacity of the State to function as a polity, what value can this approach offer the States in a transboundary water dispute? In the next section I will examine whether the immunities doctrine can be extended to apply as between States. There are two steps to the analysis: first, an examination of the application of the doctrine between States; and secondly, whether the immunities doctrine can be extended to protect more than the polity.

\textsuperscript{125} Ibid 480 (Mason CJ, Brennan J, Deane J, Toohey J, Gaudron J and McHugh J).

\textsuperscript{126} The majority of Mason CJ, Brennan J, Deane J, Toohey J, Gaudron J and McHugh J explained (at 480-1):

The relevant question is whether the Commonwealth law affects what Dixon J called the ‘existence and nature’ of the State body politic. As the Melbourne Corporation Case illustrates, this conception relates to the machinery of government and to the capacity of its respective organs to exercise such powers as are conferred upon them by the general law which includes the Constitution and the laws of the Commonwealth. A Commonwealth law cannot deprive the State of the personnel, property, goods and services which the State requires to exercise its powers and cannot impede or burden the State in the acquisition of what it so requires.

Such practical difficulty as there may be in the administration of Western Australia governing land, mineral and the pipeline transportation of petroleum products can be attributed to the realisation that land subject to native title is not the unburdened property of the State to use or to dispute of as though it were the beneficial owner. The notion that the waste lands of the Crown could be administered as the ‘patrimony of the nation’ and that the tradition rights of the holders of native title could be ignored was said to be erroneous in Mabo [No 2] and the effect of the Native Title Act on State administration must be seen in that light. The Native Title Act may diminish the breadth of the discretion available to the Executive Government but that is not sufficient to stamp it would invalidity.

This principle was again emphasised in the more recent decision of Fortescue Metals Group Ltd v Commonwealth [2013] HCA 34 (7 August 2013) [133]-[137] (Hayne, Bell and Keane JJ).
7.4.2.b Intergovernmental Immunities Doctrine as between States

The cases considering the immunities doctrine have concerned the ‘vertical’ interaction between the Commonwealth and the States. The very nature of a federal system means that Commonwealth legislation will operate within the territory of the States. The scope of the Commonwealth’s power over subject matters such as taxation means there is the potential for the Commonwealth to pass legislation that attempts to impair the capacity of a State to function as a government and in those circumstances the immunities doctrine will apply.127

One reason why the application of the immunities doctrine as between States has not been judicially considered relates to the scope of a State’s legislative power. As noted above, for State legislation to be valid there must be ‘a relevant connexion’128 to the legislating State. While a remote connection may be sufficient, a State law that might otherwise attract the immunities doctrine would often be invalid for want of a connection to the legislating State.129 However, the regulation of transboundary rivers is one of the rare instances in which the legislation of one State could have an effect (either directly or indirectly) beyond the territory of the legislating State.

While the potential for an immunities argument to arise between States is less likely, the principles upon which the existing doctrine is based could support the extension of the doctrine as between States. While the application of the intergovernmental immunities doctrine as between States has not been considered by the Court, the approach is not without some support. As Bradley Selway wrote:

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128 Union Steamship v King (1988) 166 CLR 1, 14.
129 For example, a law of one State that sought to regulate the pension of a judge in another State would have an insufficient (if any) connection to the legislating State. From a practical perspective it is difficult to envisage a State wanting to enact such legislation and the lack of connection to the legislating State is so obvious that a State Government would be unlikely to attempt to pass the legislation through Parliament. If such legislation were enacted, it would likely be invalid due to a lack of connection and it would therefore be unnecessary to consider whether a modified or extended intergovernmental immunities doctrine applied as between States. Cf Clarke v Commissioner of Taxation (2009) 240 CLR 272; Austin v Commonwealth (2003) 215 CLR 185. As Sarah Murray noted, extending the intergovernmental immunities doctrine as between the States ‘would inevitably intersect with considerations of the scope of State legislative power and extra-territorial competence’: Sarah Murray, ‘Constitutional Musing on Clark and Austin’ (2011) 6 Public Policy 121, 132.
Although less likely to arise in practice [the immunities doctrine] must also apply to limit the power of the State in respect of other States.\textsuperscript{130}

Alex Castles came to a similar conclusion:

because of Australia’s federal structure, State legislation which impinges on the sovereignty of another State within the federation may be unconstitutional.\textsuperscript{131}

Castles reasoned:

The limited doctrine of intergovernmental immunities enunciated in such cases as \textit{West v Commissioner of Taxation} (1937) 56 CLR 657 and \textit{City of Melbourne v The Commonwealth} (1947) 74 CLR 31 could provide for a limitation on State power in this regard if legislation which purported to have extra-territorial effect was construed as impinging on the prerogative rights of the other States or burdened their essential governmental functions.\textsuperscript{132}

More recently, Gleeson CJ noted that the \textit{Melbourne Corporation} principle is ‘founded upon an implication which also has significance in relation to an exercise of State legislative power which destroys or weakens the legislative authority of another State or its capacity to function as a government.’\textsuperscript{133} If the basis for the immunities doctrine is to ensure the co-existence and continued existence of the States, there would be no bar to the same principle supporting the application of the immunities doctrine between States. The purpose of the immunities doctrine is to prohibit the Commonwealth interfering with the essential workings of the States. The co-existence is not just the Commonwealth with the States but must also be the States with each other. If the legislative and executive power of the Commonwealth must be limited so as not to interfere with the continued existence of the States, then the legislative and executive power of each State must equally be limited to maintain the continued existence of the other States, and one State must not interfere with the essential workings of another State.

\begin{flushleft}
\textsuperscript{130} Bradley Selway, \textit{The Constitution of South Australia} (Federation Press, 1997) 73.
\textsuperscript{131} Alex C Castles, ‘Limitations on the Autonomy of the Australian States’ [1962] \textit{Public Law} 175, 199.
\textsuperscript{132} Ibid 199, n 72.
\end{flushleft}
If the reasoning behind the existing immunities doctrine can support the application of the immunities doctrine as between States, the next question is whether this expansion of the doctrine as between States would assist in resolving a transboundary river dispute. I now turn to that question.

