

A COLONIAL HISTORY OF THE RIVER MURRAY DISPUTE

ABSTRACT

This article examines the history of the dispute over the sharing of the waters of the River Murray between the colonies, with particular emphasis on the period from the mid-1880s to the mid-1890s. The article shows that the change in water use by the colonies during this period had a significant impact on the question of how the water should be shared between the colonies. The article examines the early legal arguments regarding the ‘rights’ of the colonies to the waters of the River Murray and argues that these early legal analyses influenced the drafting of the *Australian Constitution*, which in turn has influenced the way similar disputes between the states are resolved today.

I INTRODUCTION

Talk of reducing the flow of the waters of the River Murray evokes strong emotions in South Australians, and especially in their members of parliament.¹ This is not a recent phenomenon and has been the case since colonial times.² This article examines the history of the dispute over the sharing of the waters of the River Murray between the colonies, with particular emphasis on the period from the mid-1880s to the mid-1890s. I argue that this period, in the lead up to the Australasian Federal Conventions of the 1890s, shaped the Convention debates, which in turn influenced the drafting of the *Australian Constitution* and the way in which the issue of the sharing of the waters of the River Murray between the states has been dealt with since Federation.

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¹ See, eg, ‘SA MP Reined in after “F*** You All” Comments Over Murray-Darling Basin Plan’, *ABC News* (online), 19 November 2016 <<http://www.abc.net.au/news/2016-11-19/sa-minister-reined-in-over-expletive-laden-outburst/8039798>>. Premiers Weatherill, Rann and Olsen have all threatened legal action against the upstream states at one point or another: see respectively Lucille Keen, ‘SA Mulls Legal Redress’, *The Australian Financial Review* (Sydney), 29 May 2012, 11; Michael Owen and John Ferguson, ‘Rann’s Murray Warning to States’, *The Australian* (Sydney), 15 June 2011, 10; Greg Kelton, ‘Olsen’s Warning at Interstate Plans to Divert Murray Water’, *The Advertiser* (Adelaide), 10 January 2000, 5.

² See, eg, below n 54 and accompanying text.

During the second half of the 19th century the utilisation of the River Murray became an increasingly important issue for the Australian colonies. In the 1850s the River was seen merely as a boundary separating the colonies of New South Wales and Victoria. Over the next 50 years, the way in which the colonial governments viewed the River changed; it became a highway for trade and later a water source for irrigation. As the extraction of water from the River for irrigation increased in all three colonies, the question arose as to how the waters of the River should be shared between the colonies. This article examines how the colonies approached this question and how these approaches have in turn influenced the way in which similar disputes between states are dealt with in modern day.

This article is divided into three parts. The first part of the article sets out the development (and subsequent decline) of the River Murray as a vital trade route from the 1850s to the 1880s. The second part of the article explains the development of irrigation schemes along the Murray during the 1880s and the investigations that all three colonies undertook as to how best to utilise the River's water. These first two parts detail the changes in water use along the River before federation and explain how these changes in use affected the debate between the representatives of the colonies with respect to the sharing of water from the River Murray between the colonies. In this article I show that as river navigation declined in favour of the railways as the preferred method of transporting goods to and from inland south-eastern Australia, South Australia's negotiating position weakened from a *practical* perspective; the other colonies were no longer reliant on South Australian boats and ports. I argue (with the benefit of hindsight) that if there was an opportunity for the colonies to resolve the question of how to share the water between the colonies during this period it needed to be done while irrigation schemes were still in their infancy.

The final part of the article considers the early legal analysis during the colonial period of the sharing of the water from the River Murray in the absence of an inter-governmental agreement. In this final part of the article I also explain that prior to federation there was no court capable of hearing and adjudicating a dispute regarding the 'rights' of the colonies with respect to the River Murray without the consent of the colonies involved. This left South Australia in a weak position, with no *practical* or *legal* incentives for the other colonies to reach agreement with the downstream colony.

Understanding this period in the history of the River Murray dispute is important in explaining the position representatives from each colony later took when drafting the *Australian Constitution* at the Australasian Federal Conventions in the 1890s. When the attitudes that the Federal Convention delegates took into the Conventions are understood, it is hardly surprising that the delegates were unable to reach agreement as to how the waters of the River Murray should be shared between the colonies (and how this should be expressed in the *Australian Constitution*).³

³ For a discussion of the debates at the Australasian Federal Conventions and the history of the drafting of s 100 of the *Australian Constitution* — the only section of the *Australian Constitution* to mention 'waters of rivers' — see John M Williams

II 1850–1880: NAVIGATION AND RIVER TRADE

A Steamboats Navigate the Murray

Navigation along the River Murray commenced during the 1850s. The South Australian Government was keen to encourage trade along the River and offered the payment of a bonus to the first steamboats to travel from Goolwa at the mouth of the Murray to the junction of the Murray and Darling Rivers. In August 1850 the South Australian Colonial Secretary, Charles Sturt, declared a bonus

of £4,000 to be equally divided between the first two Iron steamers of not less than 40-horse power, and not exceeding two feet draft of water when loaded, as shall successfully navigate the waters of the River Murray from the Goolwa to (at least) the junction of the Darling, computed to be about 551 miles.⁴

In 1853 two South Australians, William Randell and Francis Cadell, took up the challenge and set off separately from Goolwa to navigate the River Murray. On 3 September 1853 Randell's steamer, the *Mary Ann*, was first to reach the Darling River Junction.⁵ Cadell's steamer, the *Lady Augusta*, caught up to Randell and overtook the *Mary Ann* just upstream of Euston; Cadell was the first of the two to reach Swan Hill on 17 September 1853.⁶ During the next 10 years the upper reaches of the Murray, the Darling and the Murrumbidgee were navigated and cleared, and the river trade increased. By the 1860s there were almost 20 steamers transporting goods up and down the river.⁷ During the 1870s the river trade grew and there were hundreds of steamers travelling along the river.⁸ By 1882 the trade along the rivers within the Murray-Darling Basin was estimated to be worth in excess of £1 million.⁹ The growth in river trade was largely due to an increase in sheep numbers across inland Australia and the transportation of the wool clip from inland rural settlements

and Adam Webster, 'Section 100 and State Water Rights' (2010) 21 *Public Law Review* 267. For an explanation of the legal arguments raised during the Australasian Federal Conventions see Adam Lyall Webster, *Defining Rights, Powers and Limits in Transboundary River Disputes: A Legal Analysis of the River Murray* (PhD Thesis, University of Adelaide, 2014) 90–102.

⁴ Gwenda Painter, *The River Trade: Wool and Steamers* (Turton & Armstrong with Pioneer Settlement Press, 1979) 9. See also Ian Mudie, *Riverboats* (Rigby, 1961) 15.

⁵ Mudie, above n 4, 21. Each of Randell and Cadell was ineligible for the Government bonus as each steamer did not meet the specifications required: at 25.

⁶ Peter Phillips, *River Boat Days on the Murray, Darling, Murrumbidgee* (Lansdowne, 1972) 15.

⁷ *Ibid* 7. See also South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 15: 'In 1857 ten steamers, with barges, were trading between Albury and South Australia'.

⁸ Phillips, above n 6, 7.

⁹ Patrick Glynn estimated total river trade to be worth £1 207 978 in 1882 and £517 717 in 1881: see P McM Glynn, *A Review of the River Murray Question, Riparian Rights, &c* (W K Thomas, 1891) 8. However, the value of the trade has been estimated to be as much as £5 million: see Painter, above n 4, 87.

to port formed a significant proportion of the river trade.¹⁰ As the downstream colony in control of the sea ports South Australia had the most to gain from the river trade.

B Riverboats Compete with the Railways

With the development of the railways, the South Australian steamers had to compete with their Victorian counterparts. The Victorian steamers, based at Echuca, utilised the railway which had been extended to that town from Bendigo in 1864. The wool clip was brought by steamer to Echuca where it would then be transported by rail down to Melbourne for export.¹¹ The South Australian vessels would bring wool back to Goolwa near the mouth of the Murray where it would be sent along the tramway to Port Elliot or Victor Harbor to be loaded on to boats for export to London.¹²

The South Australian Government was eager to ensure that it maintained — or even increased — its share of the river trade. While the South Australian boats controlled much of the Darling trade, the South Australian Government was concerned that trade from the Murrumbidgee River would pass through Echuca and on to Melbourne by rail rather than down the Murray to the South Australian ports. As a consequence, in 1870, the South Australian Parliament established a Select Committee to report on the river traffic along the Murray.¹³ The protectionist Victorian Government offered discounted haulage rates to farmers sending wool from the Riverina region in New South Wales to Melbourne and South Australia was concerned that this would affect its share of the river trade.¹⁴ Despite these fears, South Australia maintained its dominance in the river trade through the early 1880s, especially along the Darling River.¹⁵

¹⁰ Painter, above n 4, 59, 95; Phillips, above n 6, 50. Trade between the colonies was subject to tariffs and customs duties. On occasions the tariffs became a source of tension between the colonies: from W G McMinn, *A Constitutional History of Australia* (Oxford University Press, 1979) 98.

¹¹ Phillips, above n 6, 51, 62; Painter, above n 4, 42.

¹² Painter, above n 4, 41; see also, Phillips, above n 6, 54.

¹³ South Australia, *Report of the Select Committee of the House of Assembly on the River Murray Trade*, Parl Paper No 86 (1870).

¹⁴ The discounted rate meant it was cheaper for farmers from NSW to send their wool to Melbourne than for the Victorian farmers on the other side of the river: see McMinn, above n 10, 98. The Select Committee concluded:

Victoria has gradually, by the construction of the Echuca Railway, and the presentation of every possible inducement to attract the trade through her territory, obtained almost the whole of the traffic of the Murrumbidgee, although her natural position, even with regard to the districts through which that river flows, was vastly inferior to that of South Australia.

South Australia, *Report of the Select Committee of the House of Assembly on the River Murray Trade*, Parl Paper No 86 (1870) v.

¹⁵ In 1882, over 50 000 bales of wool were transported by river steamers to South Australian ports, compared with the Victorian steamers that transported fewer than 8 000 bales that same year: South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 18.

The lack of rail infrastructure in New South Wales had initially allowed the South Australian steamers to transport wool from that colony down the Darling to the South Australian ports. However, that changed when New South Wales expanded its rail network inland during the 1880s and 1890s.¹⁶ As a consequence, by the end of the 19th century much of inland south-eastern Australia was easily accessible by rail and the expansion of the rail network ultimately led to a decline in the river trade. South Australia was no longer needed for its ports for export; having the mouth of the River within its territory was no longer a competitive advantage when it came to trade to and from inland Australia.

