THE MURRAY-DARLING BASIN: DIVIDED POWER, CO-OPERATIVE SOLUTIONS?

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This article traces the legal and institutional difficulties of devising an appropriate regime for conserving and managing water and inter-dependant resources in the Murray-Darling Basin. Drawing on the history of interjurisdictional arrangements since 1902, it critically examines some current proposals for change and suggests a number of legislative techniques to strengthen the Murray-Darling Basin Agreement.

An earlier version of this article was prepared at the invitation of the Murray-Darling Basin Commission, to celebrate the centenary of the first public expression of the need to establish a cooperative regime to manage the resources of the River Murray.[1] This happened at a conference at Corowa in March 1902. The conference was convened because of community frustration with politicians and the Governments they controlled. For years there had been shrill arguments between New South Wales, Victoria and South Australia about their respective rights to water in the Murray-Darling system. Those arguments delayed federation and occupied more debating time in the Federal Conventions than any other issue.[2] When the Commonwealth Government finally came into being, many looked to the new Parliament and the new Constitution to impose a solution. But it didn't happen.

One of the enduring mysteries of our federal system is why, after 100 years, we still can't be confident that our Governments, politicians and bureaucrats have developed effective legal and institutional techniques to manage and share the resources of the Murray-Darling Basin in a sustainable way.

1. Constitutional failures

At the time of federation, both New South Wales and Victoria had started to develop promising irrigation settlements on the Murray and its tributaries. They had even done a deal to share the water in the Murray upstream of South Australia equally between them for irrigation. South Australia was, of course, outraged, because it had enjoyed a profitable river trade for some 40 years. It thus wanted to maintain navigability in the system and, if possible, place some controls on railways snaking out from Melbourne and Sydney to the Darling and the Murray, which had begun to syphon off river trade with vicious preferential tariffs.

This conflict is directly reflected in the Constitution. Following the United States' model, the new Constitution gave the Commonwealth Parliament power to make laws about trade and commerce.

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1 See Connell, D (ed) *Uncharted Waters*, Murray-Darling Basin Commission (2002). The editor acknowledges the generosity of the Commission in permitting re-publication of this article.

2 The main legal arguments, with references to the Convention Debates, are summarised in Clark, S.D., "The River Murray Question-Colonial Days" (1971) 8 *Melbourne University Law Review* 11, 30-36.

The comparable power in the Unites States' Constitution had already been interpreted by the United States Courts.[3] They had decided that their trade and commerce power gave the Federal Government the right to make all sorts of laws about any interstate river which was navigable for any part of its length.

To guarantee a similar result in Australia, South Australia fought to insert section 98. This declared that the Commonwealth's power to pass legislation about trade and commerce extended both to navigation and to State railways. In return, New South Wales and Victoria insisted on a balancing provision. Section 100 thus declares that Commonwealth legislation about trade and commerce cannot "abridge the right of a State or the residents therein to the reasonable use of water for conservation and irrigation".

The new Constitution provided three institutional initiatives which might have resolved the dispute between the three States. None ultimately proved equal to the task.

First, the Commonwealth chose not to use its legislative power to resolve disputes over the River Murray. At first, it argued that pressure of other business prevented it from acting to solve the problem. In retrospect, it seems more likely that, in the delicate early days of Federation, the Commonwealth Government was feeling its way cautiously. It was reluctant to incur the inevitable consequences of trying to step between the warring States![4]

This failure by the Commonwealth Government to step in led to the Corowa Conference of 1902. It called on both Commonwealth and State Governments "to co-operate in preparing and carrying out a comprehensive scheme for the utilisation of the waters of the River Murray",[5] which would cater both for navigation and potential consumptive uses. As a result, the States appointed an Interstate Royal Commission on the River Murray in 1902. It proposed that "a Permanent Commission be appointed to control and modify diversions of natural waters within the Murray Basin."[6] It also proposed certain jointly funded works. Predictably, however, the Commissioner appointed by South Australia disagreed with the New South Wales and Victorian Commissioners about the level of flows that should be maintained for navigation.

When the States continued to bicker, Prime Minister Watson offered to use the Commonwealth's legislative power in 1904, but only if the States agreed that it should legislate.[7] The offer fell on deaf ears and was never renewed.

