

Compulsory Acquisition and Informal Agreements: Spencer v Commonwealth

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Abstract

*Spencer v Commonwealth*¹ raises important questions about the validity of intergovernmental schemes involving the acquisition of property. In *Spencer*, the Court repeated the statement in *ICM Agriculture Pty Ltd v Commonwealth*² that the existence of informal agreements between governments may allow a Commonwealth law to be characterised as a law with respect to the acquisition of property. This case note examines the reasoning in *Spencer* and *ICM*, and considers the potential difficulties associated with the Court's approach. The Court's approach potentially requires an expansive constitutional characterisation methodology. It would also limit the Commonwealth's power under s 96 of the *Constitution*. However, the primary difficulty with the Court's approach is the question of the validity of state legislative and executive action taken pursuant to a scheme involving a Commonwealth statute that is invalid because it relates to the acquisition of property on other than just terms. This case note concludes that the practical and conceptual difficulties presented by this approach make it unlikely that *Spencer* and *ICM* will lead to intergovernmental schemes being invalidated.

I The Facts

The case centred on an action brought by Peter Spencer, the owner of the property 'Saarahnee' at Shannons Flat in New South Wales ('NSW'), not far from the southern tip of the border with the Australian Capital Territory.

The *Native Vegetation Conservation Act 1997* (NSW) and the *Native Vegetation Act 2003* (NSW) (collectively the '*NSW Vegetation Acts*'), prevented Mr Spencer from clearing vegetation on his property without consent. The *NSW Vegetation Acts* were made pursuant to a collection of intergovernmental agreements (the '*Agreements*') between the Commonwealth and NSW. Two Commonwealth laws, the *Natural Resources Management (Financial Assistance) Act 1992* (Cth) and the *Natural Heritage Trust of Australia Act 1997* (Cth) (collectively the '*Commonwealth Resources Acts*'), authorised the

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¹ (2010) 241 CLR 118 ('*Spencer*').

² (2009) 240 CLR 140 ('*ICM*').

Commonwealth's entry into the Agreements, which were to contain details of the conditions attached to any payments made pursuant to them. The *Commonwealth Resources Acts* did not mention compensation for lost property rights. The *Agreements* stated that compensation was a state responsibility, but the Commonwealth would consider contributing money to the states for compensation purposes.³

Mr Spencer alleged that the land clearing restrictions had deprived him of carbon sequestration and abatement rights attached to the land.⁴ He alleged that the Commonwealth had benefited from the deprivation because the prohibition enabled it to meet its emissions reduction obligations. Mr Spencer argued that the *Commonwealth Resources Acts* could be characterised as laws for the acquisition of property on other than just terms and were therefore invalid due to the operation of s 51(xxxi) of the *Constitution*.

On 28 August 2008, Emmett J dismissed the proceedings pursuant to s 31A of the *Federal Court of Australia Act 1976* (Cth) (the '*Federal Court Act*'), stating the action had no reasonable prospect of success.⁵ On 24 March 2009, the Full Federal Court dismissed Mr Spencer's appeal against Emmett J's decision.⁶ Mr Spencer then appealed to the High Court.

II The Decision

The Court unanimously held that the proceedings should not have been dismissed pursuant to s 31A(2) of the *Federal Court Act*. That conclusion was based on the fact that the comments of French CJ, Gummow and Crennan JJ in *ICM*—relating to the interaction of s 51(xxxi) and s 96, and the possibility of characterising a law by reference to informal agreements—meant that it could not be said that Mr Spencer had 'no reasonable prospect of success'.⁷

French CJ and Gummow J said that Mr Spencer's case involved 'important questions of public and constitutional law and potentially complex questions of fact',⁸ being the alleged existence of a scheme or device designed to allow the Commonwealth to avoid paying just terms compensation. Their Honours referred to French CJ, Gummow and Crennan JJ's statement in *ICM* that conditions attached to s 96 grants may be contained in 'informal arrangements between governments setting out the conditions upon which such grants were made',⁹ and noted the way in which an informal arrangement of that type was employed in *Pye v Renshaw*¹⁰ to subvert the effect of the decision in *PJ Magennis Pty Ltd v Commonwealth*.¹¹ French CJ and Gummow J repeated the statement in *ICM* that 'the legislative power of the Commonwealth conferred by ss 96 and 51(xxxvi) [sic]

³ *Spencer* (2010) 241 CLR 118, 123–5.