C Drought Hampers River Navigation

The steamers were not only competing against each other and the expanding rail network, but also against the harsh Australian climate. South-eastern Australia was affected by droughts in 1864–6, 1880–6 and 1895–1903.¹⁷ During these periods river levels dropped significantly and sections of the rivers became impossible to navigate. In particular, upper sections of the Darling River became nothing more than a series of watering holes for a number of months of the year.¹⁸ This often led to delays of some months in the wool clip reaching port.¹⁹ These delays only further strengthened the demand for rail transportation over the river steamers.

During this early period the focus on river navigation meant that the primary subject of intercolonial communications was the clearing of the river for navigation and the removal of snags from the river (and which colony was to pay for it);²⁰ however, as water uses changed in the 1880s, so too did the issues of most concern to the colonies. The focus would soon turn to irrigation.

¹⁶ The main southern railway line from Sydney had reached Albury by 1881, Hay in 1882 and Bourke in 1885: Painter, above n 4, 91; South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 16. Similarly, the Victorian rail network had also been extended to Swan Hill in 1890 and would later reach Mildura in 1903: Painter, above n 4, 92.

¹⁷ Bureau of Meteorology, *Living with Drought* <web.archive.org/web/20120717182119/http://www.bom.gov.au/climate/drought/livedrought.shtml>; Ian Castles, *Year Book Australia 1988* (Australian Bureau of Statistics, 1988) 622.

¹⁸ *Official Report of the National Australasian Convention Debates*, Adelaide, 17 April 1897, 818 (George Reid).

¹⁹ Painter, above n 4, 54, 85–6; see also New South Wales, Royal Commission — Conservation of Water, *Third and Final Report of the Commissioners* (1887) 11–12; New South Wales, Royal Commission — Conservation of Water, *First Report of the Commissioners* (1885) 45.

²⁰ Even in 1881 the South Australian Government seemed more interested in clearing the Murray for navigation than considering the issue of irrigation: see South Australia, *Correspondence Re Clearing River Murray*, Parl Paper No 59 (1882).

III 1880–1895: IRRIGATION, CONSERVATION AND ROYAL COMMISSIONS

The devastating drought that struck south-eastern Australia in the early 1880s caused water shortages in parts of rural Australia so severe that potable water needed to be transported by rail to the towns in those regions. Victorian Member of Parliament, Mr Charles Young, remarked that the water shortage was so serious that the situation became a matter of ‘life or death.’²¹ These dire conditions led to the colonial governments recognising a need to better utilise the water of the Murray-Darling Basin and resulted in all three colonies — New South Wales, South Australia and Victoria — establishing separate Royal Commissions to examine the issue of water use within their respective territories. The use of water for irrigation and water conservation (that is, the locking and damming of a river) were of particular interest to all three Royal Commissions. It was thought that for the colonies to grow and prosper, the waters of the Murray needed to be better utilised for agriculture.²² However, diverting water for irrigation had the potential to lower water levels and thereby affect navigation and irrigation further downstream.

To varying degrees, each of the three colonies recognised the importance of discussing how water was to be shared amongst them. However, despite acknowledging the need to discuss the issue, arranging a meeting proved impossible, primarily due to the attitude taken by the Government of New South Wales. It was during this period that the seeds of antagonism were sown that would continue to grow during the Australasian Federal Conventions and after federation.

This section examines the failed attempts to organise a meeting between the three colonies to discuss the issue of the allocation of water from the River Murray. It was during this time that the first assertions regarding the ‘rights’ of the colonies to the water from the River Murray were made, albeit with limited explanation as to the substantive principles governing them. South Australia’s negotiating position was weakening. The other colonies were no longer dependent on South Australia for transporting goods to and from the inland parts of their colonies. Further, the legal position of South Australia with respect to the ‘right’ to water from the River was far from certain. From a legal perspective, these were very much unchartered waters.

²¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 6 July 1886, 558 (Charles Young). From 1882 parts of the colony of Victoria were impacted by drought: Victoria, *Parliamentary Debates*, Legislative Assembly, 14 July 1886, 708 (Charles Officer).

²² New South Wales, Royal Commission — Conservation of Water, *First Report of the Commissioners* (1885) 32, 45; New South Wales, Royal Commission — Conservation of Water, *Second Report of the Commissioners* (1886) 2–4; New South Wales, Royal Commission — Conservation of Water, *Third and Final Report of the Commissioners* (1887) 2, 4, 6–7, 18.

A New South Wales Royal Commission on the Conservation of Water

On 10 May 1884, during a prolonged drought, New South Wales was the first colony to establish a Royal Commission to consider the question of how best to conserve and utilise the waters of the River Murray.²³

Between 1884 and 1886 the New South Wales Royal Commission produced three reports. The primary focus of the Commission was to investigate practical measures for improving water storage and supply across the colony of New South Wales as opposed to examining the legal questions surrounding the allocation of water between the colonies. However, in the Commission's first report it recognised that one of the 'important points' yet to be investigated was 'the terms on which an equitable settlement of intercolonial water rights in the waters of the Murray River can be made.'²⁴

The Commission was of the view that river traffic would ultimately decline in favour of the railways.²⁵ As a consequence, they showed little concern for how upstream conservation might affect river navigation. In its second report, the New South Wales Royal Commission concluded:

Capital has been invested in steamers, barges, wharves, and warehouses, and the facilities for communication and the transport of commodities afforded by the Murray to the dwellers upon its banks and in districts more remote have been considerable, but the necessity of navigation is being gradually superseded, and it is by no means improbable that, before the time arrives for joint action on the part of Victoria and New South Wales in the construction of weirs, anything like the through navigation of the Murray will be abandoned as unprofitable.²⁶

²³ New South Wales, Royal Commission — Conservation of Water, *First Report of the Commissioners* (1885) 1. William Lyne, politician and 'persistent advocate of water conservation' was appointed President of the Commission: Chris Cuneen, 'Lyne, Sir William John (1884–1913)' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1986) vol 10, 179, 180. The purpose of the New South Wales Royal Commission was

to make a diligent and full inquiry into the best method of conserving the rainfall, and of searching for and developing the underground reservoirs supposed to exist in the interior of this Colony, and also into the practicability, by a general system of water conservation and distribution, of averting the disastrous consequences of the periodical droughts to which the Colony is from time to time subject.

New South Wales, Royal Commission — Conservation of Water, *First Report of the Commissioners* (1885) 1.

²⁴ *Ibid* 3.

²⁵ The Commission arguably went even further to suggest that railways *should* be the primary means of transport: *Ibid* 44–5.

²⁶ New South Wales, Royal Commission — Conservation of Water, *Second Report of the Commissioners* (1886) 5.

‘Joint action’ was limited in this context to that between New South Wales and Victoria; no mention was made of South Australia.²⁷

The New South Wales Royal Commission’s second report concluded that the use of the waters of the Murray should be optimised and ought not to be allowed simply to ‘flow wastefully into the sea’.²⁸ It was silent as to the effect any future development might have on the environment. The primary concern of the Commission, much like the Victorian Royal Commission appointed later that same year, was to maximise water storage and irrigation. In doing so, the area of land used for agriculture could be increased, which would ultimately lead to the colony being able to grow and sustain a larger population. The focus on enhancing water conservation and irrigation *within* New South Wales, and the emphasis on practical measures for achieving this objective, meant that the legal questions regarding the allocation of the water from the River *between* the colonies were largely ignored in this early stage of the development of a legal framework for the River. To the extent to which the legal position was briefly mentioned, the Commissioners appeared to take the view that ownership in the water of the River Murray while it flowed through the territory of New South Wales was vested in that colony.²⁹ As I explain later in this article, the legal question became most important when all three colonies — New South Wales, South Australia and Victoria — wanted to divert the waters of the Murray for irrigation.

B *Victorian Royal Commission on Water Supply*

In the early 1880s the extent to which irrigation could be utilised in Australia was a great unknown. The Victorian Government was particularly interested in developing irrigation along the River Murray and further investigation was deemed necessary. By 1884, and after some experimentation, the potential for irrigation was beginning to be realised and farmers started to see the benefits first hand:³⁰ crop yields were often double from irrigated land when compared against non-irrigated land.³¹

On 23 December 1884 the Victorian Government appointed a Royal Commission, chaired by Alfred Deakin, and charged with the task of ‘inquir[ing] into the question

²⁷ Ibid 6. The Commission added: ‘the importance of navigation, so far as the Murray is concerned, may also be still further lessened by the further development of the railway systems of South Australia and Victoria’.

²⁸ Ibid 3.

²⁹ Ibid 2, relying on the *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict. There is also some brief discussion of water allocation between the colonies to ‘safeguard the rights of South Australia’: at 4. However, the position seemed somewhat inconsistent with the position that New South Wales had the legal rights of ownership to the river: at 2.

³⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 1886, 430 (Alfred Deakin).

³¹ Ibid 423–4 (Alfred Deakin); Victoria, *Parliamentary Debates*, Legislative Assembly, 6 July 1886, 566 (Walter Madden).

of Water Supply, and into other matters relating thereto'.³² Deakin's work as chairman of the Royal Commission was highly influential in the establishment and regulation of irrigation works within that colony. The focus of the Royal Commission's reports was the investigation of the success of irrigation schemes established in other countries with similar climatic conditions to Australia and the consideration of whether like schemes could be implemented successfully in Victoria. On Christmas Eve 1884 — the day after the Royal Commission was appointed — Deakin departed for a three-month visit to America.³³ Deakin travelled throughout the western United States;³⁴ its dry, arid landscape was not dissimilar to parts of rural Australia. He was keen for Victorians to learn from his experiences and, upon his return, provided a detailed account to the Victorian Government of the American irrigation schemes.³⁵ Two years later Deakin was invited to attend the Colonial Conference in London and en route to the Conference Deakin visited Egypt, Italy and France. Upon returning to Melbourne he published a further report of the Royal Commission examining irrigation in those countries and its applicability to Victoria.³⁶

The reports of the Victorian Royal Commission focussed on establishing irrigation schemes within the colony of Victoria and did not consider how the schemes might affect the other colonies. The Commission did not examine legal questions associated with Victoria's access to the River Murray and its tributaries. However, the Commission noted: 'There are many matters of moment in connexion with the Water Supply of the northern parts of Victoria which can only be properly considered

³² Victoria, Royal Commission on Water Supply, *First Progress Report* (1885).

³³ J A La Nauze, *Alfred Deakin — A Biography* (Melbourne University Press, 1965) vol 1, 85. La Nauze also notes (at 85) that Deakin returned to Australia in May 1885. See also J A La Nauze, *Alfred Deakin* (Oxford University Press, 1962) 10.

³⁴ Deakin visited Colorado, California, Arizona, New and Old Mexico, Nevada and Kansas: Victoria, Royal Commission on Water Supply, *First Progress Report* (1885) 1.

