

THE CONSTITUTIONALISATION OF WATER RIGHTS: SOLUTION OR LEVEE?

Introduction¹

1. Australia is the driest inhabited continent on the planet.² Yet, water is essential for continued growth and development. Tragically, however, public maladministration since colonisation has resulted in flagrant misuse and over allocation of water resources to such an extent that entire river systems are on the verge of collapse. How did this state of affairs arise? In large measure, blame may be attributed to the constitutional underpinnings governing the use of water within Australia.
2. Driven, no doubt, by an increasingly urgent need for remedial action, the Commonwealth has sought to intervene in both the interstate and intrastate arrangements with respect to the access and allocation of water. This intervention has caused tension, particularly in circumstances where the result has been a perceived diminution in rights previously held.³ The consequence has been that these arrangements, hitherto largely ignored by constitutional lawyers, are now the subject of closer scrutiny.
3. It is in this context that a discussion of the triumvirate of constitutional water rights cases commencing with *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 ("*ICM*"), continuing with *Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242 ("*Arnold*"), and concluding with *Spencer v Commonwealth* (2010) 269 ALR 233 ("*Spencer*"), takes place.

Ownership of Internal Water in Australia

Colonial Ownership

4. In order to understand how water rights have become constitutionalised, a brief examination of the history of Antipodean ownership of water is necessary.⁴
5. Upon first settlement of Australia, the title to all waters was vested in the British Crown. This was because, so the pre-*Mabo*⁵ fiction went, all private

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² Preston CJ of the New South Wales Land and Environment Court in "Water and Ecologically Sustainable Development in the Courts" (2009) 6 *MqJICEL* 129, p 129.

³ This tension was dramatically illustrated by the hostility surrounding the release of the Guide to the proposed Murray-Darling Basin Plan in 2010. In Griffith, for example, copies of the draft plan were publicly set alight.

⁴ A useful summary of colonial history is found in *Wik Peoples v Queensland* (1996) 187 at 171-177 per Gummow J, *ICM Agriculture v The Commonwealth* (2009) 240 CLR 140 at 171-173 and 188-194, Gardener A, Barlett R and Gray J, *Water Resources Law* (LexisNexis, 2009), Ch 5.

⁵ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 66 and Clark S, "The River Murray Question: Part I – Colonial Days" (1971) 8 *MULR* 11.

rights to land, which included rights of access to water resources, could only be obtained by a grant from the Crown. Initially, governors granted rights to the Crown of 'waste', or unsettled, lands and waters upon permission from the Imperial Government. As the colonies obtained powers of responsible self-government, they sought control of these unsettled lands and waters. This was achieved by Imperial legislation conferring self-government on the various colonial legislatures, which included the management and control of waste lands and the waters upon them. Concomitant with this conferral, was the power to regulate and acquire the lucrative revenue arising from these so-called waste lands. It was these colonial arrangements that governed access to water at the time of federation.

Federation

6. Who should have power to regulate access to State waters - or more specifically rivers, and in particular, the Murray River - transformed into a "monstrously long and tangled debate" in the Convention Debates.⁶
7. Section 100 is the only provision that expressly mentions "water" in the Constitution. This is no accident.
8. Initially, s 100 was fashioned to confer positive legislative authority upon the Commonwealth Parliament in respect of.⁷

The control and regulation of navigable streams and their tributaries within the Commonwealth; and the use of the waters thereof.

9. The present version, however, 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.

10. How did this drafting change come about? Ultimately it was the price to be paid for the birth of federation; the compromise to preserve the separate interests of New South Wales, Victoria and South Australia – the former of which who wanted to control access to water for the purpose of agricultural development, the latter of which who wanted to ensure access and trade in the east by means of navigation.