⁴ *Spencer v Commonwealth* [2008] FCA 1256 (26 August 2008), [6]. See the *Conveyancing Act 1919* (NSW) ss 87A, 87B for definitions of carbon sequestration rights.

⁵ *Spencer v Commonwealth* [2008] FCA 1256 (26 August 2008).

⁶ *Spencer v Commonwealth* (2009) 174 FCR 398.

⁷ *Spencer* (2010) 241 CLR 118, 134 (French CJ and Gummow J), 136 (Hayne, Crennan, Kiefel and Bell JJ), 142 (Heydon J).

⁸ *Spencer* (2010) 241 CLR 118, 133.

⁹ *Ibid.*

¹⁰ (1951) 84 CLR 58 (*Pye*).

¹¹ (1949) 80 CLR 382 (*Magennis*).

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.’¹² Their Honours noted that the existence of the *Commonwealth Resources Acts* and intergovernmental agreements made it:

... likely that there are negotiations and communications ... which might flesh out or cast light upon the practical operation of the Commonwealth and State funding arrangements. Documentary and electronic records of such negotiations and communications may be amenable to discovery and ancillary processes in the Federal Court ...¹³

Their Honours declined to consider whether a law providing for a s 96 grant, or an agreement under which such a grant might be made, could be characterised as a law with respect to the acquisition of property by reference to informal arrangements. Their Honours stated that the possibility of such a finding was ‘at least open on the amended statement of claim before the primary judge’.¹⁴

Hayne, Crennan, Kiefel and Bell JJ held that the decision in *ICM* meant that ‘it cannot now be held that the applicant “has no reasonable prospect of successfully prosecuting the proceeding”’.¹⁵ Their Honours noted that *ICM* had expressly left open the question of ‘whether, or how, s 51(xxxi), 61 and 96 intersect where there is an informal arrangement or understanding ... falling short of an intergovernmental agreement’¹⁶ and that therefore the Full Federal Court was wrong to hold that the existence of any agreement would be constitutionally irrelevant.¹⁷

Heydon J noted that *ICM* had altered the position established by *Pye* and that ‘the applicant has pleaded facts which might attract a conclusion favourable to him if that question is answered against validity.’¹⁸

III *Magennis and Pye*

The Court’s comments in *Spencer* confirm that the Court is willing to examine whether a Commonwealth law can be characterised as one with respect to the acquisition of property on other than just terms due to the existence of an informal agreement. That examination would presumably require an assessment of the ongoing authority of *Pye*. Given that *Pye* has been considered good law for more than 50 years, and given the widespread use of intergovernmental agreements in Australia, the Court’s indication that it is willing to consider departing from the case is significant. In order to understand that significance, it is necessary to examine the decisions in *Magennis* and *Pye*.

¹² *Spencer* (2010) 241 CLR 118, 133 citing *ICM* (2009) 240 CLR 140, 170.

¹³ *Spencer* (2010) 241 CLR 118, 134.

¹⁴ *Ibid.*

¹⁵ *Ibid* 136 (citations omitted).

¹⁶ *Ibid.*

¹⁷ *Ibid* 138.

¹⁸ *Ibid* 142.

A Magennis

In *Magennis*, the plaintiff challenged Commonwealth laws which permitted the government to enter into agreements with the states. The form of the authorised agreement was scheduled to the law. The Commonwealth entered into an agreement with NSW, under which the Commonwealth would provide financial assistance to NSW to fund partially a scheme involving the State compulsorily acquiring land for soldier settlement. The land was to be purchased at a price fixed by reference to its value in February 1942.

The majority of the Court rejected the argument that, because the Commonwealth law merely authorised an agreement, it was not a law for the acquisition of property on other than just terms.¹⁹ Latham CJ said the law authorised an agreement and ‘the whole subject matter of the agreement is the acquisition of property upon certain terms and conditions for certain purposes.’²⁰ Williams J said that the acquisition of property was the ‘essence of the scheme’.²¹ Webb J held that s 51(xxxi) was ‘broad enough to include an acquisition by the State exercising its powers of acquisition by agreement with the Commonwealth’ and ‘invalidity is not avoided because [the prohibited purpose] is implied and not expressed.’²²

The majority’s conclusion that the Commonwealth law was invalid meant that the subsequently executed agreement was also invalid. The Court therefore had to consider the effect of that invalidity on the state law authorising the acquisition. The majority held that, because the state law ratified the invalid agreement and only authorised action pursuant to it, the state law was inoperative but not invalid.²³

B Pye

In *Magennis*, Latham CJ said that although NSW had the power to resume the land, the method it employed failed because of its reliance on the invalid agreement.²⁴ Less than six months after *Magennis*, the NSW Parliament modified the legislative scheme to remove any reference to the agreement and the Commonwealth’s participation in the scheme.²⁵ The law again provided for compensation based on the land’s value at February 1942.