³⁵ *Ibid.* La Nauze describes the report as 'a brilliantly lucid survey of the types and methods of irrigation, and of irrigation settlements, in western America': see La Nauze, *Alfred Deakin — A Biography*, above n 33, 85. In a further progress report of the Royal Commission, Mr J D Derry, a civil engineer who had accompanied Deakin to America provided a technical report considering the engineering aspects of the irrigation works in America: Victoria, Royal Commission on Water Supply, *Further Progress Report* (9 July 1885). In 1885 The Victorian Royal Commission produced two reports entitled 'Further Progress Report'. The first included the report of Mr Derry and the second provided an update as to the investigations that the Commission had undertaken in Victoria: Victoria, Royal Commission on Water Supply, *Further Progress Report* (31 August 1885).

³⁶ Deakin did not spend a great deal of time in Italy and Egypt and he makes it clear that, unlike the report on western America, this report was based more on research than on personal experiences gained while visiting: see Victoria, Royal Commission on Water Supply, *Fourth Progress Report* (1887) 8–9. Deakin also later wrote about irrigation in India: Alfred Deakin, *Irrigated India — An Australian View of India and Ceylon, Their Irrigation and Agriculture* (Thacker & Co, 1893).

when the conditions of use of the Murray waters are clearly understood.³⁷ It is not clear whether this was a reference solely to the *physical* conditions, or also to the *legal* conditions upon which Victoria was permitted to use the water. One glaring omission from the reports was whether Victoria was permitted to access the waters of the Murray given that the southern bank of the river formed the boundary between New South Wales and Victoria.³⁸

C A Joint Royal Commission is Proposed

While the Victorian Royal Commission did not consider the issue of how the waters of the Murray were to be shared between the colonies, the Victorian Government was active in attempting to arrange for the colonies to meet to discuss the matter. In July 1885 — at about the time that Deakin was delivering his report on irrigation in the western United States — the Victorian Premier, James Service, wrote to the South Australian Chief Secretary, John Downer, and noted: ‘Various proposals have been made — some of considerable importance — for dealing with the River Murray, both in the way of improving its navigation and utilising its waters for irrigation.’³⁹ He suggested that a joint Royal Commission be appointed:

As of course the interests of New South Wales, South Australia, and Victoria would be affected by any works of the description referred to, it seems desirable that the three colonies should combine and appoint a joint Royal Commission to inquire and advise on the subject.

I beg to invite the co-operation of your Government in this preliminary measure.⁴⁰

Downer wrote back expressing the view that there would be ‘great difficulties’ in any agreement that would affect navigation, and expressing doubt that large scale irrigation could take place without that result.⁴¹ However, Downer stated that South Australia would ‘probably’ join in a joint Royal Commission, ‘for the purpose of considering any proposals which might be submitted and for protecting the interests of this colony.’⁴² Downer asked Service to inform him of ‘the nature of the proposals

³⁷ Victoria, Royal Commission on Water Supply, *Further Progress Report* (31 August 1885) iv.

³⁸ *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict, c 54, s 5.

³⁹ Letter from James Service, Premier of Victoria, to John Downer, Premier of South Australia, 18 July 1885 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 1.

⁴⁰ *Ibid.*

⁴¹ Letter from John Downer, Premier of South Australia, to James Service, Premier of Victoria, 28 July 1885 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 1.

⁴² *Ibid.*

referred to in you[r] letter as having been made to your Government respecting this matter.⁴³

Reaching agreement with the Government of New South Wales with regard to a joint Royal Commission proved to be more difficult. In a letter to the Premier of Victoria dated 3 September 1885, the Premier of New South Wales, Alexander Stuart, stated that the letter that had been sent by Service

on [the] subject of waters of [the] River Murray, opens up a very important and very difficult question, which I have submitted for opinion of my honourable colleague, the Attorney-General, and which I must ask you to accept as my excuse for not having previously replied.⁴⁴

Stuart assured Service and Downer that as soon as he received the Attorney-General's opinion he would advise them of that fact.⁴⁵ Whether that opinion was ever provided (and its content if it did exist) is not clear from the correspondence between the premiers.⁴⁶ Unfortunately, Stuart resigned as Premier in the following month due to ill health.⁴⁷ In what would become a familiar occurrence, the Government of New South Wales did not respond and communications between the colonies broke down. By the end of 1885 — six months after the Victorian Premier's first letter — a meeting between the three colonies had still not been arranged.

⁴³ Ibid. Downer also sent a copy of this correspondence to the Colonial Secretary of New South Wales: Letter from John Downer, Premier of South Australia to Alex Stuart, Colonial Secretary of New South Wales, 3 August 1885 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 1.

⁴⁴ Letter from Alexander Stuart, Premier of New South Wales, to James Service, Premier of Victoria, 3 September 1885 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 2. Stuart also held the position of Colonial Secretary during his time as Premier. Downer's letter to Stuart quoted the Imperial legislation defining the boundary between New South Wales and Victoria and arguably created the impression that Downer, at least at this stage, saw this as primarily an issue between New South Wales and Victoria: Letter from John Downer, Premier of South Australia to Alex Stuart, Colonial Secretary of New South Wales, 3 August 1885 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 1, citing *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict, c 54, s 5.

⁴⁵ Ibid. Premier Stuart also sent a letter to Downer advising the South Australian Premier that he would be back in contact once he had taken advice from the Attorney-General: see letter from Alexander Stuart, Premier of New South Wales, to John Downer, Premier of South Australia, 3 September 1885 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 2.

⁴⁶ The opinion books of the New South Wales Attorney-General of that time do not include any legal opinions on this issue: see '1877–1901' in *Opinions of the Attorney General* (State Archives and Records of New South Wales, NRS 303, 5/4696-99).

⁴⁷ Premier Stuart resigned due to ill health on 6 October 1885: Bede Nairn and Martha Rutledge, 'Stuart, Sir Alexander (1824–1886)' in Bede Nairn (ed), *Australian Dictionary of Biography* (Melbourne University Press, 1976) vol 6, 211, 213.

With the benefit of hindsight, failing to arrange a meeting between the representatives of the three colonies in 1885 was perhaps a missed opportunity for South Australia. Negotiating these matters while the irrigation schemes were still very much in their infancy was probably the best chance for South Australia to reach an agreement. As the article shows below, as time wore on the investments that the upstream colonies made in irrigation schemes made negotiating with South Australia less likely.

D New South Wales and Victoria Meet without South Australia

While South Australia waited for a response from New South Wales, in January and May of 1886, representatives of the Royal Commissions of Victoria and New South Wales met and reached agreement between themselves as to the ‘diversion and utilization of flood-waters of the Murray in their respective territories.’⁴⁸ The agreement required both colonies to pass legislation to implement the terms of the agreement.⁴⁹ However, such legislation was never passed in either colony.⁵⁰ It was probably because extractions of water in Victoria from the tributaries of the Murray could potentially diminish the flow of the River through New South Wales, whereas downstream extractions in South Australia could not, that the New South Wales Commissioners ignored the position of South Australia. The New South Wales Royal Commission later explained that not inviting South Australia was not through rudeness, and instead insisted that the deliberations in question

⁴⁸ The colonies of New South Wales and Victoria met on 22 and 23 January 1886 in Melbourne and on 5 and 6 May 1886 in Sydney: New South Wales, Royal Commission Conservation of Water, *Second Report of the Commissioners* (1886) 1. The resolutions of the conference between New South Wales and Victoria are reproduced by the Interstate Royal Commission: see New South Wales, South Australia and Victoria, Interstate Royal Commission on the River Murray, *Report of the Commissioners* (1902) 4. This agreement had not been enacted by either colonial legislature and subsequent conduct by Victoria suggested that it was not entirely confident of its legal position. Limited consideration has been given to the question of the nature of the agreement and whether, in the absence of this agreement, Victoria had a right to water from the River. The fact that New South Wales was prepared to negotiate with Victoria only added to South Australia’s frustrations, for New South Wales had ignored numerous requests from South Australia for a meeting. The agreement between New South Wales and Victoria is also reproduced in New South Wales, Royal Commission — Conservation of Water, *Second Report of the Commissioners* (1886) 4–5. The agreement established:

That a joint Trust shall be constituted, equally representative of the colonies of New South Wales and Victoria, in which shall be vested the control of the whole of the Murray River and its tributaries ... and such Trust shall have power to regulate all diversions of water from the river and tributaries within its jurisdiction.

New South Wales, South Australia and Victoria, Interstate Royal Commission on the River Murray, *Report of the Commissioners* (1902) 4.

⁴⁹ See cl 9 of the agreement in New South Wales, South Australia and Victoria, Interstate Royal Commission on the River Murray, *Report of the Commissioners* (1902) 4.

⁵⁰ *Ibid* 5.

had exclusive reference to that portion of the Murray which formed the common boundary of the two Colonies [of Victoria and New South Wales], and to the tributaries of from each. *Provision was made for maintaining the normal flow of the river, and for diversion of such surplus water only as might be available after that condition had been met.*⁵¹

If provision had been made for South Australia, it had not been clearly explained.

When Downer became aware of the meeting between representatives of Victoria and New South Wales in May 1886 he wrote to the leaders of both colonies expressing his concern that a meeting had been held in the absence of representatives from South Australia. After noting that he had not received further communication from New South Wales during the latter part of the previous year, Downer remarked:

but I now observe from the public prints that a conference has been held between New South Wales and Victoria, of which we had no notice, and that certain resolutions had then been arrived at.

I wish to express my regret that we would have heard nothing from you on the subject, and to request that you will take no action on the resolutions arrived at before this Government has had an opportunity of giving them some consideration.⁵²

During this time, Victoria also had a change in Premier and the new Premier, Duncan Gillies, sought to explain that South Australia's absence was not Victoria's doing. He stated that, like the Government of South Australia, his Government had been waiting for a response from New South Wales. Gillies pointed the blame squarely at New South Wales:

I beg to state that it was suggested at that conference [between New South Wales and Victoria] by the Victorian Commissioners that representatives from South Australia should be invited to the conference, but the suggestion was not concurred in. The absence of such representatives was not therefore owing to any action on the part of this colony.⁵³

⁵¹ New South Wales, Royal Commission Conservation of Water, *Third and Final Report of the Commissioners* (1887) 2 (emphasis added).

⁵² Letter from John Downer, Premier of South Australia, to the Premier of Victoria, 26 May 1886 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 2. A letter in similar terms was also sent to the Colonial Secretary of NSW: see letter from John Downer, Premier of South Australia, to the Colonial Secretary of New South Wales, 26 May 1886 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 2.

