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EDITORIAL

An overview of the historical legal background to the “Proposed Basin Plan” 263

ARTICLES

International law and the Murray-Darling Basin Plan – *Professor Donald R Rothwell*

Both the Water Act 2007 (Cth) and the Murray-Darling Basin Plan rely to a significant extent upon Australia’s international legal obligations under “relevant international agreements” to provide not only a constitutional basis for the legislative schema but also a foundation for how the Commonwealth has sought to develop the Plan. This raises issues regarding the extent of the international legal obligations in those agreements, the relevance of each agreement, and whether – consistent with High Court jurisprudence – the Act and Plan are consistent with aspects of the Commonwealth’s s 51(xxix) power with respect to “external affairs”. This article reviews these issues and comments on the relationship between international law and the Act and the Plan. 268

Can the High Court save the Murray River? – *Adam Webster and John M Williams*

Since before Federation, South Australian politicians have claimed that their colony (and later State) has a legal right to a share of the water from the Murray River. Recently, South Australian Premiers have said that, should current negotiations fail to produce a satisfactory outcome for the State, they may challenge the Basin Plan in the High Court to assert South Australia’s legal claim to a share of the waters of the Murray. This article explores the role that the High Court has played in resolving disputes in times of crisis, and examines whether the High Court of Australia would have jurisdiction over an interstate water dispute. Finally, the article considers the legal basis for South Australia’s claim to a “fair share” of the waters of the Murray River. 281

The significance of ICM in the evolution of s 51(xxxi) – *Andrew Macintosh and Jancis Cunliffe*

Over the past 30 years, increasing environmental and natural resource regulation has sparked debate about the protection of private property interests and provision of compensation to those affected by regulatory measures. Where these disputes involve the Commonwealth, it is not uncommon for property owners to reach for s 51(xxxi) of the Australian Constitution to bolster their claims for assistance. In the 2009 decision of *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 170 LGERA 373, the High Court took an important step in clarifying the scope of s 51(xxxi). The decision provides a strong precedent in support of the notion that, for a law to give rise to an acquisition, it must either result in the Commonwealth (or a third party) obtaining an entitlement to possession and control of the plaintiff’s property, or effectively sterilise the plaintiff’s interest while providing a correlative proprietary benefit to another party. This article reviews the evolution of the High Court’s approach to the “constitutional guarantee” and analyses ICM’s place in s 51(xxxi) jurisprudence. 297

Putting the environment first? – Tim Bonyhady

The Water Act 2007 (Cth) is one of several pieces of Australian legislation intended to prioritise the environment. The implementation of such legislation has often fallen short of this goal. Recent events suggest that the Water Act may be the same, raising serious questions about the efficacy of such legislation. 316

The legal framework for water trading in the Murray-Darling Basin: An overwhelming success? – Janice Gray

Water trading has become a key mechanism of water management in Australia and is commonly regarded as a great success. This article explores whether the legal framework supporting trading in the Murray-Darling Basin is deserving of its very positive reputation. It begins by mapping out the framework and revealing a complex web of multijurisdictional and multilayered governance. It then evaluates the effectiveness of that framework by reference to: the number and volume of trades; the clarity with which the subject of trade is defined (is it property or not?); the stated objects of trading and the outcomes produced; and Earth Jurisprudence, as a benchmark. In conclusion, it finds that despite some positive aspects there are enough negative aspects of the legal framework to preclude its characterisation as an “overwhelming success”. 328