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CASE LAW

State environmental law — federal project

In *Botany Municipal Council v Federal Airports Corporation* (1992) 66 ALJR 821, 109 ALR 321, the High Court considered whether a federal project was required by State law to undergo environmental impact assessment. While the constitutional law conclusions are hardly exciting a positive view of the roles of the relevant legislation was given.

The Federal Airports Corporation (FAC) proposed to construct a third runway at the Sydney (Kingsford Smith) Airport. It acquired land under Botany Bay from which to dredge 15 300 000 cubic metres of sand and other material from depths of 10-22 metres below the lowest tide level to construct a runway extending 3 km into Botany Bay. In July 1989 the FAC initiated procedures for environmental impact assessment of the project under the *Environment Protection (Impact of Proposals) Act* 1974 (Cth) which culminated in a decision being made on 7 December 1991 to proceed with the project, adopting recommendations made by the Minister for the Arts, Sports, Environment, Tourism and the Territories. The *Sydney (Kingsford Smith) Airport State Environmental Planning Policy* was made under s.39(4) of the *Environmental Planning and Assessment Act* 1979 (NSW) to ensure that environmental assessment of any proposal to construct a third runway would be carried out in accordance with Part 5 of that Act.

In a unanimous judgment, the Full High Court found for the Federal Airports Corporation. First, the court found that the project was within the powers of the FAC because the project is the extension of an existing airport, finding against the argument that the scale of the project was so great that it amounted to construction of a new airport, which would have been *ultra vires* the FAC.

Second, the Federal Airports Corporation Regulations were upheld. Regulation 9(2) had authorised the words ' . . . in spite of a law . . . of the State of New South Wales . . . ' It had been argued that this specific reference to State legislation was an invalid attempt to expand the operation of s.109 of the *Constitution*. The High Court said:

> There can be no objection to a Commonwealth law on a subject which falls within a head of Commonwealth legislative power providing that a person is authorised to undertake an activity despite a State law prohibiting, restricting, qualifying, or regulating that activity. Indeed, unless the law expresses itself directly in that way, there is the possibility that it may not be understood as manifesting an intention to occupy the relevant field to the exclusion of State law. [66 ALJR 825]

Third, the High Court considered the scope of the New South Wales *Environmental Planning and Assessment Act*, and found that its terms were only wide enough to apply the Act to State Authorities and Ministers, so it had no application to the FAC. For that reason the High Court found there was no inconsistency between the State and federal laws, but the court then proceeded further on the assumption that a conflict existed. The High Court observed that the object of the *Environmental Protection (Impact of Proposals) Act* 1974 (Cth):

> . . . is to ensure to the greatest extent practicable that matters affecting the environment to a significant extent are fully examined and taken into account by, or on behalf of, the Australian Government and authorities of Australia — the term 'authority of Australia' being very widely defined — in relation to the formulation of proposals, the carrying out of works, the making of agreements and arrangements, the making of decisions and recommendations and the incurring of expenditure (s.5(1)). [66 ALJR 826-7]

It ' . . . constitutes a comprehensive code governing environmental aspects of actions and decisions made by or on behalf of the Australian Government and authorities of Australia' (66 ALJR 827). The High Court had no doubt that the project would affect the environment significantly. The New South Wales legislation is also a comprehensive code with respect to that State's governmental activities. The 'codes' are similar but not identical. If the Federal Airports Corporation had been a 'determining authority' within the meaning of the New South Wales legislation and therefore subject to it, that Act would have been inconsistent with the federal legislation applying to the FAC.

Party agreements on jurisdictional points

If you have ever sought an authority on *the* question with *the* obvious answer, despite all the combined creativity which the parties to a matter can muster, look no further — a court cannot overlook a patent jurisdictional point, even if the matter has not been raised by the parties and despite any agreement between the parties that it should be overlooked: *Commissioner of Taxes v Tangentyere Council Inc* (1992) 83 NTR 32, 35 and 40.

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