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3 Gibbons v Ogden (1824) 9 Wheat 1; The Daniel Ball (1870) 10 Watt 557; United States v Rio Grande Dam and Irrigation Co (1899) 174 U.S. 690.

4 Ironically, Josiah Symons and Isaac Isaacs both held retainers from the South Australian Government on the River Murray question while they held the office of Attorney-General of the Commonwealth. A joint opinion by Symons and P.M. Glynn dated 6 March 1906 and a separate opinion by Isaacs dated 22 March 1906 were tabled in the South Australian House of Assembly in July 1906.

5 The text of the four resolutions passed at the Corowa Conference are set out in Interstate Royal Commission on the River Murray, *Report* (1902) 5-6.

6 Interstate Royal Commission on the River Murray, Report (1902), 57, Recommendation 3.

7 See Clark, S.D., "The River Murray Question: Part II – Federation, Agreement and Future Alternatives" (1971) 8 *Melbourne University Law Review* 215, 223.

When the High Court was established in 1903, South Australia closely examined its chances of bringing an action to have its right to Murray water declared. The Supreme Court of the United had already shown that it was willing to make arbitrative awards between States in such disputes.[8] But the High Court of Australia took the view that it could only apply principles of English common law, which had no rules for deciding disputes between colonies or former colonies.[9] For the High Court of Australia to apply principles of international law, comity and equity to resolve disputes, like the United States Supreme Court did, was "outside the pale of sober thought."[10]

Both the Commonwealth Legislature and Judiciary had thus left the field. The one remaining hope was the Interstate Commission, provided for by section 101 of the Constitution. When it was finally established in 1912, it was expressly given power to investigate:

- diversions and works on any rivers and their possible effect on navigation for trade and commerce;
- the maintenance and improvement of such navigability;
- any Commonwealth law which might abridge the rights of any State or its residents to the reasonable use of waters for conservation or irrigation.[11]

It was declared to be a court and given power to grant relief on just terms, award damages and grant injunctions. To all intents and purposes, it had ample investigatory, arbitrative and judicial powers to solve the Murray dispute. But it didn't get the chance. In 1915 the High Court held[12] that, because section 103(2) of the Constitution only allowed Commissioners to be appointed for 7 years, rather than for as long as they behaved themselves, the Commission was not truly independent of Government. It could thus not exercise judicial power under the Constitution. The Inter-State Commission, as established, was thus declared unconstitutional. Because it could not be revived without a successful referendum to change section 103(2) of the Constitution, the Inter-State Commission was allowed to lapse when its President's term expired.

2. River Murray Waters Agreement 1914

When it became clear that the River Murray question would not be promptly resolved under the new Constitution, the Premiers acted on the plea of the Corowa Conference for the State and Commonwealth Governments to devise a co-operative solution.

The River Murray Waters Agreement, signed in September 1914, did three things when it came into effect on 31 January 1917. First, it set out a series of structures – storages, locks and weirs – to be built by a Constructing Authority nominated by the State in which the work was located. They were to be funded almost equally by the four Governments. Later, the principle of sharing capital works equally between the parties was formally adopted. Since then, ongoing operation and maintenance costs have been shared equally by the three States.

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8 See, for example, *Kansas v Colorado* (1907) 206 U.S. 406.

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

10 Ibid. 715, per Isaacs J.

11 Inter-State Commission Act 1912 (Cth), section 17.

12 *New South Wales v Commonwealth* (1915) 20 CLR 54 (the “Wheat Case”).

Second, it established water-sharing rules. They allowed New South Wales and Victoria to use any water in their respective tributaries and half of the River Murray flow measured near Albury, provided specified monthly volumes of compensation water were allowed to flow to South Australia.

Finally, the Agreement established a Commission, comprising one Commissioner appointed by each of the four Governments. It could approve the design of proposed structures and give directions to State Constructing Authorities about their construction and operation, in order to ensure that the deliveries to South Australia specified in the Agreement were made.

From today's perspective, however, the Agreement had important deficiencies. It was geographically confined to the main stem of the Murray. It took no account of tributary rivers, adjacent land use, water quality, flooding or uses other than for irrigation, conservation and navigation. Commissioners had to agree unanimously on every decision. One by-product of that rule was that, for many years, the New South Wales Commissioner vetoed any discussion of salinity problems emerging in the system.

