HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No S6/2009

ALAN ARNOLD & ORS — APPLICANTS

AND

MINISTER ADMINISTERING THE WATER MANAGEMENT ACT 2000 & ORS — RESPONDENTS

Matter No S110/2009

ALAN ARNOLD & ORS — APPELLANTS

AND

MINISTER ADMINISTERING THE WATER MANAGEMENT ACT 2000 & ORS — RESPONDENTS

Arnold v Minister Administering the Water Management Act 2000
[2010] HCA 3
10 February 2010
S6/2009 & S110/2009

ORDER

Matter No S6/2009

1. *Grant special leave to include, as a further ground of appeal in Matter No S110/2009, the ground that the New South Wales Court of Appeal (CA [89]-[93]) erred in holding that the* National Water Commission Act *2004 (Cth) and the 2005 Funding Agreement were not laws or regulations of trade or commerce within the meaning of s 100 of the Constitution.*

2. *Applicants to pay third respondent's costs.*

Matter No S110/2009

1. *Leave to the third respondent to file a Notice of Contention in the form of the draft annexed to its written submissions.*

2. Upon the summons filed 13 August 2009 leave granted to the third respondent to file out of time a Notice of Contention limited to ground 2 of the draft.

3. Appeal dismissed.

4. Appellants to pay third respondent's costs.

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with P T Taylor SC and P E King for the applicants/appellants (instructed by Taylor & Whitty Solicitors)

M G Sexton SC, Solicitor-General for the State of New South Wales with J K Kirk for the first and second respondents (instructed by Crown Solicitor (NSW))

S J Gageler SC, Solicitor-General of the Commonwealth and A Robertson SC with C L Lenehan for the third respondent (instructed by Australian Government Solicitor)

Interveners

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell SC intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor for Western Australia)

P M Tate SC, Solicitor-General for the State of Victoria with K L Emerton SC and G A Hill intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

M G Hinton QC, Solicitor-General for the State of South Australia with K E Dennis intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor (South Australia))

G J D del Villar intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law Brisbane)

CATCHWORDS

Arnold v Minister Administering the Water Management Act 2000

Constitutional law (Cth) – Powers of Commonwealth Parliament – Limitation on legislative power – Right of State or residents therein to reasonable use of waters of rivers for conservation or irrigation – Appellants held bore licences under *Water Act* 1912 (NSW) – Appellants' bore licences replaced, pursuant to funding agreement between Commonwealth and State of New South Wales, with aquifer access licences under *Water Management Act* 2000 (NSW) ("2000 Act") – Replacement of bore licences effectuated by making of Water Sharing Plan for the Lower Murray Groundwater Source by Minister Administering the 2000 Act ("Minister") pursuant to s 50 of 2000 Act – Whether Commonwealth legislation under which funding agreement allegedly made, or funding agreement, contravened s 100 of the Constitution – Whether appellants' bore licences entitled them to use "the waters of rivers".

Administrative law – Relevant and irrelevant considerations – Whether Minister took irrelevant considerations into account in making plan under s 50 of 2000 Act.

Constitutional law (Cth) – Powers of Commonwealth Parliament – Acquisition of property on just terms – Whether replacement of bore licences acquisition of property.

Words and phrases – "the waters of rivers".

Constitution, ss 51(xxxi), 98, 100.
National Water Commission Act 2004 (Cth).
Water Act 1912 (NSW).
Water Management Act 2000 (NSW), s 50.

FRENCH CJ.

Introduction

1 On 1 November 2006, bore licences held by the appellants, who are farmers in the Lower Murray region of New South Wales, were by operation of the *Water Management Act* 2000 (NSW) "replaced" with aquifer access licences. The appellants' entitlements to extract groundwater were less under the aquifer access licences than under the bore licences. The replacement was effected under the same statutory scheme and pursuant to the same intergovernmental agreements as were considered in *ICM Agriculture Pty Ltd v The Commonwealth*[1].

2 The appellants challenged the replacement of their licences on a number of grounds, including two arising under the Constitution. Broadly, they were that the replacement, pursuant to a Funding Agreement between the Commonwealth and the State of New South Wales, constituted an acquisition of their property on other than just terms contrary to s 51(xxxi) of the Constitution and that the Funding Agreement itself was a regulation of trade or commerce which contravened s 100 of the Constitution[2]. That section provides:

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

3 Having regard to the decision of this Court in *ICM Agriculture Pty Ltd*, the challenge based on s 51(xxxi) cannot succeed. For the reasons given below, the challenge based on s 100 of the Constitution must also fail.

4 Although the statutory scheme under which the appellants' bore licences were replaced was the same as that considered in *ICM Agriculture Pty Ltd*, there were certain aspects of its implementation particular to these appellants. A brief outline of the history of the statutes, statutory processes and intergovernmental agreements culminating in the replacement of the licences follows.

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1 (2009) 261 ALR 653; [2009] HCA 51.

2 On the hearing of the appeal the appellants contended for the invalidity of the Funding Agreement only, although the proposed ground of appeal in relation to s 100 also impugned the *National Water Commission Act* 2004 (Cth).

Framework of statutes and intergovernmental agreements

The statutes, intergovernmental agreements and statutory processes applicable to the appellants in the present case included the following:

1. *Water Act* 1912 (NSW). The appellants' bore licences were held under Pt 5 of this Act relating to artesian wells[3]. They were subject to limitations or conditions which could be imposed at the time of grant or thereafter[4].

2. *Water Management Act* 2000 (NSW). Section 50 of this Act provides for the Minister to make, by order published in the Gazette, plans for water management areas or parts of the State not within such areas. Schedule 10 to this Act provides for conversion of "former entitlements to access licences and approvals". It applies to categories or subcategories of access licences relating to a part of the State or water source to which Pt 2 of Ch 3 of this Act applies by operation of a proclamation under s 55A[5]. Aquifer access licences are a category of access licence created by this Act[6]. An access licence entitles its holder, inter alia, to specified shares in available water within a specified water management area and to take water at specified times and rates, or in specified circumstances, and from specified areas or locations[7].

3. The Intergovernmental Agreement on a National Water Initiative, made on 25 June 2004 between the Commonwealth Government and the governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory. The Agreement provided for the establishment of a National Water Commission to assist with its effective implementation and the accreditation of the parties' implementation plans. Provisions of the Agreement relevant to the reduction of water access entitlements are set out in the joint judgment of Gummow and Crennan JJ.

4. The Intergovernmental Agreement, made on 25 June 2004 between the Commonwealth Government and the governments of New South Wales,

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3 *Water Act* 1912 (NSW), s 112.

4 *Water Act*, s 116C.

5 *Water Management Act* 2000 (NSW), Sched 10, cl 1(a).

6 *Water Management Act*, ss 56 and 57(1)(e).

7 *Water Management Act*, s 56(1).

Victoria, South Australia and the Australian Capital Territory, on addressing water over-allocation and achieving environmental objectives in the Murray-Darling Basin.

