

**INLAND WATERS OF AUSTRALIA
AND
COMMONWEALTH POWERS**

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PRECIS

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1. Australia's Inland Waters.
2. In Clancy of the Overflow Banjo Patterson's Clancy is a man of the Bush, who knows the overflows. I am not concerned to know who Clancy is or what he stands for today, but to discuss those overflows. It is a fascinating part of this nation's history and geography. Those very overflows are coming to life again, as I speak, following the heavy rains in Queensland over the last two months. In South East Queensland farmers are reporting the heaviest rains in a hundred years of record keeping.
3. In the Paroo which has been declared part of Australia's natural heritage the overflows are still running as they were intended before the efficient methods of modern agriculture intervened. The phenomenon occurs when the rivers break their banks and then their waters flow out across the countryside sometimes and in different places for many hundreds of kilometres. These extraordinary inland waters are literally the overflow of the rivers. Gradually the waters make their way downstream along ancient pathways to the sea or to the great inland lakes, rejoining the rivers they left as they proceed or simply evaporating.
4. In his book *Back from the Brink* [2006] recently followed up with *Beyond the Brink* [2009] Peter Andrews writes about the phenomenon of Australia's inland water flows before the

coming of white settlement and how he has attempted to replicate the flow of inland waters on a reclaimed property in the Hunter Valley. He describes not only the ponding of the land under the influence of the shallow damming techniques of the aboriginal peoples, but also the movement of water beneath the soil across an apparently arid inland.

5. Australia of course also like other continents also has surface "rivers". However it is not quite right to say our rivers are like any rivers known elsewhere on the planet. Some of the rivers are the conventional rivers of wetter continents such as Europe or America: perennial, that flow into others and then eventually into the sea, and some flow direct from their source to the sea. Some flow into large inland lakes in the centre of the continent. Others however do not act like rivers at all. They have no perceptible banks but are more impressions or depressions in the landscape barely visible unless you have local knowledge and know what you are looking for; yet they flow in times of flood or when the inland is wet as at present. And the waters often flow to nowhere. They might flow several hundred kilometres, and then disappear. They might be absorbed into the aquifers beneath the surface. They may lie in billabongs and then evaporate in the coming months. Yet most Australians would consider it odd if they were described as mere gullies or watercourses, and not rivers when filled with water, having regard to their size and stream.
6. Another unusual feature of our inland waters are its aquifers. No doubt you have heard of the Great Artesian Basin which covers much of the inland of the continent deep beneath the surface. It is like an ancient lake far underground. A general map of the Great Artesian Basin is attached. However there are other aquifers which are smaller and are linked to the surface rivers, and are themselves ancient underground rivers. For example along the Murrumbidgee River there are three such aquifers at different depths. The waters in them are fed from the rivers above and each flows gradually towards the sea, rejoining the surface river near Renmark. Like the surface rivers geo-morphologically they have banks and the waters in them flow.
7. So far as inland waters are generally concerned the Commonwealth has no constitutional power to regulate inland

waters. The regulation of inland waters is the province of the States and Territories and generally speaking since Federation they have closely guarded their power.

8. However the Commonwealth does have a number of powers that overlap with the States concerning inland waters, and it is worthwhile considering some of these.
9. Of Admiralty and Maritime Jurisdiction.
10. Let me begin with the lofty view of admiralty to these issues. The Constitution section 76 provides:

The Parliament may make laws conferring original jurisdiction on the High Court in any matter ...(iii) of Admiralty and maritime jurisdiction.

Dr Zelling the former well regarded admiralty judge of the Supreme Court of South Australia considered that section 76(iii) was a grant of jurisdiction and not a grant of power¹. He contrasted it with the United States Constitution which whilst similarly expressed includes in the actual grant of judicial power admiralty and maritime jurisdiction. However Sir Owen Dixon in giving evidence to the Constitutional Royal Commission in 1928 took a different view and said that that by coupling the incidental power in section 51(xxxix) with section 76(iii) the Constitution contained the grant of admiralty and maritime power to the legislature². He subscribed to this view in Nagrnt v The Ship Regis [1939] 61 CLR 688 at 696, in supporting the validity of Navigation Act 1912 section 262, which extended the jurisdiction of admiralty courts to personal injuries claims in actions for damage done by a ship. Interestingly Dixon J considered that the trade and commerce power was not wide enough to validate section 262 in that case as Mrs Nagrint was injured on a cruise in Sydney Harbour on an intra-State voyage, but the admiralty power in section 76(iii) with the incidental power was sufficient. Notwithstanding this promising start the Courts have not progressed further in finding that accepted "admiralty

¹ Australian Maritime Law 1991 Fed Press White ed, Zelling page 18

² Proceedings of RC on the Constitution page 784.

jurisdiction” whether exercised in personam or in rem reaches to other inland waters.

