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High Court decisions on funding agreements, potential acquisitions of property and abridgment of rights to water

In *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51 (*ICM*) and *Arnold v Minister Administering the Water Management Act 2000* [2010] HCA 3 (*Arnold*), the High Court upheld the validity of a funding agreement between the Commonwealth and New South Wales (as well as related Commonwealth and New South Wales legislation), which provided for NSW to reduce groundwater entitlements under state law to environmentally sustainable levels.

The funding agreement gave effect to a grant of financial assistance to NSW under the *National Water Commission Act 2004* (Cth). The federal parliament has power to grant financial assistance to a state under s 96 of the Constitution.

Issues considered by the High Court

ICM and *Arnold* raised for consideration whether s 96 is subject to s 51(xxxi) of the Constitution (which requires the acquisition of property to be on just terms), so that an agreement concerning a grant of financial assistance to a state cannot require a state to acquire property other than on just terms.

The challenging parties in these cases contended that s 96 was subject to s 51(xxxi), and that the funding agreement offended s 51(xxxi) of the Constitution because it provided for the acquisition of property other than on just terms. In *Arnold* the appellants also contended that the agreement was contrary to s 100 of the Constitution, which prohibits the Commonwealth abridging 'the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation'.

High Court's findings

A majority of the High Court (Heydon J dissenting) held that the *ICM* plaintiffs' and the *Arnold* appellants' groundwater entitlements had not been 'acquired' because, by reducing the plaintiffs' and appellants' groundwater entitlements, NSW had not obtained an identifiable and measurable advantage relating to the ownership or use of property that it did not already have.

Since 1966, the right to the use, flow and control of sub-surface water has been vested in the state of NSW for the benefit of the Crown. Therefore, reducing the challenging parties' entitlements did

not give NSW any larger or different right than it already had to extract or permit others to extract groundwater.

Because the majority held that there had been no 'acquisition', it was unnecessary to consider the interaction between s 96 and s 51(xxxi), and three members of the majority (Hayne, Kiefel and Bell JJ) declined to do so. However, French CJ, Gummow and Crennan JJ went on to consider this question, holding that s 96 is subject to s 51(xxxi); Heydon J agreed, though dissented on the question of 'acquisition' and, consequently, the validity of the Commonwealth and state legislation in issue.

In relation to the s 100 argument, six members of the High Court held that the groundwater in issue in *Arnold* did not fall within the expression 'waters of rivers', so the appellants' argument based on s 100 failed at the threshold. (Heydon J did not need to consider this issue.)

Implications

ICM and *Arnold* (which adopts the reasoning of *ICM* on the question of 'acquisition' and the interaction between s 96 and s 51(xxxi)) are not strictly authority for the proposition that s 96 is qualified by s 51(xxxi), because only three of the six members of the majority expressed a concluded view on that issue.

However, in light of the views expressed by French CJ, Gummow and Crennan JJ (with Heydon J agreeing), and the comments of Hayne, Kiefel and Bell JJ on this question, consideration may need to be given in the future to the manner in which Commonwealth grants of financial assistance to the states are structured, particularly where state actions might amount to an acquisition of property on other than just terms.

AGS acted for the Commonwealth in both *ICM* and *Arnold*.

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