Arnold & Ors v Minister Administering the Water Management Act 2000 - still waters run deep

Corporate Associate Will Fennell considers the High Court's recent decision regarding the application of section 100 of the Commonwealth Constitution to the reduction of NSW bore water licence rights pursuant to the National Water Initiative

The appellants were individuals and corporations conducting farming operations in the Lower Murray region of New South Wales. In November 2006, pursuant to the *Water Management Act 2000* (NSW), certain bore licences held by them were replaced with 'aquifer access' licences. The appellants entitlements to groundwater were significantly reduced under the aquifer access licences.

The appellants challenged the replacement of their bore licences, broadly under two heads. First, on the basis that the acquisition of the bore licences was not on 'just terms', contrary to section 51(xxxi) of the Commonwealth Constitution. Second, the appellants argued that the Commonwealth/State funding agreement which brought about the licence replacement contravened section 100 of the Constitution.

The appeal on the basis of section 51(xxxi) of the Constitution failed, for the same reasons given in the High Court's decision in the immediately preceding matter, *ICM Agriculture Pty Ltd v The Commonwealth*. Accordingly, this article deals with the Court's reasoning in respect of the section 100 arguments, which ultimately were unanimously dismissed by the Court.

Section 100 and the Funding Agreement

Section 100 relevantly provides that:

> *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 Appellants' bore licences were held by them pursuant to section 112 of *the Water Act* 1912 (NSW). Section 50 the *Water Management Act 2000* (NSW) allowed the Minister to make plans in respect of water management areas, or areas of the State not within a water management area.

The CEO of the National Water Initiative (established by agreement dated 25 June 2004 between NSW, Vic, QLD, SA, ACT, NT & Commonwealth Governments) had the power to administer financial assistance to particular projects relating to Australia's water resources. Accordingly, by agreement dated 4 November 2005, between the Commonwealth and New South Wales Governments entitled "*Water Smart Australia Project: Achieving Sustainable Groundwater Entitlements*" (**Funding Agreement**) New South Wales was provided funding to a maximum of $55m to reduce water entitlements of water holders in, inter alia, the Lower Murray Groundwater system.

The appellants argued that, amongst other things, the Funding Agreement was a contravention of section 100 of the Constitution.

Relying on the authority set down in *Cole v Whitfield* that the High Court can refer to drafting history to ascertain the contemporary meaning of legislative drafting, Chief Justice French considered the drafting history of section 100. Amongst other reasons relating to the literal meaning of "*waters of rivers*", his Honour held that:

> *The drafting history in my opinion makes clear that the qualification on Commonwealth legislative power imposed by section 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 s52(viii), as adopted at the Melbourne session of the Convention in 1898, was rivers which could be used for navigation or shipping.*
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> *…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.*

Noting that a number of issues concerning the construction of section 100 were raised in the case including:

- the validity of the previous decision in *Morgan v The Commonwealth* which held that the prohibition in section 100 applied only to laws capable of being made under the trade and commerce power and section 98 (as endorsed by three Justices in the *Tasmanian Dams* case);
- whether "residents therein" in section 100 applies to individuals (and accordingly whether it can be said not to apply to corporate appellants); and
- whether *"as between riparian States and their residents section 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 by the Commonwealth"*

Justices Gummow and Crennan held that it was "*unnecessary to consider these matters*" because the appellants failed to show that they had the right "*to the reasonable use of the waters of rivers for conservation or irrigation*". Their Honours gave three reasons why the bore licences were not "waters of rivers" within section 100:

- First, section 100 was a compromise between the colonies of NSW, Victoria and South Australia in respect of the Murray-Darling. By 1855, South Australia's use was primarily as a trade route, Victoria was using the river for irrigation, and NSW claimed the exclusive use of the Murray above the border with SA.
- Second, distinct common law principles were in place at the time in respect of the use of groundwater and surface water; and
- Thirdly, like Chief Justice French, they referred to the definition of "waters of rivers" provided in Quick and Garran's *The Annotated Constitution of the Australian Commonwealth (1901):*

> *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*

Justices Hayne, Kiefel and Bell also agreed that the Lower Murray Groundwater Source is not encompassed within the phrase "*waters of rivers*" in section 100. Furthermore, referring again to Quick and Garran, their Honours also held that the purpose behind section 100 was

> *to mark a particular limit upon the power of the federal Parliament to regulate navigation.*
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> *…As those authors went on to say, "the object of [section 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 and 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.*

Conclusion

The decision in *Arnold* makes it clear that "*waters of rivers*" does not extend to underground river systems associated with bore water extraction. Accordingly, it seems any challenge to a State Government's reduction of bore water entitlements under the National Water Initiative is likely to fail on the basis of section 51(xxxi) (following the decision in *ICM Agriculture*) and under section 100 following the decision in *Arnold*.