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**Water law- Commonwealth and  
State powers and judicial review in  
the Australian federation**

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**<<http://business.unisa.edu.au/commerce/waterpolicylaw>**



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thank you for the invitation

**INTERNATIONAL CONFERENCE ON WATER MANAGEMENT IN  
FEDERAL AND FEDERAL-TYPE COUNTRIES**

Aljafería Palace, Zaragoza

Organized by

Manuel Giménez Abad Foundation (Regional Parliament of  
Aragon) Scientific Director: Antonio Embid Irujo

# Plan of paper and talk

- 1 The Australian federation and the High Court.
- 2 Judicial independence of Australian courts
- 3 Water management laws from 1788 to 2007
- 4 Decisions of Australian courts on regional water allocation and water plans
- 5 Water Act 2007 (Cth) justiciable protocols
- 6 Summary and conclusions

# 5 Epochs of Australian water law

- 1 **1788-1901- Only State colonial laws** and these were highly introspective to the particular colony.
- 2 **Federation [1]1901 to 1983- fiscal federalism** (CCAC) sections 96 and section 100 prohibition on Commonwealth powers.

**[1]** *The Constitution was adopted as a schedule to the Commonwealth of Australia Constitution Act, 63 & 64 Vict Chapter 12 of the year 1900 hereafter CCAC. A law made by the British Parliament was the only legal way to establish a system of government for the whole of Australia*

# 5 epoch of Australian water law

**Treaties power 1983- 1994-** (CCAC) enhanced Federal intervention Tasmanian dam's case, MDBC agreement (weak) and ESD principles.

**4 -1994- 2007** Council of Australian Governments reforms, ESD and competition law reforms hence enhanced section 51 (xx) (CCAC), Trade Practices powers ,State litigation on State water plans. Regional delivery

**5 2007 Justiciable protocols -2007** under multiple section 51 (CCAC), powers and concurrent State powers

## summary

colonial power lead to States having power over this area due to section 199 and s 99.

recently there has been a move to have the Centre provide protocols to get some consistency in State water planning process

Common law of England

surface water riparianism has a  
*reasonable user constraint*

*groundwater no reasonable user  
constraint*

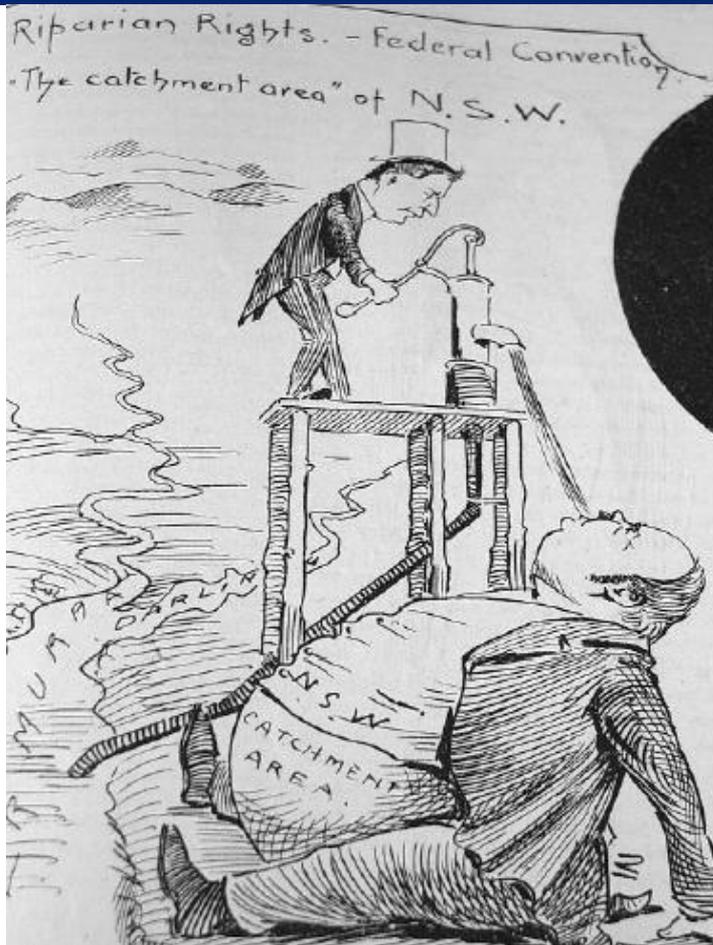
colonial legislatures abolish in favour of  
licence schemes

