EDITORIAL

The High Court rules on the relationship between State and Federal environmental assessment legislation

The controversial and complex issue of the application of State environmental and planning laws to the Commonwealth and its instrumentalities has been previously discussed in this journal (refer for eg the editorial on ANSTO Act, and Comans et al article, both in June 1992 edition).

The issue has again come to the fore in the recent litigation involving Botany Council and the Federal Airports Corporation ("FAC") over the construction of the third runway at Sydney airport [Botany MC v FAC 109 ALR 321]. The facts of the case are set out in Tony Hill's case note at page 21 of this edition.

While a number of legal questions were before the Full Court of the High Court, they all essentially involved a consideration of the operation of the NSW *Environment Planning and Assessment Act 1979* ("the State Act") and Regulations, their application to the FAC (a Commonwealth statutory authority), and the relationship of the State Act with the Commonwealth's *Environment Protection (Impact of Proposals) Act 1974* ("the Commonwealth Act") and the *FAC Act*.

Broadly, FAC argued that the State Act and Regulations did not apply to it, and in the alternative, even if did, the State Act and Regulations were, inter alia, inconsistent with the Commonwealth Act and therefore invalid under section 109 of the Constitution. The seven member bench delivered a joint judgement in favour of FAC, deciding in its favour on the first point. For this reason, the Court did not have to decide the alternative argument.

The judgment will obviously have special significance for NSW because its legislation was in question. However, some of the comments made by the Court in relation to the alternative argument have significance for governments and administrators in all the States. For example, the comments that the Commonwealth Act "constitutes a comprehensive code governing environmental aspects of actions and decisions made by or on behalf of the Australian Government and authorities of Australia" (ie Commonwealth authorities or ministers), and further comments to the effect that if the State Act purported to apply Part 5 of that Act (the Part in issue in the case) to the FAC, Part 5 would be inconsistent with, inter alia, the Commonwealth Act.

Taken at face value, and perhaps at their widest, these and other comments made in the judgment could be read to indicate that there is now no room at all for a State law concerned with environment matters to apply to activity by the Commonwealth and its instrumentalities. Taken at their narrowest, they would appear to at least support the conclusion that by virtue of section 109, and the operation of the Commonwealth Act, the land use activity of the Commonwealth and its agencies are immune from State land use requirements. This case also reinforces the practical aspects of the paramountcy of the Commonwealth parliament's legislative capacity and, to a lesser extent, the breadth that will be afforded to the interpretation Commonwealth laws for the purposes of section 109.

Clearly, proper environmental planning through legislative means requires constant attention at all levels of government to jurisdictional limitations and hence the limits of the effectiveness of those means. Thus, this case provides a useful reminder to the States (and their local councils) of the importance of recognising, and factoring into their planning arrangements, the limits of their State environmental legislation in the context of, inter alia, the Commonwealth Act and section 109, where the Commonwealth and its authorities are engaged in projects in their jurisdiction.

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** The views expressed in this editorial are not necessarily those of the editor's firm*