Another practical problem was that any change to the Agreement had to be agreed on by every Government. Further, a change only came into force when each Parliament ratified the change by legislation.

Despite this, the Agreement was revised from time to time. Amendments between 1948 and 1958 had the effect of making more water available for South Australia and improving its security of supply, when it made a credible threat to have the Commonwealth's Snowy Mountains Scheme declared unconstitutional. In 1970, provision was also made for flows to dilute salinity. But the process of change was usually painfully slow. Thus, amendments which came into effect in 1983 took eight years, or one-tenth of our Federal history, to develop and adopt!

When water quality emerged as a political issue in the 1970s, the States were still reluctant to allow the Commission to have any power over land use or development on tributaries. The most they would allow was for the Commission to study tributaries with a State's permission; to recommend water quality objectives to the parties; and to be informed of any proposed State developments which might affect the River Murray, in time to make representations to the relevant State authority before final development approval was given. Even this modest attempt to allow the Commission to pre-empt the moral plane was undermined. By innocently changing one word at a signing ceremony for the Amending Agreement in October 1982, the Premier of New South Wales ensured that proposals need only be referred to the Commission when a State wanted to do so.[13] Although no Government has subsequently chosen to take advantage of the loop-hole, the incident neatly shows how jealousy about the sovereignty of the parties to the Agreement has prevented the Commission from obtaining truly independent powers. From time to time, this has impeded its development and operation.

Doubt about the Commission's independence causes difficulties for Commissioners in deciding whether their first allegiance lies with the national interest, as represented by the Commission, or the Government that appoints them. Sometimes, their actions can have grave consequences.

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[13] The incident is recorded in Clark, S.D., "The River Murray Waters Agreement: Peace in our time?" (1983) 9 *Adelaide Law Review* 108, 135.

When the South Australian Commissioner, in the interests of the system as a whole, supported the building of Dartmouth Dam in Victoria, in preference to Chowilla Dam in South Australia, the Speaker in the South Australian Lower House of Parliament crossed the floor of the House and the Government fell.

3. Murray-Darling Basin Agreement 1987

In 1987, there just happened to be Labor Governments in all States in the Murray-Darling Basin except Queensland, which was then not a party to the Agreement. The Commonwealth Government, too, was Labor. None of them owed their existence or survival to riverine electorates. This provided a unique opportunity for statesmanship, rather than politics and the parties made major changes both to the Agreement, the Commission's role and to the management structure of the Agreement.

The new Agreement[14] was not confined to water flowing in the main stem of the Murray. Instead, it dealt with the whole of the Murray-Darling Basin and sought to promote effective planning and management for the equitable, efficient and sustainable use of the water, land and other environmental resources of the whole Basin. While this new Agreement acknowledged the interdependence of all natural systems within the Basin, it also expanded the Commission's potential mission enormously. Opportunities for conflict between priorities within and between States, and regional parochialism, grew exponentially.

In an attempt to meet this challenge, a new Ministerial Council, comprising the Ministers with responsibility for water, land and the environment in each Government, was created. Its function eventually became to:

- consider and determine major policy issues of common interest to the Governments about; and
- develop, consider and authorise measures for,

the equitable, efficient and sustainable use of the water, land and other environmental resources of the Basin.

The new Agreement of 1987 also doubled the membership of the Commission. Each Government can now appoint two Commissioners who, between them, represent water, land and environmental resource management interests. In addition to tasks set out in the Agreement, the Commission is now required to advise, assist and give effect to decisions of, and implement measures approved by, the Ministerial Council.

This new Agreement and management structure paved the way for several notable achievements. They were notable, precisely because they surmounted parochial State preferences in the interest of managing the waters of the Basin as a whole. The first achievement was to adopt and successfully implement a Salinity Strategy to reduce levels of river-borne salinity to tolerable levels at Mannum in South Australia. New South Wales and Victoria voluntarily accepted targets

[14] Executed on 30 October 1987.

to reduce their saline drainage into the system. The States agreed jointly to fund a number of salinity mitigation works at strategic locations.