⁶ La Nauze JA, *The Making of the Australian Constitution* (Melbourne University Press, 1972) p 153. For a detailed exposition of the substance of the Conventional Debates on this issue see: Clark S, "The River Murray Question: Part II – Federation, Agreement and Future Alternatives" (1971) 8 *MULR* 215, Kelly N, "A Bridge? The Troubled History of Inter-State Water Resources and Constitutional Limitations on State Water Use" (2007) 30 *UNSWLJ* 639, pp 641-645, Williams J and Webster A, "Section 100 and State Water Rights" (2010) 21 *PLR* 267, pp 267-274, Connell D, "Section 100 – A Barrier to Environmental Reform?" (2003) 8(2) *The Australasian Journal of Natural Resources Law and Policy* 83, pp 85-95. See also Quick J and Garran R, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1995 reprint), pp 879-880 and the discussion in *Arnold v The Minister* (2010) 240 *CLR* 242.

⁷ As initially proposed during the Adelaide Convention in 1897: Williams and Webster, above n 6, p 270.

11. While agreement was accommodated between the Commonwealth and the States, leading ultimately to the creation of ss 98 and 100, it is fair to say that the interstate dispute about water rights was never settled. It is a dispute that has endured from colonial settlement and informs present day constitutional arrangements.

The Present Day Constitutional Water Arrangements

12. The present day constitutional arrangements over State waters are, other than those found in s 100, contained in the *Seas and Submerged Lands Act 1973* (Cth), which defines internal waters of Australia in a way that⁸ limits the sovereignty of the Commonwealth to the waters of the sea that are otherwise part of the internal waters. Section 14 of that Act preserves, at least if read literally, State control over the waters of the sea that are waters within “any bay, gulf, estuary, river, creek, inlet, port or harbour”, which were upon federation within the limits of the State.
13. While the Act was held to be constitutionally valid in the *Seas and Submerged Lands Case*,⁹ the ambit of s 14 has not been authoritatively determined, and therefore, the precise waters falling within the limits of the colonies as at 1 January 1901, and the legislative powers of the States today in relation to those waters, remains uncertain.

The Power of the Commonwealth to Regulate the Waters of the States

14. Turning to the power of the Commonwealth to regulate State water contained in the Constitution, there is no direct power over State water at a Commonwealth level. But this does not mean there is a complete Federal legislative lacuna in this regard.¹⁰
15. There are a number of heads of power permitting the Commonwealth to enact legislation to manage water:
- a. s 51(i) – the power to regulate trade and commerce with other countries, and among the States;
 - b. s 51(ii) – the taxation power (provided it is non-discriminatory as between the States);
 - c. s 51(xx) – the corporations power;

⁸ See s 10 of that Act.

⁹ *New South Wales v The Commonwealth* (1975) 135 CLR 337. Relevantly, the Court held (Barwick CJ, McTiernan, Mason, Jacobs and Murphy JJ, Gibbs and Stephen JJ dissenting) that the provisions of the Act relating to the continental shelf were within the legislative power of the Commonwealth under s 51(xxix) – the external affairs power – on the ground that they gave effect to the Convention on the Territorial Sea and Contiguous Zone.

¹⁰ The Commonwealth can legislate with respect to matters within its capacity, even if the subject matter of the legislation is not specifically within any of the areas of legislative authority conferred on Parliament by the Constitution: *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1.

- d. s 51(xxix) – the external affairs power;
- e. s 51(xxxix) – the incidental power;
- f. s 61 – the executive power;
- g. an implied nationhood power;
- h. s 81 - the appropriations power;
- i. s 96 – the power to provide grants and financial assistance; and
- j. s 122 – the Territories power.

16. This paper shall ignore the taxation power and the Territories power, briefly comment upon the external affairs power, the corporation power and the joint and several effect of the executive, incidental and implied nationhood powers, and focus instead on the more ‘fiscal’ aspects of the constitutional regulation of the internal waters of Australia.

Appropriations and the Provision of Grants and Financial Assistance

17. No doubt because of the absence of any direct power over internal water at a Commonwealth level, and due to uncertainties as to the ambit of other heads of power to regulate this resource, overwhelmingly access to, and use of, water within Australia is managed by the Commonwealth with the constitutional carrot and stick of tied grants and the provision of financial assistance to the States on terms.¹¹

18. The Commonwealth is empowered by s 96 of the Constitution to grant financial assistance to the States on such conditions as it thinks fit. It also has the ability to make grants through its appropriations power in s 81.

