

***CAN THE RIVERS RUN WILD?* - THE LEGISLATIVE AVENUES AVAILABLE TO THE COMMONWEALTH TO ACQUIRE WATER ENTITLEMENTS FOR ENVIRONMENTAL FLOWS IN THE MURRAY-DARLING BASIN AND THEIR IMPLICATIONS FOR WATER RESOURCE MANAGEMENT**



River Murray near Murtho, SA  
Photo: John Baker

Photo: River Murray, Murtho South Australia; John Baker

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## ABSTRACT

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This paper examines the Commonwealth's source of power to support their acquisition of water entitlements for environmental flows. The source and scope of the power supporting their current legislative approach is examined, along with alternative legislative approaches that may be supported by other Constitutional powers. Both the current and alternative legislative approaches are critiqued on the basis of their implications for water resource management.

It will aim to argue that the current approach to purchasing entitlements for environmental flows is susceptible to legal challenge and will not be able to maintain effective environmental outcomes from environmental purchases and as such alternative legislative avenues could provide the federal government a more autonomous means to the management of environmental flows in the Murray-Darling Basin. As such these alternative legislative avenues for reform could provide improved stakeholder outcomes through effective management.

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## I INTRODUCTION

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*"When the well is dry; we know the worth of water"*

Benjamin Franklin 1706 - 1790

Water resources are essential for supporting a plethora of human economic and social interests. The utilisation of water resources has been ardently contested between competing uses, especially during periods of scarcity.<sup>1</sup> The over-allocation of water resources for human use has led to a decline in the ecological health of a number of catchments within the Murray Darling Basin (MDB) due to decreased environmental flows.<sup>2</sup> Without the restoration of minimum environmental flows to support the ecological functioning of ecologically stressed catchments, the ability of the water resource to support additional human interests is at risk.<sup>3</sup>

Water resource management has typically been the responsibility of State Governments under the exercise of their plenary legislative powers.<sup>4</sup> This adds to the complexity of water resource management in inter-jurisdictional catchments due to competing State interests and the inconsistencies between State water resource management approaches and associated legislative frameworks.<sup>5</sup> The growing role of the Commonwealth in the management of the MDB has been a response to this, reflected in its attempt to restore minimum

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<sup>1</sup> John Cherry, 'Drought, Water, Farmers and the law' (2006) 89 *Reform Issue: Australian Law Reform Council* 33, 34.

<sup>2</sup> Daniel Connell, *Water politics in the Murray-Darling Basin* (2007), 7. Note: Over allocated refers to where the surface water extracted has reached a level that results in significant environmental degradation.

<sup>3</sup> Stephen Beare & Stephanie Szakiel, 'Water policy and climate risk' (2007) 79 *Issues* 15, 15-16.

<sup>4</sup> See generally Alex Gardner, Richard Barlett, and Janice Gray, *Water Resources Law* (2009), 80 - 88. Cf *Constitution Act 1902* (NSW), s5; *Constitution Act 1867* (QLD), s2; and *Constitution Act 1934* (SA), s5.

<sup>5</sup> Productivity Commission (2003) *Water Rights Arrangements in Australia and Overseas*, Commission Research Paper, Productivity Commission, Melbourne, 314.

environmental flows to ecologically stressed catchments.<sup>6</sup> Environmental flows refer to water necessary to maintain critical environmental process, which support to not only environmental processes, but also economic and other social activities, such as irrigation.

The Commonwealth lacks any specific power to deal with water resource management under the Constitution. There is uncertainty regarding the Commonwealth's authority to directly regulate water resources in the MDB for environmental purposes. As the ecological processes involved in the management of interstate catchments span multiple jurisdictions, the Commonwealth's continuing oversight of the development of water policy is viewed as critical in providing a consistent and holistic policy approach to water resource management in the MDB.<sup>7</sup>

The MDB covers a number of South-Eastern Australian catchments across four States and a Territory, as illustrated in Figure 1. It is inhabited by 10 per cent of Australia's population and is the source of 40 per cent of our agriculture produce,<sup>8</sup> illustrating its essentialness in maintaining economic and social interests. Even though the MDB captures only 6 per cent of Australia's runoff, it accounts for 43 per cent of Australia's total water consumption.<sup>9</sup> Consequently environmental interests in water the MDB face competition from a range of economic and social interests.

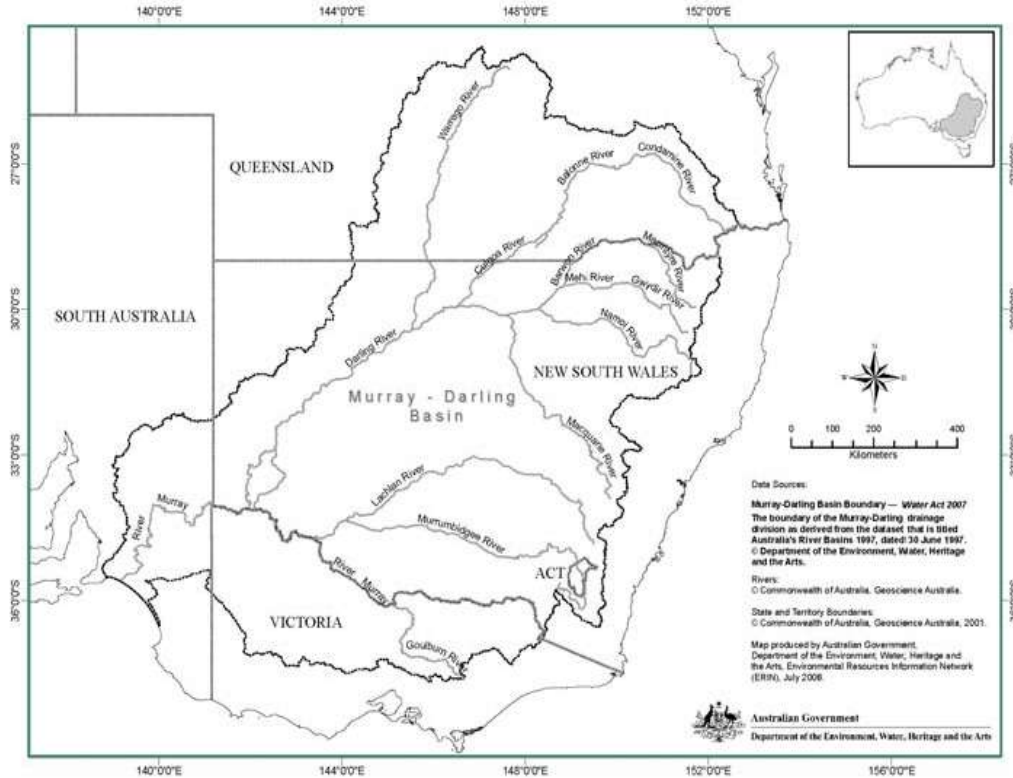
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<sup>6</sup> Note: Environmental flows is water released for the specific and exclusive use of the environment.

<sup>7</sup> Karen Hussey & Stephen Dovers; International Perspectives on water policy and management: Emerging principles, common challenges, In Hussey and Dovers (eds) *Managing Water for Australia* (2007) 141, 152.

<sup>8</sup> Australian Bureau of Statistics, *Water and the Murray Darling Basin: A statistical profile 2000-01 to 2004-05* (2005) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4610.0.55.007>> at 15 August 2009.

<sup>9</sup> Ibid.



**Figure 1: Location & Area of the Murray Darling Basin<sup>10</sup>**

The Commonwealth and the States instigated water market reform in the MDB as the most effective means of achieving the efficient allocation of water resources between competing uses.<sup>11</sup> The *Water Act 2007* (Cth) is part of the Commonwealth’s most recent reforms for the MDB. It aims to improve the incorporation of environmental interests in long term water resource planning for the MDB as ‘a plan to secure a sustainable, environmentally responsible river for the future’.<sup>12</sup> Environmental interests will be incorporated by ensuring that State water management plans comply with the sustainable diversion limits of the

<sup>10</sup> *Water Act 2007* (Cth), Sch 1A.

<sup>11</sup> Pye, Anne; ‘Water trading along the Murray: A South Australian perspective’ (2006) 23 *Environmental and Planning Law Journal* 131, 133.

<sup>12</sup> Commonwealth, *Parliamentary Debates*, Australian Senate, 25 November 2008, 7196 (Senator Donald Farrell).

Commonwealth's basin plan.<sup>13</sup> However as existing plans are not due to comply with the basin plan until 2014 and up until 2019, the over-allocation of water resources continues unabated in the short term.<sup>14</sup> The Commonwealth Environmental Water Holder (CEWH) addresses this short term issue through its purchase of water entitlements, buying back over 500,000ML of water entitlements at a cost of over A\$660m through the 'Restoring the Balance' program.<sup>15</sup> The purchase of entitlements was viewed by the federal government as the most cost effective, appropriate and efficient means to acquire entitlements.<sup>16</sup> However through purchasing entitlements the federal government is reliant upon the market to supply its access to entitlements. This combined with the States' obstruction of the purchasing process detract from the CEWH's effectiveness.<sup>17</sup>

The Commonwealth's role in water resource management in the MDB has been sporadically debated in literature immediately prior to the Commonwealth's establishment and throughout its existence. It has only been over the past two decades that the Commonwealth's growing assumption of responsibility in the MDB has attracted further academic debate. Authors such as Daniel Connell have extensively researched the issue of the Commonwealth's involvement in the

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<sup>13</sup> Garnder *et al*, above n 4.

<sup>14</sup> *Water Act 2007* (Cth), s241.

<sup>15</sup> Department of Environmental, Water, Heritage and the Arts, *Progress of the 2008-09 Restoring the balance in the Murray Darling Basin water purchasing* (2009) <<http://www.environment.gov.au/water/policy-programs/entitlement-purchasing/2008-09.html>> at 21 July 2009. Note: A water entitlement refers to exclusive access to water in each irrigation season, specified either in volumetric terms or as a share of the consumptive pool.