The Strategy also created incentives for a State to fund further salinity mitigation works, either in its own territory or in another State. A State could thereby earn "salinity credits" to offset saline drainage within that State.

The decision of the Ministerial Council to impose a cap on diversions[15] was another bold supra-jurisdictional initiative. The Ministerial Council acted, knowing the inevitable hardships the cap would create and the strident parochial criticism it would provoke. Remarkably, most States have voluntarily embraced the cap. They have earnestly attempted to adjust consumptive uses and save water within their respective jurisdictions, in order to comply with it.

Indeed, throughout the history of the Agreement the States have honoured its water-sharing principles, often in very trying domestic circumstances and presumably at considerable political cost. But this was precisely what the original Agreement sought to achieve. Despite its critics, the Agreement has thus met its most fundamental objective admirably.

4. Some stumbling blocks

This does not mean that everything has always run smoothly.

One consequence of expanding the issues to be dealt with under the Agreement was to increase matters about which Governments would have conflicting priorities. The changes coincided with developing "manageralism" in the upper echelons of the public service in each jurisdiction. As a result, many of those charged with making and implementing policy decisions for the Basin lacked any race-memory or background about the Agreement and how it had operated previously. Ministerial members of the Council changed often and unpredictably and senior managers of departments became Commissioners. They, too, changed comparatively frequently. As a result, members of the Ministerial Council and Commissioners lacked a shared history or corporate aspirations. This led to two notable casualties. The principle of comity was forgotten and the ogre of sovereignty unleashed once more.

4.1 The principle of comity among Governments

In earlier times, Commissioners and their Governments took seriously the promises:

- in clause 7 of the Agreement to provide for and to secure the execution and enforcement of the Agreement in their respective jurisdictions; and
- in clause 56 to "grant all powers, licences or permission with respect to its territory" for public authorities or other Governments to implement things required to be done under the Agreement.[16]

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[15] A cap was initially adopted for trial implementation during the 1998/99 irrigation season and a revised version adopted by the Ministerial Council on 25 August 2000.

[16] References are to the numbers of the relevant clauses as set out in the Murray-Darling Basin Agreement executed on 17 July 1992.

They also took the statement in each implementing Act, that the Commission has power to do anything it is authorised to do under the Agreement in that jurisdiction, to mean what it said.[17] They thus applied the notion of "comity", or the courteous and friendly understanding by which each sovereign jurisdiction respects the laws and usages of neighbouring jurisdictions.

In the context of compacts between different governments, comity implies negotiating with good will, good faith and a desire to reach mutually beneficial solutions. Sometimes comity requires positive administrative or legislative action by one jurisdiction to implement mutual aspirations. On other occasions, comity requires restraint by one jurisdiction to promote the mutual purpose. A good example of the latter is Victoria's decision not to apply the requirements of the *Water Act* 1989 to Dartmouth Dam on the Mitta-Mitta River in Victoria. Neither Victoria's Constructing Authority nor the Commission itself has been required to apply for or to hold the mandatory licence to operate a dam, required by section 67 of the *Water Act* 1989. Victoria has also not required either of them, or the relevant authorities representing Victoria and New South Wales, to apply for and obtain bulk entitlements to water held in Dartmouth Reservoir, under sections 36 – 43 of the *Water Act* 1989.

Since the changes made to the Agreement in 1987, however, Governments have perceptibly altered their approaches. Clause 47 of the Agreement requires the Commission to examine and take into account any environmental effects that its activities may have on water, land or other environmental resources of the Basin. Provided the Commission does this responsibly, principles of comity would require each jurisdiction to facilitate any examination by the Commission and to procure any authorisations which may be necessary under its own legislation if the Commission or Ministerial Council decides, after due examination, that the activities should proceed. In stark contrast, action taken by the New South Wales Director-General of National Parks, triggered by Aboriginal burial sites and relics discovered at Lake Victoria, required the Commission to obtain a permit containing more than 75 conditions – some of which purport to control downstream environmental issues, rather than preserve Aboriginal cultural heritage at Lake Victoria. This assault on principles of comity is even more remarkable because Lake Victoria, although within the territory of New South Wales, is actually the property of South Australia!

