



HIGH COURT OF AUSTRALIA

Manager, Public Information

9 December 2009

ICM AGRICULTURE PTY LTD ABN 32 006 077 765 & ORS

v

THE COMMONWEALTH OF AUSTRALIA & ORS [2009] HCA 51

The replacement of a groundwater bore licence with an aquifer access licence which reduces a licensee's groundwater entitlement does not constitute an acquisition of property, the High Court held today.

In June 2004 the governments of the Commonwealth, New South Wales, Queensland, South Australia, Victoria, the Australian Capital Territory and the Northern Territory made an *Intergovernmental Agreement on a National Water Initiative*. In accordance with the agreement the Commonwealth established the National Water Commission, one of whose functions was to assist with the implementation of the National Water Initiative. The legislation establishing the Commission also provided that financial assistance could be awarded to particular projects relating to Australia's water resources. Such financial assistance was awarded to a project proposed by NSW with respect to the Lower Lachlan Groundwater System (LLGS). NSW and the Commonwealth entered into a funding agreement for the project. Under the agreement NSW was required to convert all water licences in the LLGS granted under the *Water Act 1912* (NSW) to water licences under the *Water Management Act 2000* (NSW). It was required to achieve a reduction of 56 per cent in water entitlements in respect of the LLGS by 1 July 2016.

ICM Agriculture Pty Ltd and the other plaintiffs conduct farming enterprises in the LLGS. Until 1 February 2008 the plaintiffs had a number of bore licences issued under the *Water Act* which enabled them to use bores to extract groundwater with which they irrigated their properties. On 1 February 2008 the plaintiffs' bore licences were replaced by aquifer access licences issued under the *Water Management Act* which permitted the plaintiffs to take less water than the old bore licences had permitted.

The plaintiffs commenced an action in the High Court, and stated a Special Case concerning the constitutional validity of the funding agreement, and of the various processes by which bore licences were converted to aquifer access licences and water entitlements were reduced, in accordance with the funding agreement. The plaintiffs argued that the replacement of their bore licences issued under the *Water Act* with aquifer access licences issued under the *Water Management Act* resulted in an acquisition of property for which just compensation was not paid. This, they argued, contravened s 51(xxxi) of the Constitution, which requires "just terms" to be paid on the acquisition of the property, and was therefore invalid. A component of this argument was that the legislative power of the Commonwealth to grant financial assistance to the States, contained in s 96 of the Constitution, by virtue of which they entered into the funding agreement, was subject to the "just terms" restriction contained in s 51(xxxi).

Six of the seven justices of the High Court rejected the plaintiffs' argument that the replacement of their bore licences was invalid. Chief Justice French and Justices Gummow and Crennan and Justice Heydon held that the legislative power of the Commonwealth conferred by s 96 and s 51(xxxvi) does not extend to the grant of financial assistance to a State on terms and conditions

requiring the State to acquire property on other than just terms. The Court, with Justice Heydon dissenting, decided that however the licences may be characterised, there had been no acquisition of property. Acquisition implies that the “acquiring” person obtains some identifiable benefit or advantage relating to the ownership or use of the property. However, water is a natural resource and the State always had power to limit the volume of water to be taken from the resource. In reducing the volume of water to which the plaintiffs had access, the State gained no greater advantage than it already had to extract or permit others to extract water from the system. The State’s capacity to control the water resource was not enlarged by the reduction of the plaintiffs’ water entitlements via the processes provided for in the funding agreement between NSW and the Commonwealth.

Having found that replacing the plaintiffs’ bore licences with aquifer access licences did not constitute an acquisition of property, the majority determined that it was unnecessary to answer any of the other questions in the Special Case, other than to state that the plaintiffs were no longer the holders of the bore licences issued to them under the Water Act and that they should pay the costs of the Special Case.

- *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.*