

Spencer v Commonwealth of Australia [2009] FCAFC 38 (24 March 2009)

- State land clearing restrictions not an acquisition of property by the Commonwealth

This case involved a constitutional challenge to land clearing laws in NSW. Mr Spencer owns a property subject to various NSW State statutes, which prohibit the clearing of native vegetation other than in specified circumstances, and he alleged that these have made his property unsuitable for his commercial farming enterprise. Mr Spencer claims that the prohibitions and restrictions in the State statutes effected the acquisition or expropriation of certain of his property interests and that they did so by effect or authority of two Commonwealth laws, the *Natural Resources Management (Financial Assistance) Act 1992* (Cth) and the *Natural Heritage Trust of Australia Act 1997* (Cth). Mr Spencer argued that the Commonwealth statutes are thereby laws with respect to the acquisition of property which do not provide for just terms as required by s 51(xxxi) of the *Commonwealth of Australia Constitution Act* (Imp) and, accordingly, are invalid to that extent.

In the Federal Court the Commonwealth succeeded in having Mr Spencer's claim struck out on the grounds that it had no reasonable prospect of success, as the direct legal and practical operation of the Commonwealth statutes could not be characterised as a law with respect to the acquisition of property within s 51(xxxi) of the Constitution. In the Full Court, Jagot J (with whom Black CJ and Jacobson J agreed), dismissed the appeal in the following terms (at para 15):

'Mr Spencer's submissions in the appeal, whilst comprehensive, could not surmount three fundamental problems with his claims, namely: - (i) the authoritative statements of the High Court in *Pye v Renshaw* about the operation of s 51(xxxi) and 96 of the Constitution, (ii) the decision of the New South Wales Court of Appeal in *Arnold v Minister Administering the Water Management Act 2000* [2008] NSWCA 338, and (iii) the consequences of Mr Spencer accepting the validity of the State statutes, specifically the fact that, even if the Commonwealth statutes and inter-governmental agreements are invalid, the 2003 *Vegetation Act* will continue in force and impose the same prohibitions and restrictions on Mr Spencer's property. These circumstances disclose the fundamental requirement of identifying a Commonwealth law with respect to the acquisition of property. Once these circumstances are properly understood, it is apparent that Mr Spencer's detailed submissions about numerous errors allegedly made by the primary judge can neither be sustained nor lead to any conclusion different from that reached by the primary judge.'

NEW SOUTH WALES - Land and Environment Court**Summary of criminal proceedings finalised in the Land and Environment Court in 2008**

By Ed Lee (Senior Associate Henry Davis York)

In 2008, there were 27 criminal cases determined by the Land and Environment Court:

- 10 proceedings commenced by Department of Environment and Climate Change,
- 15 proceedings commenced by Local Councils,
- one proceeding commenced by Department of Planning, and
- one proceeding for a breach of the *Rivers and Foreshore Improvements Act 1948*.

Of the above cases, one has gone to appeal involving the clearance of native vegetation (*DECC v Wilton* [2008] NSWLEC 297).

Department of Environment and Climate Change (DECC) cases

Nine of the proceedings were prosecuted by the EPA, the remaining one by the Director-General of the Department of Environment and Climate Change in relation to unlawful clearing of native vegetation. A summary of the offences are as follows:

- six offences related to water pollution,

NELR casenotes

- two concerned offensive odour,
- one offence for operating a waste facility without a licence, and
- one offence for clearing native vegetation without consent (DECC prosecutor).

In each case, the Defendants pleaded guilty to the charge. A summary of the fines are as follows:

- the highest fine was \$280,000, which was for water pollution (*CSR* [2008] NSWLEC 224),
- the lowest fine was \$18,000, which was for using a waste facility without a licence (*Hogan* [2008] NSWLEC 125),
- the lowest fine for water pollution was \$50,000 (*Hanson Precast* [2008] NSWLEC 285)
- the fine was for clearing native vegetation was \$40,000 (plus \$30,000 costs) (*Wilton*)
- no fines ordered for the offensive odour proceedings, and
- three defendants were not required to pay a fine.

In *Coastal Recycled Cooking Oils* [2008] NSWLEC 224, the Court ordered that no conviction be recorded.

There was a breadth of penalties handed down for DECC matters. The total penalty for the CSR matter was over \$435,000 (including fine and legal / clean-up costs), while for *Coastal Cooking Oils* the defendant was ordered to pay the prosecutor's costs plus \$18,000 to the Hunter-Central Catchment Management Authority for the purpose of weed management project.

Council summary

In the 15 Council matters, 11 defendants pleaded guilty. Of the four defendants who pleaded not guilty, only one was convicted. A summary of the offences are as follows:

- seven of offences related to a breach of conditions of consent,
- five for breaches of tree preservation orders,
- two for water pollution, and
- one for providing false information.

A summary of the fines (excluding the offence for false information) are as follows:

- the highest fine was \$70,000 (*Fairfield City Council v Hong Son Ngo* [2008] NSWLEC 134 & *Fairfield City Council v TT Rubbish Removal Pty Limited*; *Fairfield City Council v Kim Thu Nguyen* [2008] NSWLEC 201),
- the lowest fine was \$17,500 (*Maitland City Council v Link Building Services Pty Ltd* [2008] NSWLEC 71),
- the highest fine for the breach of conditions of consent was \$45,000 (*Camden Council v Batasty Pty Limited* [2008] NSWLEC 26),
- the lowest fine for the breach of conditions of consent was \$15,000 (*Hunter's Hill Council v Touma* [2008] NSWLEC 227)
- the only fine ordered for a breach of a tree preservation order was \$65,000 (*Manly Council v Taheri* [2008] NSWLEC 314),
- the highest fine for water pollution was \$70,000 (*Hong Son Ngo* [2008] NSWLEC 134 & *TT Rubbish Removal Pty Limited* [2008] NSWLEC 201), and
- the lowest fine for water pollution was \$40,000 (*Wollongong City Council v Belmorgan Property Development Pty Limited* [2008] NSWLEC 291)