5. The *National Water Commission Act* 2004 (Cth), which commenced on 17 December 2004. This Act established the National Water Commission, which has a number of functions including assisting with the implementation of the National Water Initiative and undertaking activities promoting its objectives and outcomes[8]. The Chief Executive Officer of the National Water Commission had, among his or her functions, that of administering financial assistance awarded by the Minister to particular projects relating to Australia's water resources, either from the Australian Water Fund Account or any other Commonwealth program relating to the management and regulation of Australia's water resources[9].

6. The Funding Agreement made on 4 November 2005 between the Commonwealth and New South Wales providing for funding from the Australian Government Water Fund for the "Water Smart Australia Project: Achieving Sustainable Groundwater Entitlements". Under the Agreement, New South Wales was to implement water sharing plans pursuant to the *Water Management Act* to reduce the water entitlements of water licence holders in, inter alia, the Lower Murray groundwater system. The Commonwealth was to provide funding to a maximum of $55 million for the project. The State was required, under the Agreement, to "develop a package of upfront ex gratia structural adjustment payments to licence holders of Groundwater Systems for the purpose of assisting those licence holders manage the impact of their reduced water entitlements."

7. The Water Sharing Plan for the Lower Murray Groundwater Source 2006 made by order of the Minister for Natural Resources pursuant to s 50 of the *Water Management Act* and published on 20 October 2006 in the *New South Wales Government Gazette*. The Water Sharing Plan commenced on 1 November 2006. It applied to the water management area known as the Lower Murray Groundwater Source, including all water contained in specified "unconsolidated alluvial aquifers deeper than 12 metres below the ground surface"[10] within a defined area. The definition of "aquifer" in the *Water Management Act* was applied to the Water Sharing Plan by

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8 *National Water Commission Act*, s 7(1)(a).

9 *National Water Commission Act*, s 24(1)(a) read with s 7(1)(d)(ii).

10 Water Sharing Plan, cl 5(1).

virtue of cl 6(1) of that Plan. The term "aquifer" was defined in the *Water Management Act* Dictionary as:

"a geological structure or formation, or an artificial landfill, that is permeated with water or is capable of being permeated with water."

By cl 27 of the Water Sharing Plan the share components of entitlements greater than 20 ML under the *Water Act* 1912, which were to become aquifer access licences, were to be calculated by reference to the extraction history of each licence holder.

8. The proclamation on 25 October 2006 by Her Excellency, the Governor of New South Wales, pursuant to ss 55A(1) and 88A(1) of the *Water Management Act*, that:

"Part 2 of Chapter 3 of [the *Water Management Act*] applies to each water source to which the *Water Sharing Plan for the Lower Murray Groundwater Source 2006* applies, and to all categories and subcategories of access licences in relation to any such water source".

This proclamation applied Sched 10 to the Act to the area in which the appellants held their bore licences. It effected the "replacement" of those bore licences with aquifer access licences, with effect from 1 November 2006.

9. The coming into effect on 1 November 2006 of the Water Management (General) Amendment (Lower Murray) Regulation 2006, which amended the Water Management (General) Regulation 2004 by the insertion of a new Div 5 of Pt 3 and Sched 4B into that Regulation. The schedule specified the amounts of the entitlements calculated under cl 27 of the Water Sharing Plan.

Proceedings in the Land and Environment Court

6 On 22 January 2007, the appellants commenced proceedings in the Land and Environment Court of New South Wales challenging, on a variety of grounds, the validity and operation of the statutes, statutory instruments and regulations underpinning the purported replacement of their bore licences. The Minister administering the *Water Management Act* was named as respondent. The State of New South Wales and the Commonwealth of Australia were later joined as second and third respondent respectively.

7 By their further amended application filed 16 November 2007 the appellants sought a declaration of the invalidity of the *National Water*

Commission Act or the provisions of that Act so far as it related to water and water resources[11]. They sought a declaration that Pts 2 and 3 of Ch 3 and Sched 10 of the *Water Management Act* were inoperative with respect to their licences and that the proclamation of 25 October 2006 was also inoperative. In addition, they sought declarations that the Water Management (General) Amendment (Lower Murray) Regulation 2006 and the Water Sharing Plan for the Lower Murray Groundwater Source 2006 Order were void and inoperative. Injunctive relief and damages were also sought.

8 On 21 December 2007, Lloyd J, on the motion of the Commonwealth, dismissed the proceedings as against the Commonwealth on the basis that the Land and Environment Court had no jurisdiction to entertain them[12]. His Honour went on to hold that the Court "should also dismiss or stay the applicants' application in so far as it concerns the Commonwealth on the basis it discloses no reasonable cause of action as against the Commonwealth or on the basis that it is frivolous or vexatious"[13]. His Honour held s 51(xxxi) was not applicable, absent a law of the Commonwealth with respect to the acquisition of property[14]. As to the alleged contravention of s 100 of the Constitution, he accepted the Commonwealth's submission that the section only affected laws made under s 51(i) of the Constitution[15]. In addition, his Honour held that the appellants lacked standing to seek the relief they sought against the Commonwealth[16].

Proceedings in the Court of Appeal of the Supreme Court of New South Wales

9 On 4 December 2008, the Court of Appeal of the Supreme Court of New South Wales granted the appellants leave to appeal against the decision of the Land and Environment Court, but dismissed the appeal[17]. It held that the Land

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11 A declaration was also sought as to the invalidity of the *Natural Resources Management (Financial Assistance) Act* 1992 (Cth). That claim was not material to the appellants' submissions in this Court.

12 *Arnold v Minister Administering Water Management Act 2000* (2007) 157 LGERA 379 at 406 [86].

13 (2007) 157 LGERA 379 at 408 [98].

14 (2007) 157 LGERA 379 at 408 [99].

15 (2007) 157 LGERA 379 at 403 [72].

16 (2007) 157 LGERA 379 at 408 [97].

17 *Arnold v Minister Administering the Water Management Act 2000* (2008) 73 NSWLR 196.

and Environment Court did have jurisdiction to entertain the claim against the Commonwealth[18]. Nevertheless, it upheld that Court's summary dismissal of the proceedings against the Commonwealth on the basis that they disclosed no reasonable cause of action. None of the Commonwealth statutes relied upon by the appellants constituted a law of the Commonwealth with respect to the acquisition of property[19]. Nor was there any basis for the contention that the "joint venture" between the Commonwealth and New South Wales was a circuitous device to avoid the constraints imposed by s 51(xxxi) and s 100 of the Constitution[20]. In relation to s 100, the Court held that none of the statutes or agreements relied upon by the appellants could be characterised as a "law or regulation of trade or commerce"[21]. The prohibition in s 100 applied only to laws made under s 51(i) of the Constitution[22]. The Court also upheld the conclusion by the Land and Environment Court that the appellants lacked the requisite standing to obtain relief against the Commonwealth[23].

