Section 100 - Water rights

Section 100 of the *Commonwealth Constitution* provides:

> *"Nor abridge right to use water: The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation."*

It is important to note the initial words in this provision: *"The Commonwealth shall not…"* Like section 116, and section 99, it is a provision that solely applies to the Commonwealth and does not in any way apply to the States. Its purpose was to prevent the Commonwealth from infringing on the water rights of the States with respect to trade and commerce, as was found in ***Commonwealth v Tasmania [1983] HCA 21*** (popularly known as the *Tasmanian Dam Case*).

Sections 99 and 100 of the *Constitution* have been the subject of relatively little consideration by the High Court of Australia since federation. The decision in ***Morgan v Commonwealth [1947] HCA 6*** dealt directly with section 99 and, in the course of doing so, the Court made certain observations about section 100:

> *"The following phrases are used in this group of sections : section 98—•" laws with respect to trade and commerce " ; section 99—" any law or regulation of trade, commerce, or revenue " ; section 100—" any law or regulation of trade or commerce " ; section 101—" provisions of this Constitution relating to trade and commerce and … all laws made thereunder " ; section 102—" any law with respect to trade or commerce." These phrases vary in some particulars but they are all intended to refer to the same subject matter, namely laws which the Parliament can make under the power conferred upon it by section 51 (i)."*

Section 100 was also mentioned in ***Arnold v Minister Administering the Water Management Act 2000 [2010] HCA 3***. The New South Wales Court of Appeal also regarded *Morgan* in relation to section 100 in ***Arnold v Minister Administering the Water Management Act 2000 [2008] NSWCA 338***.

In the *Tasmanian Dam Case*, the Hydro-Electric Commission contended (amongst other things) that the Commonwealth regulations prohibiting it from building a dam on a Tasmanian river were invalid as a

result of the operation of section 100. Mason, Murphy and Brennan JJ each applied *Morgan* in separate reasons for decision. Mason J, (at 153), expressly addressed the question whether the Commonwealth legislation infringed section 100. He said the prohibitions in sections 99 and 100 were plainly directed to the Commonwealth, not to the States.

In *Arnold CA*, the appellants had commenced proceedings in the Land and Environment Court in New South Wales challenging the validity of a legislative scheme whereby farmers who held groundwater extraction entitlements required aquifer access licences and supplementary water licences. The appellants contended that a water sharing plan made in 2006 under this legislative scheme and the legislative scheme itself were invalid and unconstitutional, based upon section 51(xxxi) concerning the acquisition of the property on just terms by the Commonwealth, and on section 100. As to the section 100 point, the Chief Justice, (at 89), explained that the focus of attention in the proceeding, for the proposition that the appellants had no prospect of success, was upon the words *"by any law or regulation of trade or commerce"*. His Honour there said that this was a matter that had been "authoritatively determined by the High Court in *Morgan*…". His Honour noted, (at 90), that the appellants did not contend that the laws in question in the case before the Court were capable of answering that description. His Honour further noted, (at 91), that in the *Tasmanian Dam Case*, Mason, Murphy and Brennan JJ accepted the authority of *Morgan*.

In *Arnold HC*, the High Court declined an invitation to re-open *Morgan*, which the appellants had submitted should be overruled on the basis that the words *"law or regulation of trade or commerce"* in section 100 were not confined to laws made under section 51(i). The Court considered that the rights of the holders of bore licences under the old legislation were not to *"the waters of rivers"* within the meaning of section 100, which expression spoke only to surface water of a stream flowing in a defined channel.

A summary of these and other associated cases can be found in ***Lee v Commonwealth of Australia [2014] FCAFC 174*** where the Federal Court examined a challenge to the validity of the *Water Act 2007* (Cth) and claim for damages as a result of impairment by abridgment or acquisition of water entitlements and allocations, likewise based on a claim under section 100 of the *Constitution*.

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