7.2.4.c The Application of the Immunities Doctrine to the Transboundary River Problem

I return to the hypothetical in which New South Wales wanted to construct a dam that would cut off the flow of the River Murray entirely so that no water reached the downstream State of South Australia. The effect of such action would have serious consequences for South Australia. It would affect the many South Australian farmers and irrigators that rely on the water for their stock and crops. The effects would also be felt further in the urban areas that rely on the waters of the Murray. 134 If the flow of the River was stopped completely by an upstream State there may be a question as to whether significant portions of the State would be habitable.

Under the existing immunities doctrine transmitted to apply between States the critical issue would be whether the legislation of the upstream State impaired the capacity of the downstream State to function as a government. This would, of course, be a question of fact that would need to be determined by the Court. However, it would take a rather extreme upstream event – perhaps the damming of the river entirely – for the water shortage downstream to be so dire that it impaired the capacity of the State as a polity to function. Perhaps a water shortage that affected government buildings (and therefore prevented the government from operating) could give rise to an immunities protection under the existing doctrine, as was suggested by Brennan J in the Tasmanian Dam Case. 135 In these circumstances, the immunities doctrine may provide a solution to the extreme case where the holding of all (or nearly all) the water upstream prevents the downstream State as a polity from functioning. However, the narrow intergovernmental immunities doctrine as established in Melbourne Corporation would not assist in settling a transboundary river dispute beyond this extreme example.

134 See Chapter 1.2. It will be recalled that Adelaide’s average water use accounts for 1 per cent of the total water extracted from the Murray-Darling Basin: Murray-Darling Basin Commission, Murray-Darling Basin Water Resources Fact Sheet (November 2003), 3 <http://www2.mdbc.gov.au/__data/page/20/water_resourcesver2.pdf>

135 Cf Tasmanian Dam Case (1983) 158 CLR 1, 214 (Brennan J). See also above n 118.
The immunities doctrine to date has focused on the preservation of the processes of government. One important question that is relevant to this enquiry is whether the doctrine can extend beyond just the protection of the polity. It is that question that I now examine in this section.

In *Tasmanian Dam* Mason J left open the possibility that, upon the facts of that case, there might be circumstances where the area of land affected by the legislation in question was so great that the immunities doctrine would apply:

> It is perhaps possible that in some exceptional situations if the area of land affected by *Commonwealth* prohibitions similar to those imposed by reg. 5 [of the *World Heritage (Western Tasmania Wilderness) Regulations* (Cth)] forms a very large proportion of the state, the imposition of the prohibitions would attract the *Melbourne Corporation* principle.\(^{136}\)

Regulation 5 prevented the construction of a dam and associated works within the designated area – an area of 14,125 hectares.\(^{137}\) Mason J’s obiter remarks suggest there might be instances where the geographical impact of the legislation (or associated regulations) is so wide that it would offend the immunities doctrine.

The continued existence of the States must be more than the existence of the arms of government. It would seem somewhat artificial if the immunities doctrine was to preserve the State Legislature, Executive and Judiciary, but at the same time, the State could become uninhabitable. For the arms of government to have any purpose or function, there must be a physical State and a community operating within that geographical area. As Latham CJ explained in *Australian Communist Party v Commonwealth*:

> The continued existence of the community under the Constitution is a condition of the exercise of all the other powers contained in the Constitution, whether executive, legislative or judicial.\(^{138}\)

The *Constitution* acknowledges the division of the Australian community into States and those States as operating with a territory.\(^{139}\)

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\(^{136}\) Ibid 141 (emphasis added).

\(^{137}\) Ibid 141.

\(^{138}\) *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 141.

\(^{139}\) See, eg, *Australian Constitution* ss 111, 123.
For there to be a State Legislature, there must also be communities living within those States. Members of Parliament will come from and be elected by the community. Further, at the federal level, the establishment of the Senate requires the people of each State to elect representatives and those representatives are to be ‘directly chosen by the people’ of each State. In addition, implicit in the Constitution is the continued existence of the States as geographical areas.\textsuperscript{140} Section 51(i), for example, assumes there will be ‘trade among the States’, which suggests the continued existence of the States as separate geographical regions with economic activity. The section also assumes that communities or individuals within the different States will engage in trade, which requires people living within those geographical areas and productive output. Section 92 also assumes not only the trade between States, but travel between States,\textsuperscript{141} which further supports the implication that the States as geographical areas must continue to exist. In addition, ss 117 and 100 expressly refer to the ‘residents’ of States, adding further support to the implication that there must be States consisting of communities living within these regions. It seems, therefore, that along with the continued existence and coexistence of the States and the Commonwealth as polities, it is ‘logically and practically’\textsuperscript{142} necessary that the implication upon which the immunities doctrine is based also requires the continued existence of the States as geographical areas inhabited by residents. While it is not the role of the Court to establish or admit new States – that is the role for the Parliaments of the States and Commonwealth\textsuperscript{143} – the Constitution is founded on the existence of the States and the Court must ensure this principle is upheld.

There are sound practical reasons why the immunities doctrine must be extended to ensure that the States must continue to exist. First, short of retaliation – and even this might be difficult\textsuperscript{144} – the States have no way of resisting the actions of the other States.\textsuperscript{145} Secondly, the Commonwealth may be unable to assist the State being harmed by another State’s legislation (it may not, for example, fall within the scope of the

\begin{footnotes}
\item[141] Section 92 of the Constitution provides that ‘intercourse among the States ... shall be absolutely free.’
\item[142] Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106, 135 (Mason CJ).
\item[143] Australian Constitution ss 121-4.
\item[144] See Australian Constitution s 114
\item[145] This was Inglis Clark’s reasoning for why the High Court must have jurisdiction over transboundary river disputes: see A Inglis Clark, Studies in Australian Constitutional Law (Charles F Maxwell, 1901) 110. See above Chapter 4.3.2.
\end{footnotes}
Commonwealth’s legislative power). 146 Thirdly, even if the Commonwealth was in a position to assist, it would require the Commonwealth to side with one State over another, a position the Commonwealth might be unwilling to take. 147

If the argument is accepted that the immunities doctrine can be extended to operate between States and beyond the preservation of the polity to also include the continued existence of the States as geographical areas inhabited by residents, the challenge in extending the doctrine is in its application. I turn now to examine the application of an extended intergovernmental immunities doctrine to a transboundary river problem.