11. The other question of interest is what is the meaning of “maritime” in section 76(iii). The United States view is that the word extends the traditional admiralty jurisdiction to all questions of contract including the terms of maritime contracts and to all maritime torts³. As noted in Shin Kobe Maru v Empire Shipping Co [1994] 181 CLR 404 the point was decided under United States law as long ago as 1815 in De Lovio v. Boit (1815) 7 Fed Cas 418 at 441 (CCD Mass). In consequence, the admiralty and maritime jurisdiction of the United States extends to contracts "touching rights and duties appertaining to commerce and navigation" ((42) People's Ferry Company of Boston v. Beers (1857] [61 US 393](#) at 401. See also Story's Commentaries on the Constitution of the United States, op.cit., s.1666; and Sisson v. Ruby (1990) [111 L Ed 2d 292](#) at 305. The High Court left the point on the basis that the word “maritime” does extend the parliament’s powers over admiralty matters to those “generally accepted by maritime nations” as falling within the special powers of admiralty. As matters presently stand that probably excludes internal waters other perhaps than harbours and linked estuaries from the parliament’s powers under this head.
12. How has this conferral of jurisdiction played out? Mr Street SC in his excellent paper to this group last year entitled “Revitalising Australian Admiralty Jurisdiction on the World Stage” advocated a most robust approach by the admiralty courts, in line with his [only] magnificent win over me in the Shin Kobe Maru v Navix Line [1994] 181 CLR 404. I think he would extend the jurisdiction to a capsized on the navigable parts of the River Murray, and perhaps even to the loss of a pail of water. It appears to be difficult to advocate these views too strongly in Australia although I thought the carnal bunt wheat cases that came before this Court over several years were an excellent example of judges showing the way. Ultimately the anti-anti-suit injunctions did away with this work, in a way which I would urge the Judges to revisit now that a very senior Justice with other views on the matter has left the Court.

³ East River Steamship Corp v Transamerica Delaval Inc [1986] 90 L Edn 2d 865

13. When it comes to harbours and the true limit of inland waters I think the limits are still determined by international considerations and accepted concepts of what is admiralty's reach. A good example of the thinking in the international context is The Goring [1988] AC 831. In that case members of a boat club who were being ferried on the club's boat to De Montford Island near Reading when they observed a vessel drifting in apparent distress down the Thames. They lashed it to the Club boat and then claimed salvage. The House of Lords held that the Club had no right of salvage as the waters were non-tidal. Admiralty jurisdiction was not "world wide" as the Admiralty Judge Sheen J had held, and struck out the writ in rem. The plaintiff argued that the only reason that the admiralty courts had not regularly issued writs in rem in respect of non-tidal waters was the jealousy of the common law courts, who had wrongly accused admiralty lawyers of finding jurisdiction in a bucket of water. If that was wrong the judges should do it in line with the expansive views of American judges. Lord Brandon for the lawlords did not take up this invitation, and maintained the traditional view that the ancient right of salvage related to events on the high seas, and not to any event that fell within the body of the county, which included even those areas defined as "harbours" by the extended definitions under the Merchant Shipping Acts. Even the phrase "wheresoever arising" after the conferral of jurisdiction for salvage on the High Court did not extend past the accepted limits.

14. Until 1988 the High Court of Australia was a "colonial court of admiralty" under Colonial Courts of Admiralty Act 1890 [Imp]⁴. It took the parliament of the Commonwealth 87 years to first exercise its powers under Constitution section 76(iii) and then in relation to inland waters the Admiralty Act 1988 adopted the traditional view as to the proper limits of admiralty jurisdiction. Section 5(3) of the Act provides that this Act does not apply to a cause of action that arose in respect of inland waterways vessels, or in respect of the use or intended use of a ship on inland waters. The Act defines inland waters as "waters within Australia other than waters of the sea".