⁵³ Letter from Duncan Gillies, Premier of Victoria, to John Downer, Premier of South Australia, 7 June 1886 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 3.

South Australia's geographical disadvantage coupled with the fact that it had not been invited to the meeting at which New South Wales and Victoria reached an agreement left it in a vulnerable position. Downer seems to have concluded that South Australia needed to take a firmer stand and it was at this time that he started to make reference to the 'rights' of the colonies. However, precisely what Downer thought these 'rights' were and the basis for them was not explained in his correspondence with the other colonies. In a letter to the Victorian Premier dated 14 June 1886 Downer wrote: 'I can only express my surprise at the Governments of Victoria and New South Wales assuming the *right* and responsibility of making any such agreement.'⁵⁴

This was the first time that the question of legal rights was raised and given prominence in the communications between the states. Downer contended that the agreement between Victoria and New South Wales ignored South Australia's 'existing rights':

The treaty, whilst altogether ignoring the status of this province in the matter, assumes throughout, and in fact expressly declares, the absolute title of the two colonies parties to it to the whole of the waters of the river; and though there is a provision for the reservation of such compensation water as the 'trust' may from time to time determine, still, I need hardly point out that this will scarcely compensate us for the abrogation of our *existing rights*.⁵⁵

Downer threatened that if Victoria was to proceed with this agreement and insist on excluding South Australia then his 'Government will have no alternative but to request the Home Government to disallow any such Bill you may pass to give effect to the treaty, and to prevent by Imperial Legislation any future action such as the agreement contemplates.'⁵⁶

Three days later, on 17 June 1886, Downer gave a lengthy speech in the South Australian Parliament detailing the correspondence between the colonies.⁵⁷ The actions of New South Wales and Victoria had also caused other members of the South Australian Parliament to consider South Australia's position with respect to the allocation of water from the Murray. At the end of Downer's speech, South Australian Member of Parliament, Ebenezer Ward remarked that:

It was true that by the *Imperial Act* New South Wales might technically maintain her claim to the southern bank, and Victoria could claim its sources, but we had the mouth, which was of as much use as any other position of the river.⁵⁸

⁵⁴ Letter from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 14 June 1886 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 4 (emphasis added).

⁵⁵ Ibid (emphasis added).

⁵⁶ Ibid (emphasis added).

⁵⁷ South Australia, *Parliamentary Debates*, House of Assembly, 17 June 1886, 189–93.

⁵⁸ Ibid 194.

Ward probably overestimated the importance of the Murray mouth — it was often closed by sand and difficult to navigate.⁵⁹ Furthermore, the fact that navigation was in decline in favour of rail transport meant that South Australia did not have the geographical advantage over the river that Ward asserted.

The fact that the agreement between New South Wales and Victoria had been brokered between the respective Royal Commissions provided the Victorian Government with a degree of separation from the agreement. When Victorian Premier Gillies wrote back to Downer on 3 July 1886 he stressed that the agreement reached between the Royal Commissioners of Victoria and New South Wales was not the doing of the Victorian Government. Gillies claimed that his Government had ‘no knowledge whatever of the arrangements made or the terms provisionally agreed upon until they were made public.’⁶⁰ Gillies appeared keen to allay Downer’s concerns, while emphasising the importance of resolving the dispute promptly:

I can say that this Government has no desire to place the rights (navigation and others) of South Australia either in jeopardy or at the mercy of any Commission in which your colony is not represented, or of which you do not approve, and nothing is further from the intention of this Government than to do anything destructive of the rights of your colony.

It must, however, be borne in mind that the utilisation of the surplus waters of our rivers for irrigation purposes has become so urgent a necessity, and is so acknowledged on all sides, that the consideration of its practical solution cannot be longer delayed.⁶¹

Downer wrote back and requested that until a joint commission or conference between the three colonies was arranged, the agreement reached between the Royal Commissioners of New South Wales and Victoria not be acted upon by their respective

⁵⁹ ‘The Murray-Mouth and the River Trade’, *The South Australian Register* (Adelaide), 15 March 1878, 6. The first judge of the South Australian Supreme Court, John Jeffcott, drowned on 12 December 1837 when the whaling boat he was on capsized as it navigated the Murray mouth: R M Hague, ‘Jeffcott, Sir John William (1796–1837)’ in Douglas Pike (ed), *Australian Dictionary of Biography* (Melbourne University Press, 1967) vol 2, 15.

⁶⁰ Letter from Duncan Gillies, Premier of Victoria, to John Downer, Premier of South Australia, 3 July 1886 in South Australia, *Further Correspondence re Murray River Waters*, Parl Paper No 59A (1886) 1. The letter from Premier Gillies was published in the *South Australian Register* on 7 July for all South Australians to read: ‘The River Murray and Intercolonial Rights’ *South Australian Register* (Adelaide) 7 July 1886, 7. See also letter from C H Langtree, Secretary for Mines and Water Supply, Victoria, to the Conservator of Water (SA), 4 July 1887 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 30, suggesting that the meeting between New South Welsh and Victorian Royal Commissions was ‘of an informal nature’. Whilst the Parliamentary Papers identify C H Langtree as the author of the letter, this appears to be an error; it should be C W Langtree.

⁶¹ Letter from Duncan Gillies, Premier of Victoria, to John Downer, Premier of South Australia, 3 July 1886 in South Australia, *Further Correspondence re Murray River Waters*, Parl Paper No 59A (1886) 2.

Governments.⁶² News of the agreement between New South Wales and Victoria spurred South Australia into action, which was the first real attempt to arrange for the colonies to meet and discuss the question of the sharing of the waters of the Murray.

Downer was concerned that any subsequent conference or commission would use as its starting point the agreement already reached between the New South Wales and Victorian Royal Commissioners, thereby placing South Australia at a disadvantage. In a subsequent letter to Gillies dated 12 August 1886 Downer stated:

Whilst quite willing to take part in any Conference that may be held with reference to the use of the waters of the river, I thought I had sufficiently expressed the views of this Government that the Conference must begin *de novo* and not on the basis of the treaty arrived at between New South Wales and yourselves, though doubtless the information and evidence there obtained and taken will be of great assistance.⁶³

In late September 1886, Gillies suggested that the best way for negotiations to proceed was for South Australia to appoint a Royal Commission much like the Royal Commissions already established in the other colonies.⁶⁴ In that way, the three Commissions could finally meet and discuss the allocation of water from the River.⁶⁵ Downer wrote back immediately and confirmed that South Australia was ‘still

⁶² Letter from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 9 July 1886 in South Australia, *Further Correspondence re Murray River Waters*, Parl Paper No 59B (1886) 1.

⁶³ Letter from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 12 August 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 27. The South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) is available in South Australia, *Royal Commission on the Utilisaltion of the River Murray Waters — Progress Report*, Parl Paper No 34 (1890).

⁶⁴ Letter from Duncan Gillies, Premier of Victoria, to John Downer, Premier of South Australia, 28 September 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 27. Gillies stated:

I beg to suggest, for your consideration, whether your Government could not see its way to proceed as those of Victoria and New South Wales have done, by appointing a Royal Commission of Inquiry; such a Commission could confer with the Commissioners of the other two colonies, and perhaps jointly with those bodies might be able to offer some important recommendations respecting the locking of the River Murray, and other points in connection with the question.

⁶⁵ *Ibid.* Gillies concluded his letter by noting:

I desire, at any rate, to submit that though there may be points on which the several Governments cannot as yet take quite the same view, there should be nothing to prevent united action, so far as they are agreed, or indeed so far as they may be brought into agreement, by the suggested Conference of the various Royal Commissions.

I trust, therefore, in the interests of harmonious action amongst the colonies, you will see no objection to this preliminary step with a view of bringing them into accord, as far as possible.

willing to appoint a Commission to meet the Commissioners appointed by the other colonies'.⁶⁶

There was clearly much interest in this issue in South Australia both in the Parliament⁶⁷ and in the wider community. The correspondence between the colonial representatives was reproduced in the local newspapers.⁶⁸ Suggestions of a meeting of Royal Commissioners from each of the three colonies caused great optimism in South Australia that agreement between the three colonies would now be reached and a 'treaty' between the colonies would formalise this agreement.⁶⁹

The discussions between the three colonies appeared to be back on track. That was, until, South Australia became aware that Victoria was about to allow large-scale irrigation works along the river.

E The Chaffey Brothers' Irrigation Scheme

While in the United States during 1885, Alfred Deakin had met with Canadian brothers, George and William Chaffey.⁷⁰ The Chaffey brothers had established successful irrigation businesses in California and Deakin discussed with them the potential for similar irrigation schemes in Victoria. In 1886 George Chaffey travelled to Victoria to investigate the feasibility of establishing an irrigation scheme on the Murray. His arrival was followed by his brother's, William, in the following year.⁷¹

When Downer heard of the discussions between George Chaffey and the Victorian Government he sent a telegram to the Victorian Premier stating that he would assume that the Victorian Premier 'will not proceed further in the matter of this agreement

⁶⁶ Letter from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 9 October 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 27. Victoria agreed to contact New South Wales to organise the meeting: see telegram from Alfred Deakin to John Downer, 11 October 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 28. Whether 'still willing' was an accurate characterisation of the South Australia position is questionable. It is not that South Australia had previously expressed an unequivocal willingness to appoint a Royal Commission.

⁶⁷ See, eg, above nn 57–8 and accompanying text.

⁶⁸ See above n 60.

⁶⁹ Media reports at the time were optimistic of agreement being reached: 'The River Murray' *South Australian Weekly Chronicle* (Adelaide), 16 October 1886, 5; *The South Australian Advertiser* (Adelaide), 8 October 1886, 4.

⁷⁰ See entry dated 11 February 1885 in Alfred Deakin, 'Travel Diary From America, 1885' in *Papers of Alfred Deakin (1804–1973)* (National Library of Australia, MS 1540, Series 2, Item 2/38), 20.

