

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

Adam Lyall Webster

Thesis submitted for the degree of Doctor of Philosophy

Adelaide Law School

University of Adelaide

April 2014



*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



## Table of Contents

<b>Table of Contents</b> .....	<b>i</b>
<b>Abstract</b> .....	<b>v</b>
<b>Declaration</b> .....	<b>vi</b>
<b>Statement of Authorship</b> .....	<b>vii</b>
<b>Acknowledgements</b> .....	<b>viii</b>
<b>Chapter 1: Introduction</b> .....	<b>1</b>
1.1 The Thesis .....	1
1.2 The Murray-Darling Basin .....	3
1.3 The Current Problem .....	6
1.4 The Existing Literature.....	12
1.5 Methodology and Thesis Structure .....	18
<b>Chapter 2: The Colonial History of the River Murray Dispute</b> .....	<b>22</b>
2.1 Introduction .....	22
2.2 1850 – 1880: Navigation and River Trade .....	23
2.2.1 Steamboats Navigate the Murray .....	23
2.2.2 Riverboats Compete with the Railways .....	24
2.2.3 Drought Hampers River Navigation .....	25
2.3 1880 – 1895: Irrigation, Conservation and Royal Commissions .....	26
2.3.1 New South Wales Royal Commission on the Conservation of Water.....	27
2.3.2 Victorian Royal Commission on Water Supply.....	28
2.3.3 A Joint Royal Commission is Proposed.....	30
2.3.4 New South Wales and Victoria Meet Without South Australia .....	32
2.3.5 The Chaffey Brothers’ Irrigation Scheme.....	37
2.3.6 A Further Attempt to Meet .....	40
2.4 The Early Water ‘Rights’ Arguments .....	44
2.4.1 New South Wales Claims Legal Ownership of the River.....	44
2.4.2 The Early South Australian ‘Rights’ Arguments.....	48
2.4.3 A Forum to Hear Colonial Transboundary River Disputes? .....	53
2.5 Conclusion.....	54
<b>Chapter 3: Section 100 of the Constitution</b> .....	<b>57</b>
3.1 Introduction .....	57
3.2 The Drafting History of the Constitution .....	58
3.2.2 The First Draft – Sydney Convention, 1891 .....	59

3.2.1	The Use of the Drafting History in Constitutional Interpretation.....	62
3.2.3	Adelaide Convention 1897 .....	62
3.2.4	Melbourne Convention 1898 .....	66
3.2.5	Victoria Attempts to Avoid Taking Sides.....	69
3.2.6	Limiting the Commonwealth’s Power .....	70
3.2.7	Commentary.....	74
3.3	Judicial Consideration of Section 100.....	77
3.3.1	<i>Australasian Temperance and General Life Assurance Society v Howe</i> .....	77
3.3.2	<i>Morgan v Commonwealth</i> .....	79
3.3.3	<i>Commonwealth v Tasmania</i> (‘ <i>Tasmanian Dam Case</i> ’).....	81
3.3.4	<i>Arnold v Minister Administering the Water Management Act 2000</i> .....	84
3.4	Conclusion.....	87
<b>Chapter 4: Identifying the Alternative Arguments .....</b>		<b>90</b>
4.1	Introduction .....	90
4.2	The Australasian Federal Conventions .....	90
4.2.1	An analogy with the riparian rights doctrine?.....	94
4.2.2	An analogy with international law? .....	96
4.3	Early Post-Federation Literature .....	102
4.3.1	Quick and Garran .....	103
4.3.2	Inglis Clark.....	105
4.3.3	Harrison Moore .....	107
4.3.4	Summary of the Post-Federation Literature.....	108
4.4	Interstate Royal Commission .....	109
4.4.1	Seven Legal Experts Give Evidence.....	109
4.4.2	The Conclusions of the Royal Commissioners .....	120
4.5	South Australian Legal Opinions from Isaacs, and Symon and Glynn.....	121
4.5.1	Isaacs’ Change of Heart .....	122
4.5.2	The Symon and Glynn Opinion .....	127
4.6	An Agreement Between the States and Commonwealth is Reached .....	129
4.7	Conclusion.....	130
<b>Chapter 5: Analogies with International Law and Riparian Rights.....</b>		<b>133</b>
5.1	Introduction .....	133
5.2	The International Law Analogy .....	133
5.2.1	Earlier disputes in North America and Europe .....	134
5.2.2	International Law in the Early Post-Federation Period.....	137