The law was upheld by a unanimous Court. The Court noted that states were not required to provide just compensation and said:

... the effect of [the modifications to the scheme] is to make it perfectly clear that all relevant legislation of the Parliament of New South Wales is intended to take effect unconditioned by any Commonwealth legislation and irrespective of the existence of any agreement between the Commonwealth

¹⁹ Dixon and McTiernan JJ (in dissent) accepted that submission; *Magennis* (1949) 80 CLR 382, 410–1 (Dixon J), 416 (McTiernan J).

²⁰ *Ibid* 402.

²¹ *Ibid* 424.

²² *Ibid* 430–1.

²³ *Ibid* 404–7 (Latham CJ), 424 (Williams J), 430 (Webb J).

²⁴ *Ibid* 406.

²⁵ *Pye* (1951) 84 CLR 58, 79.

and the State of New South Wales. ... There is no possible ground of attack on the validity of this legislation, there is no ground whatever for saying that it is inoperative ...²⁶

The Court focused on the fact that the NSW Parliament had expressly authorised the NSW executive to resume the land.²⁷ The plaintiff's argument that the Commonwealth could not, pursuant to s 96 of the *Constitution*, provide funds to the State on the condition that it acquire land on other than just terms was rejected, with the Court relying on Latham CJ's statement in another case that '[t]he Commonwealth may properly induce a State to exercise its powers ... by offering a money grant'.²⁸

IV The 'Post-Pye' Era

The distinction between *Magennis* and *Pye* appears to represent a triumph of form over substance.²⁹ The substance of the impugned scheme remained intact: the Commonwealth would provide money to the State on the condition that the State used the money for soldier settlement. That reality is disclosed in a letter sent by Prime Minister Robert Menzies to Western Australian Premier Ross McLarty in 1951, which stated:

The Commonwealth wishes to avoid, for constitutional reasons disclosed by the *Magennis* Case, any arrangement of a formal character ... In all the circumstances we feel strongly that the best legal foundation for future action can be provided by means of a grant of financial assistance pursuant to s. 96 of the *Constitution* supplemented by an informal arrangement (in the form say of an exchange of letters) between governments setting out the conditions to be observed.³⁰

The cases subsequent to *Magennis* establish that this case did not create not a broad principle relating to schemes that were 'colourable' in the sense used by the Privy Council in *WR Moran Pty Ltd v Deputy Commissioner of Taxation (NSW)*.³¹ Rather, subsequent cases established that the validity of a scheme depended on whether or not the legislation made specific reference to an invalid law or agreement.³² Singh argues that the later cases effectively overruled *Magennis*,³³ making the case, to borrow a phrase from Kirby J, a 'constitutional guard-dog that would bark but once'.³⁴

²⁶ Ibid 80.

²⁷ Ibid 80–2.

²⁸ Ibid 83, citing *South Australia v Commonwealth* (1942) 65 CLR 373, 417.

²⁹ It could be argued that the State legislation in *Magennis* was operative because the State should not have been taken to have limited its powers by reference to the agreement; that is, the validity or invalidity of the agreement was irrelevant to the State's power to resume land. See McTiernan J in *Magennis* (1949) 80 CLR 382, 416; Devendra Singh 'Legislative Schemes in Australia' (1964) 4 *Melbourne University Law Review* 355, 365. That argument is discussed later in this case note.

³⁰ Letter from Robert Menzies to Ross McLarty, 19 December 1951, cited in *Gilbert v Western Australia* (1961) 107 CLR 494, 505.

³¹ (1940) 63 CLR 338, 350 (Privy Council) ('*Moran*'). The notion of 'colourable schemes' is discussed in more detail later in this case note.

³² Singh, above n 29, 365.

³³ Ibid 366.

³⁴ *Baker v The Queen* (2004) 223 CLR 513, 535.