⁷¹ Peter Westcott, 'Chaffey, George (1848–1932) and Chaffey, William Benjamin (1856–1926)' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1979) vol 7, 599.

before the joint Commission has met and considered the whole question.’⁷² Gillies responded by explaining that while an agreement between the Victorian Government and the Chaffeys had been entered into, it was still subject to the approval of the Victorian Parliament. Gillies stated that, in any event, the agreement ‘would not have been entered into if there could have been the slightest apprehension that it could so interfere [with navigation].’⁷³ In his view, the agreement entered into with the Chaffeys would not affect any intercolonial conference. However, the South Australian Premier was concerned that an agreement permitting large-scale irrigation within the Victorian colony would affect water levels at Morgan by at least four inches during the summer months.⁷⁴ Downer requested that Victoria hold off on legislative approval of the scheme until a conference between the three colonies had had an opportunity to meet.⁷⁵

Downer’s request was ignored and the agreement reached between the Chaffeys and Deakin was put before the Victorian Parliament for its approval.⁷⁶ Rather than approving the agreement, the Parliament decided to put the offer of developing an irrigation settlement out to tender.⁷⁷ This had little effect on the end result — no other tenders were received for the 250 000 acre Mallee Irrigation Scheme at what is now known as Mildura and the Chaffeys were awarded the tender.⁷⁸

Despite Downer’s concerns regarding the Chaffey agreement, it appeared that the joint conference would still convene. On 31 December 1886 the Victorian Secretary for Mines and Water Supply, C W Langtree, wrote to Downer advising him that Alfred Deakin had received confirmation that the New South Wales Royal Commissioners were agreeable to a conference between representatives of the three colonies being held in Adelaide ‘for the purpose of setting all intercolonial rights involved in the apportionment of the waters of the River Murray.’⁷⁹

⁷² Telegram from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 11 November 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 28.

⁷³ Telegram from Duncan Gillies, Premier of Victoria, to John Downer, Premier of South Australia, 12 November 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 28.

⁷⁴ Telegram from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 15 November 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 28. No doubt Downer would have been concerned given the fact that river boats were already finding it difficult to complete with the railways.

⁷⁵ *Ibid.*

⁷⁶ This led to the Victorian Parliament ultimately enacting the *Waterworks Construction Encouragement Act 1886* (Vic).

⁷⁷ *Ibid* s 7.

⁷⁸ ‘The Mallee Irrigation Scheme’, *The Age* (Melbourne) 4 March 1887, 5.

⁷⁹ Letter from C W Langtree, Secretary for Mines and Water Supply, Victoria, to John Downer, Premier of South Australia, 31 December 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 28.

Eager for the three colonies to meet, on 9 February 1887 the South Australian Government appointed its own Royal Commission to investigate

the question of utilising the waters of the River Murray for irrigation purposes, and the preservation of the navigation and water rights of this province in the river; and, for that purpose, *to confer and consult with any Commission appointed, or to be appointed, by the Governments of New South Wales and Victoria on the same subject.*⁸⁰

The South Australian Royal Commission was thus formed for somewhat different purposes to its counterparts in New South Wales and Victoria, which were formed primarily for the purpose of investigating the use of water *within* each of the respective colonies.

Despite Downer's earlier protests regarding Deakin's agreement with the Chaffey brothers, the South Australian Government was quick to make a similar arrangement with the Chaffey brothers to establish a settlement in South Australia at Renmark. The agreement was signed on 14 February 1887 by the South Australian Commissioner of Crown Lands, on behalf of the Government of South Australia, and George and William Chaffey. While concerns were raised as to how the scheme would affect navigation and water levels in the lower lakes,⁸¹ the agreement was authorised by the Parliament by the *Chaffey Brothers Irrigation Works Act 1887* (SA).⁸² The South Australian agreement granted the Chaffey brothers up to 250 000 acres and granted licences permitting them to extract water from the Murray for irrigation.⁸³

In March 1887 the Victorian Premier wrote to the Premier of New South Wales, as he understood that the term of the New South Wales Royal Commission was about to expire and suggested that it be extended so that the conference between the Royal Commissions of the three colonies could take place.⁸⁴ The Colonial Secretary of New South Wales, Henry Parkes, replied on 6 April and advised Victoria that the term of the Commission had been extended until 10 May 1887. However, this brief extension gave little time for Victoria and South Australia to arrange the joint conference.

The use of the word 'setting' suggests that this was not a process of examining existing legal principles to determine such rights, but rather that an agreement would be reached based solely on the negotiation.

⁸⁰ South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) iii (emphasis added). Patrick Glynn and Charles Hussey were appointed additional Commissioners on 13 December 1889: at iii.

⁸¹ See, eg, South Australia, *Parliamentary Debates*, Legislative Council, 16 August 1887, 478–9.

⁸² The Act was assented to on 16 November 1887: *Chaffey Brothers Irrigation Works Act 1887* (SA).

⁸³ *Ibid* Schedule.

⁸⁴ Letter from Duncan Gillies, Premier of Victoria, to the Premier of New South Wales, 10 March 1887 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 31.

The matter was made more difficult by the fact that Deakin was attending the Colonial Conference in London and would not return to Australia until June; this complicated matters because the Victorian Government wanted Deakin, as President of its Royal Commission, to attend any such conference between the three colonies.⁸⁵

Perhaps motivated by the fact that it had nothing to lose by maintaining the status quo, New South Wales declined to extend further its Royal Commission and the three colonies were again unable to arrange for the joint conference to take place as originally planned. Over the next two years the colonial governments turned their attention inward and focused on developing irrigation within the respective colonies.⁸⁶

F A Further Attempt to Meet

Despite the encouraging signs prior to the appointment of the South Australian Royal Commission, a meeting with representatives from all three colonies proved difficult to achieve (primarily due to the position taken by New South Wales). However, two years later in April 1889, the South Australian Premier, Thomas Playford, wrote to the Governments of New South Wales and Victoria again urging them to agree to a conference between the three colonies.⁸⁷ Victoria promptly replied expressing a willingness to attend a joint conference. The Victorian Premier noted, however, that the New South Wales Royal Commission had expired and it would be necessary to reappoint or appoint a similar Royal Commission in that colony.⁸⁸ In the early days of attempting to secure a meeting between the three colonies the Victorian Government had been proactive in securing the support of New South Wales. However, by this time the Victorians took a more passive role and left it to South Australia to gain New South Wales' support. As the South Australian Royal Commissioners noted in their second report: 'Victoria has always been prompt in its profession of great readiness

⁸⁵ Letter from Duncan Gillies, Premier of Victoria, to the Premier of New South Wales, 30 April 1887 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 31.

⁸⁶ By the end of the 19th century the colonies had invested significant funds into developing irrigation: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 24 January 1898, 69 (Richard O'Connor). See also *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 March 1898, 1956–8 (Joseph Carruthers).

⁸⁷ Letter from Thomas Playford to the Colonial Secretary's Office of New South Wales, 27 April 1887 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 33. The receipt of Playford's letter is acknowledged in a letter from Culcheth Walker, Principal Under Secretary of the Colonial Secretary's Office of New South Wales to Thomas Playford, 17 May 1889 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 34.

⁸⁸ Letter from Duncan Gillies, Premier of Victoria, to the Premier of South Australia, 8 May 1889 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 33–4.

to concur in the appointment of a conference, but has carefully abstained from taking any decisive step that would tend to secure such a meeting of representatives'.⁸⁹

With the establishment of the irrigation scheme at Mildura, Victoria now had more to lose and less to gain from any potential agreement between the colonies.

While Playford's letter of 27 April 1889 was formally acknowledged by New South Wales,⁹⁰ a substantive response was not forthcoming for over 10 months, despite a number of promises.⁹¹ It was not until 6 March 1890 that South Australia received the promised response. The Colonial Secretary of New South Wales, Henry Parkes, provided a reply that carefully ignored the request for a conference between the colonies. Parkes responded by telling South Australia that east of the South Australian boundary 'the whole watercourse of the Murray ... and the waters of the river ... belong, therefore, to New South Wales, as part of her territory.'⁹² Parkes cited s 5 of the *New South Wales Constitution Act 1855*, which stated:

the whole Watercourse of the said River Murray, from its Source therein described to the Eastern Boundary of the Colony of South Australia, is and shall be within the Territory of New South Wales'.⁹³

New South Wales contended that the Imperial legislation made it clear in whose territory the river flowed and, within that territory, the scope of the colonial legislative power. At around the same time, Parkes also took aim at Victoria and, in particular, the Chaffey Brothers. Adopting similar reasoning, Parkes claimed that 'any parties who had planted works in the fairway [of the river] were trespassers on New South Wales territory.'⁹⁴

⁸⁹ South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Second Report* (1890) v–vi. The South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Second Report* (1890) is available in South Australia, *Royal Commission on the Utilisation of the River Murray Waters — Second Report*, Parl Paper No 34a (1890).

⁹⁰ Letter from Culcheth Walker, Principal Under Secretary of the Colonial Secretary's Office of New South Wales to Thomas Playford, 17 May 1889 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 34.

⁹¹ Telegrams from Henry Parkes to the Premier of South Australia, 20 June 1889, 23 July 1889 and 6 September 1889 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 34.

⁹² Letter from Henry Parkes to John Cockburn, 6 March 1890 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 48. Cockburn had succeeded Playford as Premier on 27 June 1889.

⁹³ (Imp) 18 & 19 Vict, c 54.

⁹⁴ Interestingly, these remarks by Parkes in the New South Wales legislature were reproduced in the South Australian press: 'The River Murray: New South Wales Asserting Her Rights' *Adelaide Observer* (Adelaide), 7 September 1889, 28.

Parkes — apparently adopting the position that attack was the best form of defence — reminded South Australia of the following:

I desire, however, to intimate that it is held by this Government that South Australia cannot use the waters to such unreasonable extent as would interfere with the normal level of the river without committing a breach of international obligations.⁹⁵

Thus, in addition to the letter ignoring the request for a meeting between the three colonies, the letter from Parkes attempted to turn the tables on South Australia by focusing on whether the Imperial legislation placed any limitation on South Australia's ability to use the waters of the Murray. However, Parkes' letter failed to address the question of whether New South Wales had a similar corresponding obligation. Parkes' letter was the first correspondence in which the colony had asserted a legal position; earlier correspondence had spoken in terms of the 'rights' of the colonies,⁹⁶ but had made no attempt to define those 'rights' or explain their source.

The South Australian Royal Commission published the first two of its three reports in June and December 1890 respectively, and provided a comprehensive analysis of the use of the River Murray for navigation and irrigation.⁹⁷ The reports also detailed the attempts made by the South Australian Royal Commission and Government to arrange a meeting of the three colonies. After the Royal Commission presented its second report in December 1890, it 'suspended meetings in the hope that events would transpire favorable to the holding of an intercolonial conference to consider the *riparian rights* of the respective provinces'.⁹⁸ Precisely what was meant by the 'riparian rights' of the colonies was not explained in the report; however, it appeared to go beyond acknowledging the rights of individuals within each of the colonies and to suggest that the colonies (or their governments) had a 'right' to water (as against each other).

⁹⁵ Letter from Henry Parkes to John Cockburn, 6 March 1890 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 48 (emphasis added). Parkes' letter was published in *The Express and Telegraph* for all South Australians to read: 'The River Murray: Riparian Rights of New South Wales' *The Express and Telegraph* (Adelaide), 11 March 1890, 3.

⁹⁶ See, eg, Letter from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 14 June 1886 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 4.