Returning to the first scenario I posed at the start of the chapter, if a dam constructed by New South Wales cut off the flow entirely the consequence might be an extreme water shortage in Adelaide and other towns reliant on water. That could lead to the destruction of those communities; the water shortage could be so severe it leads to extreme rationing, land may be uninhabitable, towns would in all likelihood close and residents may be forced to move either within the State or even interstate. In those circumstances, it would seem there would be a strong case that the legislative actions of the upstream State have impaired the capacity of the downstream State to function as an ongoing community and would fall foul of the immunities doctrine if extended in the proposed fashion.

The difficult task for the Court is working out where to draw the line: when does the taking of water upstream become too much so as to trigger the application of the immunities doctrine? What the United States decisions demonstrate is that transboundary river cases will involve complex factual situations and will largely turn on those facts. 148 The effect that the legislative and regulatory actions of the upstream State have on the downstream State will be important and how the Court interprets how dire the situation is will have a great bearing on the resolution of the dispute. A downstream State able to show that the actions of the upstream government have caused or are in all probability likely to cause harm to communities, reduction in community numbers and perhaps even

146 Importantly, even if it were possible for the Commonwealth Parliament to legislate it is not mandatory for it to do so, and if it does, it must do so in a manner consistent with the Constitution.
147 Although that might itself be prohibited: Australian Constitution s 99.
148 See Chapter 6.3.6.
the closure of the towns or communities might be able to show that the upstream States’ actions offended this proposed extension of the immunities doctrine.\(^\text{149}\)

In maintaining the existence of the States and the communities within, it might be that the appropriate threshold to give rise to the proposed extended immunities doctrine is that each State must be permitted to have sufficient water to meet the ‘critical human water needs’ of its residents. Determining the ‘critical human water needs’ is one factor that must be taken into account in developing the Basin Plan.\(^\text{150}\) The fact that this terminology is used in developing the Basin Plan does not provide support for this concept being used as the threshold test in what might give rise to a successful challenge under the proposed extended immunities doctrine. However, it does illustrate that assessing the critical human water needs is a measure that can be determined.

If the intergovernmental immunities doctrine was to be extended in this way, the extended doctrine could also apply between the Commonwealth and the States without difficulty. It may be that the extended immunities doctrine does not arise as often as between the Commonwealth and States because there are other limits on power that may resolve these problems: ss 51 and 52 already limit the scope of the Commonwealth’s legislative power and, with respect to transboundary river disputes, s 100 provides a further limit on Commonwealth power. The rationale behind the proposed extended doctrine is that it is necessary for States to continue to function. If that basis is correct, it can apply equally as between the Commonwealth and States. Such an extension is consistent with previous decisions, particularly the \textit{Tasmanian Dam Case} and the \textit{Native Title Act Case}. In the \textit{Tasmanian Dam Case}, the Commonwealth legislation did not prevent the continued existence of the community in Tasmania. However, had the factual situation been different the result may have varied under the expanded immunities doctrine. For example, if the dam had been used for hydroelectric power and that source of power was the sole or primary source of power for Tasmania, then there might be a question of whether the Commonwealth legislation preventing the dam was going to cause the

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149 The factual nature of these disputes also highlights the importance of the High Court dealing with ‘matters’ and not answering legal questions in the abstract.
150 Water Act (Cth) s 86A. Section 86A(2) provides:

\textit{Critical human water needs} are the needs for a minimum amount of water, that can only reasonably be provided from Basin water resources, required to meet:

(a) core human consumption requirements in urban and rural areas; and
(b) those non-human consumption requirements that a failure to meet would cause prohibitively high social, economic or national security costs.
destruction of the community within the State. It would only be in these circumstances that the proposed extended immunity doctrine might apply. Similarly, in the *Native Title Act Case* there was no suggestion that the legislation in question had had or was going to have a detrimental effect on the continued existence of communities within Western Australia; the suggestion was merely that when the Government of Western Australia sought to develop mining and mineral resources within that State there would be additional regulatory procedures that it would need to undertake. While the *Native Title Act* might have made the Government’s dealing with land more difficult, there was no suggestion that it would result in the destruction of communities or severe harm to the geographical area within Western Australia.

It is important to situate this solution within the context of the other mechanisms within the *Constitution* that may assist in resolving transboundary river disputes. The Commonwealth has power to legislate with respect to various heads of power that could affect the flow of transboundary rivers: ss 51(i), 51(xx) and 51(xxxix) could all potentially give rise to the Commonwealth regulating aspects of transboundary rivers. In addition, the referral power – s 51(xxxvii) – would allow the States to hand over control of the problem to the Commonwealth, which is the approach partly taken under the current legislative framework. Of course, this may be unsatisfactory from the perspective of one or more States, as it relies on the Commonwealth’s involvement. Further, it may be that the Commonwealth sides with the upstream state, leaving the downstream State in the same position. Again, it is important to keep in mind that there is no ‘perfect’ solution to this problem. There is no s 100A of the *Constitution* that provides a ready and clear solution.

**7.4.2.d Criticisms of the Approach**

The approach advocated in extending the intergovernmental immunities doctrine as a means of resolving transboundary river disputes might be only a partial solution for South Australia. It is a more limited approach than, for example, Renard’s doctrine of reasonable sharing. It would not guarantee South Australia a reasonable share of the Murray’s waters. The extended immunities doctrine would only protect South Australia: first, where the operation of the law of another State has impaired or will impair the

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151 It would, of course, also depend on precisely what is referred and the extent of the referral.
capacity of the State to function as a government; or secondly, where the legislation has caused or will cause such severe harm to the geographical area of the downstream State or to the community of that State that it impaired or will impair the ongoing operation or function of the community or the area has become or will become uninhabitable. Determining the level of hardship that would give rise to a successful immunities argument would be the challenge for the Court. South Australia would be in the position that it must demonstrate that this harm has been done or will be done as a result of the upstream State’s legislative or executive actions.

One of the weaknesses of some of the early analyses of the transboundary river problem is that they commenced with an end in mind and tried to fit the law to reach that end. In this chapter I have commenced my analysis by examining the existing law and the principles upon which it is based, determined how it might be extended or adapted in a manner consistent with those fundamental principles, and considered the application of the proposed doctrine to the transboundary river problem.

One of the reasons why the approach based on an extension of the intergovernmental immunities doctrine is more limited is that I do not equate the continued existence of the States with equality between States. A distinction can be drawn between the survival of the States (and the communities within) and an equality between States. While I accept an argument could be made that an implication of equality between States can be drawn from the Constitution, the difficulty with this approach is giving this principle content so that it can be used to resolve a transboundary river dispute.