ICM halted the long decline of *Magennis*. French CJ, Gummow and Crennan JJ refused to overrule *Magennis* 'because, in particular, the reasoning upon which it was based is sound, all the more so in the light of developments in interpretation of the *Constitution* since *Magennis* was decided'.³⁵ Their Honours summarised the 'developments in interpretation' in the following way:

1. Sections 81 and 83 require a power to spend appropriated moneys drawn from the *Constitution* or Commonwealth laws;
2. Section 51(xxxi) 'is not confined to the acquisition of property by the Commonwealth or its instrumentalities',³⁶
3. Section 51(xxxi) has 'assumed the status of a constitutional guarantee of just terms ... and is to be given the liberal construction appropriate to such a constitutional provision'.³⁷
4. Constitutional interpretation requires looking past matters of legal form to the practical effect of laws; and
5. *Attorney-General (Vic); ex rel Black v Commonwealth*³⁸ established that ss 96 and 116 should be read together. That approach is equally applicable to ss 96 and 51(xxxi).³⁹

Based on those considerations, the following conclusion was reached:

The result is that the legislative power of the Commonwealth conferred by ss 96 and 51(xxxvi) [sic] 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.⁴⁰

Hayne, Kiefel and Bell JJ referred with approval to similar principles, but determined that it was unnecessary to consider whether *Magennis* should be reopened or how s 96 interacted with s 51(xxxi) because the plaintiff's property had not been acquired.⁴¹

Heydon J, in dissent because he held that the plaintiff's property had been acquired, adopted Dixon J's statements that s 51(xxxi) extends to 'a circuitous device to acquire indirectly the substance of a proprietary interest'⁴² and that the protection it affords 'cannot be broken down or avoided by indirect means'.⁴³ His Honour held that the relevant legislation was invalid because it 'provided for acquisition of property by New South Wales on other than just terms'.⁴⁴

³⁵ *ICM* (2009) 240 CLR 140, 169.

³⁶ *Ibid.*

³⁷ *Ibid.*, citing *Clunies-Ross v Commonwealth* (1984) 155 CLR 193, 201–2.

³⁸ (1981) 146 CLR 559 ('the *DOGS Case*').

³⁹ *ICM* (2009) 240 CLR 140, 169–70.

⁴⁰ *Ibid.* 170.

⁴¹ *Ibid.* 197–9.

⁴² *Ibid.* 216 citing *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349.

⁴³ *ICM* (2009) 240 CLR 140, 216, citing *British Medical Association v Commonwealth* (1949) 79 CLR 201, 270.

⁴⁴ *ICM* (2009) 240 CLR 140, 238.

Consequently, the funding agreement made pursuant to the legislation was also invalid. Heydon J went further to say that Covering Clause 5 and s 106 of the *Constitution* prohibit NSW from participating in conduct that breaches s 51(xxxi). He characterised the scheme as one undertaken ‘in concert’ to achieve a goal that depended on a contravention by the Commonwealth of s 51(xxxi).⁴⁵ Heydon J denied that his conclusion ‘imposed s 51(xxxi) on the States’, saying the states were still free to acquire property on other than just terms, but were ‘not at liberty to embark on schemes with the Commonwealth involving steps which include a failure by the Commonwealth to comply with s 51(xxxi)’.⁴⁶

V Discussion

As French CJ, Gummow and Crennan JJ indicated in *ICM*, the Court’s willingness to review governmental arrangements for potential infringements of constitutional guarantees is consistent with the increasing focus in constitutional interpretation on affording wide protection to constitutional guarantees, which includes an emphasis on substance over form.⁴⁷ The formalistic approach seen in *Pye* is inconsistent with s 51(xxxi)’s modern status as an important constitutional protection.⁴⁸ The new approach is also consistent with the maxim, often raised in constitutional cases, that what cannot be done directly cannot be done indirectly.⁴⁹ However, despite the obvious appeal of a rejection of *Pye*’s formalistic approach, a more substantive approach raises a number of difficult questions in relation to constitutional characterisation, s 96, and the validity of state laws.

A Characterisation

French CJ and Gummow J’s comments in *ICM* relate to the characterisation of the relevant Commonwealth law. Characterisation involves determining:

1. Whether the law answers the description of the constitutional text, construed generally. The purpose or object of the law is not relevant to this inquiry;
2. The character of the law by reference to the rights, powers, liabilities and privileges which it creates; and
3. Whether the law’s practical and legal operation creates a sufficient connection between the law and the head of power.⁵⁰

Spencer indicates that informal arrangements relevant to the law may also be used in the characterisation process. French CJ and Gummow J did not elaborate

⁴⁵ Ibid 239.

