The Constitution and the Murray-Darling Basin

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This year marks the centenary of the first intergovernmental agreement between the Commonwealth and the States dealing with the sharing of the waters of the Murray-Darling Basin. Since 1914, there have been a number of intergovernmental agreements dealing with the regulation of the Basin's waters. Despite the occasional threat of litigation from the States, disputes regarding the regulation of the waters of the Basin have remained largely out of court. This stands in stark contrast to the position in the United States, where litigation over the sharing of water from rivers that flow between States has been a common occurrence. Such litigation is complex and costly and has often taken years to resolve, which has led the US Supreme Court to conclude that resolving such disputes by negotiation is preferable to litigation.

The fact that Australia has not followed the United States' highly litigious approach to issues surrounding water regulation is surprising in light of the fact that the Constitution provides little guidance as to how rivers should be regulated within the federation, and specifically, how rivers that cross State borders should be managed. However, perhaps it is this uncertainty that has forced the States and the Commonwealth to resolve matters by agreement rather than testing these legal uncertainties. One such constitutional uncertainty is the interpretation of s 100.

Section 100 of the Constitution

The framers of the Australian Constitution spent a great deal of time considering the extent to which water regulation was necessary in the text of the document. During the Australasian Federal Convention in Melbourne in 1898 approximately one-fifth of the debate centred on who should regulate rivers and how this should be effected within the Constitution. The South Australian delegates were keen for the Commonwealth to be given control of rivers, especially rivers such as the Murray which flowed through more than one State. In contrast, New South Wales resisted Commonwealth control as that colony not only had the geographical upper hand (as the upstream colony), but had spent a great deal on establishing irrigation schemes and did not want to see these subject to Commonwealth control.

In the end, a compromise was reached in the form of s 100 of the Constitution, which 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."

Despite lengthy debate during the drafting process, s 100 is the only section of the Constitution to mention the "waters of rivers". Most lawyers will be unfamiliar with s 100 and the way in which it has been interpreted. That is because the section is one of the few express 'rights' provisions in the Constitution to receive very little attention. Prior to the Tasmanian Dam Case in 1983, the wording of s 100 had not been considered directly by the High Court and since that decision the Court has only had examined it on one further occasion. As I explain further on, the interpretation given to s 100 is such that it does not provide the States (or their residents) with a wide-reaching guarantee to the "reasonable use" of water. Instead, the section is merely a limit on the Commonwealth legislative power contained within s 51(i) – the power to legislate with respect to "trade and commerce with other countries, and among the States". The argument that s 100 is a limit on Commonwealth laws with respect to trade and commerce more generally (and not just "trade and commerce with other countries, and among the States") has previously been rejected by the High Court. In the recent case of *Lee v Commonwealth* [2014] FCA 432 the plaintiffs sought to re-agitate this point.

Lee v Commonwealth

In *Lee v Commonwealth* two farmers (one from South Australia and the other from Victoria) sought to challenge the validity of particular sections of the *Water Act 2007* (Cth) on the basis that, among other things, the legislation offended s 100 of the *Constitution*. The central provisions that were challenged established sustainable diversion limits (SDLs), which were intended to return water to the Murray-Darling Basin for the protection of the environment. The Federal Court rejected the argument that sections of the Act establishing the SDLs offended s 100.

The difficulty with the s 100 argument was that the existing case law held that the section only applied to any Commonwealth law made with respect to s 51(i). The problem in this case was that the sections of the *Water Act* in question were not laws with respect to 51(i). Instead, the Court held that they were laws with respect to s 51(xxix) – the "external affairs" power. (Interestingly, the validity of the characterisation of the Act as a law with respect to external affairs was not an alternative challenge made in this case.)

In *Lee*, North J also explained that even if the words 'any law or regulation of trade or commerce' were interpreted more broadly, the sections of the *Water Act* in question were not laws with respect to trade and commerce more generally. As a consequence, the s 100 argument failed.

An alternative argument put forward was that the *Water Act 2007* offended s 99 of the *Constitution*. Section 99 states:

The Murray River, Murray Bridge

> "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

This argument failed for much the same reason as the s 100 argument. The words "by any law or regulation of trade, commerce" in s 99 had, like s 100, been interpreted to be only a limit on laws made with respect to s 51(i). Additional arguments that the Act was contrary to either s 92 or s 101 of the Constitution, or that the Act offended the Melbourne Corporation principle also failed. The difficulty with the argument that the Act offended the Melbourne Corporation principle was that there was no evidence to suggest that the legislation curtailed the capacity of the State to function.

North J concluded that there were "fundamental misconceptions" in the challenge made on behalf of the farmers.

Under the Act and the associated Basin Plan, the Commonwealth purchases water from willing sellers. This water is then returned to the river to improve the environmental flow. As North J noted in *Lee*: "The reduction in water entitlements for use in irrigation is achieved by devoting the water purchased by the Commonwealth to environmental uses." While the Commonwealth's scheme might have flow-on effects, such as the devaluation of farming land or loss of value in some water entitlements, there was no evidence that the scheme "would lead to a reduction in the water entitlements previously held by irrigators" and thereby deprive an irrigator of the "reasonable use" of water.

As a consequence, the Court granted the Commonwealth's application for summary judgment against the farmers.

Conclusion

The case of *Lee v Commonwealth* raises (albeit not expressly) a practical question to which any State or individual seeking to challenge the validity of the *Water Act 2007* (Cth) must have regard: if the *Water Act 2007* (Cth) is unconstitutional, does this necessarily translate to more water for a State or class of people? Invalidating the Act might send the Commonwealth back to the drafting table or the negotiating table with the States, but whether that actually results in more water for the litigants is another question. **B**