<sup>16</sup> *Market Mechanisms for Recovering Water in the Murray Darling Basin*, Productivity Commission Issues Paper, August 2009, 6.

<sup>17</sup> See Mathew Cranston, 'Water restrictions may lead to flood', *The Land* (North Richmond), 11 August 2009, 9; and George Williams, 'Both sides looking for a case that holds water', *The Sydney Morning Herald* (Sydney), 26 July 2007, 5.

MDB.<sup>18</sup> This research has primarily focused on the Commonwealth's preferred cooperative approach to water resource management, rather than a more autonomous approach. There must be further discussion on the Commonwealth's authority to support an autonomous approach to management in the MDB.

Legal academics, including Alex Gardner, Douglas Fisher and Poh Ling Tan have all provided in depth discussion on water law in Australia, but this has primarily focused on State legislative frameworks.<sup>19</sup> As the Commonwealth's legislative framework is relatively new, there has been scant discussion on the legal authority which underpins it. However, there is a significant body of research covering the implications of past and present water resource management approaches in both the international and domestic context.

Climate change is predicted to reduce the availability of water resources in the mid to long term across South-Eastern Australia.<sup>20</sup> This, combined with the impact of an el niño event in the short term, requires urgent action to protect environmental flows in the MDB.<sup>21</sup> As such, the Commonwealth's authority to support the current and alternative legislative avenues in their intervention in the MDB needs to be outlined. The paper will examine the scope of current and alternate legislative avenues to support the Commonwealth's authority to directly acquire water entitlements for environmental flows.<sup>22</sup> It will then analyse the water resource management implications from utilising alternative legislative

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<sup>18</sup> Connell, above n 2.

<sup>19</sup> See Gardner *et al*, above n 4; and Douglas Fisher, *Water Law* (2000).

<sup>20</sup> Arlene Buchan, 'Letting the markets work for the environment' (2006/07) 89 *Reform* 14, 14.

<sup>21</sup> Bureau of Meteorology, *ENSO Wrap-up: A commentary on the El nino Southern Oscillation Index* (2009) < <http://www.bom.gov.au/climate/enso/> > at 10 October 2009; and CSIRO (2008) *Water availability in the Murray-Darling Basin: A report to the Australian Government from the CSIRO Murray-Darling Basin Sustainable Yields Project*, CSIRO (Canberra), 21 - 41.

<sup>22</sup> Note: Surface water refers to water that occurs or flows on the surface, including streams, rivers, estuaries, lakes, and overland flooding.

avenues that adopt an autonomous regulatory approach to management. The source and scope of the current legislative authority underpinning the acquisition of water entitlements for environmental flows through the water market will be examined. The paper will also examine how the Commonwealth might utilise its funding and compulsory acquisition powers to acquire water entitlements. This will examine the scope of s51(xxxi) to acquire entitlements through recent cases outlining its application in regard to water.<sup>23</sup> The paper will conclude with an analysis of the water resource management implications arising from a more autonomous federal regulatory approach rather than a cooperative approach to management.

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<sup>23</sup> *Australian Constitution* s 51(xxxi).

The Commonwealth's current approach to managing the over-allocation issues in the Murray Darling Basin (MDB) in the short term is through the purchase of water entitlements for environmental flows. This is the preferred short term approach to resolving the issue of declining environmental flows in surface water through the regulation of and participation in the water market.

The recently enacted *Water Act* provides the authority for the Commonwealth's involvement in the established practice of water trading.<sup>24</sup> However the legality of the market approach is facing a number of challenges, which may impair its effectiveness.<sup>25</sup> This chapter will examine the legislative authority underpinning the Commonwealth's market approach and its effectiveness for the acquisition of entitlements.

#### A *The Commonwealth's authority supporting the market approach*

The Constitution does not contain any direct reference to the environment, yet this has not stopped the Commonwealth exerting legislative influence over the management of water resources through their heads of power.<sup>26</sup> The *Water Act* is a new assertion of Commonwealth powers exercised in combination with the referral of State powers.<sup>27</sup> Whilst the management of natural resources remains a State responsibility, the Commonwealth has legislated for water

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<sup>24</sup> *Water Act 2007* (Cth).

<sup>25</sup> See Michael Owen, 'We'll sue on Murray River: Rann', *The Australian* (Sydney), 9 September 2009, 8; and NSW Department of Water and Energy, 'Details of water embargo plan released' (Press Release, 3 June 2009).

<sup>26</sup> Michael Young, 'Land and Vegetation Management' in Clark, Crommelin and Saunders (eds) *The Constitution and The Environment* (1991) 7, 9.

<sup>27</sup> Gardner *et al*, above n 4, 81.

resource management in the MDB primarily under sections 51(i), 51(xx) and 51(xxix) of the Constitution.<sup>28</sup> This is assisted by the territories power in the Australian Capital Territory.<sup>29</sup> By relying on a combination of these heads of power, the Commonwealth asserts it has the authority to purchase water entitlements. However the application of these sources of power in relation to the regulation of water resources is still largely untested.

## 1 *The trade & commerce power*

For the Commonwealth to directly regulate water resources there must be a sufficient connection with a head of power.<sup>30</sup> The interstate trade and commerce power authorises the Commonwealth to regulate interstate trade and commerce.<sup>31</sup> This gives the Commonwealth authority to regulate commercial activities that occur in, on or under a river across a State border.<sup>32</sup> The interstate trade of water entitlements and the rules governing the transfer of entitlements arguably fall within this head of power. However the purchase of entitlements for environmental purposes is beyond the direct scope of this power.

Despite this, the trade and commerce power extends to matters incidental to interstate trade and commerce.<sup>33</sup> Intrastate activities that are sufficiently connected to interstate or overseas trade and commerce can be regulated for

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<sup>28</sup> *Australian Constitution*, ss51(i), 51(xx) & 51(xxix); Water Act 2007 (Cth), s9. See also Gardner *et al*, above n 4, 87; and Philips Fox & Queensland University of Technology; *Trading in water rights – Towards a national legal framework* (2004), 21-23.

<sup>29</sup> *Australian Constitution* s122. See also Gardner *et al*, above n 4, 87.

<sup>30</sup> Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (4<sup>th</sup> ed, 2006) 778.

<sup>31</sup> John Quick and Robert Garran, *The annotated Constitution of the Australian Commonwealth* (1901) 508.

<sup>32</sup> Gardner *et al*, above n 4, 88.

<sup>33</sup> *O'Sullivan v Noarlunga* (1954) 92 CLR 565, 597-598.

interstate purposes.<sup>34</sup> This raises the question of whether the regulation of water as an input into intrastate production of interstate or overseas products could be characterised within the incidental scope of the trade and commerce power.

The United State's Constitution's equivalent incidental trade and commerce power has been interpreted by the Supreme Court as including the regulation of water used in production.<sup>35</sup> The words of the Australian Constitution are even wider than that of the US's Constitution, suggesting that it could be analogised that the Commonwealth's power may have a similarly broad scope.<sup>36</sup> This argument for a wider interpretation of the incidental scope has been rejected by the High Court, as its adoption would undermine the wording of s51(i) to expressly preclude the Commonwealth authority over intrastate trade and commerce.<sup>37</sup> This indicates that the purchase of water by the Commonwealth for environmental purposes would not be found by the High Court as a law within either the direct or incidental scope of the trade and commerce power.

## 2 *The Corporations power*

The Commonwealth's authority over foreign, trading and financial corporations enables it to regulate corporations engaged in the water industry.<sup>38</sup> The widened scope of the corporations' power as a result of the outcome of the *Work Choices Case* enables the Commonwealth to directly regulate the water

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<sup>34</sup> Ibid.

<sup>35</sup> Andrew Inglis Clark, *Studies in Australian Constitutional Law* (1901) 106 – 107.

<sup>36</sup> Quick *et al*, above n 31, 883.

<sup>37</sup> *Attorney General (WA); Ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 138 CLR 492, 509 (Stephen J).

<sup>38</sup> Gardner *et al*, above n 4, 94.

use of all Constitutional corporations.<sup>39</sup> This would extend to engaging Constitutional corporations for the purchase of water entitlements.

The difficulty is that this would limit the entitlements for purchase to those held by constitutional corporations. If this remained the only available head of power the Commonwealth's access to entitlements would be limited, reducing the effectiveness of a market approach. A wider scope of legislative authority is required to access entitlements from all entitlement holders, rather than those of Constitutional corporations.

### 3 *The external affairs power*

The external affairs power provides the Commonwealth with the authority to give effect to international obligations it has agreed to under international law.<sup>40</sup> International obligations must arise under bona fide international agreements and the enacting statute must give effect to the agreement in a manner that is reasonably appropriate to the outlined obligations.<sup>41</sup>

The external affairs power had been utilised to intervene in the State's management of natural resources, such as in the *Tasmanian Dams Case*.<sup>42</sup> The resulting broader scope of the external affairs enabled the Commonwealth to prevent the State regulation of a river for hydroelectricity. For s51(xxix) to provide the Commonwealth with the authority to purchase water entitlements for environmental flows there must be specific international obligations. There are eight international agreements outlined by the *Water Act* which relate to the

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<sup>39</sup> *New South Wales v Commonwealth* (2006) 229 CLR 1.

<sup>40</sup> Gardner *et al*, above n 4, 94.

<sup>41</sup> *Victoria v Commonwealth* (1996) 187 CLR 416, 486.

<sup>42</sup> *Tasmania v Commonwealth* (1983) 158 CLR 1.

protection of environmental values associated with water.<sup>43</sup> For example the Ramsar Convention provides for the conservation of wetlands of international importance of which there are a number within the MDB, which would require the conservation of environmental flows. However for entitlements to be purchased by the Commonwealth, acquisitions would need to be linked to the conservation of wetlands.<sup>44</sup> As a result the purchase of entitlements in catchments not sufficiently linked to Ramsar wetlands would be difficult to characterise under this head of power.