19. This financial assistance has included:¹²

- a. direct grants by the Commonwealth to a State for specific projects within a State.¹³ Typically the grants legislation deals with the financial assistance, while authority for the implementation of the project is a matter for State law;
- b. Ministerially approved financial assistance for specified projects¹⁴; and

¹¹ In his seminal work *Water Law*, (LBC Information Services, 2000), p 42, Professor D E Fisher describes the provision of financial assistance on terms to be one of the most significant mechanisms for the regulation of the internal waters of Australia.

¹² Lucy J, *Water Regulation, The Laws of Australia* (2008, Thomson Reuters), p 31-32.

¹³ For example, the *Queensland Grant (Dawson River Weirs) Act 1973* (Cth).

¹⁴ For example, the *National Water Resources (Financial Assistance) Act 1978* (Cth) and its successor the *Natural Management (Financial Assistance) Act 1992* (Cth), which provided project assistance in the form of an agreement between the Commonwealth and a State. The details are contained in the agreement that is not part of the legislation. The *National Water Commission Act 2004* (Cth) establishing the Australian Water Fund Account is not dissimilar.

- c. statutory approval of assistance pursuant to an agreement between the Commonwealth and the State in relation to a particular project.¹⁵
20. The orthodox view, until recently, had been that the Commonwealth's discretion to exercise its funding and appropriations powers was broad. After *Combet v The Commonwealth* (2005) 224 CLR 494 and *Pape v Federal Commissioner for Taxation* (2009) 238 CLR 1 ("Pape"), this can no longer be maintained.
21. Accordingly, if an appropriation was made for investing in water infrastructure, for example the building of a new sewage system for the purposes of generating recycled water, Commonwealth expenditure on a water infrastructure project that did not achieve this outcome, such as the building of a dam, could be invalid.
22. In *Pape*, the plaintiff sued the Commissioner of Taxation and the Commonwealth, claiming that the tax bonus under Commonwealth legislation known as the "Tax Bonus Act" was invalid because it was a gift, was not a law with respect to taxation under s 51(ii), or any other source of legislative power of the Commonwealth, and that it did not comply with ss 81 and 83, because it did not lawfully appropriate money for the purposes of the Commonwealth. The Court relevantly held that ss 81 and 83 did not confer a substantive spending power in respect of anything that the Parliament designated as a purpose of the Commonwealth. Accordingly, the Act could not be supported by this power.¹⁶
23. The Act was, however, supported by ss 61 and 51(xxxix) of the Constitution as a law that was incidental to an exercise of executive power. This was because of the extraordinary circumstances in which the legislation was passed, namely, the midst of the global financial crisis requiring immediate fiscal stimulus to the national economy. This was a matter that plainly concerned Australia as a nation.¹⁷
24. Also as illustrated by *Pape*, when combined with the incidental power in s 51(xxxix), the executive power in s 61 can become a legislative power of the Commonwealth "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 a nation", or by the implied nationhood power.¹⁸
25. That the extent of this power is uncertain (if it ever was certain) after *Pape* is an understatement. While the learned authors of *Water Resources Law* argue

¹⁵ For example, the *Lake Eyre Basin Intergovernmental Agreement Act 2001* (Cth), which implements an agreement between the Commonwealth, Queensland and South Australia, whereby the governments share funding responsibilities for the management of natural resources, including water, in the Lake Eyre Basin.

¹⁶ At 55-56 per French CJ and 72-81 per Gummow, Crennan and Bell JJ.

¹⁷ At 89.