Again, from June 1997, the Ministerial Council permanently capped all diversions within the Basin at 1993/94 levels of development. Three States have changed the administration of consumptive use and striven for more efficient water distribution systems within their jurisdictions, in order to comply with the cap on diversions, as a matter of comity rather than of statutory obligation. Queensland, however, has repeatedly postponed declaring baselines against which its compliance with the cap on diversions can be measured.

4.2 The ogre of sovereignty

The United States President's Water Policy Commission of 1969 identified two critical and apparently universal characteristics of inter-governmental water compacts. It pointed out that, although each jurisdiction may acknowledge that a supra-jurisdictional body is necessary to solve problems which it cannot solve alone, ironically jurisdictions invariably:

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[17] See, for example, Murray-Darling Basin Act 1993 (Vic), section 12. The Act of each other jurisdiction has a comparable provision.

- are so "niggardly" in granting the body sufficient independent powers to do the job; and
- hedge any powers about with such negatively conceived controls,

that the body they create cannot get on and do the job the compact gives it to do! The result is to accentuate State and local parochialism at the expense of regional and national goals.[18]

This paradox accurately describes the historic predicament of the Murray-Darling Basin Commission. One small example is the repeated refusal of the parties to clarify the legal personality of the Commission. They have refused to declare that either the Commission, or River Murray Water – created by the Ministerial Council to implement COAG reforms in the water sector – is a corporate body. Although the Commission is probably now a common law corporation because of the powers it enjoys, no one is prepared to admit it or to say so in legislation.

This reluctance is primarily attributable to the ogre of sovereignty. First, there is a fear that, if the Commission is a body corporate, the Commonwealth may be able to use its legislative power with respect to certain corporations, without consulting the States. In the past, the States have vigorously repelled any initiatives which might give the Commonwealth a greater or more powerful role under the Agreement than the States.

Second, if the Commission is a body corporate, Commissioners might have to observe the common law duties of directors always to act in the best interests of the corporation – rather than observe the parochial political priorities dictated by their respective appointing Governments. A director of a corporation also has an obligation to be thoroughly informed about each matter to be determined by the Board of Directors and to act independently when making decisions.

There are other manifestations of the ogre of sovereignty and negatively conceived controls. The requirement that Commission decisions be unanimous is one. In institutions informed by democratic principles, rather than jealous self interest, it is more usual to decide matters by a majority.

Again, any amendments to an inter-jurisdictional agreement must usually be submitted to each contracting Government for approval and then to its Parliament for legislative ratification. The process is often painfully slow and may also be politically treacherous, for Parliaments are usually bastions of parochial interests and unmoved by notions of comity among Governments.

This process is not effective when dynamic environmental systems must be managed in sensitive and adaptive ways. Amendments to the Agreement executed in July 1992 thus took note of the fact that the Ministerial Council contains up to three Ministers from each jurisdiction and has a remit to determine important policy issues of common interest. On the assumption that three responsible Ministerial advocates would carry the day in their respective Cabinets, the parties allowed the Ministerial Council, by resolution, to adopt or amend Schedules to the Agreement, which then simply had to be laid on the table in each House of Parliament to come into effect.

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[18] Muys, JC, *Interstate Water Comparts. The Interstate Compact and Federal-Interstate Compact*, Arlington, Virginia 1971, 364; Leach RA and Sugg, RS, *The Administration of Interstate Compacts*, Louisiana State University, 1959, 43.

This simple solution may not be effective to meet the complex and difficult problems which now confront the Commission. Instead of simply making minor amendments to existing Schedules, the Commission has had to develop rules about the cap on diversions and water trading between jurisdictions, which incidentally affect the fundamental water-sharing provisions of the Agreement. The better view is that constitutional propriety, if not hard rules of law, require measures which alter basic provisions of such an Agreement to be approved by each Parliament. If this is so, the delay and political hazards involved may make it impossible for the Commission to implement measures to manage dynamic natural systems adaptively, responsibly and sustainably under the present Agreement.

The opposite pulls of sovereignty and comity are likely to become more acute in the immediate future. To meet the requirements of the cap on diversions, States may have to terminate some existing consumptive uses or acquire them, with or without compensation. Reduced consumption will certainly be necessary if decisions are made markedly to increase environmental flows throughout the Basin. It will be very difficult to decide how this can be done equitably between the States and whether retired consumptive rights should attract compensation or be acquired in the market.

