



## HIGH COURT OF AUSTRALIA

1 September 2010

### SPENCER v COMMONWEALTH OF AUSTRALIA [2010] HCA 28

In 2007 Mr Spencer commenced proceedings in the Federal Court of Australia claiming that certain Commonwealth legislation and intergovernmental agreements had effected an acquisition of his property other than on just terms. Today the High Court held that the case should not have been summarily dismissed under s 31A of the *Federal Court of Australia Act 1976* (Cth), as it could not be said that Mr Spencer had "no reasonable prospect" of successfully prosecuting the proceedings.

Mr Spencer was the owner of a farm at Shannons Flat, New South Wales, known as "Saarahnee". The property was subject to the *Native Vegetation Act 2003* (NSW) and previously subject to the *Native Vegetation Conservation Act 1997* (NSW) ("the State Acts"). Both statutes restricted his ability to clear native vegetation on his land.

On 12 June 2007, Mr Spencer commenced proceedings against the Commonwealth of Australia in the Federal Court. He claimed that the restrictions imposed by the State Acts effectively amounted to an acquisition of his interests in the land, in particular his rights to carbon sequestration. He claimed that the acquisition had been on other than just terms and had been made in furtherance of agreements between the Commonwealth and the State of New South Wales. Those agreements established a framework for the management and use of land, including native vegetation clearing, and allocated Commonwealth funds to the State for that purpose. Mr Spencer alleged that the agreements, and the Commonwealth legislation that authorised them – the *Natural Resources Management (Financial Assistance) Act 1992* (Cth) and the *Natural Heritage Trust of Australia Act 1997* (Cth) ("the Commonwealth Acts") – were invalid to the extent to which they effected or authorised the acquisition of property other than on just terms within the meaning of s 51(xxxi) of the Constitution.

At first instance, the Commonwealth applied for summary judgment under s 31A of the *Federal Court of Australia Act 1976* (Cth). Section 31A provides that the Court may give judgment for one party against another where "the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding". On 28 August 2008, Justice Emmett made an order dismissing the proceedings on the basis that neither of the Commonwealth Acts could be characterised as a law with respect to the acquisition of property within the meaning of s 51(xxxi). His Honour held that neither of the Commonwealth Acts required or permitted the Commonwealth to impose, as a condition for the grant of financial assistance, a requirement that the State acquire the property other than on just terms.

Mr Spencer was granted leave to appeal to the Full Court of the Federal Court but the appeal was dismissed on 24 March 2009. On 12 March 2010, Mr Spencer's application for special leave to appeal to the High Court was referred for hearing before seven Justices of the High Court.

Today the High Court held that the case had not been a suitable one for the application of s 31A of the *Federal Court of Australia Act*. Mr Spencer had argued that the Commonwealth Acts formed

part of a scheme or device designed to avoid the restrictions on Commonwealth legislative power found in s 51(xxxi) of the Constitution. The statement of claim referred to arrangements or understandings between the Commonwealth and the State of New South Wales beyond what appeared on the face of the relevant legislation and intergovernmental agreements. The Court noted that, in a case decided after the Full Federal Court's decision in this matter (*ICM Agriculture Pty Ltd v The Commonwealth*), three members of the High Court expressly left open the question whether a Commonwealth law might be characterised by reference to informal arrangements for the grant of financial assistance as a law with respect to the acquisition of property. Whether there were such arrangements in this case, and whether they were constitutionally significant, was not a question suitable for determination on a summary judgment application. The High Court held that, in light of the decision in *ICM*, it could not be said that Mr Spencer had "no reasonable prospect of successfully prosecuting the proceeding". The Court granted Mr Spencer special leave to appeal and allowed the appeal with costs.

- *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.*