5.2.3	More Recent Developments in International Law .....	145
5.2.4	International Law and the Development of the Common Law.....	149
5.3	The Riparian Rights Analogy.....	152
5.3.1	The Riparian Rights Doctrine in 19 <sup>th</sup> Century England.....	153
5.3.2	Application of the Riparian Rights Doctrine in Australia .....	160
5.3.3	A Comparison with States in the United States .....	170
5.3.4	Australian State Legislatures Abolish the Riparian Rights Doctrine.....	177
5.4	Conclusion.....	183
<b>Chapter 6: The Development of the Common Law .....</b>		<b>185</b>
6.1	Introduction .....	185
6.2	Does the High Court Have Jurisdiction?.....	186
6.2.1	Establishing Jurisdiction: Is There a ‘Matter’? .....	187
6.2.2	The South Australian-Victorian Boundary Dispute.....	189
6.2.3	An Analogy with the Rights of Individual Persons .....	192
6.2.4	Summary .....	195
6.3	The Development of a ‘Federal Common Law’ in the United States .....	196
6.3.1	Introduction.....	196
6.3.2	The Preliminary Jurisdiction Question in the United States .....	197
6.3.3	The United States Supreme Court Develops a ‘Federal Common Law’ ...	200
6.3.4	An Equality of Right between States .....	203
6.3.5	Factors Determining an Equitable Apportionment between States .....	206
6.3.6	The Complexities of Transboundary Disputes .....	208
6.3.7	Commentary on the Equitable Apportionment Doctrine .....	209
6.4	An ‘Interstate Common Law’ in Australia? .....	212
6.4.1	Courts Developing the Common Law .....	212
6.4.2	Ian Renard’s ‘Interstate Common Law’ .....	218
6.4.3	Can the Common Law Limit State Legislative and Executive Power?.....	220
6.4.4	The Reasoning behind ‘Reasonableness’ as the Guiding Principle in an Interstate Common Law.....	223
6.4.5	Who Can Modify the Interstate Common Law?.....	227
6.5	Conclusion.....	230
<b>Chapter 7: Reconceiving the Principles: Limits on State Power .....</b>		<b>233</b>
7.1	Introduction .....	233
7.2	Conceptualising Interstate Disputes .....	234
7.2.1	What is Meant by a ‘State’s Right to Water’? .....	234

7.2.2	Historical Transboundary River ‘Rights’ Discourse.....	235
7.2.3	Reframing the Problem .....	237
7.3	Potential Limits on Legislative and Executive Power .....	239
7.3.1	The Scope of State Legislative Power and Extraterritorial Effect.....	239
7.3.2	Inconsistency between State Laws and Regulations.....	243
7.4	Constitutional Implications and Limits on State Power.....	246
7.4.1	An ‘Equality Between States’? .....	247
7.4.2	An Extension to the Intergovernmental Immunities Doctrine? .....	259
7.5	Conclusion.....	274
	<b>Chapter 8: Conclusion.....</b>	<b>276</b>
8.1	Water Regulation: Responding to the Changes in Water Use .....	276
8.2	Arguments Founded upon Equality.....	279
8.3	Framing the Problem in Terms of the ‘Rights’ of the States .....	279
8.4	Reconceiving the Problem: Limits on State Legislative and Executive Power	284
8.5	Practical Lessons .....	285
8.6	Concluding Comments.....	287
	<b>Bibliography .....</b>	<b>289</b>
	Cases .....	289
	Legislation.....	295
	Gazettes, Parliamentary Debates and Other Primary Sources .....	297
	Royal Commission Reports .....	299
	Articles, Books and Theses.....	300
	Media Reports and Press Releases.....	311
	Correspondence.....	314
	Memoranda and Legal Opinions.....	316
	Other Secondary Sources .....	316
	<b>Appendix A: Opinion of Charles Mann.....</b>	<b>320</b>

## 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.

I give consent to this copy of my thesis, when deposited in the University Library, being made available for loan and photocopying, subject to the provisions of the *Copyright Act 1968 (Cth)*.

I also give permission for the digital version of my thesis to be made available on the web, via the University's Digital research repository, the Library Catalogue and also through web search engines, unless permission has been granted by the University to restrict access for a period of time.

-----

-----

## 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.

### Article (1): 'Can the High Court Save the Murray River?'

#### *Author Contributions*

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

John M Williams: planning and structuring of the manuscript; supervision of research; reviewing manuscript.

### Article (2): 'Section 100 and State water rights'

#### *Author Contributions*

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.

-----

Adam Webster (Candidate)

-----

John M Williams

## ACKNOWLEDGEMENTS

I am extremely grateful for the support and encouragement provided by my supervisors, John Williams and Martin Hinton. Your guidance and enthusiasm for this project have made the process all the more wonderful. I have enjoyed the lively and interesting discussions as I shared my thoughts and ideas.

I am grateful for the financial support that has been provided to me to undertake this project. This research would not have been possible without generous financial assistance from the Australian-American Fulbright Commission, the Zelling-Gray Scholarship in Law and the Law Foundation of South Australia.

I thank the faculty and staff of the Law School at the University of Colorado and the James E Rogers College of Law at the University of Arizona for hosting me during my stay in the United States. The warm welcome I received at both law schools made for a most enjoyable and rewarding time in the United States.

Thank you to Stefanie Wilkins, Gabrielle Appleby and Peter Burdon for reading various drafts of this thesis. Your encouragement, support and occasional prod along the way have been invaluable.

Most importantly, I must acknowledge my family and friends. The support that they have provided during this project cannot be fully documented on this page. To my family, and in particular to my parents, Teresa and Norm, thank you for all you have done for me. To my wonderful wife, Stefanie, I am indebted to you in so many ways; I could not have completed this project without all that you have done to support me while writing this thesis.