⁴ Nagrint v The Ship Regis [1939] 61 CLR 688; John Sharp & Sons Ltd. v. The Katherine Mackall [1924] 34 CLR 320

15. The Trade and Commerce Power.
16. A more real Commonwealth intrusion into the powers of the States over inland waters arises under the trade and commerce power. As you know section 98 of the Constitution provides:

The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping and to railways the property of the State

This power, which as Quick and Garran explained obviously is intended to supplement the trade and commerce power in section 51(i) has had a checkered history. Although in Australian Coastal Shipping Commission v O'Reilly [1962] 107 CLR 46 Dixon CJ held that the combination of sections 51(i) and 98 gave the widest power to deal with the whole subject matter of navigation and shipping in relation to trade and commerce with other countries and among the States, that did not extend to trade within the State. Whilst the provisions authorised the establishment of an Australian publicly owned shipping line, it did not permit the regulation of inland navigation as such.

17. Hence the High Court has held that section 98 does not confer an independent head of power at all, and did not authorise the Commonwealth to regulate the wages and conditions of sailors and boatmen on intra-State vessels [Owners of SS Kalibia v Wilson [1910] 11 CLR 689]. Nor did it extend to the manning of ships not in fact engaged in the interstate or overseas trades: Newcastle and Hunter River Steamship Company v AG Commonwealth [1921] 29 CLR 357. Nor did it extend to appointing a court of marine inquiry into a collision in way of foreign or interstate trades but involving vessels themselves not in such trades: R v Turner; ex parte Marine Board of Hobart [1927] 39 CLR 411. Nonetheless Seaman's Compensation Act 1911 [Cth] was a valid exercise of that power: Australian Steamships v Malcolm [1914] 19 CLR 298. However Morgan v Commonwealth [1947] 74 CLR 421 has held an unusually strong sway in preventing the powers over navigation and shipping to be independent sources of power.

18. Morgan held that the Constitution section 99 protection against laws of trade and commerce which discriminated as between States or residents, did not apply to laws made under powers other than the trade or commerce power. Accordingly black marketing laws prohibited by wartime defence regulations but which discriminated against the residents of a particular State were valid. The problem with this reasoning is that it strips away the protections that it is reasonably apparent the Constitution intended in respect of any law of trade or commerce as a general description, and creates narrow and over tie a perplexing constitutional reach. In The Tasmanian Dams case arguments were put up to have Morgan overturned but these failed. In Arnold v Minister Administering Water Management Act [2010] HCA 3_ and ICM v Commonwealth [2009] HCA 51 decided recently similar arguments to review the caselaw failed. I would join the calls for the High Court to review Morgan, and to overturn it on the basis that it was a wartime decision about black marketeers and that to compartmentalise the various powers provided for is not consistent with the text of the Constitution or thread of contemporary authority. In particular to lock the protections in sections 99 to 103 including the Inter-state Commission which has never convened into the trade and commerce power limitations is now apparent as a sign of immaturity in our Constitutional law, and a brake on the growth of a real shared tradition of Constitutional law and the attainment of a robust and community focussed Constitutional Compact between the Commonwealth and the States in the interests of all citizens, such as is apparent in the United States. Again as recently as Arnold to which I will come in a moment the Court gave little or no recognition to the plain words of section 100 that protects the water rights of farmers and conservators.

19. Accordingly at present Commonwealth powers over inland navigation and inland waters generally rely on the trade and commerce power itself. Section 51(i) provides:

The Parliament shall, subject to this Constitution, have power to make laws for the peace order and good government of the Commonwealth with respect to... (i) trade and commerce with other countries and among the States.

Thus the management of commercial vessels as instruments of trade and commerce fall within the power and support the Navigation Act 1912: Australian Steamships Ltd v Malcolm [1914] 19 CLR 298 at 335. In W and A McArthur Ltd v Queensland [1920] 28 CLR 530 at 546 the majority held that “trade and commerce” extended beyond the act of transportation across State borders to all commercial transactions. In O’Sullivan v Noarlunga Meat Ltd [1954] 92 CLR 565 at 598 is the locus classicus found in the judgment of Fullagar J for the principle that the regulation of intra-State trade which feeds into overseas trade and commerce is within the trade and commerce power as one cannot be properly regulated without the other. Also see Airlines of NSW Ltd v New South Wales [1964] 113 CLR 54. Nonetheless this power does not extend into the management of internal trade and commerce of a State.

20. Having said that the Navigation Act 1912 is an important exercise of the section 51(i) power as extended by section 98. Obviously the Australian Maritime and Safety Authority [AMSA] finds much of its authority sourced to this statute. I should add that Constitution section 51(vii) relating to lighthouses, beacons and buoys is an important source of the statutes which confer power upon it to regulate overseas and interstate shipping. However it is the State authorities who regulate the intra-state marine activities.