10 On 1 May 2009, this Court granted to the appellants special leave to appeal against the decision of the Court of Appeal on two grounds and referred to a Full Court the question whether special leave should be granted in respect of a ground relating to s 100 of the Constitution.

Grounds of appeal – disposition

11 The grounds of appeal on which special leave was granted are:

> "The New South Wales Court of Appeal erred in holding that a grant made by the Commonwealth to a State on condition that the State acquire property on unjust terms is not invalid; and that it was not ultra vires the legislative power of the Commonwealth to authorise an agreement that requires a State to use its powers to acquire property on unjust terms.

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18 (2008) 73 NSWLR 196 at 217 [86] per Spigelman CJ, Allsop P and Handley AJA agreeing at 225 [147] and [148] respectively.

19 (2008) 73 NSWLR 196 at 218 [96] and 221 [109]-[110].

20 (2008) 73 NSWLR 196 at 224 [134].

21 (2008) 73 NSWLR 196 at 217-218 [93].

22 (2008) 73 NSWLR 196 at 217 [89]-[92].

23 (2008) 73 NSWLR 196 at 225 [145].

> The New South Wales Court of Appeal erred in holding that the invalidity of a Commonwealth-State agreement was not legally relevant to the State Minister's decision to issue the 2006 Plan notwithstanding that the Minister was guided by that agreement."

The first of these grounds of appeal fails for the reasons set out in the joint judgment of Gummow and Crennan JJ and myself in *ICM Agriculture Pty Ltd*[24]. The second of the grounds is parasitic on the first and fails with it. I agree generally with the reasons of Gummow and Crennan JJ in their joint judgment in relation to these grounds of appeal.

The referred special leave matter

12 The application for special leave was referred to a Full Court in relation to the ground that:

> "The New South Wales Court of Appeal erred in holding that the National Water Commission Act 2004 and the 2005 Funding Agreement were not laws or regulations of trade or commerce within the meaning of section 100 of the Constitution."

13 The Commonwealth attached to its submissions a draft notice of contention it wished to file in the event that special leave were granted. The matters raised on the draft notice were that, for the purposes and within the meaning of s 100 of the Constitution:

> "1. There was no law or regulation of the Commonwealth by which any right of the appellants was 'abridged';
>
> 2. Such rights as the appellants formerly had were not to the use of the waters of any 'river';
>
> 3. There was no abridgment of the 'reasonable use' of any waters for conservation or irrigation."

The pleadings and argument on the s 100 ground

14 The Court of Appeal disposed of the appellants' argument on the basis that *Morgan v The Commonwealth*[25] was binding authority for the proposition that the words "by any law or regulation of trade or commerce" in ss 98 to 102 of the Constitution referred only to laws made under the trade and commerce power in

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24 (2009) 261 ALR 653.

25 (1947) 74 CLR 421; [1947] HCA 6.

s 51(i)[26]. Although, it was said, there were obiter dicta by Deane J in *The Tasmanian Dam Case*[27] suggesting that this Court might reconsider *Morgan*, the Court of Appeal held that, in any event, no statute or agreement relied upon by the appellants could be characterised as a "law or regulation of trade or commerce"[28].

15 The Court of Appeal dealt with the grounds raised by the appellants before it on the assumption that the factual allegations relied upon to support their claims for relief were true. Paragraph 36 of the appellants' further amended points of claim in the Land and Environment Court alleged:

> "Further or alternatively in the premises the [Commonwealth] has by a law or by regulation of trade or commerce of the Applicants and/or water users of New South Wales abridged the rights of the State and of the residents of the State to the reasonable use of the waters of the State including the Murray River and its tributaries and linked aquifers being ancient underground rivers in the particular circumstances of the case for conservation or irrigation."

This was a pleading which on the face of it established a less than substantial factual foundation for the appellants' invocation of s 100. The appellants submitted that it had been assumed, for the purposes of the summary dismissal application, that the waters the subject of the rights abridged pursuant to the Funding Agreement were "waters of rivers" within the meaning of s 100. But that assumption involved an assumption of law, namely that groundwater as described in the Water Sharing Plan made pursuant to the Funding Agreement was capable of constituting the "waters of rivers" for the purposes of s 100. That assumption was not accepted in argument before this Court[29]. The pleading as drawn referred to "waters of the State", a term which describes no relevant category of water. The pleading must be taken, in the circumstances, as asserting that the appellants are residents of the State of New South Wales, whose rights to the reasonable use of the waters of the Murray River have been abridged. The reference to "tributaries" can be taken as a reference to the waters of the Murray River. The concept of "linked aquifers" which are underground rivers is unclear. It was not asserted that the aquifers themselves are part of the Murray River. Nor does the pleading convey that there are currently flowing "ancient underground rivers".

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26 (2008) 73 NSWLR 196 at 217 [92].

27 *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 251; [1983] HCA 21.

28 (2008) 73 NSWLR 196 at 217-218 [93].

29 [2009] HCATrans 204 at 4820-4919.

16 The Court of Appeal said that no issue arose in this case as to whether or not groundwater fell within the concept of "waters of rivers" in s 100[30]. As noted above, however, this involved a question of law which was agitated on the referred application for special leave to this Court.

17 The appellants argued that the words "law or regulation of trade or commerce" in s 100 are not confined to laws made under s 51(i). They sought leave to reopen *Morgan*, and submitted that it should be overruled. They submitted that the Funding Agreement was a regulation of trade or commerce and was therefore subject to the guarantee in s 100 and invalid for contravening it. The next step in their argument was that the Funding Agreement determined the content of the 2006 Water Sharing Plan. They submitted that whether the Minister's decision to promulgate the Water Sharing Plan was vitiated by the invalid Funding Agreement was a question of fact dependent upon evidence to be decided at trial, and should not have been determined on a summary judgment application.

The drafting history of s 100

18 Words reflecting the substance of what is now s 100 of the Constitution were first included in the draft Constitution at the Melbourne session of the Australasian Federal Convention in 1898. The draft Constitution which had emerged from the Adelaide session in 1897 would have conferred legislative power on the Federal Parliament with respect to[31]:

- Section 52(I) – The regulation of trade and commerce with other countries, and among the several States;
- Section 52(VIII) – Navigation and shipping; and
- Section 52(XXXI) – The control and regulation of the navigation of the River Murray, and the use of the waters thereof from where it first forms the boundary between Victoria and New South Wales to the sea.

19 In a critique of the 1897 draft Bill, Inglis Clark referred to decisions of the courts of the United States establishing that Congress had power to legislate, under the commerce power in the United States Constitution, with respect to the

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30 (2008) 73 NSWLR 196 at 217 [88].

31 A copy of the 1897 draft Bill, as framed and approved at the Adelaide Convention, is reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 637. These provisions appear at 648-649.

use of all the navigable rivers as highways for commerce between those States or with foreign countries[32]. The reference to "navigation" in s 52(VIII) of the 1897 draft of the Australian Constitution practically repeated the gift of legislative power already conferred on the Parliament by s 52(I). Inglis Clark said that it was therefore unnecessary to mention any particular river in this connection. He would have reduced the s 52(XXXI) power to a power to make laws with respect to the use of the waters of the River Murray for irrigation and manufacturing purposes.