⁴⁶ Ibid.

⁴⁷ Ibid 169–70.

⁴⁸ See, eg, *Trade Practices Commission v Tooth and Co Ltd* (1979) 142 CLR 397; *Clunies-Ross v Commonwealth* (1984) 155 CLR 193, 201–202; *New South Wales v The Commonwealth* (2006) 229 CLR 1, 211.

⁴⁹ Or, as Dixon J would have it in *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 350: ‘*quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.*’

⁵⁰ *Grain Pool of Western Australia v Commonwealth* (2002) 202 CLR 479, 492.

on how an informal agreement could be used to characterise the relevant law, other than commenting that the agreement may be evidenced by documents and electronic records.⁵¹ In the case of a convoluted series of Commonwealth laws, intergovernmental agreements and state laws like the relevant arrangement in *Spencer*, it is difficult to see how the *Commonwealth Resources Acts* could be characterised as laws relating to the acquisition of property without a significant departure from standard principles of characterisation. The approaches set out in any standard text on constitutional characterisation provide little guidance on how such a process would operate.⁵² That is all the more true given that the informal agreements that could possibly lead to such a characterisation exist in addition to the detailed provisions of two *Commonwealth Resources Acts*, two *NSW Vegetation Acts* and four Agreements.

Such use of informal agreements would also depart from the orthodox proposition that assessing an Act's purpose (a necessary process if the law does not directly 'answer the description of a head of power')⁵³ requires an inquiry into the substance of the legislation and not the legislature's motive.⁵⁴ Put another way, laws are not characterised by reference to the motives behind them or the consequences that flow from them.⁵⁵ While it is true that the existence of an agreement enabled the Court in *Magennis* to characterise a law as one with the purpose of acquiring property on other than just terms, in that case the agreement was scheduled to the Act and specifically stated that the State would acquire property pursuant to it.⁵⁶ An informal agreement would presumably only constitute evidence of the motive behind the relevant Commonwealth Act. Further, it would arguably only represent the motive of the executive government (or of some members of the executive) for proposing the legislation. Attributing the motive of the executive government to the legislature in order to characterise an otherwise valid law as one with respect to property acquisition is a process beset by practical and conceptual problems.

French CJ and Gummow J did not present a concluded view as to whether an informal agreement could be used to characterise a law as one with respect to s 51(xxxi). They merely indicated that possibility. Given the difficulties associated with attempting to characterise a Commonwealth law in that manner, it is perhaps unlikely that Mr Spencer will succeed on this front. The *Commonwealth Resources Acts* in *Spencer* authorised the government to enter into agreements with the states to make grants on terms and conditions, and to establish a fund from which those grants will be paid. Even using an expansive characterisation methodology, and construing s 51(xxxi) 'with all the generality which the words used admit',⁵⁷ it may be difficult to characterise the *Commonwealth Resources Acts* as laws with respect to the acquisition of property.

⁵¹ *Spencer* (2010) 241 CLR 118, 134.

⁵² See, eg, Leslie Zines 'Characterisation of Commonwealth Laws', in HP Lee and G Winterton (eds) *Australian Constitutional Perspectives* (Law Book, 1992) 33.

⁵³ *Ibid.*

⁵⁴ *R v Barger* (1908) 6 CLR 41, 75.

⁵⁵ *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492, 515–516; *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 20.

⁵⁶ *Magennis* (1949) 80 CLR 382, 402.

⁵⁷ *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225–6.

Mr Spencer may argue that the ‘substance and purpose’ of the *Commonwealth Resources Acts* render them a ‘colourable’ attempt to avoid a constitutional prohibition.⁵⁸ That broader approach to characterisation⁵⁹ would revive the long-dormant possibility raised in *Moran* that, in certain circumstances, a s 96 law may be characterised as a colourable attempt to avoid a constitutional prohibition.