Another criticism that might be levelled at an approach based upon an extension of the immunities doctrine is that it places South Australia in a weaker negotiating position than its upstream neighbours. However, any time a court makes a determination of the rights of parties or the limits on legislative power, it has the potential to weaken the future negotiating position of one party and strengthen that of another. That is a function of a court determining legal issues in favour of one party over another.

From a practical perspective, the solution proposed in this section is one that provides a more limited role for the Court in resolving transboundary river disputes. Except in the extreme situation, a dispute will be left to the States to resolve by negotiation and

152 See Chapter 2.4 and Chapter 4.2-4.5.
agreement. While negotiation between the States can be challenging and time consuming, the experience in the United States has been that negotiation is still preferable to litigation, which is also a lengthy process. Equally, however difficult it might have been at times, for the past 100 years the States of Australia have been able to negotiate a solution to the dispute over the regulation of the waters of the River Murray. It must also be remembered that whether a solution is reached by negotiation or litigation, there is no ‘quick-fix’ to these complex problems.

7.5 Conclusion

This chapter commenced by examining how the interstate water dispute has been expressed and conceptualised. The word ‘rights’ has been used to mean both a moral and legal right in the context of the transboundary river dispute. Previous analogies with the riparian rights doctrine have tried to equate the rights of private individuals with the legislative power of a State. South Australia’s ability to take water from the Murray is dependent on the scope of State legislative and executive power, both of its own power and that of the upstream States. In this chapter I have argued that it is more instructive to re-examine the problem in terms of the scope of the legislative and executive power of the States and the limits on that power to resolve the transboundary river problem.

In the second part of the chapter I examined the scope of State legislative power and the ability of a State to legislate extraterritorially. I considered whether South Australia would be able to regulate water use in the upstream States so that it could ensure that a particular volume of water reached the downstream State. While South Australia may be able to legislate with respect to matters outside its borders so long as there is a connection to that State, where there is an inconsistency between the laws of South Australia and New South Wales in New South Wales, the law of New South Wales is likely to prevail.

In this chapter I have examined two potential constitutional implications: equality between States and an extended implied intergovernmental immunities doctrine. I explained that one of the difficulties with the equality between States argument is determining the content of such a principle that would provide a solution to a transboundary river problem.

In this chapter I have argued that the intergovernmental immunities doctrine can be extended to operate between States. The fundamental principle upon which the doctrine is based – the continued existence of the States – applies equally to a State attempting to
impair the capacity of another State to function as it does the Commonwealth. I further argued that it is ‘logically and practically necessary’ for the immunities doctrine to be extended to circumstances where not just the function of the polity of the State was impaired, but also where the existence of the community is threatened. Without a community living within the State the political structure established by the Constitution becomes redundant. The immunities argument may also arise where a significant proportion of the geographical area was destroyed by another State.

Water shortages, water rationing, the destruction and closure of river towns may all be examples of circumstances that could be used to support the argument that the actions of the upstream State are so extreme that they are causing destruction to the State as a community and may give rise to the protection afforded by the immunities doctrine. To ensure that the community can continue to live within the State, I propose that States must have access to sufficient water from transboundary rivers to meet the critical human water needs of the communities within the State.

The effect of only a limited restriction on State power means that it would be only in limited cases that the Court could intervene. Such an approach places the solution in the hands of State Governments rather than the Court. While the negotiation of a political solution may at times be difficult, there is no indication that a Court-based resolution would be more efficient. The solution proposed in this chapter provides each State with a protection from the extreme actions of other States, but leaves precisely how water from transboundary rivers should be allocated between States in the hands of the respective State Governments.

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154 Although such an area would probably need to be significant: cf Tasmanian Dam Case (1983) 158 CLR 1, 141 (Mason J).
155 Cf the experience in the United States: see Chapter 6.3.6.
CHAPTER 8: CONCLUSION

Since Federation the allocation of water from the River Murray between States has been achieved through intergovernmental agreement. As I explained in the introduction to this thesis, the great unanswered question is whether there exists a legal mechanism for the resolution of disputes regarding the allocation of water from transboundary rivers in Australia in the absence of an intergovernmental agreement. In an attempt to find the best solution to the problem, this thesis evaluated previous attempts to answer the question, reformulated the problem and provided an alternative solution that is consistent with existing legal doctrines and the Australian Constitution. In this conclusion I draw together the themes that flow through the thesis as well as identify some practical lessons that can be taken from the United States experience over transboundary river disputes.

8.1 Water Regulation: Responding to the Changes in Water Use

As water uses have developed over time, one of the challenges for the law has been keeping up with and responding to these changes in use. This has been a challenge for both courts and legislatures not just in Australia, but also in England and the United States. In England, the development by the courts of the common law riparian rights doctrine was, at least in part, a response to changes in water use in that country as a consequence of the industrial revolution. The English courts sought to ensure in-stream water uses were not disturbed, while allowing water to be diverted from a stream if such a diversion would not upset the natural flow. In the United States, the English common law doctrine was modified by legislatures and courts in response to changes in water use and the environmental conditions of that country. In the western United States, the riparian rights doctrine was abandoned in favour of a doctrine founded on the prior appropriation doctrine – that is, first-in-time, first-in-right. From an Australian perspective, these are significant changes in water regulation and it is remarkable that a

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1 As I explained in Chapter 1.5, by ‘best solution’, I mean the approach that provides the most coherent legal solution that is consistent with existing legal doctrines. In identifying the ‘best solution’, I am seeking to anticipate how the High Court might approach the problem, based on the current state of the law.
2 See Chapter 5.3.1.
3 See Chapter 5.3.1.a and the cases cited therein.
4 See Chapter 5.3.3.
5 See Chapter 5.3.3.b.
court was willing to make such a dramatic change to the law. The approach was justified on the basis that miners and irrigators had to be provided with certainty; once they had started using the water, their use could not be usurped by subsequent upstream water users. Equally, in the eastern United States, a strict application of the English riparian rights doctrine was deemed unsuitable and courts modified the English doctrine so that the determining factor in settling water allocation disputes was ‘reasonableness’. Such an approach provided courts with greater flexibility in allowing water to be diverted without the requirement of maintaining the natural flow.6

In Australia, development of the law was also necessary to respond to changes in water use and the differences in the Australian environmental conditions. However, rather than the courts taking a leading role in this respect, the task was left to legislatures. The development of the law in Australia was left to legislatures because the Australian colonial courts followed the English riparian rights doctrine in resolving intra-colonial disputes and no case had sought to challenge directly the English common law principles. The Australian colonial courts’ adherence to the English riparian rights doctrine was reflective of a broader approach of adhering closely to the decisions of the Privy Council and the House of Lords even where it may have been possible to distinguish the Australian position from that of the English common law. The licensing regimes established by the colonies (and later States) were largely a response to an increase in irrigation works and a desire to promote such schemes.