¹⁸ *Victoria v Commonwealth* (1975) 134 CLR 338 at 397. For an excellent discussion of *Pape* and the implied nationhood power, see Twomey A, "Pushing the Boundaries of Executive Power – *Pape*, the Prerogative and Nationhood Powers" (2010) 34 *MULR* 313.

that there is potential to utilise this power given the pressing need to manage rivers and water basins across several States,¹⁹ – indeed s 119(3) of the *Water Act 2007* (Cth) contains a specific reference to the “implied power of the Parliament to make laws with respect to nationhood”²⁰ – I do not share this optimism, given the reasoning and language in *Pape*.²¹ The natural disaster that has befallen the Murray-Darling Basin, together with other morbidly compromised water systems in Australia, regrettably lack the immediate and decisive urgency required to engage the incidental and executive powers in this way. I am reinforced in this view by the *Tasmanian Dams* case, where recourse to this head of power to support the Commonwealth legislation prohibiting the building of the dam was rejected.²²

Section 51(xxxi) as a Limitation on the Provision of Commonwealth Grants and Financial Assistance to the States

26. A potential fetter on the distribution of Commonwealth monies to fund projects designed to manage water resources within Australia is s 51(xxxi), which prohibits the acquisition of property on just terms from any State, or person, for any purpose in respect of which the Parliament has power to make laws.²³ States, by contrast, may, subject to the laws of the State, acquire property on any terms. Section 51(xxxi), therefore, has no application to a State. Or does it?

ICM

27. In *ICM* the plaintiffs, who were farmers, held licences to extract groundwater, or “bore licences”, under the *Water Act 1912* (NSW). These licences were replaced by a new system of aquifer access licences under the *Water Management Act 2000* (NSW). These new licences substantially reduced (by up to 70%) the amount of water the plaintiffs were permitted to draw. The plaintiffs received some *ex-gratia* structural adjustment payments for the reduction under a 2005 Funding Agreement between the Commonwealth and New South Wales that established the new licences. But, as agreed by the parties, the payments were inadequate and did not constitute compensation on just terms. Because the Commonwealth was a party to the Funding Agreement, the plaintiffs argued that their reduction in entitlements was a Commonwealth acquisition of their property contrary to s 51(xxxi).²⁴
28. The parties to the Funding Agreement were the Commonwealth, acting through the National Water Commission, and the State of New South Wales, acting through the Department of Natural Resources. The payments were to

¹⁹ Gardner, Bartlett and Gray, above n 4, para 5.49.

²⁰ Gardner, Bartlett and Gray, above n 4, para 5.49.

²¹ At [233].

²² *Commonwealth v Tasmania* (1983) 158 CLR 1 at 203 and 252.

²³ In the context of water rights, see the discussion with respect to s 51(xxxi) of the Constitution contained in Fisher D E, “Water law, the High Court and techniques of judicial reasoning” (2010) 27 *EPLJ* 85, Hepburn S, “Statutory verification of water rights: the ‘insuperable’ difficulties of propertising water entitlement” (2010) 19 *Australian Property Law Journal* 1 and McKenzie M, “Water Rights in NSW: Properly Property?” (2009) 31 *Sydney Law Review* 443.

²⁴ For a detailed analysis of this decision, see Hepburn, above n 23.

be shared equally by the Commonwealth and the State. The National Water Commission was established by the *National Water Commission Act 2004* (Cth) ("Commission Act"), assisted with the implementation of a 2004 intergovernmental agreement, known as the National Water Initiative. One of the key features of the Initiative was to return currently overallocated and overused water systems to environmentally sustainable levels.

29. Section 40 of the *Commission Act* established the Australian Water Fund Account, which was a special account to, amongst other things, pay costs or obligations incurred by the Commonwealth in the performance of the Commission's function under the *Commission Act*. The account was specifically funded by a standing appropriation from the Consolidated Revenue Fund pursuant to ss 81 and 83 of the Constitution.
30. It was the New South Wales Minister Administering the *Water Management Act 2000*, however, who ordered that the water entitlements be reduced.
31. French CJ, Gummow and Crennan JJ held that the legislative power of the Commonwealth conferred by s 96, together with s 51(xxxvi), did not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property other than on just terms contrary to s 51(xxxi).²⁵ Similarly, to the extent that s 96 was qualified by s 51(xxxi), an agreement to grant financial assistance, which could not be authorised by s 96 could equally not be supported by s 61 of the Constitution. To this extent they accepted the plaintiffs' case. So too did Heydon J, in his dissent.
32. Their Honours accepted that limitations on Commonwealth legislative power could inform the consistency of the Funding Agreement with the Constitution. In so doing, they refused leave to re-open *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 ("Magennis") and affirmed the reasoning of Latham CJ, who rejected the proposition that a federal statute giving financial assistance to the States could not be a law with respect to the acquisition of property for the purpose of s 51(xxxi). In this respect, there was no inconsistency between the reasoning in *Magennis* and the reasoning *Pye v Renshaw* (1951) 84 CLR 58 ("Pye").²⁶ In *Pye* the Court had rejected the argument that the exercise of the power to grant financial assistance under s 96 would be vitiated if shown to be for the *purpose* of inducing the State to exercise its powers of acquisition other than on just terms. Because s 96 was silent as to purpose,²⁷ their Honours were able to reconcile the apparent inconsistency with *Magennis*.