Interstate rivalry over the Murray river



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# contests between the States over the Murray



'Riparian Rights,taken from the Quiz in April 1897.(fig.2)Here the two leading New South Wales Convention representatives,George Reid and Edmund Barton,are busy pumping as much of the water from the Murray,just below its junction with the Darling,as they can.George 's Reid 's huge belly reflects New South Wales ' insatiable demand for water.

federation

world war 1

world war 2

presently in south eastern  
**AUSTRALIA**



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Federation a nation for a continent and a  
continent for a nation 1901

S100

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

Section 96 Fiscal federalism not  
reviewable by a court



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## after federation

section 51 treaties Tasmanian Dam

Murray Darling Commission and CAP  
1992 1995

Great Artesian Basin 1989 co operative  
agreement

Intergovernmental agreement on the  
environment 1992

Ecologically sustainable development ESD  
as an intergovernmental agreement



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## 1994 2004 Council of Australian governments

1994 CoAG changed the legal structures removed state provision and created 333 water supply businesses in 14 different legal forms.

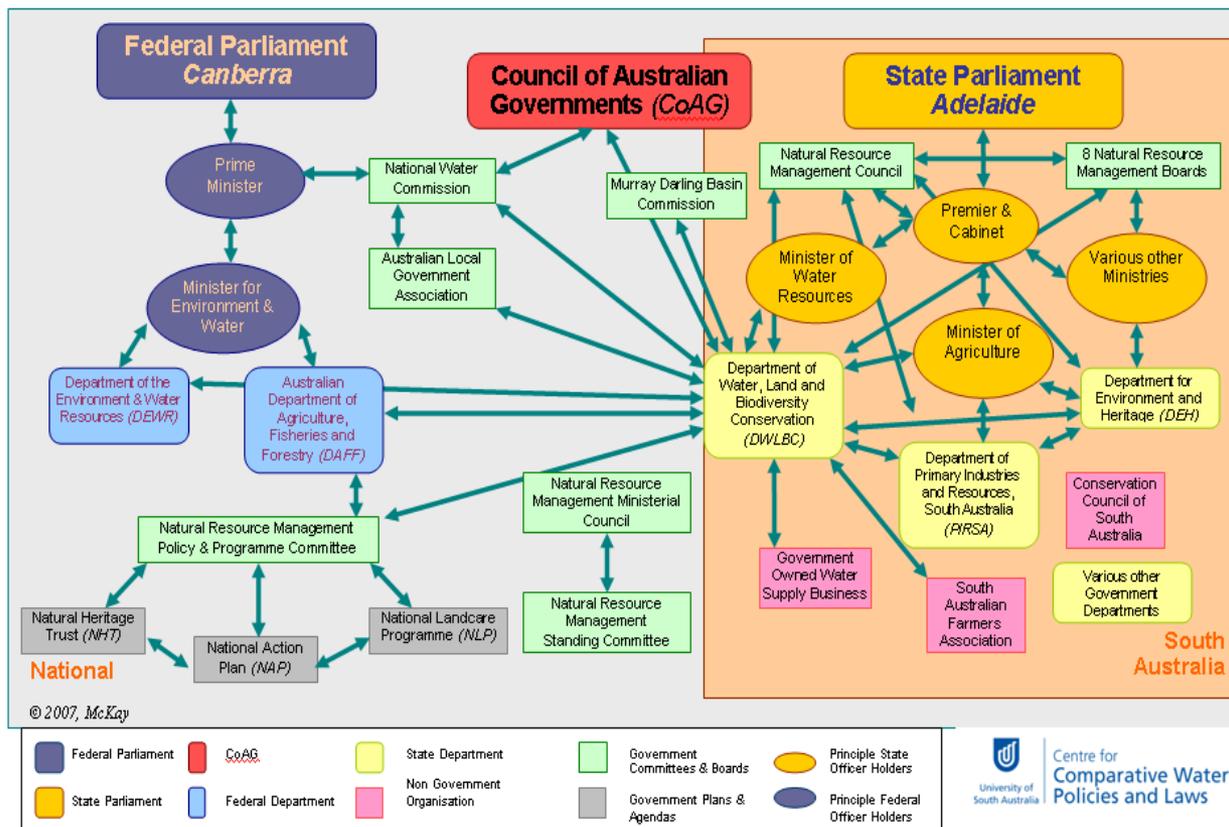
created water markets separated water use rights into many components