The hazards of negotiating a solution in the face of contending State interests have led some, particularly in South Australia, again to propose that the matter be resolved by the Commonwealth. They envisage more than the Commonwealth merely taking a leading role in co-ordinating the development of a National Water Policy and using its spending power to provide resources for the States and the Commission to implement it. Proponents for more Commonwealth action suggest that the task of retrieving and managing environmental flows should be taken away from the States and the Commission and given to the Commonwealth. Is this a realistic option?

5. The Commonwealth's role

Those who advocate Commonwealth intervention believe either that:

- all riparian States will agree to refer legislative power to the Commonwealth to resolve the issues; or
- the High Court's generous interpretation of Commonwealth legislative power in recent years means that the Commonwealth could act unilaterally, if it chose to.

It seems unlikely that the Queensland, New South Wales or Victorian Parliaments would join a South Australian initiative to refer legislative power to the Commonwealth to resolve part or all of the problem. Without them all agreeing, the power could not be successfully referred. Once a legislative power is referred, the States lose control of how it is exercised. Even if the scope of possible Commonwealth legislation is negotiated before a reference is made, the Commonwealth Parliament cannot be bound to enact, or to refrain from amending, the agreed version of draft legislation.

If the High Court continues to take a benign view of Commonwealth power, the State's legislative and administrative control over other natural resources dependent on the hydrological cycle may also be at risk. The ogre of State sovereignty will surely block this path.

Could the Commonwealth act unilaterally?

A Senate Select Committee on Water Pollution in 1969 concluded that, on the evidence it had received, the Commonwealth had sufficient legislative power to create a National Water Commission, which would formulate a national policy on water resources and be "the administering authority for waters within the Commonwealth's jurisdiction."[19] It would comprise seven members, six of whom would be appointed by the Commonwealth from a panel of nominations made by the States.[20]

The then Australian Water Resources Council - a Council of Ministers representing each jurisdiction - dismissed the proposal out of hand. The idea progressed no further.

Less grandiose possibilities still exist. One avenue for Commonwealth legislative action is to use its external affairs power. The Commonwealth Parliament has recently demonstrated the potential scope of this power by passing the *Environment Protection and Biodiversity Conservation Act* 1999. This implements the Commonwealth's treaty obligations in relation to world heritage properties, wetlands of international importance, threatened species and communities and migratory species. These provisions could certainly affect the environmental flow regime in the Murray-Darling Basin, if they are used to require environmental impacts to be assessed under Commonwealth rules. If this happens, ultimately it would be a Commonwealth Minister, rather than the Ministerial Council or the Commission, who would decide whether measures approved under the Agreement can proceed. The Commonwealth could also require management plans to be developed to meet its requirements for areas where its treaty obligations are relevant.

It remains to be seen how effective the regime established by the *Environment Protection and Biodiversity Conservation Act* 1999 will be and whether it provokes co-operative or obstructive action by the States. It is certainly proving difficult to negotiate the bilateral agreements about environmental assessment that the Act contemplates will be made between the States and the Commonwealth.

It is probable that appropriate environmental flows to ensure sustainability throughout the Basin will need to exceed those which might be secured in order to meet the international obligations upon which the *Environment Protection and Biodiversity Conservation Act* 1999 depends. If so, in the absence of other relevant treaties or conventions, the external affairs power would not support Commonwealth legislation to retire sufficient existing consumptive entitlements to provide the necessary environmental flows.

Could the Commonwealth retire the necessary volume of consumptive uses in other ways?

It might not be able to do so compulsorily, even if it were prepared to meet the constitutional obligation to pay just compensation when it acquires property in this way. Such action may raise

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[19] Commonwealth of Australia, Senate Select Committee, *Report: Water Pollution in Australia* (1970), xv, 188.