20 In the event, s 52(XXXI) was deleted at the Melbourne session of the Convention in 1898. This left regulation of the rivers, as Professor Williams has observed, "subject to a combination of 52(I), the 'trade and commerce' clause, and 52(VIII)."[33] A limiting amendment to s 52(VIII), foreshadowing s 100, was proposed by Mr Reid so that the section read[34]:

> "The powers contained in this sub-section, and those relating to trade and commerce under this Constitution, shall not abridge the rights of a state or its citizens to the use of the waters of rivers for conservation and irrigation."

The South Australian delegate, Sir John Downer, proposed the insertion of the word "reasonable" before "use"[35], and this amendment was accepted[36]. Section 52(VIII) was agreed with the incorporation of the Reid and Downer amendments. Their limitations were subsequently taken out of the power provision by the Drafting Committee and redrawn in terms of the current s 100 (initially numbered s 99)[37]. The deletion of the reference to navigation and shipping in the powers listed in what was then s 52 reflects an acceptance of the proposition that laws relating to such matters fell within the trade and commerce power.

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32 Williams, *The Australian Constitution: A Documentary History*, (2005) at 706.

33 Williams, *The Australian Constitution: A Documentary History*, (2005) at 795.

34 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 7 March 1898 at 1989.

35 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 7 March 1898 at 1989.

36 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 7 March 1898 at 1990.

37 Williams, *The Australian Constitution: A Documentary History*, (2005) at 795-796 and 1107.

21 The navigation and shipping power, for which s 52(VIII) provided, was relocated in s 98 along with the power to make laws with respect to railways the property of any State. Those powers were, in effect, declared to be part of the power of the Parliament to make laws with respect to trade and commerce.

22 Quick and Garran, commenting on the inclusion of the railways provision in s 98, said that[38]:

> "The object of substituting the declaratory for the enabling form was to prevent any limitation of the trade and commerce power being implied; and the object of the provision itself was to remove doubts as to whether State-owned railways were subject to the trade and commerce power."

The use of the declaratory form in relation to "navigation and shipping" was said to have been inserted into its present position "for similar reasons"[39].

Section 100 and the bore licences

23 Section 100 of the Constitution gives rise to a number of important constructional questions, some of which were agitated before this Court on the referred application for special leave. The section was described by Quick and Garran as being one which takes its place in the Constitution, along with s 99, as "a further limitation of the trade and commerce power."[40] The limitations in ss 99 and 100 were held in *Morgan*[41] to be confined to laws made under s 51(i)[42] of the Constitution[43]. That confinement of the limitation was endorsed by three of the Justices in *The Tasmanian Dam Case*[44]. No reference was made in

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38 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 873, referring to the *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 11 March 1898 at 2386-2390.

39 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 873.

40 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 880.

41 (1947) 74 CLR 421.

42 As extended by s 98 of the Constitution.

43 (1947) 74 CLR 421 at 454-455 per Latham CJ, Dixon, McTiernan and Williams JJ.

44 (1983) 158 CLR 1 at 153-154 per Mason J, 182 per Murphy J (who did so on the wrong assumption that the correctness of *Morgan* had not been challenged), 249 per Brennan J.

Morgan, nor later in *The Tasmanian Dam Case*, to the drafting history relating to s 99 or s 100. That is not surprising. It was not until *Cole v Whitfield*[45] that this Court accepted that such references could be made to ascertain the contemporary meaning of language used in a provision of the Constitution, the subject to which that language was directed, and the nature and objectives of the movement towards federation from which the Constitution emerged[46]. However, the invitation to overrule *Morgan* should be declined for present purposes. This case does not require that its correctness be re-examined, although the artificiality of its consequences, to which Mason J adverted in *The Tasmanian Dam Case*[47], remains.

24 The appellants' invocation of s 100 was directed to the validity of the Funding Agreement. It was upon the premise of its invalidity that they based their submissions that the exercise of ministerial power in making the Water Sharing Plan was vitiated. Having regard to the drafting history and irrespective of the correctness of the Court's decision in *Morgan*, it is difficult to see how an agreement made between the executive governments of the Commonwealth and the States could, of itself, constitute a "law or regulation of trade or commerce". There is also an interesting question whether the term "right of … the residents" in s 100 is used in a collective sense rather than as a reference to individual rights[48].

25 Critical and sufficient for the disposition of the application is the question whether the rights of the appellants said to have been abridged by the replacement of their bore licences related to the use of the "waters of rivers" within the meaning of s 100.

26 The drafting history in my opinion makes clear that the qualification on Commonwealth legislative power imposed by s 100 was directed to the application, to the waters of rivers, of legislative powers with respect to trade and commerce and navigation and shipping. The subject matter of the limitation originally contained in the proposed s 52(VIII), as adopted at the Melbourne session of the Convention in 1898, was rivers which could be used for navigation or shipping. Mr Reid's amendment of s 52(VIII) to include a reference to trade or commerce no doubt reflected in part the view expressed by Inglis Clark that the trade and commerce power would extend to navigation and shipping. Section

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45 (1988) 165 CLR 360; [1988] HCA 18.

46 (1988) 165 CLR 360 at 385 per the Court.

47 (1983) 158 CLR 1 at 154.

48 See the discussion in *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290 at 334-335; [1922] HCA 50.

98 in the final draft put that proposition beyond doubt. Against this background, and without suggesting that the prohibition is limited to navigable rivers, there is no plausible basis for construing the limitation as applying to underground water in aquifers.

27 This conclusion reflects the historical context of s 100. As Gleeson CJ said in *Singh v The Commonwealth*[49]:

> "Recognition of the importance of context in the interpretation of a text that was written a century ago is not inconsistent with the role of the Constitution as a dynamic instrument of government. It is no more than an application of orthodox legal principle."

28 Quick and Garran reflected contemporary understanding of the concept of the "waters of rivers", in the observation that[50]:

> "A river is a stream flowing in a defined channel; and the waters of a river are the waters flowing over its bed and between its banks. Rainwater flowing over or percolating through the soil, but not flowing in a defined channel, is not the water of a river[51]. Artesian water is therefore not the water of a river; nor, it would seem, is flood-water which has escaped from the banks of a river and overflowed the surrounding country."

29 The rights conferred by the appellants' bore licences related to underground water. The Water Sharing Plan 2006 applied to the Lower Murray Groundwater Source, the definition of which was referred to earlier in these reasons. It applied to underground water, not to the waters of rivers within the meaning of s 100. The pleading of this aspect of the appellants' claim provides no foundation for a contention of fact which, assumed in their favour for the purposes of the summary dismissal application, could have sustained their contention about s 100. The dismissal should stand.