Although there are international agreements that deal generally with ecologically sustainable development and conservation, none relate specifically to domestic water management and provide definable obligations for restoring environmental flows.<sup>45</sup> The external affairs power is likely to only support the Commonwealth's purchase of entitlements in catchments where the restoration of environmental flows can be linked to specific international obligations.

#### 4 *The implied nationhood power*

The implied nationhood power allows the Commonwealth to engage in enterprises and activities peculiarly adapted to the Government of the nation and which cannot otherwise be carried on for the benefit of the nation.<sup>46</sup> However the

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<sup>43</sup> See *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, opened for signature 26 May 1987, 996 UNTS 245 (entered into force 1 May 1994). See also Gardner *et al*, above n 4, 95.

<sup>44</sup> *Ibid*, Art 3(1).

<sup>45</sup> Donald Anton, Jonathan Charney, Philippe Sands, Thomas Schoenbaum and Michael Young, *International Environmental Law: Cases, Materials and Problems* (2007) 755.

<sup>46</sup> *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 395 (Mason J). See also *Australian Constitution* ss51(xxxix), 61.

power has been interpreted as unable to provide authority for coercive legislation,<sup>47</sup> for which the purchase of water entitlements would require.

A recent High Court case has contradicted this, suggesting that this power may support coercive measures, specifically in relation to unusual events of national impact such as the global financial crisis.<sup>48</sup> An analogy could be drawn to the current crisis in the MDB and the resources, capacity and appropriateness of a Commonwealth response. If this view becomes accepted by a majority of the High Court then it may support the Commonwealth's intervention. However as the power is undeveloped, it would be risky to base legislation solely upon it, until its scope has been further clarified.

The above analysis suggests that the sources and scope of the Commonwealth's legislative authority to purchase water entitlements would be limited without the States referral of powers. If the states withdrew their referral of powers, the CEWH would be left to rely primarily upon the corporations' and external affairs power to continue purchases.

## **B**      *Limitations affecting the Purchase Process*

The Commonwealth's authority to purchase entitlements is limited by both the provisions within the *Water Act* and limitations upon the Commonwealth's legislative authority under the Constitution. These limitations inhibit the effectiveness of the purchasing process.

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<sup>47</sup> *Davis v Commonwealth* (1988) 166 CLR 79.

<sup>48</sup> *Pape v Commissioner of Taxation* [2009] HCA 23 (Unreported French CJ, Gummow Hayne, Heydon, Crennan Kiefel and Bell JJ, 7 July 2009) [229-245] (Gummow, Crennan and Bell JJ).

## 1 *The limitations within the Water Act*

The *Water Act* operates within the State legislative frameworks, rather than intending to cover the field.<sup>49</sup> This is partially due to the Commonwealth's limited legislative authority and reliance on the States' referral of powers. Therefore, rather than overriding State statute when an inconsistency arises,<sup>50</sup> the legislative framework dictates that in the event of an inconsistency the Commonwealth provisions are deemed inoperative.<sup>51</sup> As a result State regulations have the authority to modify the functioning of the market approach and thus the purchasing process.<sup>52</sup> The consequence of this statutory limitation is that if the Commonwealth purchases entitlements in a manner that is unacceptable to the State Governments, they can curtail the operation of the Commonwealth's purchase process. This emphasises the Commonwealth's reliance upon the States' cooperation, which restrains the Commonwealth's purchasing program.

## 2 *The application of section 100*

Express Constitutional limitations also affect the extent of the Commonwealth's power and their authority to purchase entitlements. Section 100 imposes a restriction that:

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<sup>49</sup> *Water Act 2007* (Cth), s 250B.

<sup>50</sup> *Australian Constitution* s109.

<sup>51</sup> *Water Act 2007* (Cth), s250D.

<sup>52</sup> *Water Act 2007* (Cth), s250E.

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.<sup>53</sup>

The 'reasonable use' right provides a limitation that restrains the legislative authority of the Commonwealth from unreasonably interfering with the practice of irrigation in the States.<sup>54</sup> However there is uncertainty in the scope of this limitation due to the phrase 'any law or regulation of trade and commerce' and whether this solely applies to laws characterised under s51(i) or if it extends to other heads of power, such as the corporation's power, which also impact upon trade and commerce.<sup>55</sup>

Commentators of the Constitutional debates suggested that s100 explicitly applied to 'the legislative power of the Parliament in regard to trade and commerce.'<sup>56</sup> An authority supporting this view can be found in *Morgan v The Commonwealth*, which interpreted the same reference to laws of 'trade and commerce' in s99 to be confined to laws characterised under s51(i).<sup>57</sup> This approach was later adopted in *Commonwealth v Tasmania*, which found that legislation enacted pursuant to the corporations' power had not impugned the operation of s100.<sup>58</sup> However Mason J noted that it might be:

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<sup>53</sup> *Australian Constitution*, s100.

<sup>54</sup> Connell, above n 2, 49. See generally Nicholas Kelly, 'A Bridge? The troubled history of interstate water resources and constitutional limitations on state water use' (2007) 30(3) *University of New South Wales Law Journal* 639.

<sup>55</sup> Gardner *et al*, above n 4, 91.

<sup>56</sup> Clark, above n 35, 103-104.

<sup>57</sup> *Morgan v The Commonwealth* (1947) 74 CLR 421; 455-458. See also Gardner *et al*, above n 4, 91.

<sup>58</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1, 124 (Mason J).

artificial to confine the restriction on legislative power to laws made ... in exercise of one power when a somewhat similar effect ... might be achieved ... in the exercise of other legislative powers.<sup>59</sup>

This indicates that Mason J was uneasy with the interpretation of s100.

Clarification of the scope of the application of s100 has been sought by the *Arnold* case, currently on appeal before the High Court.<sup>60</sup> This case seeks to challenge Commonwealth funding Acts as invalid due to their contravention of s100. Arguments before the High Court in *Arnold* assert that laws which merely impact upon trade and commerce, rather than characterised as a law with respect to it, should fall within s100.<sup>61</sup>

If the High Court concludes that s100 is limited to laws that are characterised under s51(i), then this could limit the Commonwealth's ability to regulate the water market rules. However as the purchase of entitlements would be difficult to characterise as a law relating to trade and commerce, this limitation may not apply. It will depend on the outcome of the *Arnold* case in determining whether s100 applies only to laws characterised under the trade and commerce power.

### 3 *The freedom of interstate trade*

Section 92 prevents a law discriminating against interstate trade to protect local production.<sup>62</sup> In relation to water trading, this may require that no State can

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<sup>59</sup> Ibid.

<sup>60</sup> *Arnold v Minister Administering the Water Management Act 2000* [2008] NSWCA 338.

<sup>61</sup> Transcript of Proceedings, *Arnold & Others v Minister Administering the Water Management Act 2000 & Others* (High Court of Australia, French CJ, Gummot, Hayne, Heydon, Crennan, Kiefel, Bell JJ, 27 August 2009).

<sup>62</sup> *Australian Constitution* s92; and *Cole v Whitfield* (1988) 165 CLR 360.

restrain water trades to other jurisdictions, as this would stifle trade and limit production in other States through reduced availability of water. South Australia is currently preparing a High Court challenge against Victoria on this limitation due to Victoria's restrictions on the trading of entitlements out of catchment areas.<sup>63</sup> This limitation, depending on how it is interpreted in relation to s100, would assist in preventing the States from restricting interstate trade in water entitlements, assisting unrestrained trade in the water market.

This would encourage free trade, supporting the Commonwealth's purchasing process. However, it may restrict the CEWH's ability to impose rules on purchasing of entitlements for environmental flows, if these rules restrict a state's ability to engage in irrigated production in relation to another state. The application of this section to the management of environmental flows will depend somewhat on the outcome of South Australia's legal challenge to Victoria's restrictions on water trading.

### C *The Legislative Framework underpinning the market approach*

The use of the water market to purchase water entitlements for environmental flows has arisen from the establishment and reform of water trading combined with the Commonwealth's involvement as a market participant. The objective of the water market is to provide for the efficient allocation of water resources, which would create indirect environmental benefits through increased efficiency in water use by irrigators.<sup>64</sup> A market mechanism arguably provides a

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<sup>63</sup> Michael Owen, 'Water cap dispute may spill into court' *The Australian* (Sydney) 9 September 2009, 4.

<sup>64</sup> Peter Cullen, 'The challenges of water policy for Australia' (2004) 52 *Growth (Committee for economic Development of Australia)*, 8, 10.

means of achieving the most efficient use of a natural resource, if it is implemented effectively.<sup>65</sup> By providing clear, predictable and enforceable market rules through a legislative framework, natural resources can be managed through a market.<sup>66</sup> Subsequently for water entitlements to be traded effectively they require specific attributes, notably transferability, exclusivity and certainty.<sup>67</sup>

Water trading began operating within the MDB on a State by State basis, starting with Victoria from 1987.<sup>68</sup> However it was not until reform, which initiated the cap on extractions within the MDB and the separation of water from land titles that the volume of water trading increased.<sup>69</sup> Through the 1994 reforms, a cap was placed upon the total extraction of water resources within the MDB.<sup>70</sup> This resulted in the increased scarcity of entitlements and promoted exclusivity by preventing the issuance of further entitlements. The separation of water entitlements from land titles assisted in increasing the volume of water trade through providing water entitlements with the characteristic of transferability.<sup>71</sup> However the over-allocation of water resources under State water management frameworks meant that the increase in water trading resulted in the activation of

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<sup>65</sup> Tom Tietenberg, *Environmental Economics and Policy* (2004 4<sup>th</sup> Ed), 126 – 129.

<sup>66</sup> Philips Fox *et al*, above n 28, 1.

<sup>67</sup> Above n 5, 93.