21. According to the Navigation Act 1912 [Cth] the sea “includes any waters within the ebb and flow of the tide”. The word “includes” is interesting. The same statute defines a harbour as “a harbour properly so called, whether natural or artificial and includes an estuary, navigable river, creek, channel, haven, roadstead, dock, pier, jetty or other work in or at which ships can obtain shelter or ship and unship goods or passengers”. Professor Bach in his work on the Maritime History of Australia describes the thriving coastal trades in the nineteenth century before the coming of the rail. Even today a visit to those marvellous old ports is of great interest, such as Wingham, on the Manning River or Morpeth on the Hunter River, to name two that are close by. Most of the obligations and standards that are regulated by the Navigation Act apply only to the “coasting trade” or a ship registered in Australia, and not inland waterways vessels.

22. Before leaving the question of express conferral of powers in the Constitution that may affect the Commonwealth's legislative authority I should mention several other sources of power. The defence power [section 51(vi)] may in conceivable cases extend that authority, as does the corporations power given the breadth of meaning of "trading corporation" since Strickland v Rocla Concrete Pipes Ltd [1971] 124 CLR 468_[section 51(xx)]. Likewise the external affairs power may when treaty obligations arise such as over the Tasmanian wilderness and its rivers under the World Heritage Convention overcome the limits set by the High Court over other powers [see section 51(xxix)], and possibly the nationhood power⁵ which at least addresses powers over homeland security and may support one off legislation over inland waters such as Environment Protection (Alligator Rivers Region) Act 1978. These may in specific circumstances contemplated by the terms of the head of power extend the Commonwealth's powers over inland waters but are not of general application, nor I think are any of them capable of being read in that way or so extended in the future.

23. Is the Constitution out of date in the manner in which it addresses inland water issues, and related questions. Professor George Williams the Sir Anthony Mason Professor of Law at UNSW thinks so [see SMH 16 10 2010 "Stuck in an Unfair Federal System"]. It is worthwhile noting that in the 109 years since Federation the issue of water has moved from being a local concern to being an international issue. 2.53% of the water on the planet is freshwater. Two thirds of that is locked up in glaciers and permanent snow. Of the balance we pollute about 2 million tonnes per day. UNESCO estimates that 50% of people in developing countries are exposed to polluted water. In this context in 1992 the Dublin Conference on Water and Development the first of several such conferences since including the Rio Conference which led to the UNFCCC declared "Water has an economic value in all its competing uses and should be recognised as an economic good". In Australia in 1994 COAG first adopted a strategic framework for the reform

⁵ Sourced to Davis v Commonwealth [1988] 166 CLR 79

of Australia's water, including natural resource management, pricing and trading in water.

24. In 2003 the National Water Initiative was established through COAG leading to the first Commonwealth legislation on the topic the National Water Commission Act 2003. That Act like the Natural Resource Management [Financial Assistance] Act 1992 authorised the Commonwealth to enter into intergovernmental agreements with the States and Territories in relation to water issues. It was one such agreement called Achieving Sustainable Water Entitlements 2005 between the Commonwealth and the State of NSW that led to payments by the Commonwealth to the NSW Government to pass the water sharing plans under Water Management Act 2000 [NSW] in the form prescribed by the NWI agreements and protocols. Moneys for measures, or cash for laws if you like.
25. Another important initiative but not so recent has been the Murray Darling Basin compacts between the Commonwealth and the States of Victoria, NSW, and South Australia, with Queensland occasionally joining up. The Basin comprises about 14% of the continent and includes Australia's 3 largest rivers the Murray [2530 kms long], the Darling [2740 kms long] and the Murrumbidgee [1690 kms long]. The Murray Darling Basin Act 1993 established a Council comprising representatives of the Commonwealth and the States on a consensual basis. Then on 25 January 2007 the Commonwealth announced it proposed the transfer of powers to it under Constitution section 51(xxxvii) over inland waters particularly with respect to the greater protection of the Murray Darling Basin so that the Commonwealth might exercise powers of land and water management. All but Victoria agreed. This led to a somewhat unsatisfactory Water Act 2007. After the election of the Rudd Government Victoria then also agreed to transfer such power, and led to Water [Amendment] Act 1908. One difficulty as I see it with the legislation is that it attempts to do too much, yet not enough. Land management and with it management of inland waters has never been the province of the Commonwealth and for good reason. The States' powers quintessentially are exercised over land management. Further as they know that carries with it the responsibility to manage inland waters responsibly, and to due to blaming each other if their State suffers due to upstream excessive use or even

polluting of the waters of the rivers. Now they blame the Commonwealth, which in truth has little real power to resolve the issues without a complete takeover of powers over inland land and waters. That requires a referendum, and has little or no chance of succeeding. The real exercise of powers under the Water Act 2007 is in the administration of \$12.9 billions appropriated under Water for the Future plan authorised by the Act. Announced on 29 April 2008 it is a ten year plan to secure Australia' water resources. So far that has meant little more than buying at market rates surface water entitlements or land linked to such entitlements, such as Toorale Station securing floodplain harvesting right to return an average of 20 gigalitres of water to the Darling River each year. Those waters are then "owned" by Commonwealth Environmental Water Holdings an entity or more precisely a fund of money established under Water Act 2007.