With respect to transboundary rivers in Australia, the absence of any clearly defined principles as to how to share water between the States has created great uncertainty. The history of the River Murray dispute reveals a number of missed opportunities to define clearly the legal obligations of the States with respect to the sharing of the waters of the Murray. Perhaps the greatest omission from the Constitution is a definition of the obligations of the States with respect to the sharing of ‘the waters of rivers’.

In this thesis I have shown the great tensions that existed during the drafting of the Constitution when it came to regulating the waters of the River Murray. I explained that s 100 was the best compromise that could be reached at the time while still achieving Federation. This thesis fills the lacuna in the commentary and has examined the drafting

6 See Chapter 5.3.3.b.
history and the limited judicial consideration of s 100. The High Court has acknowledged there are a number of unanswered questions with respect to the interpretation of s 100.\(^7\)

While it has been suggested that s 100 places a limit on the legislative power of the States, I have shown that this argument is not supported by the plain meaning of the section along with the drafting history and limited case law. This examination of s 100 revealed that the provision is a limitation on the Commonwealth’s legislative power with respect to trade and commerce. \(^8\) The consequence of this conclusion is that the Constitution does not provide an express solution to the problem of how to allocate water from a transboundary river between the States.

The second missed opportunity with respect to transboundary river regulation was not litigating the issue in the first decade after Federation. How the High Court might have dealt with this issue in the first decade after the establishment of the Court would have been very different from how the Court deals with the problem today or in the near future. The Court during this early period was heavily influenced by the jurisprudence of the United States Supreme Court\(^9\) and the High Court in its infancy, yet to develop a body of constitutional law to guide it, might have looked favourably upon the equitable apportionment doctrine developed by the Supreme Court in Kansas v Colorado (No 2).\(^10\)

However, the High Court today is more likely to develop a solution by first examining the existing body of Australian constitutional jurisprudence and the influence of the American jurisprudence is likely to have diminished over time.\(^11\) As I have demonstrated in this thesis, the equitable apportionment doctrine developed by the United States Supreme Court is, for a number of reasons, unlikely to find favour in this country.\(^12\)

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\(^7\) Commonwealth v Tasmania (1983) 158 CLR 1, 153 (‘Tasmanian Dam Case’); Arnold v Minister Administering the Water Management Act 2000 (2010) 240 CLR 242 , 264 [53]. See also Chapter 3.3.

\(^8\) See Chapter 3.

\(^9\) See, eg, D’Emden v Pedder (1904) 1 CLR 91, 112; Deakin v Webb (1904) 1 CLR 585, 605; Jumbunna Coal Mine NL v Victorian Coal Miners Association (1908) 6 CLR 309, 357-8. In D’Emden, Griffith CJ noted (at 112):

So far, therefore, as the United States Constitution and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance.

\(^10\) Kansas v Colorado, 206 US 46 (1907) (‘Kansas v Colorado (No 2’).


\(^12\) See Chapter 6.3.
8.2 Arguments Founded upon Equality

Previous analyses of the transboundary water problem have been founded upon notions of equality between States or upon the argument that each State is entitled to a reasonable share of the waters of a transboundary river. Renard’s doctrine of ‘reasonable sharing’, for example, was based upon the principle that an equality between States can drive the development of the common law to create an ‘interstate common law’. Similarily, the development of the equitable apportionment doctrine in the United States was founded upon an ‘equality of right’ between States. As I explained in Chapter 6, one of the weaknesses in the United States Supreme Court’s reasoning in Kansas v Colorado (No 2) is the reasoning behind the principle of equality between States. Similarly, one of the difficulties with the argument that there is equality between States in Australia is identifying a basis for this principle. Ian Renard stated that equality between States was an essential attribute of Federation in Australia. In Chapter 7, I explained that a stronger line of reasoning might be that an implication of an equality of States can be supported by the text and structure of the Constitution. However, my analysis demonstrated that the difficulty with this argument is determining the content of the doctrine that can be translated to resolve a transboundary river dispute. Consequently, I concluded that this approach is not the best solution to the problem. Instead, the argument that I develop later in Chapter 7 was based on the principle that there must be a continued existence and co-existence of the States. This approach is founded upon an extension of the implied intergovernmental immunities doctrine.

8.3 Framing the Problem in Terms of the ‘Rights’ of the States

I have argued in this thesis that the primary problem of previous analyses of the transboundary river problem has been framing the problem in terms of the ‘rights’ of the States. The expression the ‘rights of the States’ with respect to the waters of a transboundary river was often used without careful consideration of what was meant by the term and the ramifications for any argument regarding water allocation.

As I have demonstrated through my examination of the history of the River Murray dispute, prior to Federation the legal arguments regarding the ‘rights’ of the colonies with

respect to transboundary rivers were often intertwined with moral arguments and political considerations. The expression ‘the rights of the colonies’ was used in this context without distinguishing between a legal or a moral claim to water resources and this failure affected the clarity of the legal analysis. The post-Federation analysis of the problem then built upon these colonial arguments and failed to consider fully how the Australian Constitution may have altered the legal relationships between the States.

From examining the history of the dispute, it is easy to understand how the inquiry was misdirected by framing the problem in terms of the ‘rights’ of the colonies (and later States). First, the early 20th century jurisprudence of the United States Supreme Court with regard to transboundary river disputes had already shaped the problem in that country in terms of an ‘equality of right’ between States. Many Australian lawyers, academics and politicians relied upon the United States experience when crafting arguments with respect to the legal ‘rights’ of the States in this country. Secondly, the fact that there was an existing common law doctrine – the riparian rights doctrine – that applied as between individuals and focused on preserving the natural flow was, at first glance, an obvious analogy that could be drawn. Thirdly, in South Australia v Victoria several members of the High Court had stated that one of the criteria for the Court having jurisdiction over an interstate dispute was that the dispute is similar to a dispute between individuals. However, as I explained in Chapter 6, this criterion must now be questioned. Finally, more recent decisions of the Court have assisted in understanding the interaction between the Constitution and the common law and the circumstances in which the Court can derive an implication from the text and structure of the Constitution. It has been a combination of these factors that has led previous analyses to attempt to equate the rights of individuals with the scope of legislative and executive power of a State.