Conclusion

30 Special leave to appeal should be granted on the s 100 ground, and leave to the Commonwealth to file its notices of contention in relation to s 100 and s 51(xxxi) (confined to ground 2). The appeal should be dismissed with costs in

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49 (2004) 222 CLR 322 at 340 [27]; [2004] HCA 43.

50 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 893.

51 See *McNab v Robertson* [1897] AC 129 at 134.

favour of the Commonwealth. The State of New South Wales and the Minister sought no order as to costs.

31 GUMMOW AND CRENNAN JJ. This appeal and application for special leave were heard immediately after *ICM Agriculture Pty Ltd v The Commonwealth*[52] and there are a number of issues common to each matter. These reasons should be read with those of French CJ, Gummow and Crennan JJ in *ICM*. However, in this matter particular reliance was placed by the appellants upon s 100 of the Constitution. It is convenient to describe the background to the matter, particularly to indicate the broader context in which those arguments for a grant of special leave based on s 100 were advanced.

The National Water Initiative Agreement

32 On 25 June 2004, the Commonwealth of Australia (the third respondent) and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory entered into an intergovernmental agreement known as the National Water Initiative ("the NWI"). In its Preamble, the agreement stated[53]:

> "The Parties agree to implement this National Water Initiative ... in recognition of the continuing national imperative to increase the productivity and efficiency of Australia's water use, the need to service rural and urban communities, and to ensure the health of river and groundwater systems by establishing clear pathways to return all systems to environmentally sustainable levels of extraction."

33 Paragraph 27 of the NWI provides:

> "Recognising that States and Territories retain the vested rights to the use, flow and control of water, they agree to modify their existing legislation and administrative regimes where necessary to ensure that their water access entitlement and planning frameworks incorporate the features identified in paragraphs 28-57 below[54]."

Paragraph 39 of the NWI provides for the preparation of statutory water plans by States and Territories. Schedule E to the NWI contains guidelines for preparing water plans. Clause 2 of Sched E provides that:

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52 (2009) 261 ALR 653; [2009] HCA 51.

53 Intergovernmental Agreement on a National Water Initiative, 25 June 2004, par 5.

54 These paragraphs deal with the topics "water access entitlements", "environmental and other public benefit outcomes", "water planning", "addressing currently overallocated and/or overused systems", "assigning risks for changes in allocation", "indigenous access" and "interception".

"Where systems are found to be *overallocated* or *overused*, the relevant plan should set out a pathway to correct the *overallocation* or *overuse*".

34 Terms which are italicised in the NWI are defined in the glossary contained in Sched B(i).

35 "[O]verallocation" is defined as referring:

"to situations where with full development of water access entitlements in a particular system, the total volume of water able to be extracted by *entitlement holders* at a given time exceeds the *environmentally sustainable level of extraction* for that system".

36 "[O]verused" is defined as referring:

"to situations where the total volume of water actually extracted for consumptive use in a particular system at a given time exceeds the *environmentally sustainable level of extraction* for that system. Overuse may arise in systems that are overallocated, or it may arise in systems where the planned allocation is exceeded due to inadequate monitoring and accounting."

37 In turn, "environmentally sustainable level of extraction" is defined as:

"the level of water extraction from a particular system which, if exceeded would compromise key environmental assets, or ecosystem functions and the productive base of the resource".

38 "[E]ntitlement holders" is not expressly defined but plainly means the holder of a "water access entitlement", a term that is defined to mean:

"a perpetual or ongoing entitlement to exclusive access to a share of water from a specified *consumptive pool* as defined in the relevant *water plan*".

39 "[C]onsumptive pool" is defined as:

"the amount of water resource that can be made available for *consumptive use* in a given water system under the rules of the relevant water plan".

40 "[C]onsumptive use" is defined as:

"use of water for private benefit consumptive purposes including irrigation, industry, urban and stock and domestic use".

41 From this series of inter-locking definitions, it can be appreciated that par 39 and Sched E of the NWI contemplate the creation, by the States and Territories who have agreed to the NWI, of statutory water plans which involve reduction of water access entitlements where this is necessary to achieve the environmentally sustainable use of water systems.

42 Paragraph 97 of the NWI is directed to addressing the consequences for entitlement holders arising from the reduction of their entitlements:

> "The Parties agree to address significant adjustment issues affecting *water access entitlement* holders and communities that may arise from reductions in water availability as a result of implementing the reforms proposed in this Agreement.
>
> i) States and Territories will consult with affected water users, communities and associated industry on possible appropriate responses to address these impacts, taking into account factors including:
>
> a) possible trade-offs between higher reliability and lower absolute amounts of water;
>
> b) the fact that water users have benefited from using the resource in the past;
>
> c) the scale of the changes sought and the speed with which they are to be implemented (including consideration of previous changes in water availability); and
>
> d) the risk assignment framework referred to in paragraphs 46 to 51[55].
>
> ii) The Commonwealth Government commits itself to discussing with signatories to this Agreement assistance to affected regions on a case by case basis (including set up costs), noting that it reserves the right to initiate projects on its own behalf."

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55 Paragraphs 46 to 51 of the NWI assign the risk of future reductions in the availability of water for consumptive use between water access entitlement holders and the Commonwealth, State and Territory Governments.

The Funding Agreement

43 On 4 November 2005, the Commonwealth and the State of New South Wales ("the State") (the second respondent) entered into an agreement titled "Funding Agreement in Relation to Funding from the Australian Government Water Fund for the Following Water Smart Australia Project: Achieving Sustainable Groundwater Entitlements" ("the Funding Agreement").

44 Item 1 of the Schedule to the Funding Agreement contains details of what is referred to in the Funding Agreement as the Project[56]. Item 1.6 of the Schedule provides that:

> "The Project requires the State to:
>
> a. implement, from 1 July 2006, Water Sharing Plans (as provided for in the *Water Management Act* 2000 (NSW)) that reduce (over a 10 year period) the water entitlements of water licence holders in the Lower Gwydir, the Lower Lachlan, the Lower Macquarie, the [L]ower Murray, the Lower Murrumbidgee and the Upper and Lower Namoi groundwater systems (all of which are referred to in this Schedule as 'the Groundwater Systems') to ensure sustainable future use of those Groundwater Systems;
>
> b. ensure that after sufficient consultation with licence holders and other stakeholders, the Water Sharing Plans for the Groundwater Systems include a method for reducing entitlements to sustainable yield and take account of, among other things, each licence holders' [sic] history of extraction of the relevant Groundwater System;
>
> c. make up-front *ex gratia* structural adjustment payments to licence holders of the Groundwater Systems to allow them to better manage the transition to reduced and sustainable water entitlements; and
>
> d. establish and administer a Community Development Fund."

Clause 5.1 of the Funding Agreement refers to the State's agreement to carry out the Project. Clause 4.1 deals with the Commonwealth's provision of funding for the Project and Item 2 of the Schedule sets out in detail the financial contributions of the Commonwealth to be provided for the Project.

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56 The Project is defined in cl 1 of the Funding Agreement by reference to Item 1 of the Schedule.