²⁵ At [46].

²⁶ At [33]-[40].

²⁷ In *ICM* French CJ, Gummow and Crennan JJ did not see *Pye* as inconsistent with *Magennis* because the concept of improper purpose as a vitiating characteristic was "rightly rejected" in the former case given that s 96 says nothing about purpose: at [36]. Further, their Honours noted that in *Pye*, *Magennis* was distinguished on the basis that changes in the intervening period meant that all references to any agreement with the Commonwealth or to any direct or indirect participation of the Commonwealth in any state scheme had been deleted (or "decoupled") from all relevant State legislation: at [39].

33. Significantly, as we shall see, their Honours deliberately left open the question of whether grants of financial assistance pursuant to s 96 of the Constitution supported by informal arrangements between governments – such as an exchange of letters²⁸, negotiations or email communications – setting out conditions to be observed in securing the financial assistance, which included an acquisition by the State of property other than on just terms, could be valid pursuant to s 51(xxxi).²⁹
34. Their Honours then went on to hold that the character of the bore licences precluded the application of s 51(xxxi). This was because, while noting that “water is a finite and fluctuating natural resource”,³⁰ first, the plaintiffs had no common law rights with respect to the extraction from the land of groundwater, the effect of the *Water Act 1912* (NSW) having been to extinguish whatever common law rights the plaintiffs had to appropriate this water.³¹ Second, while their Honours did not decide whether the bore licences were of such an insubstantial character so as to be no more than an interest defeasible by operation of the legislation that called them into existence, and therefore, not proprietary,³² they applied *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155, and held that there was no acquisition of property, merely an extinguishment, modification or deprivation of rights, which did not confer a measurable benefit or advantage on the State. This was because the plaintiffs did not enjoy private rights over the natural resource extracted. These rights had accrued in the State, and the State could exercise its power to prohibit their access or use.³³
35. Hayne, Kiefel and Bell JJ did not consider any of the issues concerning the intersection of ss 96 and 51(xxxi) of the Constitution.³⁴ Instead, their Honours held that while the statutory basis of the “fragile” bore licences, particularly given their ability to be traded and used as security, did not necessarily preclude them from being a species of property for the purpose of s 51(xxxi) (the water itself was not property given its “replaceable but fugitive source”³⁵), the plaintiffs’ entitlement was more in the form of a statutory dispensation from a general prohibition against the taking of groundwater, rather than conferring any positive right to do so.³⁶ There was no acquisition of property because no party had, as was required, derived an identifiable and measurable advantage or benefit by the reduction in the water allocation.³⁷ The cancellation and replacement of the bore licences and the commensurate increase in the groundwater did not give the State any new, larger or enhanced interest in the property.³⁸

²⁸ Referred to in *Gilbert v Western Australia* (1962) 107 CLR 494 at 505.

²⁹ At [37]-[38].

³⁰ At [50].

³¹ At [72].

³² At [80].

³³ At [82]-[84].

³⁴ At [141].

³⁵ At [145].

³⁶ At [144].

³⁷ At [107].

³⁸ At [151]-[154].

