Court decision protects Ramsar wetland

by Chris McGrath, Barrister

In *Minister for the Environment & Heritage v Greentree (No 2)* [2004] FCA 741 (11 June 2004) the federal environment Minister sought an injunction, pecuniary penalty and remediation order under sections 475 and 481 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) against wheat farmers who had cleared part of the Gwydir Ramsar wetland in northern NSW, on a property known as "Windella", and then ploughed and sown a wheat crop in the wetland. The court had earlier granted an interim injunction in the case restraining the respondent wheat farmers from cultivating the land.[1] The area in question was located on private land owned by the respondent farmers in freehold (the previous owner had voluntarily agreed to the land being included in the listing of the Ramsar wetland in 1999 and the respondents had purchased the land in 2002 knowing of the listing).

After rejecting legal arguments made by the farmers that the listing of the Ramsar wetland in question was invalid and that the clearing, ploughing and cultivation of wheat were existing lawful uses, Sackville J considered the impacts of the farmers' actions and concluded at [199] that:

> *"Once it is accepted that the Windella Ramsar site retained attributes as a wetland immediately before the actions … took place, the conclusion seems to me inevitable that those activities had a significant impact on the ecological character of the site. The simple fact is that the entire site, other than a narrow strip … was cleared and ploughed and later sown with wheat. In essence … the site has been 'sterilised'. Perhaps the sterilisation was not complete since … even in its cleared state an inundation of the site would allow a range of native wetland plants to re-establish themselves over time, at least if they did not have to compete with crops. But by the time the interlocutory injunction was granted, the Windella Ramsar site was not recognisable as an area of wetland with native vegetation and fauna."*

While indicating that he would grant the injunction, Sackville J did not make final orders when delivering the decision but allowed the parties to make submissions on the form of the injunction, level of civil penalty and remediation that should be ordered. Once the final orders are made an appeal appears likely.

This decision represents a milestone for federal environmental law in Australia. While the federal government won the constitutional power to directly regulate land management issues in the States in the 1983 Tasmanian dam dispute, this is the first court case where it has used its constitutional powers to directly regulate private land management in a State.[2]

The case is significant in terms of the operation of the EPBC Act, particularly regarding the application of the existing lawful use provisions in sections 43A and 43B. It is only the second civil action by the Minister under the EPBC Act.[3]

1 *Minister for the Environment & Heritage v Greentree* [2003] FCA 857 (8 August 2003).

2 Of course, the federal government has used indirect means such as fiscal powers and export licences to regulate land management issues within the States for decades (see, for example, *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1) and regulation of offshore fisheries and marine protected areas by the federal government is common (see, for example, *Olbers v Commonwealth of Australia* (No 4) [2004] FCA 229).

3 In *Minister for the Environment & Heritage v Wilson* [2004] FCA 4 (16 January 2004), a pecuniary penalty of $12,000 was awarded against a shark fisherman who set a net in the Great Australian Bight Marine Park (a Commonwealth reserve) in contravention of section 354(1) of the EPBC Act.