<sup>68</sup> Bate, Roger; 'Trading our Reputation' (2007) 23(1) *Policy* 23, 25.

<sup>69</sup> Connell, Daniel; 'Contrasting approaches to water management in the Murray Darling Basin' (2007) 14 *Australasian Journal of Environmental Management* 6, 7-8, 9-10.

<sup>70</sup> Council of Australian Governments, *Intergovernmental agreement on a National Water Initiative Between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory*, (2004) Council of Australian Governments, Canberra.

<sup>71</sup> Productivity Commission (2006) *Rural Water Use and the Environment: The Role of Market Mechanisms*, Research Report, Melbourne, 263-275.

unused entitlements, causing further environmental degradation through reduced flows.<sup>72</sup>

To rectify this issue in the long term the Commonwealth enacted the *Water Act* to implement a basin wide plan for sustainable levels of extraction. As a short term solution prior to commencement of the plan, the CEWH was established to purchase of entitlements from willing sellers and apply their annual allocations to protect and restore environmental assets.<sup>73</sup> The legal titles of the entitlements held by the CEWH are defined by State law.<sup>74</sup>

Crucially the CEWH must operate in concurrence with State law and avoid direct inconsistency.<sup>75</sup> If a direct inconsistency arises between the Commonwealth water legislation and State law, the Commonwealth law will be deemed inoperative.<sup>76</sup> The result is that any State can limit the operation of the CEWH through their State water resource legislative frameworks, as exemplified by NSW's embargo on trade to the Commonwealth. This overriding state authority can impair the operation of the CEWH, limiting its effectiveness to purchase entitlements.

#### **D**     *The effectiveness of the market approach*

The Federal Government relies on its limited authority combined with the States' authority to support its purchase of entitlements. The 'Restoring the Balance' Program initiated under the Federal Government's 'Water for the Future'

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<sup>72</sup> Connell, above n 69, 9-10.

<sup>73</sup> *Water Act 2007* (Cth), Part 6 & ss105, 108 & 109. See also Gardner *et al*, above n 4, 620.

<sup>74</sup> Gardner *et al*, above n 4, 620.

<sup>75</sup> *Water Act 2007* (Cth), ss250B, 250D, 250E.

<sup>76</sup> *Water Act 2007* (Cth), ss250D(3), 250D(5).

plan purchases entitlements to ‘help improve the health of the Basin’s rivers, wetlands and floodplains’.<sup>77</sup> The first round of water entitlement purchases made in 2007-08 irrigation season, amounted to 24GL at a cost of A\$34m.<sup>78</sup> As of June 2009 a total of 555GL of entitlements had been purchased for the environment.<sup>79</sup> Despite these purchases there are a number of issues that have arisen in the market approach as a result of the Commonwealth’s limited authority.

### 1 *The inability to target the acquisition of reliable entitlements*

The Commonwealth’s market approach has not allowed for the targeted acquisition of entitlements. It has operated on a no regrets presumption, purchasing any accessible entitlements through an open tender.<sup>80</sup> This has meant that it has not responded to meeting environmental needs in catchments at critical risk of ecological decline.<sup>81</sup> The Commonwealth is reliant on willing sellers in the market to supply entitlements under the market approach. Consequently the Commonwealth has no control over the reliability or catchment area where entitlements are offered for purchase.

Under the States’ water resources legislative frameworks, water entitlements have a varying reliability depending on their priority in receiving an allocation of shared water combined with the overall reliability of inflows within

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<sup>77</sup> Senator Penny Wong, Minister for Climate Change and Water, ‘Strong results on government water purchase’ (Press Release, 24 July 2009).

<sup>78</sup> Department of Environment, Water, Heritage and the Arts, *Restoring the Balance in the Murray Darling Basin Factsheet* (2009) <<http://www.environment.gov.au/water/publications/mdb/pubs/restoring-balance.pdf>> at 27 July 2009.

<sup>79</sup> Department of Environment, Water, Heritage and the Arts, *Progress of 2008-09 Restoring the Balance in the Murray Darling Basin Water Purchasing* (2009) <<http://www.environment.gov.au/water/policy-programs/entitlement-purchasing/2008-09.html>> at 27 July 2009.

<sup>80</sup> Above n 16, 14.

<sup>81</sup> *Ibid.*

the particular catchment.<sup>82</sup> The entitlements that have been purchased have included a number of low reliability entitlements.<sup>83</sup> Whilst 555GL worth of water entitlements have been acquired through the market, only 342GL will be returned to the MDB on average annually.<sup>84</sup> The majority of the entitlements in the possession of the CEWH have received a poor sustainable rivers audit health rating.<sup>85</sup> The effects of climate change on supply are likely to decrease the environmental benefits provided by the purchased entitlements. This illustrates the difficulty in relying upon the market to supply an appropriate volume of entitlements of a sufficiently reliable nature in areas that require the restoration of environmental flows.

## 2 *Challenges to the market approach's operation*

Legal challenges regarding the operation of the market threaten the Commonwealth's ability to purchase entitlements. From May to September 2009 the NSW Government imposed an embargo on the sale of entitlements for environmental purposes to the CEWH.<sup>86</sup> This was under the State Minister's authority to suspend trade under the State's *Water Management Act*.<sup>87</sup> It was a result of the disproportional number of entitlements purchased for the environment within NSW, causing economic harm to agricultural activity by

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<sup>82</sup> Tian Shi (2005) *Simplifying Complexity: A Framework for the Rationalisation of Water Entitlements in the Southern Connected River Murray System*, Policy and Economic Research Unit, CSIRO Land and Water, Canberra, 10 – 12.

<sup>83</sup> *Ibid.*

<sup>84</sup> Above n 79.

<sup>85</sup> CSIRO, above n 21.

<sup>86</sup> NSW Government Department of Water and Energy, above n 25.

<sup>87</sup> *Water Management Act 2000* (NSW), s71Z.

reducing the availability of water entitlements for production.<sup>88</sup> At the time of the embargo 97 per cent of entitlements purchased by the CEWH had been from NSW catchments.<sup>89</sup> NSW's actions have effectively stalled the purchasing program for more than five months, further prolonging ecological decline. Future challenges like this would further obstruct the effectiveness of the market approach.

SA's challenge against Victoria regarding the freedom of trade in water entitlements reflects another complication for the market approach. This is exemplified in the Victorian cap on inter-catchment trades of no more than 4 per cent of a catchment's entitlements in an irrigation season and the limit on trades to the Commonwealth.<sup>90</sup> By restricting trades to the environment in catchments where the limit has been reached it limits the purchasing process.<sup>91</sup> These barriers continue as an impediment to the purchasing process, despite section 92 dictating the freedom of interstate trade.<sup>92</sup>

The Commonwealth's reliance on the market to supply reliable entitlements in catchments with a defined environmental need indicates the CEWH's ineffectiveness. The limited sources of legislative authority to support the operation of the CEWH suggest that the effectiveness of the CEWH will continue to be at risk from legal challenges.

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<sup>88</sup> Debra Jopson, 'NSW faces brunt of buyback, say irrigators' *Sydney Morning Herald* (Sydney) 26 February 2009, 9.

<sup>89</sup> Department of Water and Energy, *Water Licensing: Embargo on trades to the environment – Frequently asked questions* (2009) <[http://www.dwe.nsw.gov.au/water\\_trade/trade\\_embargo\\_faq.shtml](http://www.dwe.nsw.gov.au/water_trade/trade_embargo_faq.shtml)> at 4 August 2009.

<sup>90</sup> Pye, above n 11, 133.

<sup>91</sup> Peter Hunt, 'Northern Water Trade Rejected' *The Land* (North Richmond), 12 August 2009, 4.

<sup>92</sup> Above n 16, 4, 9-10.

In the past the Commonwealth has used its funding powers under the Constitution to finance water resource management. These powers have been applied to fund State Government action to restore environmental flows within the MDB. However the powers have not been used to direct the States to acquire water entitlements on behalf of the Commonwealth. This chapter will examine whether the Commonwealth could fund the States to acquire entitlements for environmental flows. The source and scope of the funding powers will be explored in conjunction with the relevant Constitutional limitations in order to determine their application in funding the acquisition of entitlements. This chapter will then address the water resource management implications arising from utilising these funding powers.

#### A *The source & scope of the Commonwealth's funding powers*

The Commonwealth is authorised under the Constitution to provide funding to States and any person or entity through its grants and appropriations powers.<sup>93</sup> Furthermore, the Commonwealth may impose any conditions on the grant of this funding, subject to relevant limitations. The funding powers have been utilised to assist with funding the management of natural resources, including water resources.<sup>94</sup> Yet the source and scope of these powers has not

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<sup>93</sup> *Australian Constitution* ss81, 96. See also Clark, above n 35, 212.

<sup>94</sup> Gardner, above n 4, 97.

been explored as to its potential to support the acquisition of entitlements on behalf of the Commonwealth.

## 1 *The appropriations power*

Section 81 enables the Commonwealth to make an appropriation for the purposes of the Commonwealth to any individual or entity it chooses. The issue is whether the scope of the power extends beyond the legislative subject matter outlined within the Constitution and to what extent the Commonwealth can impose conditions on the financial grant.

It must be determined whether grants for acquiring entitlements can be classified 'for the purposes of the Commonwealth'. The broad view in the *Pharmaceutical Benefits Case* and the *AAP Case*, was that monies could be expended for any purposes 'as the parliament determines'.<sup>95</sup> The drafters of the Constitution supported this arguing that the power was an absolute one and it should not be limited to spending related to specific heads of power.<sup>96</sup> The narrower view was that the purpose must be found within the 'four corners of the Constitution' and therefore linked to a head of power within the Constitution.<sup>97</sup> No clear decision on which view was preferred emerged from the *AAP case*.<sup>98</sup>

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<sup>95</sup> *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237, 256 (Latham CJ); and *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 393-401 (Mason J).

<sup>96</sup> *Quick et al*, above n 31, 812, 814-815.