regional delivery of ESD in 56 regions set by the States

2004 National water initiative

# organisational complexity SA

Organisations Creating and Monitoring Legal and Policy Instruments for Water in South Australia





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## other initiatives

56 regions set up under State law

4 types

Confederation of Emergent groups( no skill base for board members) with no Statutory duties,

Confederation of Emergent groups( no skill base for board members) with Statutory duties,

Skill based board with no statutory duties, and

Skill based with statutory duties,

# DECISIONS OF STATE COURTS ON WATER

- 1 the construction of the ESD obligation in the relevant State act.
- 2 the type of body drafting the plans also derived from the Act see Table 2 above,
- 3 the type of review power in the relevant act setting up the court, and
- 4 these are only persuasive on each other.



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# DECISIONS OF STATE COURTS ON WATER

water plans interpreted strictly no  
discretion in Minister to vary a plan  
ESD used to reduce water  
allocations by up to 50%  
pro-rata reductions seen as fair  
normal administrative law rules apply  
so there must be procedural fairness



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# DECISIONS OF STATE COURTS ON WATER

Upholding of plenary power of State to  
change water laws and reduce  
allocations

also to require licences for storing  
water in a dam



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# MOVE TO CENTRALISE POWER

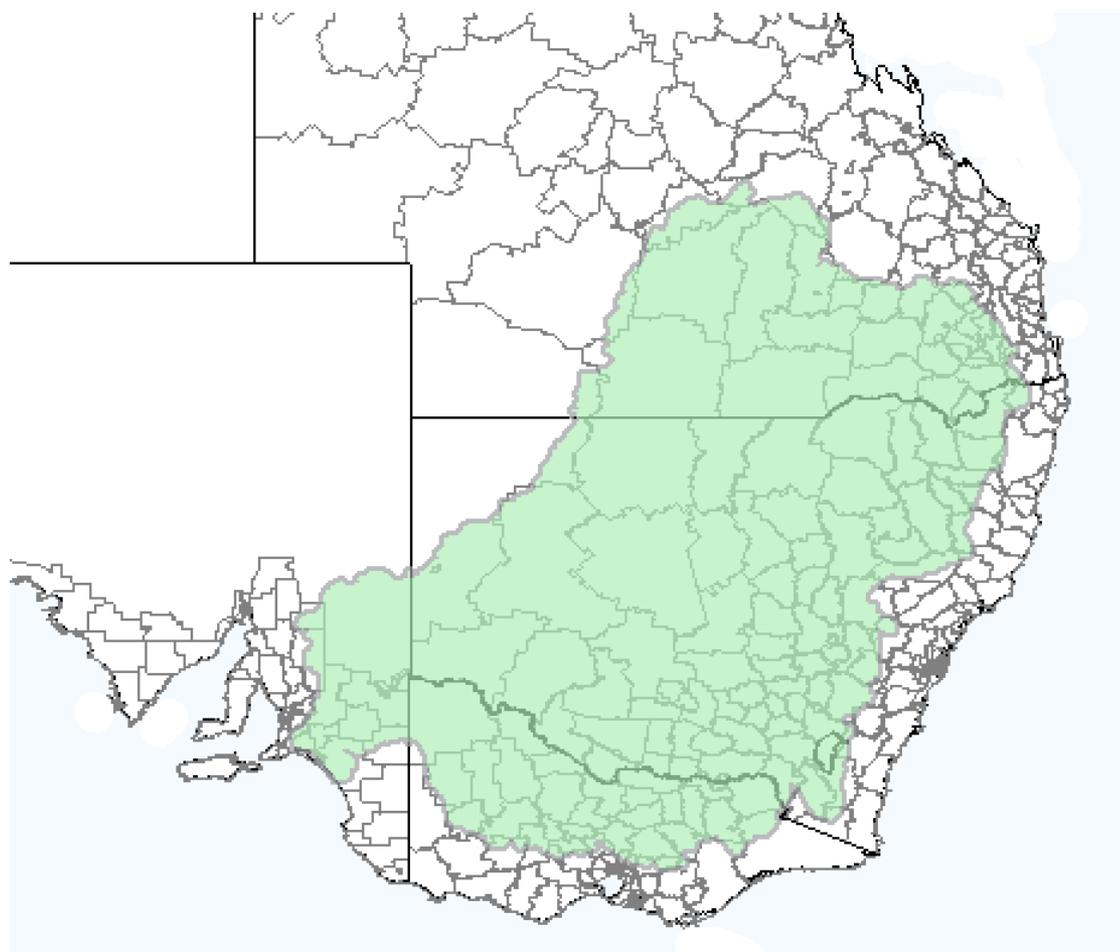
Many factors such as poor administration of the Cap on water allocations by the States, poor uptake of water markets, community up set about environmental issues such as blue green algae and drought



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# MDBC and local government boundaries



# Water Act 2007 Cth recent final negotiations 3 July 08

These are stated in a long list in section 5 and start with the *national interest* and *relevant international agreements* and subject to the above, to promote the use and management of Basin water resources to optimise economic, social and environmental outcomes.

