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.

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.

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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.

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Adam Webster (Candidate)

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