36. In dissent, Heydon J agreed that the plaintiffs had no common law right to take the groundwater. But his Honour compellingly, in my view, found that the bore licences did amount to “property” in the constitutional sense: landowners had paid money for them, the licences were transferable, security interests could be given over them and they were included in assessing land values.³⁹

37. In relation to the question of whether there had been an acquisition, his Honour held that there had because the State received an advantage upon the reduction in the plaintiffs’ proprietary rights, in that it was relieved of its obligation under the bore licences to ensure that the plaintiffs received their allocated share of groundwater.⁴⁰ Accordingly, Heydon J found that there had been an acquisition of property other than on just terms in breach of the Constitution, and, therefore, the *Commission Act* and the Funding Agreement were invalid.

38. In summary what emerged from *ICM* is that:

- a. first, the provision of tied financial assistance by the Commonwealth to the States attracts the operation of s 51(xxxi) and cannot be used as a device to circumvent the operation of the Constitution;
- b. second, that whether statutorily created licences permitting the extraction of a natural resource are a species of constitutional property is an open question and depends on their legislative characteristics;
- c. third, there will be no acquisition absent any identifiable or measurable benefit or advantage conferred by an intergovernmental funding arrangement; and
- d. fourth, funding pursuant to s 96 of the Constitution supported by informal arrangements between governments which include, by way of condition, the acquisition by the State of property rights other than on just terms may also be invalid pursuant to s 51(xxxi).

Arnold

39. The reasoning in *ICM* in relation to s 51(xxxi) was affirmed and adopted two months later in the almost factually identical decision in *Arnold*, to which I will return.

Spencer

40. In *Spencer*, the Commonwealth brought a motion under s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) seeking dismissal of Mr Spencer’s proceedings on the basis that he had no reasonable prospect of success. The facts in *Spencer* were similar to those in *ICM* and *Arnold*, but rather than restrictions on groundwater extraction, it was asserted by the applicant that by operation of a suite of federal enactments and intergovernmental agreements

³⁹ At [194]-[215].

⁴⁰ At [216]-[245].

between the Commonwealth and the New South Wales, resultant State legislation restricted his ability to clear native vegetation on his farm and constituted a constitutionally invalid acquisition of his property.

41. The judge at first instance upheld the motion.

42. In dismissing the appeal,⁴¹ the Full Court of the Federal Court relied on the decision in *Pye*; the decision of the New South Wales Court of Appeal in *Arnold v Minister Administering the Water Management Act 2000* (2008) 73 NSWLR 196, which was indistinguishable; and the applicant's acceptance of the validity of the State legislation, which meant that even if the Commonwealth legislation and intergovernmental agreements were invalid, the State legislation would continue in force as the source of the prohibitions and restrictions he complained of.

43. The decision of the Full Court was handed down prior to the High Court deciding either *ICM* or *Arnold*.

44. In the High Court, French CJ and Gummow J, with whom the other judges agreed,⁴² first discussed the history, scope and operation of s 31A of the *Federal Court of Australia Act 1976* (Cth).⁴³ Their Honours then went on to conclude that, because *ICM* had left open the question of whether an informal arrangement between the Commonwealth and the State conditioning any funding to be provided upon the acquisition of property other than on just terms could be valid under s 51(xxxi), and because the applicant's pleadings left open this possibility thereby requiring factual exploration and possible amendment, his case was not one which had no reasonable prospects of success and should not have been dismissed.⁴⁴

Regulating the Use of Water as an Incidence of Trade and Commerce

45. What of the fact that water is a commodity which is priced and traded like any other commercial asset? Given this commercialisation, can the Commonwealth regulate the use of State water under the trade and commerce power (s 51(i)), and/or the corporations power (s 51(xx))?

S 51(i): the Trade and Commerce Power

46. Turning first to the trade and commerce power, how far back beyond mere prescription of standards for export the Parliamentary power conferred by s 51(i) extends remains an unanswered question. In *O'Sullivan v Noarlunga Meat Ltd*, Fullagar J stated that s 51(i) can "enter the factory or the field or the mine".⁴⁵ And if it can enter the mine, presumably it can wade into the river.

⁴¹ *Spencer v Commonwealth of Australia* (2009) 174 FCR 398.

⁴² At [40] per Hayne, Crennan, Kiefel and Bell JJ and [61] per Heydon J.

⁴³ At [17]-[26].

⁴⁴ At [28]-[34].