The term national interest is not defined

Other objects are specified in 8 subparagraphs which makes the law very difficult to interpret if not indeterminate.



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# creates justiciable protocols my word

The Water Act is based on suite of Commonwealth powers s .51(i), (ii), (viii), (xi), (xv), (xx), (xxix) (xxxvii), (xxxix), s122 notably the referral of power under section 51(xxxvii).

There are specific attempts in many sections to read down provisions so as not to infringe section 100. (s.11) to create Commonwealth water legislation (s.14).



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# Water Act cth 2007

This new term *justiciable protocols*<sup>[1]</sup> is used to encapsulate the clear processes envisaged under the new Water Act<sup>[2]</sup>.

Creating *justiciable protocols* is a third way of the Commonwealth achieving more power.

It leaves the water laws in the competence of the States but provides protocols as the content of instruments such as water plans (s. 19, 20, and 22)<sup>[3]</sup> created under State laws

# Water Act Cth 2007

It requires State water plans to have certain content (s. 22 and s. 55) be accredited (s. 56) by the Commonwealth or adopted (s.57).

It aims for the new Murray-Darling Basin Authority (MDBA) to create a Basin plan (for MDB waters only). And this must be designed to achieve ESD

# Water Act Cth 2007

It makes the basin plan a legislative instrument (s 33) and this means that any State law to the contrary is invalid s109

allows review by courts exercising federal jurisdiction and specifically mentions the Federal Magistrates Court (s139) and the AAT and the High Court

# summary and conclusions

Water law is a mosaic in Australia

Many aspects of the new Act will require interpretation by various courts

is it legal to accredit a State water plan and hence alter a duly locally conceived plan?

again the understanding of ESD by judges will be an issue.



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thank you