The ‘rights-based’ approach led to analogy arguments being drawn with either the riparian rights doctrine or international law. A further problem with these arguments was

15 See Chapter 2.4 and Chapter 4.
16 Or words to that effect.
17 See Chapter 4.
19 South Australia v Victoria (1911) 12 CLR 667 (‘Boundary Dispute Case’). See Chapter 6.2.3.
20 See Chapter 6.2.3.
that they failed to examine closely the respective bodies of international law and the riparian rights doctrine. As I demonstrated in Chapter 5, for different reasons, each doctrine was unsuitable at the time of Federation and subsequently for the purpose of attempting to draw an analogy with the position of the States. At the time of drafting the Australian Constitution, the Australian colonies were viewed as quasi-sovereign nations, with only limited interference from the Imperial Parliament. In this sense, it is understandable that analogies were made between the ‘rights’ of the colonies and those of nation states at international law. While on a conceptual level that argument may have sounded appealing, I have shown that the analogy was unlikely to aid in the question of how to allocate water from transboundary rivers between States.

This study has undertaken an examination of international law at the time of Federation – when the analogy argument was made – and also the present position at international law with respect to the sharing of water from transboundary rivers between nation states. That analysis revealed that customary international law is yet to develop principles for the allocation of water between nation states. At international law, these disputes are resolved by treaty. The United Nations has adopted the Convention on the Law of the Non-Navigational Uses of International Watercourses, but Australia is not a signatory to the Convention and the Convention is yet to come into force. While the Convention declares that water should be allocated between nation states on a reasonable and equitable basis, those principles are not universally accepted. As a consequence, I argued that the extent to which these principles could be used to develop the common law are limited.

Like the international law analogy, the riparian rights analogy is not without some limitations. The riparian rights doctrine was unsuitable for the Australian conditions as it attempted to preserve the natural flow of the river. The problem was that many Australian rivers, including the River Murray, did not flow year-round. Those making the analogy argument also ignored some of the potential difficulties with equating the rights of private individuals with the ‘rights’ of States. For example, the riparian rights doctrine applied only to the taking of water for use on the land adjacent to the stream, whereas the States

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21 See Chapter 5.2.3.
22 *Attwood v Llay Main Collieries Ltd* [1926] 1 Ch 444, 459; *Swindon Waterworks Co Ltd v Wiltshire & Berkshire Canal Navigation Co* (1875) LR 7 HL 697, 704. The riparian rights doctrine is explained in detail in Chapter 5.3.
seeking to apply the same principles to the ‘riparian States’ wanted to be able to use the water beyond the land close to the river. If the riparian rights doctrine was to form the basis for a solution to the transboundary river problem then some modifications to the doctrine would need to be made.

One of the great omissions from earlier analyses of the problem is that arguments advocating the development of an ‘interstate common law’ have failed to examine the critical question: how can the common law ‘trump’ State legislative and executive power? In the early analyses it was assumed that the common law could apply as between the States and this question was simply ignored.23 In developing an interstate common law solution, Ian Renard argued that equality between States was an essential attribute of Federation, which was not derived from the text and structure of the Constitution. As I explained in Chapter 6, any limit on State power must find its source in the text and structure of the document.

The development of an interstate common law also raises the question whether the Commonwealth could modify the interstate common law, keeping in mind that the Commonwealth Parliament can only legislate within the defined scope of its legislative power. If the interstate common law can be modified by legislation, this might require the Court to accept that the Commonwealth has power to modify the common law as a consequence of s 61 in conjunction with s 51(xxxix), which is sometimes referred to as the ‘nationhood power’.24 However, the scope of the ‘nationhood power’ has not been fully developed by the Court and would need to be addressed if the Court were to develop a common law solution to the transboundary river question. Attempting to resolve the problem by developing an interstate common law opens up a number of additional constitutional questions. As I explained in Chapter 6, the development of an interstate common law is not the best approach to resolving a transboundary river problem.

To date, this analysis has focused on transboundary rivers, which ignores the fact that rivers, such as the River Murray, are part of a larger river basin. Within the Murray-

23 Isaac A Isaacs, Re Waters of the Murray River and its Tributaries and Interstate Rights to Divert Them (Opinion, 22 March 1906); J H Symon and P McM Glynn, The Rights of the States and the Residents Therein in and to the use of the Federal Power in Respect of the Waters of the River Murray and its Tributaries and Ex Parte the State of South Australia (Opinion, 26 March 1906) 14. The High Court made similar remarks regarding interstate disputes more generally: South Australia v Victoria (1911) 12 CLR 667 (‘Boundary Dispute Case’).
24 See Chapter 6.4.5.

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Darling Basin there are many rivers, some of which cross State borders while others flow into another river, which then crosses a State border. Any common law solution that draws upon the riparian rights doctrine needs to justify why the solution should apply not just along a particular transboundary river, but across the entire river basin.\(^{25}\) In contrast, the solution proposed in Chapter 7 does not require the same consideration; it is a matter of examining whether the State legislation or executive action has a sufficient connection to the State, determining whether there is any inconsistency with another State’s legislation and examining whether it offends the extended implied intergovernmental immunities doctrine. The principles for reformulating and resolving the problem in this way apply equally whether there is one transboundary river or whether the river is part of a larger river system.

In summary, in Chapter 6 I argued that the development of an ‘interstate common law’ is not without some difficulty and is not the best solution. First, the effect of such an approach is for the common law to ‘trump’ State legislative power. Secondly, in the case of Renard’s interstate common law doctrine of reasonable sharing, it failed to explain why ‘reasonableness’ is to be the determining factor. An alternative approach would be to accept that the existing riparian rights doctrine is unsuitable for Australian conditions and to argue that the doctrine must be modified so that ‘reasonableness’ is the sole guiding factor against which competing claims to water are to be resolved. If the Court were to accept that the riparian rights doctrine must be modified in this way, it would then be a question as to whether it can be applied as between States. This would yield the same result as the approach adopted by Renard, but it would provide a firm theoretical basis as to why reasonableness is to be the defining characteristic of the interstate common law. Finally, an interstate common law approach also raises a question of whether the Commonwealth could modify the common law as it applied between the States.