⁹⁷ See South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890); South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Second Report* (1890).

⁹⁸ South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Final Report* (1894) 3 (emphasis added). The South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Final Report* (1894) is available in South Australia, *Royal Commission on the Utilisaltion of the River Murray Waters — Final Report*, Parl Paper No 34 (1894).

It was now more than five years since the Victorian Premier, James Service, had first written to the South Australian Premier, John Downer, to suggest a meeting between the colonies and still the matter remained unresolved. On 27 October 1892 further promises were made by the Colonial Secretary of New South Wales, George Dibbs, who wrote to the South Australian Premier assuring him that a meeting of the colonies would soon be possible.⁹⁹

The South Australian Royal Commissioners had received similar promises before and did not believe that the Government of New South Wales was genuine in its desire to meet. The Commissioners were of the opinion that Dibbs' letter did not contain 'such an assurance that the question of a conference is being seriously considered as would justify us in postponing the presentation of this our final report'¹⁰⁰ and, in June 1894, the South Australian Royal Commission produced its final report. The report was much shorter than the previous two and simply stated that, despite numerous attempts to arrange a meeting with the other two colonies, arranging such a meeting had proved unsuccessful.¹⁰¹

IV THE EARLY WATER 'RIGHTS' ARGUMENTS

During the period when the colonies were attempting to arrange an opportunity to meet, they were also starting to consider the 'rights' of the colonies with respect to the waters of the River Murray. However, those making these arguments were more interested in bringing about a political agreement as to how to share the waters of the Murray and less concerned if such a 'right' actually existed. The arguments that South Australia had a legal right to the share of the waters of the Murray were not strong.

A New South Wales Claims Legal Ownership of the River

The New South Wales Royal Commission considered, in a limited way, the rights of the colonies to the waters of the River Murray. The New South Wales Royal Commission took the view that east of the South Australian border the Murray was

⁹⁹ Letter from George Dibbs to John Downer, 27 October 1892 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Final Report* (1894) 4. Dibbs explained at 4:

I have the honor to inform you that a Bill has been prepared, and will be introduced at once (notice to that effect having already been given), which, *inter alia*, will give power to the Governor, with the concurrence of the Government of any other colony, to deal with matters of common concernment as to riparian and other rights; and that, pending this proposed legislation, the Government consider it advisable that the final consideration of Mr Playford's suggestions should remain in abeyance.

¹⁰⁰ South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Final Report* (1894) 3.

¹⁰¹ *Ibid.*

within the colony of New South Wales and as such that colony had absolute legal control over the River as it passed through its territory:

We are fully aware that no action which it might be in our power to take could abrogate the legal rights of ownership in the Murray, which, as we have seen, is by the *Constitution Act* vested in the Legislature of New South Wales.¹⁰²

However, the New South Wales Royal Commission acknowledged that this right was ‘qualified ... by co-ordinate powers in regard to navigation and the collections of Customs duties by the Government of Victoria, and by the riparian rights of the inhabitants of Victoria who are settled upon the southern bank of the stream’.¹⁰³ The common law riparian rights doctrine granted the owners of the bank along a river within each colony — referred to as the ‘riparian proprietor’ — a right ‘to the reasonable use of the water for ... domestic purposes and for ... cattle’ and also the right to dam the river or take water for irrigation so long as those ‘extraordinary use[s]’ did not ‘interfere with the rights of other [riparian] proprietors’.¹⁰⁴ The emphasis of the riparian rights doctrine was on maintaining the natural flow and ‘extraordinary use[s]’, such as irrigation, were impermissible where they would disturb the flow for downstream users.¹⁰⁵

While willing to concede that the Victorian land owners along the River might be entitled to use the waters as riparian proprietors, no such similar acknowledgment was made with respect to the downstream proprietors in South Australia. However, arguably the same concession should have applied to riparian proprietors in that colony. While the rights of the individual land owners were recognised, no mention was made as to the ability of the Victorian Parliament to regulate the Murray (or its tributaries) in a way that could affect the interests of either the Government of New South Wales or landowners within that colony.

While acknowledging the common law rights of the riparian owners, there was a practical problem with the application of the doctrine in Australia. The New South Wales Royal Commission took the view that the English riparian rights doctrine that applied between land owners along the banks of a river was unsuitable for the Australian conditions because rivers did not flow all year round:

¹⁰² New South Wales, Royal Commission — Conservation of Water, *Second Report of the Commissioners* (1886) 2.

¹⁰³ *Ibid* 2–3. Although the Commission also took the pragmatic view that they should not ‘insist upon such an extreme view of our statutory position as should preclude the consideration and recommendation of any scheme which might seem to be equitable and advantageous to the *two* Colonies’: at 2 (emphasis added). The reference to the ‘two’ colonies was a reference to New South Wales and Victoria, omitting any reference at this point to South Australia.

¹⁰⁴ *Miner v Gilmour* (1858) 12 Moo 131, 156; 14 ER 861, 870.

¹⁰⁵ *Ibid*.

the presumptions of English law in regard to riparian rights are not applicable to the conditions of New South Wales, where, in too many cases, what are called rivers are actually the dry channels of watercourses, which need to be converted into canals; and this opinion has led us to the conclusion that each Colony must be allowed to deal with the tributaries of the Murray in such manner as will best conduce to its own development, with the sole reservation that a certain proportion of the water contained in those streams must be allowed to flow into the Murray.¹⁰⁶

Furthermore, the Commission was of the opinion that if the riparian rights doctrine was to be applied across colonial boundaries it would impair development along the River Murray and in effect cede control of the Murray to South Australia:

A just application of the principle will safeguard the rights of South Australia, which we recognize to be as valid as our own; but the logical outcome of legal presumptions in regard to the riparian rights, if Queensland, New South Wales, Victoria and South Australia, were one community, would enable the last named Colony to insist on the uninterrupted flow of an immense proportion of the whole rainfall of the Continent, simply because the waters of the Murray run through her territory to the sea.¹⁰⁷

This passage is important as it shows that the legal questions were starting to be considered and that the obvious source of law — the riparian rights doctrine — might be inadequate for the conditions (both environmental and legal) in Australia. In any event, the New South Wales Royal Commission was of the opinion that the most appropriate way to deal with the allocation of water as between the colonies was by mutual agreement. The Royal Commission was keen to develop the River in a way that would be ‘equitable and advantageous’¹⁰⁸ to both New South Wales and Victoria.

In 1889 in a memorandum to the Colonial Secretary, Henry Parkes, the Engineer for Water Conservation in New South Wales, Hugh McKinney, set out what he believed

¹⁰⁶ New South Wales, Royal Commission — Conservation of Water, *Second Report of the Commissioners* (1886) 3. Similar views were expressed in the first report:

The doctrine of riparian rights ... appears better adapted to England, where the people are more concerned to drain off the water as quickly as possible than to New South Wales, where the all-important question is how best to retain it. ... We believe there is a large amount of uncertainty as to what the application of the common law of England would be in cases which might be brought before the Courts, inasmuch as those cases would be founded upon circumstances entirely novel, and to which no analogy could probably be discovered in causes tried elsewhere.

New South Wales, Royal Commission Conservation of Water, *First Report of the Commissioners* (1885) 68.

¹⁰⁷ New South Wales, Royal Commission Conservation of Water, *Second Report of the Commissioners* (1886) 4.

¹⁰⁸ *Ibid* 2.

to be the position with regard to intercolonial water rights.¹⁰⁹ Like the New South Wales Royal Commissioners, he stated that the fact that the river was within the colony of New South Wales granted that colony the ownership of the water:

Under the *Constitution Act* the River Murray is altogether within the territory of New South Wales as far as the junction of South Australia; and, as national territory consists of water as well as land, the waters of the Murray belong primarily to New South Wales.¹¹⁰

McKinney, however, made a number of concessions to this position which were not fully explained. For example, with regard to the position of South Australia he noted:

The colony of South Australia has no statutory right in the River Murray and its only legal claim is under the British Law of Riparian Rights, which gives to South Australia only similar rights to those possessed by riparian owners and occupiers in New South Wales and Victoria.¹¹¹

McKinney may have been making a similar point here to that which was made by the New South Wales Royal Commission: that the individual landowners along the river, the riparian proprietors, might have a limited right to use the water, but the colony of South Australia at large did not have an entitlement to a particular share of the water from the river.

McKinney also contended that South Australia did not have a moral claim to the waters because there were no tributaries in that colony which contributed to the waters of the Murray.¹¹² There were a number of inconsistencies in McKinney's analysis. First, according to McKinney, South Australia was not entitled to a share of the waters of the Murray, but the riparian proprietors in that colony were, whereas the colony of New South Wales (not just the riparian proprietors) was entitled to a share of the water despite the fact that the Murray flowed through both of these States. Secondly, if New South Wales was entitled to a share of the water from the tributaries from Victoria because the River flowed through its territory, why was South Australia not also entitled to a share of the water from those tributaries given that the lower parts

¹⁰⁹ For a short biography of McKinney see Annette Alafaci, *McKinney, Hugh Giffen (1846–1930)* Encyclopedia of Australian Science <<http://www.eoas.info/biogs/P004573b.htm>>.

¹¹⁰ Legal opinion of Hugh McKinney for Henry Parkes, 28 October 1889, 1 in *Sir Henry Parkes — Papers* (State Library of New South Wales, Correspondence vol 27), 319–27.

¹¹¹ *Ibid* 1–2.

¹¹² 'Regarding the moral rights to the waters of the River Murray, New South Wales and Victoria are, in a large measure, in similar positions as contributors to these waters; but South Australia contributes practically nothing to the ordinary discharge of the Murray and therefore has no moral right on that ground': see *ibid* 2.

of the Murray flowed through South Australia?¹¹³ McKinney's analysis is perhaps an example of barracking for one's own state in preference to developing a well-reasoned analysis of the problem. However, in his defence, it must also be remembered that McKinney was an engineer, and not a lawyer, so it is unsurprising that there is no legal analysis supporting the conclusions he asserted in the memorandum to Parkes. While the memorandum does not assist in determining how water from the River Murray might be allocated in the absence of an intergovernmental agreement, it does demonstrate that officials from that colony were starting to realise that this was a legal question that — one way or another — needed to be resolved.

B *The Early South Australian 'Rights' Arguments*

As time progressed, it must have become apparent to the South Australian Government and to the members of the South Australian Royal Commission that the chance of organising a joint conference between the Royal Commissions of the respective colonies was unlikely. The South Australian Royal Commissioners were also aware that the Royal Commissioners of New South Wales and Victoria had already met and made a tentative agreement regarding the allocation of water between those two colonies. It is unsurprising, therefore, that the South Australian Royal Commission and the South Australian Government sought advice as to the legal position of the colony with respect to the waters of the River Murray.

