HIGH COURT OF AUSTRALIA

Manager, Public Information

10 February 2010

ARNOLD & ORS v MINISTER ADMINISTERING THE WATER MANAGEMENT ACT 2000 & ORS [2010] HCA 3

In December 2009 in the case of *ICM Agriculture Pty Ltd v The Commonwealth* the High Court determined that the replacement of a groundwater bore licence with an aquifer access licence which reduced a licensee's groundwater entitlement did not constitute an acquisition of property. Today the High Court held that the reduction of a licensee's groundwater entitlement under an aquifer access licence does not abridge the rights of that licensee to reasonable use of the waters of rivers for conservation or irrigation.

The circumstances of this appeal are virtually the same as those in *ICM Agriculture Pty Ltd* v *The Commonwealth* and the appeals were heard one after the other. Mr Arnold and the other appellants had held a number of bore licences issued under the *Water Act* 1912 (NSW) to extract groundwater to irrigate their properties in the Lower Murray Groundwater System. Arising out of the *Intergovernmental Agreement on a National Water Initiative* between the Commonwealth and New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory, New South Wales developed the *Water Sharing Plan for the Lower Murray Groundwater Source* (the Lower Murray Plan), which resulted in the bore licences issued under the Water Act being replaced by aquifer access licences issued under the *Water Management Act* 2000 (NSW). The replacement licences significantly reduced the amount of water the appellants were permitted to take. As a consequence of developing the Lower Murray Plan (amongst other plans) New South Wales and the Commonwealth entered into a funding agreement, under which funds were provided to make *ex gratia* structural adjustment payments to allow bore water licence holders to manage their transition to reduced water entitlements.

In the Land and Environment Court of New South Wales the appellants sought a range of relief including declarations that the Lower Murray Plan was inoperative and that their bore licences had not been affected by it. The Commonwealth successfully applied for an order dismissing the proceedings. The Court of Appeal of the Supreme Court of New South Wales granted the appellants leave to appeal but dismissed the appeal. Three justices of the High Court granted the appellants special leave to appeal on two grounds based on the argument that the replacement of the bore licences with the aquifer access licences constituted an acquisition of property other than on just terms, contrary to s 51(xxxi) of the Constitution. The justices referred to the Full Court the special leave application on a third ground - whether the *National Water Commission Act* 2004 (Cth) and the Funding Agreement were laws or regulations of trade or commerce contravening s 100 of the Constitution, which prohibits the Commonwealth from limiting the right of a State (and its residents) to the reasonable use of the waters of rivers for conservation or irrigation.

In *ICM Agriculture Pty Ltd* v *The Commonwealth* the High Court by majority held that there had been no acquisition of property when the New South Wales government replaced bore water licences issued under the Water Act with aquifer access licences issued under the Water Management Act. Applying that holding to this case, the appellants' arguments based on contravention of s 51(xxxi) of the Constitution failed.

The question whether the *National Water Commission Act* 2004 (Cth) and the Funding Agreement contravened s 100 of the Constitution had not been argued in *ICM Agriculture*. Six of the seven High Court justices determined that leave should be granted on the application for special leave to appeal on this ground, but that the appeal should be dismissed. The majority held that, whatever rights and liberties the appellants may have had under the bore licences, these were rights and liberties in relation to groundwater, not rights to use "the water of rivers" within the meaning of s 100. That being so, no contravention of s 100 of the Constitution had occurred and the appeal was dismissed.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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