The approach of modifying the common law to develop a solution to the transboundary river problem requires a number of modifications or deviations from what is currently understood to be the settled constitutional and common law jurisprudence. I have argued that a more appropriate solution (and one that does not require the same large deviations from settled law) is to be found by examining the limits on State legislative and executive power.

\(^{25}\) See Chapter 6.4.4.b.
8.4 Reconceiving the Problem: Limits on State Legislative and Executive Power

In the final chapter of the thesis I argued that a more appropriate way to resolve this legal question is by reconceiving the problem in terms of limits on State legislative and executive power. In doing so, existing constitutional principles and legal doctrine can then be used to resolve the problem. There are three elements to the solution. First, I explained that while a State can legislate extraterritorially, there must be a connection back to the legislating State. As a consequence, a State Government seeking to regulate directly the water use of residents of another State must be able to demonstrate a connection back to its own State. As it has already been accepted that a State can regulate the quality of the water that flows into its territory, it could be possible for a State to attempt to regulate the quantity of the water.

Second, some transboundary disputes will be able to be resolved by applying principles dealing with inconsistency of laws. Suppose a downstream State sought to regulate water use in an upstream State that was also regulated by the legislation of the upstream State. If there is an inconsistency between those laws, the law with the ‘predominant territorial concern’ should prevail, which in this case would be the upstream State. As a consequence, the first two elements might only be of limited assistance to a downstream State.

It is the third element – the consideration of any constitutional implications that might limit State legislative and executive power – that is most critical. I examine two potential constitutional implications: first, equality between States; and secondly, the extension of the intergovernmental immunities principle.

First, I considered whether the text and structure of the Constitution could support a principle of equality between States. While I accepted that it may be possible to make such an argument, I concluded that the difficulty with this approach is in giving content to the principle that can be used to resolve a transboundary river dispute.

Secondly, I argued that the existing intergovernmental immunities principle as set out in Melbourne Corporation and subsequent cases could equally be applied as between the States. Furthermore, I demonstrated that the doctrine could be applied beyond circumstances where the legislative or executive action of one State impaired the capacity

26 Brownlie v State Pollution Control Commission (1992) 27 NSWLR 78. See Chapter 7.3.
of the polity of another State to function. For the polity to exist there must a physical State and a community operating in that area. Where the legislative or executive action of one State would impair the capacity of another State to function as an ongoing community, such action would fall foul of the immunities doctrine if extended in the proposed fashion. This would ensure that States continue to exist and ensure there is sufficient water to meet the critical human needs of the community.

While this approach is grounded in existing constitutional principles, it still requires the Court to accept that the immunities doctrine can be extended in the proposed fashion. However, the fact that the approach requires an extension of an existing constitutional doctrine requires less of a leap in reasoning than the alternative of developing an ‘interstate common law’.

8.5 Practical Lessons

From a practical perspective, much can be taken from the transboundary river litigation in the United States. Irrespective of the precise form of the guiding legal principles, litigation of this nature is not a ‘quick fix’ to the problem of how to allocate water between States along a transboundary river. In the United States, proceedings have taken many years to resolve and the Supreme Court has stated that agreement between the States is preferable to litigation.\(^27\) The dispute between Kansas and Colorado at the beginning of the 19th century took over 7 years for the Supreme Court to resolve. This is because each transboundary river dispute is unique and the resolution of these disputes will require a close examination of the complex and detailed facts of the individual case.

In the United States, the evidence put before the Special Master appointed to hear the transboundary river dispute is extensive. Collecting the necessary evidence to prove there is an inequitable sharing of the water requires detailed information regarding existing water allocations and the briefing of experts to interpret and explain the evidence. These disputes turn largely on the complex and detailed facts of the particular case, which means that the quality of the evidence will be an important factor in any transboundary river case. Furthermore, the uniqueness of each case means that it may be difficult to predict with a high degree of certainty the likelihood of success. Similar practical issues are likely to be relevant to any future litigation in Australia. If the High Court was to

\(^27\) *Colorado v Kansas*, 320 US 383, 392 (1943).
adopt the solution I proposed in Chapter 7 based upon an extension of the immunities doctrine, important factual issues may arise as to whether the actions of an upstream State were impairing the capacity of the State to function as a polity or as an ongoing community.\textsuperscript{28} One of the difficult tasks for the Court – irrespective of the principles used to resolve a transboundary river dispute – will be compiling the factual basis on which the dispute is to be resolved.\textsuperscript{29}

While the prediction of the precise result in an action involving the allocation of water in a transboundary river dispute might be difficult, the broad principles that the Supreme Court has set down provides the States with some guidance as to how a dispute would be resolved in future litigation. In Australia, there are no such guiding principles. In a sense the States in Australia are in the same position as the States in the United States prior to the decision of the Supreme Court in \textit{Kansas v Colorado (No 2)}. One advantage of the body of case law developed by the United States Supreme Court is that State Governments know that in a transboundary river dispute each State is entitled to a share of the water; although precisely where the line is drawn is for the Court to determine. In Australia, knowing that the Court will apportion water could encourage States to resolve these disputes between themselves more promptly. In addition, it removes the ability of a State to use litigation as a threat in any negotiation. However, the risk that any State runs in commencing litigation of this kind is that, if the Court finds there is no limit on a State’s ability to take water from a transboundary river, the downstream State could be left in a vulnerable position and the upstream States would take even more water than they are presently taking. Consequently, the stakes of any future litigation are high.

One area of future research connected to the question examined in this thesis is the constitutional validity of the \textit{Water Act 2008} (Cth) in the absence of a referral of State legislative power. If a State was to withdraw the referral of power made in accordance with s 51(\text{xxxvii}), could the Commonwealth legislate in any event? The extent to which the Commonwealth relies upon the external affairs power – specifically, the implementation of a number of treaty obligations – is one aspect of the existing regulatory

\textsuperscript{28} See Chapter 7.4.2. Equally if the Court were to develop an interstate common law doctrine, there would be similar factual issues regarding whether a State was receiving a ‘reasonable share’ of the water.