26. The right to irrigate and conserve water. Section 100 of the Constitution provides:

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

It was argued in Arnold [2010] HCA 3 by the applicants in the class action that the taking of their water entitlements by a State water sharing plan under a funding agreement authorised by Commonwealth laws between the State and the Commonwealth was caught by the "right", and that the law was invalid. In the Court of Appeal the Court noted correctly that the question whether "waters of rivers" included groundwater was foreclosed by the strike out application against the Commonwealth. However in the High Court the learned Justices decided that question as a matter of construction of section 100, to mean that only "waters of rivers flowing in a defined channel...over its bed and between its banks" can be "rivers of waters" within section 100 [eg French CJ at [28] citing Quick and Garran's 1901 edition at page 893]. This remarkable outcome having regard to the nature of the question before the Court in a strike out application means that groundwater flowing through ancient river beds and in aquifers can never be protected by section 100.

27. Another remarkable feature of the decision bearing in mind its procedural foundation on the appeal to the High Court was the adoption by the Court of its decision in ICM v Commonwealth [2009] HCA 51; 261 ALR 653. I am please that I have my learned leader Mr Taylor SC present to confirm that counsel were somewhat surprised to find that ICM which was an exercise of original jurisdiction by the High Court, and in which by majority the Court found that an “acquisition” for the purposes of Constitution section 51(xxxi) can only occur where a benefit or measurable advantage has been received by reason of the acquisition, was the applied without discussion in Arnold. Heydon J though mere expropriation without compensation was enough. Thus the applicants in Arnold who considered they were in a position to prove the State had received a benefit by the acquisitions of water [such as by the re-sale of water taken under eater sharing plans “for the environment”] are left to commence a fresh action, and to scratch their heads.

28. The abuse of Commonwealth powers.

29. There are occasions when for the saving of costs or for political reasons the Commonwealth does not seek power over the land and waters within the States and under their normal control but rather distributes it to the States. The reason in short is nefarious although it is put on the ground of convenience: the real reason is that the States are not burdened by the constitutional guarantees, which are really a restriction on the nature and effect of the laws the Commonwealth can make. In particular they are not bound by section 51(xxxi). In essence the question at the heart of the decision of the High Court in P J Magennis Pty Ltd v Commonwealth [1949] 80 CLR 382 was whether such measures by the Commonwealth could be excused as an exercise of the financial assistance powers under section 96 or was subject to the constitutional guarantee. For a long time the decision of the majority in Magennis in favour of the plaintiff was treated as an aberration and even as wrong. However in ICM, to use the words of Gummow J Magennis was “invigorated”. Thus the applicants who were victims of such Commonwealth State measures might legitimately complain

under section 51(xxxi). The only problem was they could not prove receipt of a benefit by the Commonwealth or the State from the expropriation of their water entitlements and lost. Interestingly enough in the following case of Spencer v Commonwealth [2009] FCAFC 38 still to be decided by the High Court the Commonwealth has admitted the receipt of a benefit of economic advantage.

30. The way forward. First I would advocate a bill of rights being fundamental and broadly accepted rights and of the basic kind familiar to the draftsman of Magna Carta and the Bill of Rights forming part of the United States Constitution, except perhaps the right to bear arms, and such charter of rights must bind the States as well as the Commonwealth. Cash for laws is an outrage, and only brings the Constitutional compact into contempt. Nor should such a foundational covenant between the people and their governors be a wish list of social justice concerns such as recommended by the Brennan Commission . Second I think the Water Act in its present form has failed our farmers and our people and the administration of the questions of land and linked ware management should be returned to the States and addressed cooperatively as it was for more than 70 years prior to Water Act 2007. Third a more robust approach by the Courts is necessary in the teeth of arguments put up by governments that they have the right to tear up the property rights of the people. As Brandeis J said when governments wage war on their own people which they do for money and property then the Courts have a duty difficult though it may be to step in and make our society the just and fair society we all deserve to live in and be a full and rightful component part.