[20] Several contemporary arguments about the Senate Select Committee's proposals are set out in Clark SD, "The River Murray Question: Part II – Federation, Agreement and Future Alternatives" (1971) 8 *Melbourne University Law Review* 215, 246-251. Perceptions about the scope of Commonwealth legislative power have changed dramatically since that time.

constitutional problems and would certainly provoke undesirable and expensive litigation. Section 100 of the Constitution may prove insurmountable. Legislation which effectively prevents farmers from producing and selling irrigated crops, might well be characterised as a law with respect to trade and commerce, whatever head of power is recited in the Act's preamble. Such legislation is prohibited from abridging the rights of a State or its residents to the "reasonable use of water for conservation and irrigation". Because the prohibition applies to each individual's personal rights, rather than the cumulative effect of exercising such rights, protracted and repetitive litigation is likely.

Further, if the impact of such legislation, for example, disadvantages upstream interests in favour of downstream uses, it may also run foul of section 99 of the Constitution. This prohibits the Commonwealth from giving preference to one State, or any part thereof, over another State, or part thereof, by any law or regulation of trade, commerce or revenue.

The Commonwealth probably has wider and better opportunities to retire existing consumptive uses by deploying its spending power. It could possibly arrange to retire existing consumptive uses by finding a way to participate in the market for transfers of water entitlements.

This market depends on statutory arrangements in each State for transferring water entitlements created by the legislation of each State. Both the right to use water represented by an entitlement and the means of transferring that entitlement, depend entirely on the legislation of each State. State legislation does not presently provide for transfers to be made to the Commonwealth Government. Further, Victorian legislation only allows irrigation water rights to be transferred to another owner or occupier of land.

If the Commonwealth Government wished to buy up water rights through the existing market, each State would have to pass legislation to allow this to happen. Manifestly, this would require co-operative action by the States and Commonwealth, rather than unilateral Commonwealth action.

In this context it is important to note that, throughout the long history of both the River Murray Waters Agreement and the Murray-Darling Basin Agreement, the parties have carefully avoided any statements about who owns, or has territorial sovereignty over, water subject to the Agreements. The Agreements simply acknowledge that the various States (but not the Commonwealth) have the right to use water in the Basin in agreed ways and amounts. This reluctance to attribute either ownership or sovereignty over water to any Government has been deliberate. None of the parties has wanted to do anything which might revive the unproductive wrangling between the States which preceded federation. This value should be respected in devising any new arrangements for the Basin.

Such arrangements must also recognise that all private entitlements to use water, and rights to transfer entitlements to water, depend on State, not Commonwealth, legislation. In view of this, a good way of avoiding controversy might be for all Governments to agree to pass parallel State legislation which would allow existing consumptive rights to water to be retired for environmental purposes (rather than acquired or transferred to someone else) by payments made through the existing market for transfer of water rights. The necessary retirement payments might be made directly by the Commonwealth, or through the States, or through a body like the Murray-Darling Basin Commission, with funds made available by one or more of the contracting Governments.

Once sufficient consumptive entitlements have been retired for environmental purposes, the next issue would be how to manage the environmental flows which become available. To optimise their use, an appropriate program to manage releases would need to be modelled and implemented throughout the whole Basin. This program would need to be compatible with consumptive use requirements in different parts of the Basin at different times. To implement the program, storages belonging to the States and others controlled by the Murray-Darling Basin Ministerial Council and Commission would have to be operated in compatible ways.

Effective co-operation between the Governments thus seems essential to implement any program successfully. On the other hand, States are unlikely to cooperate with any Commonwealth legislation which seeks to override existing regimes devised by the States or operated under the Murray-Darling Basin Agreement. Over-riding unilateral Commonwealth legislation is thus likely to be unproductive. It must, at best, also be unlikely, unless the Commonwealth's zeal outruns its reason.

6. A co-operative solution?

In practical terms, the existing and looming threats to sustainable and equitable sharing of land, water and other environmental resources in the Basin will only be met by serious co-operation between all Governments. For this to happen, there will need to be some supra-jurisdictional policy and decision-making forum and a complementary supra-jurisdictional executive body, capable of requiring and getting complementary action from State Parliaments and Governments.

Thirty years of controversy before and after federation and a subsequent 90 years' experience of a supra-jurisdictional River Murray Commission and Murray-Darling Basin Commission have not provided a solution. Nevertheless, experience has taught us a number of things to avoid and other techniques which would greatly increase the likelihood of success.