\textsuperscript{29} As the United States jurisprudence demonstrates, the process of understanding factual basis of the dispute can be complex and time consuming: see Chapter 6.3.6.
regime that requires further examination. However, a State seeking to withdraw its referral of power and challenge the validity of the Water Act must also have regard to the practical effect of such a challenge. Invalidating the Act may simply put the State back at the negotiating table to renegotiate the intergovernmental agreement. Such litigation may only add to the hostilities of any subsequent negotiation. From a practical perspective, must such a challenge also be accompanied by an assertion that each State has an entitlement to a share of the waters of the Murray? If that is the approach adopted, the issues examined in this thesis will also need to be considered by the Court.

In summary, any State seeking to litigate these issues will need to consider carefully the practical outcomes it seeks to achieve and whether the litigation is likely to produce the desired result. In this regard, the effect that litigation might have on the prospects of future negotiations will also need to be considered.

8.6 Concluding Comments

The arguments made by the State Governments over the legal ‘rights’ to the waters of the River Murray are older than the States themselves. Since representatives of the colonies of New South Wales and Victoria met in 1886 to discuss the sharing of the Murray’s waters in the absence of any delegates from South Australia, this has been a highly-charged political issue and, as a consequence, reaching agreement between the parties has been extremely challenging. Ultimately, if the sharing of the waters of the Murray cannot


31 Isaac Isaacs made some practical observations regarding the resolution of this dispute, which are still relevant today:

Although not coming within the scope of legal advice I cannot refrain in view of the magnitude of the interests involved from suggesting that the whole of this matter is eminently one for judicious arrangement between the States concerned. So much depends upon the utilisation of the water of our rivers whether regarded as means of irrigation or of navigation that the utmost goodwill in dealing with this momentous question should I think be allowed to guide the counsels of the Eastern States. It would be disastrous to all concerned if by any chance some strictly legal determination were to stand in the way of national development. There is no necessity as it seems to be for transferring the consideration of the great question – how best to utilise our river water, from the executive to the judiciary; and it is just at this juncture before any decided step is taken to enter the Courts that mutual accommodation is most effective. The water question means much to New South Wales and Victoria and it also means much to South Australia. It is not unlikely that combined friendly consideration would lead to far greater general benefit than the compulsory obedience to the decree of the Court.

Isaac A Isaacs, Re Waters of the Murray River and its Tributaries and Interstate Rights to Divert Them (Opinion, 22 March 1906) 23.
be resolved by intergovernmental agreement the legal questions examined in this thesis are likely to be litigated and considered by the High Court of Australia.

In the short term, the likelihood of the legal questions examined in this thesis being tested is dependent on the attitude of the States towards the implementation of the Murray-Darling Basin Plan. The Basin Plan is to be implemented gradually and will be fully implemented by 2019. Over time, State and Commonwealth governments are likely to change and with those changes in government could also come a change in attitude and commitment to the Basin Plan. It would only take one State withdrawing its support for the Basin Plan and revoking its referral of legislative power to the Commonwealth to cause the legal questions regarding transboundary rivers to be re-examined.

In the longer-term, there will be another drought in south-eastern Australia. History tells us that the additional stresses that a drought places on the Murray-Darling Basin will no doubt cause the States to reconsider whether they are receiving a ‘fair share’ of the waters of the River Murray and its tributaries. It could be then that the legal questions and possible solutions addressed in this thesis regarding the River Murray are finally litigated.
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APPENDIX A: OPINION OF CHARLES MANN

River Murray Riparian Rights -

Memo for the Attorney General

In accordance with the desire of the Hon Attorney General for a joint opinion of myself, Sir Jno. W. Downer Q.C. and Mr J. H. Symon Q.C. on the above subject I submitted a case to the above gentlemen and we had several consultations on the subject preparatory to giving a joint opinion as requested. Altho on most of the points for our consideration we were completely in accord there were a few minor points in which that was not the case. Ultimately Sir John W. Downer and Mr Symon preferred writing separate opinions which they have done and which I now forward. It only remains for me to add that I have carefully considered these opinions and on all main points thoroughly concur with the views expressed by the learned gentlemen.

It seems perfectly clear that whatever the water rights of this Colony may be there is no tribunal to which any appeal can be made to prevent their infringement short of the Supreme authority i.e. the Imperial Parliament. A perusal of the opinions of Sir John W. Downer and Mr Symon shows that altho they do not arrive at their conclusions by identically similar reasoning still that they only differ and that not to any very great extent as to the principles on which the Imperial Parliament would be likely to act in settling the rights of this Colony and those of Victoria and New South Wales to the reasonable use of the waters of the Murray.

Mr Symon takes very strongly the view that under no circumstances would higher Riparian colonies be allowed so to use the higher waters as to affect the navigability of the River where it flows through South Australian Territory. Sir John Downer seems to take a similar view but thinks that New South Wales and Victoria would be allowed a reasonable use of the higher waters such purposes as Irrigation etc even though such use might to some extent impair the navigability of the lower River. As Mr Symon says the case is without any ‘precise precedent’ – in fact I am not aware of any precedent on the point. If disputes arise they must unquestionably be settled by the Supreme Authority. That authority having to frame laws & regulations for a state of affairs hitherto non-existent would no-doubt devise some authoritative scheme whereby the greatest use might be made of the water without unduly injuring the rights of any of the Colonies interested. Probably the Imperial Parliament would not feel itself bound to apply the law
as between private Riparian owners as to do so would most likely restrict the higher Riparian Colonies from a fairly beneficial use of the waters of that portion of the River flowing through their territories. On the other hand I feel tolerably certain that such a use of the higher waters as would interfere with the navigability of the River as it flows through our territory preserved absolutely intact and should refuse to enter into any in negotiations & certainly decline to enter into any agreement in which that principle is not in terms freely and completely recognized by the other Colonies.

Unless this is made a sine qua non in any negotiations it seems to me that as Sir John W. Downer pointed out in his correspondence with Mr Gilles we shall be comparatively powerless because if we once admit the principle that the other Colonies may so use the water as to injuriously affect even in a small degree the navigation of the lower River it seems to me it will be very difficult indeed for us afterwards to object and endeavour to fix the extent to which the navigation may be interfered with. Whether therefore Mr Symons is right or wrong in expressing his views on this point so very positively I think there can be no doubt that the view he has enunciated is the one this colony should insist upon.

19 Dec 1887

C. Mann