The concept of ‘colourable’ uses of s 96 has not received detailed attention, and is based on Evatt J’s lone dissent in the case that led to the *Moran* Privy Council appeal. Mr Spencer would have to prove that the s 96 power ‘has been used inconsistently with an overriding constitutional mandate’.⁶⁰ *Moran* involved Commonwealth taxation legislation tied to a grant that was argued to discriminate in favour of Tasmania. The case did not involve questions relating to state legislation, intergovernmental agreements or informal arrangements, so its authoritative value for *Spencer* is questionable. However, the notion of ‘colourable’ uses of s 96 could prove to be a more logical and consistent ground for the Court to consider invalidating the *Commonwealth Resources Acts* and the subsequent Agreements, because it would avoid the problems, discussed above, associated with approaching the case using orthodox characterisation principles.

B Section 96

Spencer raises the possibility that informal agreements may be used to characterise a law providing for a s 96 grant as one that breaches s 51(xxxi). That result would impose a restriction on the Commonwealth’s broad power to grant financial assistance to the States on ‘such terms and conditions as the Parliament thinks fit’.⁶¹

The Court has interpreted s 96 to give the Commonwealth a wide power to attach conditions to financial grants. As Fullagar J said, s 96 ‘expressly provided that conditions may be imposed, and I can see no real reason for limiting in any way the nature of the conditions which may be imposed’.⁶² The wide power granted by s 96 has become, through the Court’s expansive interpretation, ‘the mechanism of Commonwealth supremacy’.⁶³ However, the expansive power to impose terms and conditions on s 96 grants is subject to some limitation. Even in Fullagar J’s comment above, taken from the *Second Uniform Tax Case*, it was noted that ‘if a condition calls for State action, that action must be action of which the State is constitutionally capable’.⁶⁴ That view is consistent with Heydon J’s argument in *ICM*: on his view, the states are not ‘constitutionally capable’ of participating in a scheme that involves a breach of s 51(xxxi).⁶⁵ However, Fullagar J’s statement most likely envisaged situations where the state takes action in breach of its own constitution, and not where the Commonwealth has breached the *Constitution*.

⁵⁸ *Moran* (1940) CLR 338, 350.

⁵⁹ Singh, above n 29, 358 confirms that the question of whether a law is ‘colourable’ is a question relating to characterisation.

⁶⁰ *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735, 778 (Evatt J).

⁶¹ *Constitution*, s 96.

⁶² *Victoria v Commonwealth* (1957) 99 CLR 575, 656 (‘*Second Uniform Tax Case*’).

⁶³ KH Bailey, ‘The Uniform Tax Plan (1942)’ (1944) 20 *Economic Record* 170, 185.

⁶⁴ *Second Uniform Tax Case*, (1957) 99 CLR 575, 656 (Fullagar J), 630 (Williams J).

⁶⁵ *ICM* (2009) 240 CLR 140, 239.

The s 96 power is also subject to the express prohibitions contained in the *Constitution*. *Magennis* is an example of that proposition.⁶⁶ Latham CJ said the fact that the Commonwealth law related to s 96 did not make it valid, because it was also a law relating to the acquisition of property on other than just terms.⁶⁷ Similarly, in the *DOGS Case*, s 96 was held to be subject to s 116 of the *Constitution*, which prohibits laws establishing religion. Gibbs J said:

It is one thing to say that Parliament, by a condition imposed under s 96, could achieve a result which it lacks power to bring about by direct legislation, but quite another to say that the Parliament can frame a condition for the purpose of evading an express prohibition contained in the *Constitution*.⁶⁸

The obiter comments of French CJ, Gummow and Crennan JJ in *ICM*, approved in *Spencer*, appear to have cemented s 51 (xxxi) as a limitation on the s 96 power.⁶⁹

In *Spencer*, French CJ and Gummow J said that the conditions attached to an s 96 grant may be disclosed by reference to ‘informal arrangements’ between governments.⁷⁰ Although they expressly declined to determine whether a s 96 law could be characterised as a law with respect to acquisition of property by reference to those informal agreements, they said that the question was open.⁷¹ That possibility would extend the limitations on s 96 grant conditions beyond those ruled impermissible in *Magennis* and the *DOGS Case*, which both involved legislation expressly stating the conditions on which the grant was to be made.⁷² The legislation and agreements considered in *Spencer* did not contain express provisions requiring NSW to use money granted under s 96 to acquire property. *Spencer* makes it clear that the Court will consider informal arrangements to determine whether the law or grant is an impermissible attempt to avoid an express constitutional prohibition. However, it is not certain that proof of an informal arrangement will be sufficient to invalidate the relevant Commonwealth law or agreement. Although there are some exceptions, s 96 is primarily understood as a broad power.⁷³ Limitations on the breadth of the power conferred by s 96 would appear to arise only where the s 96 legislation expressly attaches impermissible conditions to the grant.⁷⁴ Whether an otherwise legitimate grant, conferred for a purpose of national significance, would become invalid as a result of conditions contained in an informal agreement, remains uncertain.