1 *The South Australian Attorney-General Briefs Counsel*

While reference is made in the minutes of the South Australian Royal Commission's meetings to legal opinions, the authorship and content of the opinions was not identified within the Royal Commissioners' reports.¹¹⁴ The opinion of Charles Mann, the South Australian Crown Solicitor, dated 19 December 1887, is one of the earliest legal opinions on the question of how to allocate water from the River Murray between the colonies. No mention is made of Mann's opinion¹¹⁵ in the existing literature.

Mann's opinion reveals that the Attorney-General, Charles Kingston, had also briefed prominent South Australian lawyers, John Downer and Josiah Symon.¹¹⁶ Mann's

¹¹³ 'As owner of the River Murray, New South Wales has a certain right in the Victorian tributaries of that river — a point which is admitted in the resolutions agreed to by the Victorian Water Commission at its conference with the Water Commission of New South Wales': see *ibid* 2.

¹¹⁴ Reference was, however, made in the South Australian Parliament to 'the joint opinion of the Crown Solicitor, Sir J W Downer QC and Mr J H Symon QC': South Australia, *Parliamentary Debates*, Legislative Council, 17 August 1887, 510 (J G Ramsay).

¹¹⁵ Legal opinion of C Mann for Charles Kingston, Attorney-General, 19 December 1887 in *Opinions — Crown Solicitor* (State Records of South Australia, GRG57/16).

¹¹⁶ Kingston was Attorney-General from 11 June 1887 to 27 June 1889 and it must have been shortly after his appointment that he requested the opinions. The advice of Mann makes reference to the opinion of Downer and Symon.

opinion stated that while the three men ultimately delivered separate advices, for the most part, they reached the same conclusion.¹¹⁷ Unfortunately, the opinions of Downer and Symon have never been located, but they are referred to and described by Mann.¹¹⁸ Mann noted that those opinions

only differ and that not to any very great extent as to the principles on which the Imperial Parliament would be likely to act in settling the rights of this colony and those of Victoria and New South Wales to the reasonable use of the waters of the Murray.¹¹⁹

To the extent that the opinions did differ, Mann remarked:

Mr Symon takes very strongly the view that under no circumstances would higher Riparian colonies be allowed to use the higher waters as to affect the navigability of the River where it flows through South Australian territory. Sir John Downer seems to take a similar view but thinks that New South Wales and Victoria would be allowed a reasonable use of the higher waters for such purposes as irrigation etc even though such use might to some extent impair the navigability of the lower river.¹²⁰

Importantly, Mann's opinion recognises the differing water uses of the colonies. From a practical perspective, Mann thought any concession made by South Australia that navigation could be interfered with may place the downstream colony in a difficult

¹¹⁷ Legal opinion of C Mann for Charles Kingston, Attorney-General, 19 December 1887 in *Opinions — Crown Solicitor* (State Records of South Australia, GRG57/16).

¹¹⁸ However, Downer and Symon were both present at the Federal Conventions and the views on the question (or at least those they expressed publicly) are set out in the transcript of the debates. Further, Symon provided an additional opinion to the South Australian Government after federation in 1906, which provides further insight into his view on the matter: see Legal opinion of J H Symon and P McM Glynn for the Attorney-General, 26 March 1906, 1 in *Papers of Sir Josiah Symon* (National Library of Australia, MS 1739, Series 10, Folder 26); (South Australian Parliamentary Library).

¹¹⁹ Legal opinion of C Mann for Charles Kingston, Attorney-General, 19 December 1887 in *Opinions — Crown Solicitor* (State Records of South Australia, GRG57/16). The question whether the Judicial Committee of the Privy Council provided a forum for the resolution of this dispute (rather than the Imperial Parliament) is explained below in Part IV(C).

¹²⁰ Legal opinion of C Mann for Charles Kingston, Attorney-General, 19 December 1887 in *Opinions — Crown Solicitor* (State Records of South Australia, GRG57/16). For a discussion of the idea that the states have a common law 'right' to a share of the waters of rivers that flow through them, see Ian Renard, 'Australian Inter-State Common Law' (1970) 4 *Federal Law Review* 87; Ian A Renard, 'The River Murray Question: Part III — New Doctrines for Old Problems' (1972) 8 *Melbourne University Law Review* 625, 649; Adam Webster, 'Sharing Water from Transboundary Rivers in Australia — An Interstate Common Law?' (2015) 39 *Melbourne University Law Review* 263.

position. Even without water being extracted for irrigation, navigation along the river was at times extremely challenging.¹²¹ A further reduction in water levels by allowing upstream irrigation would only compound the problem. For the purposes of negotiations with the other colonies, Mann recommended that the approach advocated by Symon should be preferred as

once [we] admit the principle that the other colonies may so use the water as to injuriously affect even in a small degree the navigation of the lower river it seems to me it will be very difficult indeed for us afterwards to object and endeavour to fix the extent to which the navigation may be interfered with.¹²²

There was, therefore, awareness that there may need to be a difference between the publicly asserted bargaining position and the legal advice received on point.¹²³

2 The Royal Commissioners Consider the Legal Question

The opinions from Mann, Symon and Downer were obviously of great interest to the South Australian Royal Commissioners. James Howe, Chairman of the South Australian Royal Commission and Commissioner of Public Works,¹²⁴ wrote to the Chief Secretary of South Australia, Thomas Playford, requesting that the Royal Commission be provided with access to the legal opinions.¹²⁵ At first, the Chief Secretary refused the request of the Commission; however, the Commissioners were ultimately permitted to view the opinions.¹²⁶ The legal opinions were mentioned briefly in the minutes of the proceedings of the South Australian Royal Commission and there was no detailed analysis of these views in the Commissioners' reports.¹²⁷

¹²¹ South Australian steamers were already struggling to compete against the Victorian railways and a drop in the water level in drought years made the river difficult to navigate: see above Parts II(B)–(C).

¹²² Legal opinion of C Mann for Charles Kingston, Attorney-General, 19 December 1887 in *Opinions — Crown Solicitor* (State Records of South Australia, GRG57/16) (emphasis in the original).

¹²³ Unfortunately, my searches of the State Archives and Records of New South Wales and the Public Records Office of Victoria have not revealed any legal opinions from the Attorneys-General, Solicitors-General or Crown Solicitors of those colonies during this period. That does not exclude the possibility that such opinions exist but have not been made publicly available.

¹²⁴ Rob van den Hoorn, 'Howe, James Henderson (1839–1920)' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1983) vol 9, 378.

¹²⁵ South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) ix.

¹²⁶ The Commissioners were permitted to view the opinions on 5 February 1890. After the Commissioners viewed the opinions, they were returned to the Attorney-General: *ibid* x.

¹²⁷ *Ibid*.

As attempts to negotiate with the other colonies started to break down, the South Australian Royal Commissioners considered the colony's legal position. In late 1890 the South Australian Royal Commission published its second progress report which set out, again albeit briefly, the legal arguments. There was some division between the Commissioners as to the best way to proceed. Patrick Glynn, Commissioner and Member of the House of Assembly, was reluctant to call upon the Imperial Parliament to interfere in the dispute. Glynn's views reflected a desire for South Australia to self-govern without the need to involve the British Government. He thought that the Imperial Parliament could only amend the *Imperial Act*¹²⁸ to 'express what either is known already, or had been agreed'¹²⁹ between the colonies. Furthermore, he added that any such request would be 'out of keeping with the spirit of constitutional liberty in the colonies'.¹³⁰

The question whether the Imperial Parliament would interfere in such disputes had been debated several years earlier in 1887 by members of the South Australian Parliament. Some members were of the view that the Imperial Parliament should be appealed to without delay. However, as Member of the Legislative Council and former Commissioner of Public Works, William West-Erskine noted, the Imperial Government may be less inclined to interfere 'if the other colonies went to any great expense' in developing, for example, dams or irrigation settlements along the river.¹³¹ Fellow South Australian Member of Parliament, Richard Baker, also thought that the Imperial Government would not intervene; however, he took the more cynical view that the Imperial Government would not intervene merely for fear of 'offending Victoria or New South Wales.'¹³² It must also be remembered that the colonies were now largely self-governing and any Act of the Imperial Parliament would only apply in the colonies if such an intention was made clear by the Imperial Parliament.¹³³

To reach an agreement Glynn suggested that the negotiations between the colonies could be 'guided' by principles of private and international law.¹³⁴ He said that '[o]n the analogy of private riparian rights the mutual claims of the colonies can easily be settled.'¹³⁵ In drawing a comparison with nation states, Glynn stated that:

¹²⁸ *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict, c 54 ('*Imperial Act*').

¹²⁹ South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Second Report* (1890) vi.

¹³⁰ *Ibid* vii.

¹³¹ South Australia, *Parliamentary Debates*, Legislative Council, 19 July 1887, 242. James Rankine also expressed the view: 'If we waited till the other colonies constructed their works the Home Government would then decline to act in the matter': at 243.

¹³² *Ibid* 242.

¹³³ *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63, s 1.

¹³⁴ The view was supported by Messrs Jones, Burgoyne, Landseer and Kirchauff. Glynn, however, does not consider how these principles would be applied: South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Second Report* (1890) vii. See also Glynn, above n 9, 10–11; P McM Glynn, *The Interstate Rivers Question* (W K Thomas & Co, 1902) 6–7.

¹³⁵ Glynn, above n 9, 9.

The claim of a nation upstream to navigate a river to the mouth, though expressive only of an imperfect right, and having its origin only in a sense of natural justice, has been recognised by treaties in Europe and America, and has acquired the strength of custom.¹³⁶

Glynn referred to the rights with respect to navigation; however, no mention is made as to whether nation states had a right to take water for irrigation. Glynn's argument that future negotiations should be guided by principles of either the common law or international law perhaps reflected the unique position of the colonies: the perception was that colonies fell somewhere in between the position of a wholly sovereign states and private citizens.¹³⁷

Charles Hussey, South Australian Royal Commissioner and fellow Member of the House of Assembly, dissented from the recommendations of the other Commissioners and wrote a separate, brief, opinion as to how the matter must be resolved. Hussey's recommendations, like Glynn's, reflected a practical desire to solve the problem rather than any detailed analysis of the legal issues. The difference between the two approaches was that for Hussey, the existence of s 5 of the *Imperial Act* prevented the colonies reaching a practical solution. Hussey was of the opinion that irrespective of whether s 5 of the *Imperial Act* actually granted New South Wales control of the water of the Murray, the existence of the provision meant that New South Wales would continue to make the argument and would have no reason to negotiate with South Australia. He noted that 'so long as that Act is in existence the riparian rights of neither of the colonies concerned can be equitably defined or adjusted.'¹³⁸ As a consequence, Hussey argued that s 5 of the *Imperial Act* impeded the resolution of the matter and needed to be 'immediately repealed, and legislation clearly defining the riparian rights of each of these colonies adopted.'¹³⁹ Like Mann, Hussey was of the view that it was ultimately for the Imperial Parliament to resolve this matter and that the South Australian Government ought to request that the Imperial Parliament clarify the position by introducing legislation stating that s 5 did not confer a right to water.¹⁴⁰ Hussey maintained his position that the *Imperial Act* must be 'amended or repealed' and 'with a view of this necessity being accomplished, the Privy Council should be appealed to without delay.'¹⁴¹

Hussey thought that any request to the Imperial Parliament would need to be made through the Privy Council. However, the more likely avenue was a request to the

¹³⁶ Ibid 10.