<sup>97</sup> *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237, 282 (Williams J).

<sup>98</sup> Saunders, 'Development of the Government Spending powers' (1978) 11 *Melbourne University Law Review* 369, 374.

However the High Court has recently clarified this issue in *Pape v Commissioner of Taxation*.<sup>99</sup> A majority of the court found the phrase indicated that appropriations spending must be for purposes related to a head of power, reflecting the narrower view.<sup>100</sup> This indicates that for the Commonwealth to spend money related to water resource management, it must rely upon a defined sourced of legislative power, which as outlined would be problematic.

Furthermore any spending under section 81 must not impose conditions unless its purposes fall within a recognised source of legislative power.<sup>101</sup> The Act must only be an Act appropriating money and can go no further to control a particular subject unless there is a relevant source of legislative power.<sup>102</sup> This would be problematic as there are currently no direct Commonwealth heads of power to regulate the management of water resources currently exists.

## 2 *The grants power*

Section 96 provides the Commonwealth with an alternative means to acquire entitlements by funding the States to acquire entitlements on their behalf. The *Second Uniform Tax Case* decided that the Commonwealth may make a financial grant with attached conditions to a State.<sup>103</sup> The High Court held that the conditions of a grant offered by the Commonwealth are to be widely construed

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<sup>99</sup> *Pape v Commissioner of Taxation* [2009] HCA 23 (Unreported French CJ, Gummow Hayne, Heydon, Crennan Kiefel and Bell JJ, 7 July 2009) [184-186] (Gummow, Crennan and Bell JJ).

<sup>100</sup> *Ibid.*

<sup>101</sup> R Lumb and G Moens, *The Constitution of the Commonwealth of Australia Annotated* (5<sup>th</sup> ed, 1995), 426-430.

<sup>102</sup> *Attorney-General (Vic); Ex rel Dael v Commonwealth* (1945) 71 CLR 237, 256 (Latham CJ).

<sup>103</sup> *Victoria and New South Wales v Commonwealth* (1957) 99 CLR 575.

and few, if any restrictions apply.<sup>104</sup> This allows the conditions of a grant to be outside the legislative subject areas of the Commonwealth. This enables the Commonwealth to provide a financial grant to the States on specific conditions relating to water resource management.

The exercise of the funding power is limited in other ways. Firstly the Commonwealth has no power to compel the acceptance of the grant nor the accompanying terms or conditions.<sup>105</sup> Secondly, the power cannot be used to enable the making of a coercive law.<sup>106</sup> This prevents the power imposing legislative sanctions under a financial grant. If a State accepts the conditions of a specific purpose grant and the grant itself imposes no restrictions on the legislative authority of the State, it is a valid exercise of power.<sup>107</sup>

Consequently the appropriations power is unlikely to authorise the Commonwealth to engage individuals or entities in the acquisition of water entitlements. However a specific purpose grant would enable the Commonwealth to engage the States to carry out acquisitions on their behalf. Through providing specific purpose grants to the States, the Commonwealth would have an alternative avenue to acquire entitlements, as long as the receiving State agrees. This may support the Commonwealth to fund the States to choose to either purchase or compulsorily acquire entitlements under the State's legislative authority, depending on the relevant Constitutional limitations.

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<sup>104</sup> Ibid, 609 (Dixon CJ).

<sup>105</sup> *South Australia v Commonwealth* (1942) 65 CLR 373, 416 (Latham CJ).

<sup>106</sup> *Victoria and New South Wales v Commonwealth* (1957) 99 CLR 575, 609 (Dixon CJ).

<sup>107</sup> *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; the Commonwealth cannot attach a condition to a grant that would require the state to abdicate a field of constitutional power.

## B *The limitations on the grants power*

In funding the States to acquire entitlements on its behalf, the Commonwealth's use of the grants power is restrained by Constitutional limitations. These include both express limitations on the exercise of the Commonwealth's power in general and the conditions which apply specifically to the exercise of the grants power.

### 1 *The just terms limitation: The Pye & Magennis distinction*

It has been argued that funding the States' use of their legislative powers to acquire property is a circumvention of the conditions of the 'just terms' of compulsory acquisition.<sup>108</sup> The High Court has drawn a distinction between funding agreements which require an acquisition of property in a particular manner, compared to those which allow the States the right to choose.<sup>109</sup> The High Court has held that the Commonwealth is entitled to exercise the grants power to fund the States' use of their legislative authority in order to acquire property, but the terms of acquisition must be chosen by the State.<sup>110</sup>

Despite this, the conditions which apply to the Commonwealth's compulsory acquisition power do not apply to the State's exercise of their plenary power, pursuant to a specific purpose grant.<sup>111</sup> This allows the Commonwealth to use the grants power in conjunction with the States to acquire entitlements compulsorily without the consideration of just terms. Cases currently before the

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<sup>108</sup> *Pye v Renshaw* (1951) 84 CLR 58.

<sup>109</sup> See *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382; contra *Pye v Renshaw* (1951) 84 CLR 58. See also Gardner *et al*, above n 4, 98.

<sup>110</sup> *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382.

<sup>111</sup> *Ibid.*

High Court have questioned the circumvention of this restriction through the use of the grants power on the basis that it undermines the Constitutional limitations upon the Commonwealth's authority.<sup>112</sup> The High Court's decision in *Arnold & ICM Agriculture* on whether the distinction in *Magennis* is reasonable will determine if the Commonwealth can use the grants power in such a manner'.<sup>113</sup> The outcome will affect the manner in which the States could acquire entitlements under a Commonwealth funding agreement.

## 2 *The express limitations on the grants power*

Express limitations within the Constitution are also applicable to the Commonwealth's exercise of the grants power.<sup>114</sup> The High Court has found that the freedom of religion limitation is applicable to the exercise of the grants power. Therefore it may be possible that other relevant limitations apply, such as s100.<sup>115</sup> This will depend on the High Court's decision whether the scope of section 100 extends to laws that relate to trade and commerce rather than laws with respect to it. If this limitation does apply then funding of the acquisition of entitlements through the States may be curtailed by the States' residents' right to reasonable use. Consideration must also be given to the possibility of a narrower view supported by *Moran's* case which found that limitations preventing State discrimination and preference were not applicable to the use of the grants

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<sup>112</sup> *Spencer v Commonwealth of Australia* [2009] FCAFC 38; and *Arnold v Minister administering the Water Management Act 2000* [2008] NSWCA 338.

<sup>113</sup> Transcript of Proceedings, *Arnold & Others v Minister Administering the Water Management Act 2000 & Others* (High Court of Australia, French CJ, Gummow and Bell JJ, 1 May 2009; and Transcript of Proceedings, *ICM Agriculture Pty Ltd & Ors v The Commonwealth of Australia & Ors* (High Court of Australia, French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, Bell JJ, 24 August 2009

<sup>114</sup> *Lumb et al*, above n 101, 483.

<sup>115</sup> *Attorney General(Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559.

power.<sup>116</sup> Any Commonwealth grants' scheme should consider the potential influence of s100, depending on the outcome in *Arnold*.

The use of the grants power would allow the Commonwealth to fund the States to carry out acquisitions of entitlements on their behalf through the States' legislative authority to either purchase or compulsorily acquire entitlements for environmental flows. Depending on how section 100 is interpreted by the court, its effect may have to be considered for any potential grants' scheme for water resource management.

### C *Potential funding scheme's under the grants power*

The *Natural Resources Management (Financial Assistance) Act* and *National Water Commission Act* have funded State projects to restore environmental flows.<sup>117</sup> These Acts are examples of the application of the Commonwealth's grants power, which illustrate potential alternative avenues to acquire entitlements for environmental flows. This could be carried out through funding the States to either purchase entitlements through the water market or compulsorily acquire entitlements under their legislative authority.

#### 1 *Funding State purchases of entitlements*

The *Natural Resources Management (Financial Assistance) Act* authorises the Commonwealth to 'enter an agreement with a State on financial

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<sup>116</sup> *Deputy Federal Commissioner of Taxation v WR Pty Ltd* (1939) 61 CLR 735, 763-764 (Latham CJ).

<sup>117</sup> *Natural Resources Management (Financial Assistance) Act 1992* (Cth); and *National Water Commission Act 2004* (Cth).

assistance' for specified projects based on the grants power.<sup>118</sup> Its objective is to provide the Commonwealth with funding arrangements to support the management of natural resources and assist in developing an integrated approach.<sup>119</sup> Through a written agreement with a State, the Commonwealth could fund natural resource projects agreed upon by the State and the Commonwealth. These projects include those which espouse efficient, sustainable and equitable natural resource management, consistent with the principles of ecologically sustainable development, like the acquisition of entitlements to support environmental flows in the MDB.<sup>120</sup>

The *Living Murray Initiative* is an example of how the Commonwealth has used this authority to enter into an agreement with the States to conduct water buybacks for environmental purposes within the MDB.<sup>121</sup> As part of this program the Commonwealth entered into an agreement for water recovery with the States to endorse the Murray Darling Basin Commission to purchase entitlements for environmental flows. By 2009 the program aimed to purchase 500GL of entitlements for environmental flows of which 342GL have currently been bought.<sup>122</sup>

The grants power supports the Commonwealth to continue purchasing entitlements through providing funding to the States. The difficulty is this would

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<sup>118</sup> *Natural Resources Management (Financial Assistance) Act 1992* (Cth), s5.

<sup>119</sup> *Natural Resources Management (Financial Assistance) Act 1992* (Cth), s3.

<sup>120</sup> *Natural Resources Management (Financial Assistance) Act 1992* (Cth), s3(2).

<sup>121</sup> Murray Darling Basin Commission, *The Living Murray* (2009)

<<http://www.thelivingmurray.mdbc.gov.au/>> at 4 August 2009.