The appellants and the Lower Murray Water Sharing Plan

45 The appellants are individuals and corporations conducting farming operations in the Lower Murray area of the State. They held bore licences under Pt 5 of the *Water Act* 1912 (NSW) ("the 1912 Act"), which entitled them to extract groundwater. Their entitlements were significantly reduced upon replacement of the bore licences by aquifer access licences and supplementary water licences issued with effect 1 November 2006. These changes followed upon the making by the first respondent ("the Minister") of the "Water Sharing Plan for the Lower Murray Groundwater Source" ("the Lower Murray Plan") by order pursuant to s 50 of the *Water Management Act* 2000 (NSW) ("the 2000 Act").

46 By proceedings 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 void and inoperative and that their bore licences had not been affected by it.

47 The Commonwealth successfully applied to the Land and Environment Court for an order dismissing the proceedings[57]. The Court of Appeal of the Supreme Court of New South Wales (Spigelman CJ, Allsop P and Handley AJA) granted leave to appeal but dismissed the appeal[58].

The appeal to this Court

48 Special leave to appeal to this Court was granted on 1 May 2009 upon two grounds. The first is to the effect that the Funding Agreement required the State to use its powers to acquire property on unjust terms and therefore could not be authorised by federal law. By summons dated 13 August 2009, the Commonwealth sought leave to file out of time a Notice of Contention ground 2 of which is to the effect that, in any event, there had been no acquisition of property within the meaning of s 51(xxxi) of the Constitution. That leave should be granted. For the reasons given in *ICM*, the replacement of the bore licences involved no acquisition of the property of the appellants within the meaning of s 51(xxxi). A consequence is that the first ground of appeal fails.

49 The second ground is that the Court of Appeal erred in holding that "the invalidity of [the Funding Agreement] was not legally relevant to [the Minister's] decision to issue [the Lower Murray Plan] notwithstanding that the Minister was

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57 (2007) 157 LGERA 379.

58 (2008) 73 NSWLR 196.

guided by that agreement". This ground also fails. First, as indicated in *ICM*, while the decision in *P J Magennis Pty Ltd v The Commonwealth*[59], contrary to the submission of the Commonwealth, should not be reopened, the Funding Agreement did not lead to the taking of steps involving the acquisition of the property of the appellants. Secondly, it was open to the Minister to treat the existence of the Funding Agreement as a relevant (even if not imperative) consideration in deciding to exercise the power conferred by s 50 of the 2000 Act to make a plan under that section.

Section 100 of the Constitution

50 The appellants seek an order expanding the scope of the grant of special leave to include a ground that the *National Water Commission Act* 2004 (Cth) and the Funding Agreement were laws or regulations of trade or commerce within the meaning of s 100 of the Constitution. The Commonwealth seeks leave to file a Notice of Contention denying the engagement of s 100 in this case. These orders sought should be made. For the reasons which follow, the appeal on the s 100 ground also fails.

51 Section 100 states:

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

The section should be read with the text of s 98 in mind. This states:

> "The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State."

52 In *Morgan v The Commonwealth*[60] it was held that the prohibition imposed by s 100 applied only to laws which were capable of being made under s 51(i) and s 98 of the Constitution, and, for example, did not apply to laws supported by the defence power (s 51(vi)). Thereafter, in *The Tasmanian Dam Case*[61] Mason J said that, for the construction of s 100:

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59 (1949) 80 CLR 382; [1949] HCA 66.

60 (1947) 74 CLR 421 at 454-455, 458-459; [1947] HCA 6.

61 *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 154; [1983] HCA 21.

> "Section 98 is of special significance because (1) it provides that Parliament's power with respect to trade and commerce extends to navigation and shipping; (2) it demonstrates that the references in other sections to a law or regulation of trade and commerce are references to laws which are made, or perhaps can be made, under s 51(i) as explained by s 98; and (3) it thereby suggests that the primary purpose of s 100 was to safeguard the rights of a State and its residents to the use of waters in rivers used for interstate trade and commerce including navigation and shipping, viz, the Murray River."

His Honour added[62]:

> "At first glance it may seem somewhat artificial to confine the restriction on legislative power to laws made, or capable of being made, in exercise of one power when a somewhat similar effect in relation to the use of waters of rivers by a State and its residents for conservation or irrigation might be achieved by the Commonwealth in the exercise of other legislative powers. Why, one might ask, would the framers of the Constitution confine the pursuit of the objective – the protection of the State and its residents in relation to the use of the waters – to some Commonwealth laws but not others?
>
> The answer to this question probably lies in the importance of the Murray River to New South Wales, Victoria and South Australia and the residents of those States and the apprehensions entertained by them as to the impact of the Commonwealth's legislative powers under ss 51(i) and 98."

53 The appellants sought leave to reopen *Morgan*. As will appear, it is unnecessary to rule upon that application. Other issues of construction of s 100 also appeared in the course of argument. One is whether the term "residents therein" is confined to individuals and thus could not include the corporate appellants[63]. Another is whether as between riparian States and their residents s 100 guarantees access to the use of the waters for the purposes mentioned, or does no more than impose a restriction upon the exercise of the power of the Commonwealth. Mason J left the point open in the *Tasmanian Dam Case*[64].

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62 (1983) 158 CLR 1 at 154.

63 Cf *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290 at 299, 320-321, 334-335; [1922] HCA 50.

64 (1983) 158 CLR 1 at 153.

The absence of necessary rights in the appellants

54 It is unnecessary to consider these matters because the appellants must first show that they had, within the meaning of s 100, the right "to the reasonable use of the waters of rivers for conservation or irrigation". They had no such right.

55 In the light of s 4B of the 1912 Act and as explained in *ICM*, the appellants had no common law right to the extraction and use of groundwater for irrigation. They had the right (or, more accurately, the liberty) to do so given by their bore licences. But the bore licences did not permit the use for irrigation of "the waters of rivers" within the meaning of s 100 of the Constitution.

56 Three reasons support that conclusion respecting the construction of s 100. First, the compromise represented by the formulation of s 100 responded to the conflicting interests of the colonies of New South Wales, Victoria and South Australia with respect to the Murray-Darling river system. By 1855, South Australia had the benefit of a river trade extending throughout that system; goods were off-loaded before their transport reached what even then was the non-navigable mouth of the Murray and were taken to Victor Harbor and Port Adelaide[65]. South Australia had as its primary interest navigation and the maintenance of the river flow for that purpose. Victoria was the first colony to exploit the advantages of irrigation[66], and was interested in the diversion of water from the upper Murray and all tributaries within its territory. New South Wales had the further interest based upon the denial by Imperial legislation in 1855[67] of any claim by Victoria to a mid-river boundary line along the Murray; New South Wales claimed the exclusive use of the waters of the Murray above the border with South Australia.

57 Secondly, as explained in *ICM*, the common law had distinct principles respecting the use of surface water and groundwater; this distinction then was reflected in the legislative regulation of surface water and groundwater by the colonies and then by the States, which proceeded at different paces and in different terms.