⁴⁵ (1954) 92 CLR 565 at 598.

47. But perhaps not. In *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, the Court determined that the direct operation of the law in question was to prohibit the export of a commodity from Australia, and not, as it appeared, a law directed to halt sand-mining on Fraser Island. Thus its validity under s 51(i) was upheld. However, Mason J explicitly opined that the Commonwealth law would have exceeded the powers of the Commonwealth if this had been its subject-matter.⁴⁶
48. That the Commonwealth can use this head of power to regulate the interstate water market is an unremarkable proposition and one which supports some of the water trading rules of the Basin Plan under Pts 2 and 4 of the *Water Act 2007* (Cth).⁴⁷ Less certain, however, is the extent to which s 51(i) may be used, even in an incidental capacity, to regulate the activities of intrastate trade. For example, could this head of power be used to control the quantity of water used to irrigate crops, only a limited proportion of which was ultimately to be consumed overseas or interstate?
49. The somewhat artificial quarantining of intrastate trade and commerce from this head of power, given the complexity of modern commercial transactions, has meant that it has had limited scope in the promulgation of national economic policies directed towards water preservation.

Section 100

50. A further complication is the apparent restriction contained in s 100 of the Constitution. Until *Arnold*, s 100 had not been the subject of extensive judicial scrutiny. Is the provision a limitation or a guarantee? Do the words “any law or regulation of trade or commerce” include not only s 51(i) but, for example, s 51(xx)?⁴⁸
51. In *Morgan v The Commonwealth* (1947) 74 CLR 421 (“Morgan”) the High Court confined the reference to the laws of “trade and commerce” contained in ss 98-102 to s 51(i).⁴⁹ *Morgan* was followed in the *Tasmanian Dams* case.⁵⁰
52. However, in that decision Mason J expressly acknowledged the artificiality of the narrow approach in *Morgan*, which permitted the Commonwealth to achieve, by recourse to other legislative powers, that which was verboten under s 100.⁵¹ The explanation he gave was a historical one, that s 100 was an expression of the economic importance of, in particular, the Murray River to New South Wales, Victoria and South Australia at the time of federation.

⁴⁶ At 22.

⁴⁷ Gardner, Bartlett and Gray, above n 4, para 5.24.

⁴⁸ See the discussion as to the history behind the drafting of s 100 and its possible scope in Kelly, above n 6, Connell, above n 6, Williams and Webster, above n 6, and J Quick and R R Garran, above n 6, pp 879-894.

⁴⁹ At 455 and 458.

⁵⁰ At 154. In that case the High Court rejected the argument that sections of the *World Heritage Properties Conservation Act 1983* (Cth) prohibiting the construction of a dam across the Franklin River were impugned by reference to s 100.

⁵¹ Although his Honour left this question open: at 153.

Arnold

53. The *Commission Act* and the National Water Initiative were again the subject of scrutiny in the *Arnold* decision. Indeed the facts underpinning that decision were relevantly similar to those in *ICM*.
54. In *Arnold*, the appellants challenged the replacement licences on a number of grounds, including two constitutional grounds: first, that the replacement licences constituted an acquisition of property otherwise on just terms contrary to s 51(xxxi); and second, that the Funding Agreement was a regulation of trade or commerce that contravened s 100.
55. The first issue was quickly dispensed with by the majority (French CJ, Gummow and Crennan JJ, Hayne, Kiefel and Bell JJ, with Heydon J in dissent) applying the reasoning in *ICM*.
56. The challenge based on s 100 of the Constitution also failed. The majority held that it was clear from the drafting history of the Constitution that s 100 was directed to limiting the Commonwealth's power in respect of ss 51(i) and 98 of the Constitution.
57. The majority held, relying in particular on Quick and Garran's commentary on s 100, that the rights of the appellants, said to have been abridged by the replacement of their bore licences, did not relate to the use of the "water of rivers" in s 100, but related to underground water in aquifers.⁵² Therefore, s 100 had no application.
58. *Arnold* arguably raised more questions than it answered in relation to the reach of s 100. For example:
- a. first, while the Court refused to re-examine the correctness of *Morgan*, it also declined to endorse it. French CJ specifically noted that the artificiality of its consequences, adverted to by Mason J in the *Tasmanian Dams* case, remained ever present;⁵³
 - b. second, French CJ also noted that it would be difficult to see how an agreement made between the executive governments of the Commonwealth and the States could, of itself, ever constitute a "law or regulation of trade or commerce";⁵⁴
 - c. third, there was also "an interesting question" raised by French CJ⁵⁵ and Gummow and Crennan JJ,⁵⁶ whether the term "right of...the residents" in s 100 was used in a collective sense or in an individual sense;