Enduring, productive and effective co-operation is unlikely, unless all Governments return to the values underlying the principles of comity. Experience shows that corporate race-memory and education within relevant Government agencies is no longer sufficient to ensure that there is a continuing tradition of effective, if reluctant, restraint and active co-operation in order to implement policies determined by the Ministerial Council or decisions of the Commission. If we are to ensure that the Murray-Darling Basin is, in future, managed sustainably in the best interests of all, we must devise new means to prevent those policies and decisions being undermined by short-term self-interest and bureaucratic or legislative inertia.

This may require new legislation in each jurisdiction. It might direct bureaucrats to administer and apply existing legislation, such as State water management, planning and environmental legislation, in a manner consistent with the Agreement and in ways which implement any resolutions of the Ministerial Council or decisions of the Commission.

These legislative directions may need to be made enforceable obligations. For many years, Acts implementing the Agreement in each jurisdiction allowed Commission decisions to be made a rule or order of the relevant Supreme Court or of the High Court. No one quite understood this provision. But it is apparent that, from the beginning, Governments meant Commission decisions to be enforceable in each jurisdiction. New legislation, consistent with modern principles of

administrative law, could honour and implement this intent. Such laws might, for example, allow the Commission to obtain orders to enforce decisions of the Ministerial Council or of the Commission against Ministers, administrators and citizens in each jurisdiction.

A further technique might be to provide a power for the Governor-in-Council in each jurisdiction to adopt model regulations, prepared on the Commission's instructions, to implement policies and decisions of the Ministerial Council and Commission. Such regulations should not have to comply with local procedural requirements, such as regulatory impact statements. They should also not be subject to legislative disallowance in each jurisdiction.

Provisions of this type, of course, do impose on the sovereignty of each jurisdiction. On the other hand, the values underlying comity will often require Governments to restrain their urge to parade their sovereignty. Adaptive management to ensure sustainability in the Basin will require an ability to change management practices rapidly and with confidence. Among other things, this will require some way to overcome the need to refer substantive changes in the Agreement back to Governments, to obtain their consent and ratifying legislation. History has shown the present requirement to be both too perilous and too slow even to meet simpler challenges than those we now confront.

Bearing in mind justifiable constitutional misgivings, there still must be some way of devising an internal mechanism for amending or adding to the Agreement when the Ministerial Council resolves that a change must be made. There is no question that, as a matter of law, the implementing Act in each jurisdiction could expressly give the Ministerial Council the necessary authority to change the Agreement, without compromising constitutional principles. Ironically, to do so would actually be a supreme assertion of Parliamentary sovereignty, rather than detracting from it!

Two other important changes would also have implications for sovereignty. While the Agreement should express a desire that both the Ministerial Council and the Commission should reach their decisions by consensus, ultimately it should be possible to by-pass entrenched parochialism in order to achieve wider goals. The present principle of unanimity should thus be abolished in favour of decisions by a majority of Ministers or Commissioners voting on any issue.

Further, legislation in each jurisdiction should require that any person appointed as a Commissioner or Deputy Commissioner must have such skills, experience and background relevant to the business of the Commission as will allow that person to understand and participate effectively in making decisions upon issues determined by the Commission.

Ultimately, the challenge will be to ensure that the Ministerial Council and the Commission, or their successors, have a clear mandate and sufficient independent power to achieve it. Complementary implementing legislation must be re-drawn to ensure that independent powers can be exercised effectively in each jurisdiction and that, when they are, that exercise binds all Government authorities and citizens. The difficulty will be to find ways of ensuring that the Ministerial Council and Commission are also sufficiently responsive and accountable to participating Governments, to satisfy their politicians and bureaucrats.

A supra-jurisdictional regime could certainly be created, which operates effectively, provided there is a shared political will to make this happen. The trick will be to inspire that political will, before

it is too late. That is precisely what the Corowa Conference tried to do in 1902. Perhaps we now need to remind our politicians of the words of Patrick McMahon Glynn, a tireless campaigner for South Australia's rights, in evidence before the Interstate Royal Commission on the River Murray in 1902:

> ″All the States apparently desire to treat the rivers from a Federal point of view: unfortunately, however, with politicians, other considerations take weight – we, perhaps, play too much to the galleries at times".[21]

[21] Interstate Royal Commission on the River Murray, *Minutes of Evidence* (1902), 8.