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65 Clark, "The River Murray Question: Part 1 – Colonial Days", (1971) 8 *Melbourne University Law Review* 11 at 24-25.

66 La Nauze, *Alfred Deakin*, (1965), vol 1 at 84-88.

67 18 & 19 Vict c 54. See the reasons of Stephen J in *Ward v The Queen* (1980) 142 CLR 308 at 315-324; [1980] HCA 11.

58 Thirdly, the ordinary understanding of the expression "the waters of rivers" in 1900 was that given by Quick and Garran in their commentary on s 100[68], namely:

> "A river is a stream flowing in a defined channel; and the waters of a river are the waters flowing over its bed and between its banks. Rainwater flowing over or percolating through the soil, but not flowing in a defined channel, is not the water of a river".

They added:

> "One interesting question that arises is whether the great lakes and billabongs into which the Darling River spreads in flood-time can be called part of the river, or whether the waters which they then contain can be called the waters of the river."

Orders

59 The grant of special leave should be expanded and there should be leave to the Commonwealth to file its Notices of Contention, as indicated earlier in these reasons. The appeal should be dismissed. The appellants should pay the costs of the third respondent.

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68 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 893. See also *Lyons v Winter* (1899) 25 VLR 464 at 465.

60 HAYNE, KIEFEL AND BELL JJ. This appeal and application for special leave were heard immediately after the matter of *ICM Agriculture Pty Ltd v The Commonwealth*[69]. These reasons must be read with our reasons in *ICM*.

61 The appellants held bore licences under Pt 5 of the *Water Act* 1912 (NSW) ("the 1912 Act") which permitted them to extract groundwater in the Lower Murray region. Those licences were cancelled and, in their place, aquifer access licences were issued under the *Water Management Act* 2000 (NSW) ("the 2000 Act"). The aquifer access licences issued to the appellants permit them to extract less water than could have been extracted under the bore licences. These steps were taken in consequence of an agreement ("the Funding Agreement") made in 2005 between the Commonwealth and the State of New South Wales.

62 By the Funding Agreement, the Commonwealth agreed to provide money to the State for a "project" known as the "Achieving Sustainable Groundwater Entitlements" project. The project required the State to reduce the groundwater extraction entitlements of the appellants and others in relation not only to the Lower Murray region, but also to other areas of the State. Entitlements to extract groundwater in the Lower Murray region were to be reduced by a total of 68% over 10 years.

63 Section 50 of the 2000 Act empowered the State Minister, by order published in the *New South Wales Government Gazette*, to make a plan (among other things) for any water source, or part of a water source, for which a management plan was not then in force. In 2006, by order published in the *New South Wales Government Gazette*, the Minister for Natural Resources of New South Wales made the "Water Sharing Plan for the Lower Murray Groundwater Source". That plan ("the Water Sharing Plan") provided for the adjustment of water entitlements in respect of the Lower Murray Groundwater Source in accordance with the Funding Agreement.

64 In 2007, the appellants instituted proceedings in the Land and Environment Court of New South Wales challenging the validity of the Water Sharing Plan, the Funding Agreement, and Commonwealth legislation under which it was alleged that the Funding Agreement had been made: the *Natural Resources Management (Financial Assistance) Act* 1992 (Cth) ("the Financial Assistance Act") and the *National Water Commission Act* 2004 (Cth) ("the NWC Act"). The appellants alleged that the steps taken to reduce their water entitlements amounted to an acquisition of property otherwise than on just terms, contrary to s 51(xxxi) of the Constitution. The appellants further alleged that,

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69 (2009) 261 ALR 653; [2009] HCA 51.

contrary to s 100 of the Constitution, the Commonwealth had "by any law or regulation of trade or commerce, abridge[d] the right of a State or of the residents therein to the reasonable use of the waters of rivers for ... irrigation". The appellants also alleged that the steps taken under the 2000 Act to make and implement the Water Sharing Plan were legally infirm because one or more of the relevant decision-makers had taken irrelevant considerations into account.

65 The Commonwealth sought and obtained summary judgment in the Land and Environment Court[70] dismissing the appellants' claims against the Commonwealth. The Land and Environment Court (Lloyd J) held[71] that it had no jurisdiction to entertain the appellants' claims against the Commonwealth. It further held[72] that, in any event, this Court's decisions in *P J Magennis Pty Ltd v The Commonwealth*[73] and *Pye v Renshaw*[74] required the conclusion that it was not arguable that either the Financial Assistance Act or the NWC Act was in any relevant respect a law with respect to the acquisition of property.

66 Those who are now appellants in this Court sought leave to appeal to the Court of Appeal of the Supreme Court of New South Wales against the orders of the Land and Environment Court dismissing their claims against the Commonwealth. The Court of Appeal (Spigelman CJ, Allsop P and Handley AJA) granted leave to appeal but dismissed the appeal[75].

67 The Court of Appeal concluded[76] that even if, as the appellants submitted, there was no valid Commonwealth law supporting the making of the Funding Agreement and even if, as the appellants further submitted, the Funding Agreement itself was invalid, nothing in the 2000 Act or the Water Sharing Plan depended on the existence of a valid Commonwealth law or a valid agreement

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70 *Arnold v Minister Administering Water Management Act 2000* (2007) 157 LGERA 379.

71 (2007) 157 LGERA 379 at 406 [86].

72 (2007) 157 LGERA 379 at 408-409 [98]-[100].

73 (1949) 80 CLR 382; [1949] HCA 66.

74 (1951) 84 CLR 58; [1951] HCA 8.

75 *Arnold v Minister Administering the Water Management Act 2000* (2008) 73 NSWLR 196.

76 (2008) 73 NSWLR 196 at 222 [117]-[118].

between the Commonwealth and the State. The Court of Appeal rejected[77] the appellants' further argument that the State Minister had taken into account irrelevant considerations in exercising powers under the 2000 Act by taking account of the existence of what the appellants submitted was an invalid Commonwealth law and an invalid ("non-existent") Funding Agreement.

68 The Court of Appeal further held[78] that neither the Funding Agreement, nor either of the impugned Commonwealth Acts (the Financial Assistance Act or the NWC Act), was a "law or regulation of trade or commerce" which, contrary to s 100 of the Constitution, abridged "the right of a State or of the residents therein to the reasonable use of the waters of rivers for ... irrigation". The Court of Appeal held[79] that this conclusion was required by this Court's decision in *Morgan v The Commonwealth*[80], in which it was held that the restraint on Commonwealth legislative power provided by s 100 applied "only to laws which can be made under the power conferred upon the Commonwealth Parliament by s 51(i)". The Court of Appeal recorded[81] that the appellants did not submit that the laws which they sought to impugn were capable of answering that description.