⁶⁶ Although the Court did not extensively consider s 96.

⁶⁷ *Magennis* (1949) 80 CLR 382, 403.

⁶⁸ *DOGS Case* (1981) 146 CLR 559, 593.

⁶⁹ *ICM* (2009) 240 CLR 140, 170.

⁷⁰ *Spencer* (2010) 241 CLR 118, 133–4. In *ICM*, French CJ, Gummow and Crennan JJ did not decide whether ss 96 and 61 of the *Constitution* could be used to impose conditions on an s 96 grant using an informal agreement.

⁷¹ *Spencer* (2010) 241 CLR 118, 134.

⁷² It should be noted that in the *DOGS Case*, although the Court agreed that s 96 of the *Constitution* was subject to s 116, the conditions set out in the relevant s 96 legislation were held not to offend s 116.

⁷³ See, eg, *South Australia v Commonwealth* (1942) 65 CLR 373 (‘*First Uniform Tax Case*’); *Second Uniform Tax Case* (1957) 99 CLR 575.

⁷⁴ See, eg, *Magennis* (1949) 80 CLR 382; *DOGS Case* (1981) 146 CLR 559.

C *State Legislative and Executive Action*

The discussion so far has focused on the characterisation of Commonwealth laws and their interaction with s 96. The discussion now turns to what effect invalidating a Commonwealth law based on the existence of an informal agreement would have on any associated state legislative or executive action.

Magennis does not provide any guidance on the issue, because the state legislation in that case required a valid agreement between the Commonwealth and the state. In the absence of that dependence, it is difficult to see how, or why, a state law would be invalid merely because it was made in furtherance of an informal agreement with the Commonwealth which operated independently of the state law. As McTiernan J said in dissent in *Magennis*, such a finding implies that the state has, by entering into the arrangement, in some way imposed a limitation upon its powers that would otherwise not exist.⁷⁵

Heydon J in *ICM* suggested that Covering Clause 5 and s 106 of the *Constitution* prohibited the state from acting ‘in concert’ with the Commonwealth to breach s 51(xxxi), because state constitutions are ‘subject to this *Constitution*’ and make the *Constitution* binding on the people and courts of each state.⁷⁶ For Heydon J, those provisions prevent the states and the Commonwealth entering into agreements and schemes which involve Commonwealth contravention of s 51(xxxi).⁷⁷ This approach draws on concepts more usually associated with criminal law—the idea of a state co-perpetrating or being complicit in a constitutional breach. On this view, the state’s power to acquire property is not limited by virtue of its participation in the scheme (thereby avoiding McTiernan J’s objection in *Magennis*), but rather by virtue of its participation in a breach of the *Constitution*.

Heydon J’s approach is novel. The limiting words in s 96—‘subject to this *Constitution*’—have been interpreted to mean ‘if not inconsistent with or repugnant to’.⁷⁸ The section has been understood as a limitation on federal power⁷⁹ that preserves the continuation of state constitutions and protects states from the exercise of Commonwealth power.⁸⁰ In relation to state powers, s 106 has been said to have extinguished state legislative power that was repugnant to the *Constitution*.⁸¹ It has also been held to limit state legislative power to interfere with political communication.⁸² Heydon J’s approach would extend the limitation to state executive action (because *ICM* did not involve a challenge to the validity of state legislation), which in *ICM* included proclamations, orders and the enactment of regulations. The notion that s 106 restricts non-legislative action would greatly expand the restriction that the words ‘subject to this *Constitution*’ in s 106 place on the states. Whether understood as a restriction on state executive or legislative power, or both, the conclusion that s 106 limits the states’ ability to acquire

⁷⁵ *Magennis* (1949) 80 CLR 382, 416.

⁷⁶ *ICM* (2009) 240 CLR 140, 239.

⁷⁷ *Magennis* (1949) 80 CLR 382, 416.

⁷⁸ *McGinty v Western Australia* (1996) 186 CLR 140, 210 (Toohey J).

⁷⁹ Leslie Zines, *The High Court and the Constitution*, (Federation Press, 5th ed, 2008) 466–73.