⁵² At [26]–[29] per French CJ, [55] per Gummow and Crennan JJ, [75] per Hayne, Kiefel and Bell JJ

⁵³ At [23].

⁵⁴ At [24].

⁵⁵ At [24].

⁵⁶ At [53].

- d. fourth, Gummow and Crennan JJ left open the question of whether as between riparian States and their residents, s 100 guarantees access to the use of the waters for the purposes mentioned, or did no more than impose a restriction on the exercise of the power of the Commonwealth;⁵⁷ and
- e. fifth, their Honours queried whether the lakes and billabongs into which a river spreads in flood is part of a river and thus included in “the water of rivers”.⁵⁸

59. One further issue which has not been tested to date, is the extent to which the Commonwealth may pass a law which promotes an environmentally sustainable use of rivers on the basis that to do so would be to provide for the “reasonable” use of water. Put another way, can the Commonwealth pass a law that would, in effect, prohibit the unreasonable use of the waters of rivers for conservation.

Section 51(xx): the Corporations Power

60. As the *Tasmanian Dams* case demonstrated, few, if any, of these limitations exist with respect to the use of the corporations power. Any lingering doubts were swept away by the confirmation of the almost plenary nature of the power in the *Work Choices* case.⁵⁹

Section 51(xxix): the External Affairs Power

61. Finally, the external affairs power. To the detriment of the States,⁶⁰ the considerable width of the Commonwealth’s external affairs power in s 51(xxix) was established in the *Tasmanian Dams* case, and later reinforced in *Victoria v Commonwealth* (1996) 187 CLR 416 (“the *Industrial Relations* case”) and other similar decisions.

62. But the external affairs power demands that any Commonwealth legislation be faithful, and give effect to the terms of the international instrument Australia has agreed to implement. Parliament cannot, by recourse to s 51(xxix), legislate at will. The enacting statute must be reasonably appropriate and adapted to the achievement of the obligations under the convention or treaty. Given that there are presently no international treaties that specifically cover the conservation of water resources, this constraint may prove problematic.⁶¹

⁵⁷ At [53].

⁵⁸ At [58].

⁵⁹ *New South Wales v The Commonwealth* (2006) 229 CLR 1 (“the *Work Choices* case”). Although the majority (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, Kirby and Callinan JJ in dissent) in the *Work Choices* case were careful to eschew the use of term in relation to the power contained in s 51(xx): at [186].

⁶⁰ “The colonies never were and the States are not international persons”: the *Work Choices* case at 373.

⁶¹ Gardner, Bartlett and Gray, above n 4, para 5.45.

This may explain why the *Water Act 2007* (Cth) relies, in part, on no less than eight international agreements for legitimacy.⁶²

Conclusion

63. The colonial hangover from which we still constitutionally suffer, namely, that control over water rights remains the exclusive preserve of the States, has led to dehydration. The Constitution provides limited recourse to the Federal government to regulate and replenish this vital resource. This is further compromised by the constitutional uncertainty created by decisions such as *Arnold*, *ICM* and *Spencer*, which serve only to render the Constitution a less than satisfactory vehicle to administer an effective solution to the current crisis. As Professor George Williams has put it, “once again, how we manage our scarce water resources is being held hostage by our 1901 constitution”.⁶³

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⁶² Gardner, Bartlett and Gray, above n 4, para 5.45.

⁶³ Williams G, “When water pours into legal minefields”, *The Sydney Morning Herald* (Sydney), 26 October 2010, p 13.