<sup>122</sup> Murray Darling Basin Commission, *The Living Murray Initiative Progress Report 2009* (2009)

<<http://www.mdba.gov.au/system/files/TLM-WR-prog-rep-JUN09.pdf>> at 4 August 2009.

necessitate agreement by the States, which would be problematic due to their competing interests.<sup>123</sup>

## 2 *Alternative methods of State acquisition supported by the grants power*

A Commonwealth financial grant to support a State's compulsory acquisition of entitlements may be a more effective avenue due to the ability to acquire any entitlement of high environmental value. This approach has not been previously utilised, however similar funding has been made to State governments in order to assist in the reduction of licences for ground water.<sup>124</sup>

Under the *National Water Commission Act* the Commonwealth minister may administer financial assistance from the water fund account to support particular projects.<sup>125</sup> This is an exercise of the Commonwealth's combined authority under the implied nationhood power, appropriations power and grants power.<sup>126</sup> This Act authorises Commonwealth funding to assist States to reduce the volume under groundwater licences. Even though the legality of this approach is currently being contested in the High Court, because of its potential acquisition of property, it is likely that a similar legislative framework could fund the States' acquisition of entitlements. Under the grants power, a similar program could be implemented, depending on the States' acceptance, to fund the acquisition of entitlements.

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<sup>123</sup> Lumb *et al*, above n 101, 481.

<sup>124</sup> Murray Catchment Authority, *Achieving Sustainable Groundwater Entitlements Program Groundwater Entitlement Reductions in the Lower Murray Groundwater Source* (2006) <[http://www.murray.cma.nsw.gov.au/includes/documents/pdf/informationbulletin\\_gw\\_asgep\\_2006.02.02v2.pdf](http://www.murray.cma.nsw.gov.au/includes/documents/pdf/informationbulletin_gw_asgep_2006.02.02v2.pdf)> at 8 August 2009.

<sup>125</sup> *National Water Commission Act 2004* (Cth), ss24, 40-42.

<sup>126</sup> Gardner, above n 4, 97.

These examples illustrate potential statutory frameworks to acquire entitlements for environmental flows through either the market or compulsorily under the grants power. If the scope of the Commonwealth's legislative authority under their section 51 powers is insufficient to support their purchasing program, the grants power offers an alternative means to achieve their policy objectives.

**D**     *Funding powers and their effectiveness in acquiring entitlements*

Any policy response under the authority of the grants power requires the States' agreement.<sup>127</sup> Whilst the grants power authorises the Commonwealth to employ a wider range of policy responses to acquire entitlements to restore environmental flows, potentially including compulsory acquisition, the consent of the States still remains as a problematic limitation.

The occurrence of State and Federal Labor Governments in power in all jurisdictions covering the MDB was expected to provide a strong platform to bring a more holistic and unified management approach.<sup>128</sup> Whilst there has been a history of cooperation in the MDB, divisive competing interests between different jurisdictions remain, evident in the Constitutional legal challenge being issued against Victoria by South Australia and the NSW embargo on environmental trades.<sup>129</sup> The upstream jurisdictions of NSW, Queensland and Victoria have typically been resistant to any potential Federal State agreement where water

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<sup>127</sup> *South Australia v Commonwealth* (1942) 65 CLR 373, 417 (Latham CJ).

<sup>128</sup> Senator Penny Wong, 'Transcript: Water Management of the Murray Darling Basin; Rudd Government on track to meet Kyoto targets' (Media Release, 25 February 2008) 1.

<sup>129</sup> Williams, above n 17.

use for irrigated agriculture is reduced.<sup>130</sup> Therefore any policy response to acquire entitlements for environmental flows under the grants power will be limited by the terms the States are willing to accept. As a result, the States may only be willing to accept an agreement if the Commonwealth gives a guarantee protecting agricultural interests. Such a condition on any funding agreement would be a compromise for the restoration of environmental flows. This evidently reduces the effectiveness of the policy response in achieving the restoration of environmental flows.

Additionally there would still be difficulty regarding the enforceability of the funding agreement.<sup>131</sup> If a State refuses to carry out a funding agreement, then the Commonwealth can only withdraw the funding supplied.<sup>132</sup> Whilst the States and the Commonwealth have a history of cooperation regarding the management of the MDB, it is still possible that a State may renege on an agreement if its constituents' interests are significantly jeopardised, as has occurred in NSW.<sup>133</sup> In such an event the Commonwealth could not compel the State to carry out the obligations of the funding agreement, undermining the effectiveness of any acquisition process.

These issues regarding the use of the grants power to fund the acquisition of entitlements illustrate, that because of the need for State consent, this source of authority is unlikely to assist in an effective Commonwealth policy response. The grants power offers the Commonwealth Government an alternative source of

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<sup>130</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 14 August 2007, 16 (Dr Andrew Southcott MP).

<sup>131</sup> Kelly, above n 54.

<sup>132</sup> Enid Campbell, 'Suits between governments in a federation' (1971) 6(3) *Sydney Law Review* 309, 318.

<sup>133</sup> NSW Department of Water and Energy, above n 25.

legislative authority under the Constitution to intervene in the MDB and support the acquisition of water entitlements for environmental flows. The difficulty arises from the requirement of the States' consent to funding, limiting the effectiveness of a Commonwealth approach to acquire the entitlements necessary to achieve its policy objectives. Consequently other sources of legislative authority should be examined.

The Commonwealth's power of compulsory acquisition may offer a more effective means of acquiring entitlements than relying upon either the market approach or a funding grant scheme. The compulsory acquisition power assists the Commonwealth to acquire property for purposes under heads of power, particularly public works, such as railways and communications infrastructure.<sup>134</sup> This chapter will examine the source and scope of the compulsory acquisition power to support a compulsory acquisition scheme for water entitlements for environmental flows. It will consider the Constitutional limitations on the exercise of this power and how these might impact on a compulsory acquisition scheme for water entitlements. It will then provide an analysis of the effectiveness of the compulsory acquisition power in achieving the Federal Government's policy objectives to restore environmental flows within the MDB.

**A** *The source & scope of the compulsory acquisition power*

Section 51(xxxi) of the Constitution provides the Commonwealth with the power to acquire property on just terms from any State or person for any purposes with which the parliament has the power to make laws. It was inserted into the Constitution due to doubts regarding the scope of the incidental matters power to support the acquisition of property for Federal purposes.<sup>135</sup> Section

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<sup>134</sup> Quick *et al*, above n 31, 640.

<sup>135</sup> *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 22 April 1897, 1199 (Mr Wise).

51(xxxi) requires that there is both an acquisition and that this be an acquisition of property.<sup>136</sup>

## 1 *An acquisition in relation to water entitlements*

An acquisition has been characterised by the High Court as including a transfer of property from a State or person.<sup>137</sup> The modification, extinguishment or transfer of rights has been defined by the High Court as a category under the meaning of acquisition.<sup>138</sup> It has been held by the High Court that it is immaterial whether the acquisition is carried out by the Commonwealth or some body authorised by the Commonwealth, so long as an proprietary interest is affected.<sup>139</sup>

The acquisition of water entitlements could clearly be interpreted under this meaning of acquisition as it would entail the transfer of property rights into the possession of the federal government or nominated body. The CEWH's possession of purchased entitlements reflects a similar acquisition process. Compulsorily acquired entitlements are likely to be acquired in a similar manner.

## 2 *Water entitlements as property*

Section 51(xxxi) also requires an acquisition of a proprietary interest. Property has been given a wide definition by the High Court.<sup>140</sup> The court has

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<sup>136</sup> Simon Evans, "The search for a principled approach to section 51(xxxi)" (2000) 11 *Public Law Review* 184.

<sup>137</sup> *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155, 189-190 (Deane & Gaudron JJ).

<sup>138</sup> *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, 252-253 (McHugh J).

<sup>139</sup> *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 423 (Williams J).

<sup>140</sup> Above n 30, 1274-1275.

found that property is a general term referring to any tangible or intangible thing, which the law protects under the name of property.<sup>141</sup> It is likely that water entitlements would fall within this interpretation of property as a proprietary interest for the access to and use of water. However, there has been uncertainty regarding whether a water entitlement constitutes a proprietary interest.<sup>142</sup> This is because in the past water entitlements were primarily seen as licences rather than proprietary interests, partly due to the fact that most licences were attached to land rights.<sup>143</sup> However as part of statutory reforms initiated by an intergovernmental agreement between the basin jurisdictions, water rights in the MDB were separated from land rights to assist the operation of water trading.<sup>144</sup> As water rights have now undergone the separation process in most jurisdictions, entitlements are now generally considered proprietary interests in their own right. This is illustrated by their transferability within the water market.<sup>145</sup> It is therefore likely that a water entitlement would be characterised as property.

This indicates that the Commonwealth's potential acquisition of water entitlements through a Commonwealth body would be characterised as an acquisition and surface water entitlements are likely to be characterised as property under the compulsory acquisition power.

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<sup>141</sup> *Minister of State for the Army v Dalziel* (1944) 68 CLR 261.

<sup>142</sup> Lindsay Alford 'The law, the rules & mechanisms to consider when dealing in the property right of water: Comparing the regulation of an emerging water market in QLD with NSW, VIC & SA' (2007) 14 *Australian Property Law Journal* 259.

<sup>143</sup> Poh Ling-Tan, 'Water Licences and Property Rights: Legal Principles for compensation in Queensland' (1999) 16(4) *Environmental & Planning Law Journal* 284.

<sup>144</sup> Above n 70, cl 23.

<sup>145</sup> Above n 71, 8-9.

## B *Limitations affecting the Commonwealth's compulsory acquisition power*

The limits on the exercise of the compulsory acquisition power may restrain the extent to which the Federal Government could rely upon its authority to acquire water entitlements. Property acquired under section 51(xxxi) must be acquired on just terms and for a purpose with which the Commonwealth has the power to make laws. Express limitations are also relevant to determining the extent of this power. Clearly these qualifications on the exercise of this power will affect the Federal Government's authority to acquire water entitlements.