⁸⁰ *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 391–2 (Dixon J).

⁸¹ *A-G (Qld); ex rel Goldsbrough Mort & Co Ltd v A-G (Cth)* (1915) 20 CLR 148, 172.

⁸² *Theophanous v Herald & Weekly Times Ltd* (1993) 182 CLR 104, 165–6.

property on other than just terms is difficult to reconcile with s 107, which provides for the continuation of powers not ‘exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State’.⁸³ The *Constitution* does not exclusively grant the power to compulsorily acquire property to the Commonwealth—indeed, the power is strictly limited to acquiring property on just terms⁸⁴—therefore the states’ power to compulsorily acquire land continues pursuant to s 107. To say that s 51(xxxi) is a ‘constitutional guarantee’ does not justify extending its operation to prohibit states from acting ‘in concert’ with the Commonwealth, because the ‘guarantee’ is limited to protection from Commonwealth appropriation. Any analogy drawn to the fact that the implied freedom of political communication limits state power is weakened by the fact that the just terms ‘guarantee’ is an express limitation on the Commonwealth legislative power conferred by s 51, and is not a broad principle implied from a doctrine ‘embodied in the *Constitution* as a whole.’⁸⁵

The application of Heydon J’s notion of the ‘New South Wales Government’ acting ‘in concert’ with the Commonwealth faces some conceptual difficulties. It is difficult to understand how a state parliament, consisting of individual members presumably (for the most part) unaware of any informal agreement relating to the legislation, could participate in a breach of the *Constitution*. If the blame lies with the executive government, which presumably enters into the informal agreement, then the case for invalidity is even weaker, because the legislation represents the will of Parliament and not of the executive. Further, the motive behind legislation is irrelevant if the legislation is within power.⁸⁶

Once the difficulty of the ongoing validity of state legislation is acknowledged, it becomes clear the decisions like *Pye* are not just based on strict formalism, but relate to fundamental constitutional principles relating to the ongoing power of the states pursuant to the *Constitution*. Particularly in circumstances where the state legislation relates to an issue of wide public interest like carbon reduction strategies, it may be that the state had its own motivation to preserve the native vegetation at Saarahnee. Invalidating state laws because they involved an informal agreement with the Commonwealth that it would provide money to assist in any acquisition of property necessary to achieve the state’s goals would constitute an attack on the state’s independent political existence. Such an approach would also potentially prevent the states from obtaining Commonwealth funding for their constitutionally legitimate activities.

Because Heydon J was the only member of the Court who held that the facts in *ICM* enlivened s 51(xxxi), it is unclear to what extent His Honour’s view represents the law regarding the interaction of ss 51(xxxi) and 106 with state action. Any conclusion about the likelihood of other members of the Court adopting Heydon J’s approach would be speculative. Nonetheless, the decisions in *ICM* and *Spencer* have brought that question to the forefront of s 51(xxxi) jurisprudence, particularly because in *Spencer* NSW undeniably has the legislative

⁸³ *Constitution*, s 107.

⁸⁴ *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290.

⁸⁵ *Theophanous v Herald & Weekly Times Ltd* (1993) 182 CLR 104, 166.

⁸⁶ *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492, 515. See also *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1.

power to restrict the use of Mr Spencer's property. It is possible that, even if Mr Spencer was to succeed in characterising the *Commonwealth Resources Acts* as laws relating to property acquisition by producing evidence of informal agreements, he may still find himself bound by the *NSW Vegetation Acts*.

VI Conclusion

The decision in *Spencer* shows the Court's willingness to move beyond questions of form and examine the substance of Commonwealth and state legislative and executive action taken pursuant to an intergovernmental scheme in circumstances where the scheme is apparently designed to avoid the constitutional guarantee of just terms. However, as discussed above, although the Court has indicated that it is willing to undertake that examination, the difficulties associated with that course make it, in the writer's opinion, unlikely that the Court will ultimately invalidate an intergovernmental scheme by reference to informal agreements. That conclusion follows from the difficulty of using informal agreements to characterise Commonwealth laws, the difficulty of limiting s 96 grants by reference to informal agreements, and the problem of the effect of invalidation on state laws. An emphasis on the substance of laws and the need to protect constitutional guarantees is welcome, but is not of itself sufficient to overcome the important principles and problems discussed in this case note. Any application of the principles raised in *Spencer* would need to be carefully considered so as not to damage fundamental principles of characterisation and state independence.