¹³⁷ Glynn's argument was developed further by the South Australian delegates at the Federal Conventions: see, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 21 January 1898, 50–7.

¹³⁸ South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Second Report* (1890) vii.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Final Report* (1894) 4.

Secretary of State for the Colonies. A few years later this problem arose in the context of a long running dispute between South Australia and Victoria over the location of the shared border. In 1894 the South Australian Governor, Lord Kintore, wrote to the Secretary of State for the Colonies requesting the Imperial Parliament pass legislation clarifying the location of the border between South Australia and Victoria. The Secretary of State for the Colonies, the Marquis of Ripon, wrote back advising that the Imperial Parliament could not interfere unless the colonies were in agreement as to the terms of the legislation.¹⁴² The difficulty for South Australia was that even the intervention of the Imperial Parliament would require New South Wales to agree a solution. Hussey's recommendations in the final report of the Commission do, however, raise the question of what role the Privy Council could have played in the resolution of a dispute between the colonies over the waters of the River Murray. There is the question of whether a dispute such as this could even be referred to the Judicial Committee of the Privy Council.

C A Forum to Hear Colonial Disputes over the River Murray?

If requesting the Imperial Parliament to intervene in a dispute over the River Murray would require the consent of the colonies involved, could a colony appeal to the Judicial Committee of the Privy Council?

After the passing of the *Judicial Committee Act 1833* (Imp) 3 & 4 Wm 4, c 41 and the establishment of the Judicial Committee of the Privy Council, intercolonial disputes were referred to the Judicial Committee instead of to the Committee for Trade and Plantations, which had previously dealt with these matters.¹⁴³ Section 4 of the Act provided a discretion that allowed 'any such other matters whatsoever as His Majesty shall think fit' to be referred to the Judicial Committee.¹⁴⁴ However, by the end of the

¹⁴² *South Australia v Victoria* (1911) 12 CLR 667, 698.

¹⁴³ Since as early as the 17th century, disputes between British colonies in North America had arisen involving the fixing of a shared boundary: 'Documents: vol 5' in *South Australia v Victoria* (State Library of New South Wales, Q990.4/A). In the early disputes, the power to settle intercolonial disputes rested with the Sovereign. As Griffith CJ explained: 'up to the middle of the 18th century the Royal Prerogative to determine questions of disputed boundaries between Dependencies of the Crown was recognized and exercised': *South Australia v Victoria* (1911) 12 CLR 667, 702. The disputes often, but not always, came to the monarch with the consent of both colonies; however, on at least one occasion a dispute was resolved without the consent of both colonies. Griffith CJ noted that '[i]t also appears that the jurisdiction was exercised *in invitos*, and not merely on reference by both parties': *South Australia v Victoria* (1911) 12 CLR 667, 702. See also 'Documents: vol 5' in *South Australia v Victoria* (State Library of New South Wales, Q990.4/A); W F Finlason, *The History, Constitution, and Character of the Judicial Committee of the Privy Council, Considered as a Judicial Tribunal: Especially in Ecclesiastical Cases, with Special Reference to the Right and Duty of its Members to Declare their Opinions* (Stevens and Sons, 1878) 34.

¹⁴⁴ Isaacs argued that s 4 did not extend beyond matters that were judicial in nature: *South Australia v Victoria* (1911) 12 CLR 667, 720–1. In contrast, Harrison Moore has argued that the referral under s 4 can extend beyond matters that are solely judicial:

19th century the practice was to require all colonies party to the dispute to consent before the matter could be referred to the Judicial Committee.¹⁴⁵

South Australia, therefore, found itself in a difficult position. Both options available to it — seeking the Imperial Parliament to define the ‘rights’ of the colonies with respect to the River Murray or having the Judicial Committee settle the dispute — required the consent of the other colonies. What South Australia required was a mechanism by which this dispute could be settled without the need to seek agreement or consent from the other colonies.

The great hope for South Australia was that federation and the drafting of the *Australian Constitution* would provide an opportunity to define the ‘rights’ of the colonies (and later states) and create a mechanism for resolving disputes between governments over the waters of the River Murray. However, unfortunately for South Australia, that hope would also be dashed. The upstream colonies had no incentive to define expressly the rights of the future states to the waters of the River, as they had made significant investment in irrigation schemes and only risked limiting the amount of water available to their communities.¹⁴⁶ While the *Australian Constitution* placed a limit on the powers of the newly-formed Commonwealth Parliament, it was silent on any limits on the powers of the states. By failing to define the ‘rights’ of the states within the *Australian Constitution*, the dispute has always needed to be resolved post-federation through negotiation.¹⁴⁷

W Harrison Moore, ‘The Case of Pental Island’ (1904) 20 *The Law Quarterly Review* 236, 236. For a discussion of s 4 see also P A Howell, *The Judicial Committee of the Privy Council 1833–1876* (1979, Cambridge University Press) 40–2.

¹⁴⁵ In *South Australia v Victoria*, Griffith CJ suggested that by this time the Crown’s prerogative to resolve these matters on their own volition may have no longer existed:

the Prerogative so freely exercised in the 18th century ought not, in the existing conditions of the self-governing Dependencies, to be exercised without the consent of the Dependencies concerned. The Prerogative may, therefore, I think be regarded as having then fallen into abeyance, and as no longer affording a practicable means of solution of such difficulties.

South Australia v Victoria (1911) 12 CLR 667, 703.

¹⁴⁶ See above n 86. See also Williams and Webster, above n 3.

¹⁴⁷ Agreement after federation was first reached on 9 September 1914 when the Prime Minister and the Premiers of New South Wales, Victoria and South Australia signed the *River Murray Waters Agreement*. The agreement was implemented by the Commonwealth and the relevant States passing separate but substantially similar legislation: see *River Murray Waters Act 1915* (Cth); *River Murray Waters Act 1915* (NSW); *River Murray Waters Act 1915* (SA); *River Murray Waters Act 1915* (Vic). The most recent agreement between the states and the Commonwealth is encapsulated in the *Water Act 2007* (Cth). The Murray-Darling Basin Agreement is set out in Schedule 1 to the Act. The *Water Act 2007* (Cth) was amended by the *Water Amendment Act 2008* (Cth) to give effect to the intergovernmental agreement entered into between the Commonwealth, New South Wales, Victoria, Queensland, South

V CONCLUSION

During the second half of the 19th century there was great change in the use of the waters of the River Murray. Over this period river navigation started to decline and irrigation had become an important water use. There was some tension between these water uses: navigation required water levels be maintained, whereas for irrigation to prosper there was likely to be a reduction in water levels. As the importance of river navigation declined, South Australia's negotiating position with respect to defining the rights of the colonies to the waters of the River was weakened.

At least in the beginning, all three colonies — New South Wales, South Australia and Victoria — recognised the importance of being able to utilise better the waters of the River Murray. Vital to achieving that objective was determining how the waters of the Murray would be shared between the three colonies. If there was ever going to be a resolution of this matter it was going to be immediately after New South Wales and Victoria had established Royal Commissions in 1884. With the benefit of hindsight, the failure to arrange a meeting between the three colonies in 1885 was a missed opportunity for South Australia. As this article demonstrates, as time wore on and the upstream colonies invested in irrigation schemes, there was less incentive for them to negotiate with South Australia. As a consequence, there was considerable difficulty in arranging a meeting between the three colonies to discuss this question. This, of course, made reaching agreement impossible.

As early as the 1880s South Australians had started to assert a 'right' to the waters of the Murray. They thought that the scope of these 'rights' could be 'guided'¹⁴⁸ by principles of international law or by the common law riparian rights doctrine. However, there was no detailed *legal* analysis of these proposed solutions. On the one hand, this might be explained by the fact that there were no clear legal principles to resolve intercolonial disputes of this nature. On the other hand, perhaps not exploring fully the legal questions was a function of energies being focused on the attempt to negotiate a solution. Furthermore, keeping the legal questions unanswered also increased the chances of bringing the upstream colonies to the bargaining table: while no one was entirely confident of what the legal rights were (and feared what they could be), negotiations towards a non-legal solution were more likely to continue. However, South Australia's uncertain legal position coupled with the fact that there were no practical incentives for the other colonies to negotiate with their downstream neighbour made reaching agreement between the three colonies near impossible.

South Australia carried this weak negotiating position into the Australasian Federal Conventions. Considerable time during the Federal Convention debates was

Australia and the Australian Capital Territory: see *Agreement on Murray-Darling Basin Reform* (3 July 2008) Council of Australian Governments <https://www.coag.gov.au/sites/default/files/agreements/Murray_Darling_IGA.pdf>.

¹⁴⁸ South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Second Report* (1890) vi.

dedicated to the issue of the River Murray.¹⁴⁹ The Convention delegates — many of whom were the same political figures involved in these earlier attempts to hold meetings between representatives of the three colonial Royal Commissions — were unable to reach agreement as to defining the rights of the colonies to the waters of the Murray. New South Wales and Victoria had the geographical upper hand and there were no legal or practical incentives for them to resolve this issue by prescribing the respective rights of the future state to the waters of the Murray within the *Australian Constitution*. As a consequence, the uncertainty over the legal rights of the colonies continued after federation between the states and still exists today.¹⁵⁰

¹⁴⁹ About one-fifth of the time during the Melbourne Convention in 1898 was spent debating the issues relating to transboundary rivers and, in particular, the River Murray: Nicholas Kelly, 'A Bridge? The Troubled History of Inter-State Water Resources and Constitutional Limitations on State Water Use' (2007) 30 *University of New South Wales Law Journal* 639, 642.

¹⁵⁰ See, eg, Renard, 'Australian Inter-State Common Law', above n 121; Renard, 'The River Murray Question: Part III — New Doctrines for Old Problems', above n 121; Webster, above n 121; Adam Webster, 'Sharing Water from Transboundary Rivers in Australia: Limits on State Power' (2016) 44 *Federal Law Review* 25.