### 1 *The impact of the just terms qualification*

The just terms qualification was inserted to recognise the principle of the immunity of private and provincial property from interference by the federal government, except by fair and equitable terms.<sup>146</sup> A similar phrase within the United States Constitution has been interpreted as an obligation on the Federal Government to provide compensation for an appropriation of property.<sup>147</sup> However unlike the phrase 'just compensation' in the US constitution, 'just terms' does not imply that the Government must provide the market value of the property as compensation.<sup>148</sup> Instead reparation is based on a judgement of fairness and must take into account all interests affected, not just those of the dispossessed owner.<sup>149</sup> As such the judgement of fairness must determine whether the law amounts to a true attempt to provide fair and just standards of

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<sup>146</sup> Quick *et al*, above n 31, 641.

<sup>147</sup> Ibid, 624; and *United States Constitution*, Amend V.

<sup>148</sup> Blackshield *et al*, above n 30, 1288. See also *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290-291 (Dixon J).

<sup>149</sup> *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 496.

compensating or rehabilitating the owner of the property, fair and just as between the owner and the government of the country.<sup>150</sup>

Clearly the Federal Government would be required to provide compensation, as all reasonable use of the entitlements would be prevented through acquisition.<sup>151</sup> However the test of fairness raises issues regarding the extent of compensation that would be required to meet the standard of just and fair. As many irrigated agricultural enterprises would be rendered unproductive without their associated water entitlements, the extent of compensation may extend to the lost production and decreased asset value due to the acquisition of entitlements as an input into production. The High Court has found that compensation for compulsorily acquired land can extend to any loss or damage that follows as a direct and natural consequence of the expropriation.<sup>152</sup> As such compensation for the acquisition of land was not limited to the mere saleable value of land.<sup>153</sup> This might include compensation for loss of business or goodwill, costs of removal and the value of fixture.<sup>154</sup> Therefore the Federal Government may be required to pay not only compensation for the entitlement's market value, but also compensation for the loss and damage as a result of the acquisition. This would require any Federal Government compulsory acquisition scheme to provide compensation, which could be significant in value.

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<sup>150</sup> *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290-291 (Dixon J).

<sup>151</sup> See the distinction between *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513; which states that property rights cannot be regulated to prevent all reasonable use without compensation despite *The Commonwealth v Tasmania* (1983) 158 CLR 1; previously endorsing that property can be curtailed to an extent without compensation. See also Michael Coper, *The Franklin Dam Case* (1983) 18-20.

<sup>152</sup> *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290-291 (Dixon J).

<sup>153</sup> *Minister of Army v Parbury Henty and Co Ltd* (1945) 70 CLR 459, 492 (Latham CJ).

<sup>154</sup> *Lumb et al*, above n 101, 250.

## 2 *Compulsory acquisition for legislative purposes only*

Another condition is that the Commonwealth may only compulsorily acquire property for purposes with which it has the power to make laws. This condition requires that this power may only be exercised if the property acquired relates to purposes found under a head of power within the Constitution.<sup>155</sup> As a result the Commonwealth would most likely have to rely on a combination of the external affairs and corporations' powers to support its direct acquisition of water entitlements. The exercise of legislative power under these sources would be limited to those areas or subject matter under international treaties and entitlements owned by Constitutional corporations. This would not provide access to all entitlement holders across the MDB and as such would not provide the Commonwealth with the power to implement a holistic approach.

## 3 *Other express limitations*

Express limitations, such as section 100 also apply to the exercise of the Commonwealth's compulsory acquisition power, again limiting the scope of its application. Whether this limitation will apply depends on if the High Court determines that s100 extends beyond laws that are characterised under the trade and commerce power, to laws that simply regulate trade and commerce regardless of their source of legislative power.<sup>156</sup> In argument before the High Court the Commonwealth and States have asserted that this limitation is restricted to laws under the trade and commerce power as per the reasoning outlined by Quick and Garran and later followed in the decisions of *Morgan's*

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<sup>155</sup> Quick *et al*, above n 31, 642.

<sup>156</sup> Gardner *et al*, above n 4, 90-94.

*Case and Tasmanian Dams*.<sup>157</sup> If the High Court follows this reasoning based on precedent and the intentions of the framers of the Constitution, the s100 limitation would not apply to the compulsory acquisition of water entitlements, unless the power was applied in relation to the trade and commerce power. As the acquisition of entitlements is unlikely to be characterised under the trade and commerce power, the compulsory acquisition would be unaffected.

The limitations affecting the use of the compulsory acquisition power pose significant restrictions on how it might be utilised by the Commonwealth to acquire entitlements. It seems that the Commonwealth could only apply this power to acquire entitlements from constitutional corporations and for purposes under the external affairs power, depending on the extent of our international obligations. The potential effectiveness of any scheme under the compulsory acquisition power needs to be examined with reference to the impact of the scope and limitations affecting the exercise of this legislative power.

### C *The effectiveness of a compulsory acquisition scheme*

A water entitlement acquisition scheme based on compulsory acquisition may provide increased effectiveness in resolving the issue of declining environmental flows in the short term due to its direct and targeted approach in acquiring entitlements. However the limited application of the compulsory acquisition power has a number of implications for the effectiveness of any Federal Government scheme reliant on this power.

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<sup>157</sup> Transcript of Proceedings, *Arnold & Others v Minister Administering the Water Management Act 2000 & Others* (High Court of Australia, French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, Bell JJ, 28 August 2009).

The main benefit of a compulsory acquisition scheme for water entitlements would be the ability to provide targeted acquisitions across the MDB. The Productivity Commission has identified that the targeted entitlement purchases as an issue that needs to be addressed within the current buyback process.<sup>158</sup> A number of stakeholders within the MDB have argued that specific environmental demands need to be more closely linked to the targeting of each purchase or acquisition.<sup>159</sup> A Commonwealth scheme based on the compulsory acquisition power would allow the Federal Government to acquire entitlements in a targeted manner to more effectively meet environmental needs across the basin by restoring environmental flows to at risk areas.

However the limited scope of the compulsory acquisition power for purposes with which the Commonwealth has the power to make laws would restrict the proportion of entitlements a compulsory acquisition scheme could access. Reliance solely upon the compulsory acquisition power would prevent the holistic policy approach required for effective management.<sup>160</sup> However authority to compulsorily acquire to entitlements extensively across the MDB may be provided through a combination of the corporations' and external affairs powers. The substantial proportion of entitlements held by Constitutional corporations combined with those connected to wetlands of international

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<sup>158</sup> Above n 16, 14.

<sup>159</sup> Tandou Limited, *Market Mechanisms for Recovering water the Murray Darling Basin*, *Submission to the Productivity Commissions review on Market Mechanisms for recovering water in the Murray-Darling Basin*, Productivity Commission, Canberra, 2009, available at [http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0008/91484/sub028.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0008/91484/sub028.pdf), p 5.

<sup>160</sup> See Connell, above n 69, 8.

importance within the MDB would provide the Commonwealth significant access to entitlements across the MDB.<sup>161</sup>

The issue of compensation detracts from this power's effectiveness due to the uncertainty in costs from the need to acquire property on just terms. As the current Federal Government is committed to purchasing entitlements at market price, it is possible that if compulsory acquisitions were carried out they could increase the cost of meeting the volume of environmental flows required.<sup>162</sup> This uncertainty in the cost of acquisition could result in greater government spending in comparison to the current program, requiring greater expenditure to acquire a similar proportion of entitlements.

These limitations present significant considerations for the effectiveness of compulsorily acquiring entitlements as they undermine the benefits of this approach as a sole policy response. Providing a direct means to acquire entitlements without the involvement of the States would allow the Federal Government to circumvent the States' reluctance to engage in water reform.<sup>163</sup> The legal dilemma is that the limited scope of this power due to the consequence of the lack of any direct power for water resources narrows the access to available entitlements. As a sole policy response compulsory acquisition may not be effective, however it may offer a means to augment existing policy approaches.

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<sup>161</sup> National Farmers Federation, *Submission to the Senate Standing Committee for Rural & Regional Affairs & Transport Inquiry into water management in the Coorong and Lower Lakes* (2008) [21] <[www.nff.org.au/get/2457698805.pdf](http://www.nff.org.au/get/2457698805.pdf)> at 22 October 2009.

<sup>162</sup> Department of Environment, Water, Heritage and the Arts, *Water for the Future : A sustainable future for the Murray Darling Basin* (2009) [2] <<http://www.environment.gov.au/water/publications/mdb/pubs/sustainable-future-for-mdb.pdf>> at 18 September 2009.

<sup>163</sup> Sophie Morris, 'Rudd's water plan may flush away \$3bn', *Australian Financial Review* (Sydney), 6 October 2009, 1, 8.

## V CHAPTER FOUR: AVAILABLE LEGISLATIVE AVENUES & THEIR WATER RESOURCE MANAGEMENT OUTCOMES

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The characteristics of each legislative avenue produce different outcomes for the political, social, economic and environmental interests of stakeholders within the MDB. Consideration needs to be given as to how the outcomes for water resource management vary between different legislative avenues. It needs to be determined which legislative avenue provides the characteristics that most effectively balance these competing interests. This chapter will discuss some of the water resource management outcomes that need to be considered in choosing an appropriate avenue of legislative authority to support the acquisition of water entitlements.

### A *Is the market approach meeting environmental needs?*

Current Federal Government policy clearly outlines their preference for the use of market mechanisms in acquiring water entitlements.<sup>164</sup> The Federal Government has supported the use of the water market as a vehicle to acquire entitlements for environmental purposes and established the Commonwealth Environmental Water Holder, as a cost effective and equitable means of restoring environmental flows.<sup>165</sup> However, this reliance on the market as an avenue for the acquisition of entitlements for environmental flows has been criticised by both

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<sup>164</sup> Crase, O'Keefe & Dollery; 'Water Buy-Back in Australia: Political, Technical and Allocative Challenges' *Submission to the Productivity Commissions review on Market Mechanisms for recovering water in the Murray-Darling Basin*, Productivity Commission, Canberra, 2009, available at [http://www.pc.gov.au/data/assets/pdf\\_file/0020/90812/sub002.pdf](http://www.pc.gov.au/data/assets/pdf_file/0020/90812/sub002.pdf), p 2.