69 Argument in the Court of Appeal proceeded on the assumptions that the reduction of the appellants' water entitlements constituted an acquisition of property other than on just terms[82], that the appellants had rights to the reasonable use of the waters of rivers for irrigation and that those rights had been abridged[83]. These assumptions were challenged in this Court, and accordingly, the arguments advanced in this Court departed in significant respects from those advanced in the courts below. It is necessary, however, to deal with only three aspects of the appellants' arguments in this Court: (a) the proposition that the cancellation of bore licences and issue of aquifer access licences permitting the extraction of less water was an acquisition of property within the meaning of

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77 (2008) 73 NSWLR 196 at 222 [119].

78 (2008) 73 NSWLR 196 at 217 [92].

79 (2008) 73 NSWLR 196 at 217 [89].

80 (1947) 74 CLR 421 at 455; [1947] HCA 6.

81 (2008) 73 NSWLR 196 at 217 [90].

82 (2008) 73 NSWLR 196 at 218 [94].

83 (2008) 73 NSWLR 196 at 217 [88].

s 51(xxxi); (b) the proposition that taking groundwater under the bore licences or the aquifer access licences was "use of the waters of rivers" within the meaning of s 100; and (c) the proposition that the steps taken to effect the cancellation of bore licences and issue of aquifer access licences were legally infirm because the State Minister had taken irrelevant considerations into account in making the Water Sharing Plan.

70 The appellants require a grant of special leave to agitate questions about the application of s 100. They should have that leave. The Commonwealth should be given leave to rely on grounds in its notices of contention which sought to answer the matters put in issue by the appellants' reliance upon s 51(xxxi) and s 100.

71 These reasons will demonstrate that each of the three propositions identified should be rejected. It follows that the appeal should be dismissed.

Acquisition of property?

72 For the reasons given in *ICM*, the cancellation of bore licences and issue of aquifer access licences permitting the extraction of less water did not constitute an acquisition of property within the meaning of s 51(xxxi). It follows that the further questions that may otherwise have arisen about the intersection of ss 51(xxxi) and 96 of the Constitution and about whether *Magennis* or *Pye v Renshaw* should now be overruled need not be decided.

Waters of rivers

73 The Water Sharing Plan described the Lower Murray Groundwater Source as including "all water contained in the Calivil, Renmark, and the Lower Shepparton unconsolidated alluvial aquifers deeper than 12 metres below the ground surface" within an area delineated in a schedule to the plan. It noted that the Lower Murray Groundwater Source is recharged primarily from an overlying groundwater source – the Shepparton Groundwater Source – which in turn is recharged "in part, from irrigation losses".

74 The plan identified a number of objectives. At the risk of some oversimplification, the central purpose of the plan can be understood as being to reduce, and then manage, the extraction of groundwater from the Lower Murray Groundwater Source to a level variously described as "an ecologically sustainable level" or the "estimated sustainable yield".

75 Water extracted from the Lower Murray Groundwater Source is not encompassed by the expression in s 100: "the waters of rivers". The water at issue in this appeal is not surface water. It is groundwater that percolates through

the soil. It does not flow in a defined channel. Together, these are reasons enough to conclude that the water in question does not form part of "the waters of rivers". But the conclusion is reinforced by consideration of the purpose served by s 100. An important purpose (perhaps the purpose) behind the inclusion of s 100 in the Constitution was to mark a particular limit upon the power of the federal Parliament to regulate navigation. As Quick and Garran pointed out[84], the federal Parliament's power to legislate with respect to trade and commerce (explicitly extended by s 98 to "navigation and shipping") "would have prevailed absolutely against any claims by the States to the use of the water" of rivers as "highways of interstate commerce" or for the development of land. As those authors went on to say[85], "the object of [s 100] is to limit the paramountcy of the navigation power so far as it may interfere with 'the reasonable use' of the waters for State purposes" of conservation or irrigation. The federal Parliament's legislative powers with respect to navigation have no immediate intersection with the extraction, for use in irrigation, of groundwater that percolates through the soil and does not flow in a defined channel. They do have an obvious intersection with the use of the waters of rivers for that purpose.

76 Because the waters at issue in this matter are not "the waters of rivers" the further questions argued about the operation of s 100 need not be examined. In particular, it is not necessary to decide whether the decision in *Morgan* should be reopened.

Irrelevant considerations?

77 The appellants' argument that the State Minister had taken irrelevant considerations into account in deciding whether to make the Water Sharing Plan was understood by the Court of Appeal as being an argument that the Minister had taken account of the existence of what was alleged to be one or more invalid Commonwealth laws and what was alleged to be an invalid Funding Agreement. The appellants' amended points of claim in the Land and Environment Court had described the allegedly irrelevant considerations taken into account by the Minister in rather different terms. In their pleading the appellants identified the matter that had been taken into account as being "the dictation or requirement of the Commonwealth Government as to the basis for reductions in water allocation rather than a broad approach of general application balanced by considerations of equity amongst water users in the State and having regard to the environment of

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84 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 880, §416.

85 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 880, §416.

New South Wales". The appellants did not seek to make any case in this Court or in the Court of Appeal that the State Minister acted under dictation.

78 Assuming, without deciding, that it was open to the appellants to frame their argument along the lines described by the Court of Appeal, repeated in this Court, the argument should not be accepted. Because there was not, as the appellants submitted, an acquisition of property, neither the Funding Agreement nor either of the two federal statutes whose validity the appellants impugned was invalid for any want of provision of just terms. Having regard to the subject matter, scope and purposes of the 2000 Act as a whole, and s 50 in particular, the existence of the Funding Agreement was not a consideration irrelevant to the exercise of the power given to the State Minister by s 50 of the 2000 Act to make the Water Sharing Plan. On its face the Water Sharing Plan was intended, in the words of s 3 of the 2000 Act, "to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations". Under the Funding Agreement the State was to receive money to effect the Water Sharing Plan. The Funding Agreement was not an irrelevant consideration in exercising the power given by s 50.

Conclusion and orders

79 For these reasons the appeal should be dismissed. Neither the Minister nor the State sought costs. The appellants should pay the Commonwealth's costs.

80 HEYDON J. The background is set out in the reasons for judgment of Gummow and Crennan JJ.

81 *ICM Agriculture Pty Ltd v The Commonwealth*[86] was argued immediately before this appeal. In that case, reasons were given which differ in some significant respects from what was advocated by the appellants in this appeal. However, those reasons lead to the conclusion that the replacement of the appellants' bore licences by aquifer access licences was invalid. The bore licences remain on foot.

82 Accordingly the orders which the appellants seek – allowing the appeal to this Court and the Court of Appeal, both with costs, and dismissing the third respondent's application to the Land and Environment Court of New South Wales, with costs – should be made.

83 The appellants' application for special leave to add an additional ground of appeal in relation to s 100 of the Constitution should be dismissed. Since success on that ground of appeal, were special leave to be granted, would not result in substantive orders more favourable than those described in the previous paragraph, there is no point in considering the merits of the appellants' arguments in a case which is far from satisfactory as a mechanism for doing so.

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86 (2009) 261 ALR 653 at 694-724 [158]-[257]; [2009] HCA 51.