<sup>165</sup> Wong, P, 'Water for the Future: A Speech to the 4th Annual Australian Water Summit' (Speech delivered at the 4<sup>th</sup> Annual Australian Water Summit, Sydney Convention Centre, 29<sup>th</sup> April 2008).

industry and environmentalists alike.<sup>166</sup> These criticisms have arisen because of the Federal Government has purchased entitlements on a 'no regrets' presumption resulting in the acquisition of entitlements in an ad hoc manner across the basin.<sup>167</sup> As a result entitlement purchases have not been carried out in catchments at substantial risk of ecological degradation. This reflects the inadequacy of the market approach to carry out targeted acquisitions in order to meet critical environmental needs.

To address this issue, it has been argued that the Federal Government, rather than using an open tender, should incorporate a selective element into their purchasing program.<sup>168</sup> Whilst market proponents have argued that a selective purchasing approach can target at risk environmental areas,<sup>169</sup> it still fails to acknowledge that the market drives the supply of entitlements. As a result, there is no control over the access the Federal Government has to entitlements in specific areas. Although the current supply of water entitlements is high,<sup>170</sup> it is argued that as the purchase process continues the supply of entitlements will decrease.<sup>171</sup> This may mean that it will be increasingly difficult to purchase entitlements in areas with critical environmental needs. This reflects the need for a coercive and selective approach to the acquisition of entitlements, the legality of which would be better supported by either the grants or compulsory acquisition power.

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<sup>166</sup> Above n 16.

<sup>167</sup> Ibid, 22.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> Above n 1.

<sup>171</sup> I H Douglas, *The Murray Darling and the wall street syndrome* (2009) Fair Water Use Australian <<http://www.fairwateruse.com.au/content/view/121/1/>> at 3 October 2009.

This issue reflects the difference between market and regulatory approaches, and the advantages a regulatory approach could offer in assisting a more selective acquisition of entitlements. A regulatory approach would require a significant shift in the Federal Government's preference for market-based policies.

**B**      *The Commonwealth's need for an autonomous approach*

The management of the MDB has been primarily carried out through a cooperative approach between the States and Federal Government.<sup>172</sup> Through instigating intergovernmental agreements for water reform, the Federal Government has increased its role in the management of the MDB since the early 1990s. The Federal Government has been recognised as the most appropriate level of Government to provide a holistic policy approach.<sup>173</sup> The lack of any direct Commonwealth power to deal with water resource management in the Murray Darling Basin and cooperative federalism has influenced the management of the MDB. However it is apparent that an approach involving political cooperation and negotiation between the basin jurisdictions is deteriorating, causing inaction and perverse outcomes for the basin's management.<sup>174</sup> A recent report by the National Water Commission has criticised the States' inaction on water reform, particularly the trading restrictions that have inhibited the Commonwealth from purchasing entitlements in certain jurisdictions.<sup>175</sup> Additionally water reforms to be carried out by States under

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<sup>172</sup> Above n 69, 6-7.

<sup>173</sup> Ibid, 8.

<sup>174</sup> National Water Commission 2009, *Australian Water Reform 2009: Second biennial assessment of progress in implementation of the National Water Initiative*, National Water Commission, Canberra, 61-87.

<sup>175</sup> Ibid, 67.

intergovernmental agreements have lagged, with the ACT being the only jurisdiction to have implemented the necessary reforms.<sup>176</sup> This is why the cooperative approach involving agreement between the States and Federal Governments is becoming increasingly inadequate for producing effective management outcomes.

As a result the use of the grants power would be potentially as ineffective as the current market approach due the requirement of the State's consent. It is another argument for the Commonwealth exerting its control over the management of the MDB and exploring other legislative avenues, such as the compulsory acquisition of entitlements. The use of the compulsory acquisition power under the Constitutional authority of the corporations' and external affairs powers would provide a direct means to acquire entitlements. An autonomous management approach, if implemented correctly, would assist in providing holistic policy in a streamlined and responsive manner, producing more effective management outcomes due to the Federal Government's greater control.

### **C** *Considerations in choosing an autonomous regulatory approach*

If the Federal Government chooses to adopt an autonomous regulatory approach to the acquisition of entitlements from environmental flows in the MDB, the ramifications for a number of stakeholders will need to be considered. The difficulty is that there is a complex mix of competing stakeholder interests in the use of water, including domestic supply, irrigation, environmental flows,

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<sup>176</sup> Ibid.

recreational use and mining.<sup>177</sup> Whilst an autonomous regulatory approach by the Federal Government would provide a direct and targeted means of acquiring entitlements to better meet environmental outcomes, consideration must be given to how it will affect the irrigation industry and the communities who rely upon it.

If entitlements are compulsorily acquired, the acquisitions must not only be equitable, but also carried out in a manner that does not excessively penalise productive and efficient users of water.<sup>178</sup> Compulsory acquisitions could impact on irrigated enterprises through lost production from reduced access to water. Additionally this lost production will also impact on the economic growth of rural communities, affecting tens of thousands of farmers.<sup>179</sup> Structural adjustment for the irrigation industry in catchments at critical risk of environmental degradation will be required.<sup>180</sup> The need for structural reform in affected areas as result of compulsory acquisition will be even more immediate than under the current purchasing process, necessitating further public spending to assist these communities to realise alternate income sources. These considerations will undoubtedly add to the costs of any compulsory acquisition policy, which combined with the political opposition it will face from the agricultural sector and associated lobby groups, pose significant obstacles in utilising such an approach.<sup>181</sup>

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<sup>177</sup> Roberts, Mitchell, and Douglas, *Water and Australia's future economic growth* (2006) [53] Australian Treasury, <[http://www.treasury.gov.au/documents/1087/PDF/05\\_Water.pdf](http://www.treasury.gov.au/documents/1087/PDF/05_Water.pdf)> at 11 September 2009.

<sup>178</sup> *Ibid*, 60 – 62.

<sup>179</sup> Hussey and Dovers, 'Trajectories in Australian Water Policy' (2006) 135 *Journal of Contemporary Water Research & Education* 36, 43; and above n 161.

<sup>180</sup> J McColl and M Young, *Managing Change: Australians structural adjustment lessons for water* (2005) [vi] Commonwealth Scientific and Industrial Research Organisation <[http://www.myong.net.au/water/publications/managing\\_change\\_tr16-05.pdf](http://www.myong.net.au/water/publications/managing_change_tr16-05.pdf)> at 6 October 2009.

<sup>181</sup> Young and McColl, 'Robust Reform: The case for a new water entitlement system for Australia' (2003) 36(2) *The Australian Economic Review* 225, 231.

However the short term costs of reform are likely to be less than the long term costs of the impact of further environmental degradation on economic growth as well as environmental and social interests if reform is not carried out.<sup>182</sup> The direct and targeted approach that compulsory acquisition could provide for the acquisition of entitlements for environmental flows in at risk catchments could assist in preventing the occurrence of these excessive long term costs due to environmental degradation. A more autonomous regulatory approach may not be effective as a sole policy response, but it could certainly moderate the deficiencies of the current market approach and increase its effectiveness, providing improved water resource management outcomes.

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<sup>182</sup> Above n 20, 14.

## V CONCLUSION

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The restoration of environmental flows in at risk catchments within the MDB is a clear policy objective of the current Federal Government. The restoration of environmental flows is crucial to sustaining the social and economic interests, which rely upon the MDB's ongoing ecological functioning. The urgency of this issue requires an immediate policy response to prevent further ecological decline. The Federal Government's response has been to utilise its limited powers under the Constitution in conjunction with the assistance of the States to purchase entitlements for environmental flows in a market approach. However it is clear that without the assistance of the States, the limited Commonwealth legislative authority to support the purchasing process will undermine the effectiveness of the market approach in achieving its policy objectives. The lack of Constitutional power to deal with water resources means that the Federal Government will find it difficult to exert its legislative authority for the holistic management of the MDB. This is reflected in the challenges in applying other legislative approaches to acquire entitlements for environmental flows. Despite this, it is clear that the effectiveness of the market approach could be enhanced through the Commonwealth utilising a more autonomous regulatory approach, such as the compulsory acquisition of specific entitlements with high environmental value.

These findings indicate that the Commonwealth should take a more autonomous approach to the management of the MDB and utilise the full scope of its legislative authority. This would minimise the impact of conflicting State interests affecting the reform process. Through utilising alternative legislative

avenues available, the federal government could provide a multifaceted policy response. Through expanding its legislative authority the Commonwealth could provide a greater range of policy responses, which in the correct mix, could provide a more effective means to acquiring entitlements through different acquisition processes in the short term.

From a Constitutional law viewpoint this would a greater exertion of Commonwealth powers with the Federal Government moving into a legislative field that is typically the domain of State Governments. In water law it will signify a new direction for the legislative frameworks that govern how water is managed for environmental purposes under a Federal approach. Lastly for water resource management it would mean the development of new management approaches, which could provide improved resource management outcomes. As a result there will be the need for future research into how the Commonwealth's authority can be applied to the management of water resources for environmental issues. This view raises the need for an exploration into the potential obligations for compensation under different legislative approaches for a compulsory acquisition of entitlements.

Franklin's axiom that the when the well is dry, we know the worth of water serves as literal warning to those involved in the management of the MDB and the acquisition of water entitlements. It should prompt the Federal Government to take action in order to exert their legislative authority to its full extent to acquire water entitlements. If the current crisis in the MDB is to be resolved, it is critical that the Commonwealth leads a holistic and effective management approach.

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