



Friday, 3 May 2024

Weekly Environmental Law A Weekly Bulletin listing Decisions of Superior Courts of Australia covering Environmental Law

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Executive Summary (One Minute Read)

Save Our Strathbogie Forest Inc v Secretary to the Department of Energy, Environment and Climate Action (No 2) (FCA) - unsuccessful applicant in “public interest” environmental litigation ordered to pay costs

Kane & Co (NSW) Pty Ltd v Idolbox Pty Ltd (NSWSC) - purchaser was not entitled to rescind contract for sale of a service station on the basis of an environmental report showing some contamination

HABEAS CANEM

Panting pooches



Benchmark

Summaries With Link (Five Minute Read)

Save Our Strathbogie Forest Inc v Secretary to the Department of Energy, Environment and Climate Action (No 2) [2024] FCA 430

Federal Court of Australia

Horan J

Costs in environmental litigation - the Secretary to the Victorian Department of Energy, Environment and Climate Action intended to conduct planned fuel management burns in four areas in the Strathbogie State Forest - the applicant contended the burns would be a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), as they would likely have a significant impact on the Southern Greater Glider, and, in the absence of an applicable exemption, would therefore require the approval of the Commonwealth Environment Minister under Part 9 of the Act - the applicant sought a declaration restraining the burns without such approval - there was no dispute that the planned burn areas included habitat suitable for the Southern Greater Glider and that some gliders were likely to be present - the Secretary contended that the planned burns amounted to a lawful continuation of a use of land that was occurring immediately before the commencement of the Act, and that an exemption therefore applied - the Court held that the evidence did not establish that this would be likely to lead to any significant reduction in the abundance of gliders in the planned burn areas, nor in the Strathbogie State Forest, and that any impacts of the planned burns on individual gliders in the areas affected by fire were not likely to have a significant impact on the population of Southern Greater Gliders in the Strathbogie State Forest, or on the species, and refused to make an injunction (see Benchmark 9 April 2024) - the Court now determined costs - s43 of the *Federal Court of Australia Act 1976* (Cth) confers on the Court a broad discretion to order costs, which must be exercised judicially and consistently with the purpose of the power, taking into account all relevant facts and circumstances connected with the litigation - there is no universal exception in "public interest" proceedings from the usual rule that costs should follow the event - that a proceeding was brought otherwise than for the personal or financial gain of the applicant, and in that sense in the public interest, does not detract from the general proposition that ordinarily costs follow the event and that the primary factor in deciding on the award of costs is the outcome of the litigation - further, a court should be reluctant to embrace the proposition that, as a general rule, it is appropriate to undertake an enquiry as to who was successful in relation to particular issues in a case to determine whether there should be an apportionment of costs against a successful party - in this case, there was no reason to depart from the ordinary rule as to costs and it was not appropriate to allow any reduction in respect of the Secretary's costs - applicant to pay the Secretary's costs on a party and party basis.

[Save Our Strathbogie Forest Inc](#)

[From Benchmark Wednesday, 1 May 2024]

Kane & Co (NSW) Pty Ltd v Idolbox Pty Ltd [2024] NSWSC 410

Supreme Court of New South Wales

Parker J

Contracts - the purchaser under a contract for the sale of land containing a petrol station and an automotive repair workshop claimed to be entitled to terminate the contract under a special condition - the background to the special condition was a concern on the part of the purchaser that the land might be contaminated, having regard to its past and continuing use as a service station - the special condition provided for the parties to obtain an environmental report into the scope and nature of any contamination and that either party might rescind the contract pursuant to the standard rescission clause (that is, with the deposit being refunded) if the environmental report indicated that the property did not fall within the NSW Environment Protection Authority Guidelines in relation to contamination levels in, on or under the property and which permitted the property to be used as a service station - the purchaser claimed the report entitled it to rescind - the vendor sought rectification of the special condition so that either party would be entitled to rescind if the report showed that the property does not fall within the NSW EPA Guidelines in relation to the contamination levels in, on or under, notwithstanding that it permitted the property to be used as a Service Station - held: the *Contaminated Land Management Act 1997* (NSW) contains a general statutory regime which applies to contaminated land in NSW, and empowers the EPA to make management orders binding on the owner of contaminated land - rectification is only available where the evidence that the contract does not reflect the parties' common intention is clear and compelling - the claim for rectification failed - as to interpretation of the contract of sale, it was to be interpreted by reference to its text, context and purpose, and its context included any contract, document or statutory provision referred to in the contract - what the environmental report must do for rescission to be permitted is to "indicate" that the site does not fall within (that is, exceeds) relevant contamination levels - the report did identify some exceedences of investigation levels at the site, but, on the correct construction of the special condition, this was insufficient to give the purchaser a right of rescission - proceedings dismissed.

[View Decision](#)

[From Benchmark Monday, 29 April 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

R v Secretary of State for the Home Department (UKSC) - Failed asylum seeker who committed criminal acts within the UK and who thwarted his deportation was lawfully refused government benefits and was not denied his rights under the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

R v Secretary of State for the Home Department [2024] UKSC 13

Supreme Court of the United Kingdom

Lord Lloyd-Jones, Lord Sales, Lord Hamblen, Lord Stephens, and Lady Simler

AM was a national of Belarus. He arrived in the UK in 1998 and claimed asylum. In 2000, he was denied asylum status and removed to Belarus. He was denied entry to Belarus and returned to the UK because he provided Belarus officials with false information that caused the officials to believe that he was not a citizen. Upon his return to the UK, he committed various criminal offences and was classified as a foreign criminal by British authorities. The Government desired to extradite AM to Belarus, but he resisted these attempts. Further, the British authorities refused to grant AM Leave to Remain, which would entitle him to full government benefits. Instead, AM is in 'limbo' status under which (1) he may not seek employment in the UK, (2) he is not entitled to National Health Service benefits, excepting emergency care, (3) he may not open a bank account, (4) he may not enter into a tenancy agreement, and (5) he receives very limited social welfare benefits, at the same level of failed asylum seekers awaiting deportation. Instead, he received a payment card for food, clothing, and toiletries at a subsistence level and government accommodation. As AM may not return to Belarus, he claimed that the British Government's action of placing him in a legal 'limbo' amounted to a denial of his rights under Article 8 of the *European Convention of Human Rights*, and that the Government had to grant him Leave to Remain status that would enable him to obtain full public benefits. Article 8 provides that 'everyone has the right to respect for his private and family life' and that 'there shall be no interference by a public authority in the exercise of this right except as in accordance with law and is necessary in a democratic society in the interests of national security, public safety' - administrative tribunals and then the Court of Appeal agreed with AM, and ordered the Home Secretary to grant AM Leave to Remain status. On review, in a unanimous decision, the Supreme Court reversed the Court of Appeal and held that the Home Secretary did not violate AM's Article 8 rights by placing him in 'limbo' status. The Supreme Court found that AM's attempts to thwart his deportation were highly material factors in evaluating whether the Home Secretary's actions were proportional. The Court added that the



public interest in maintaining effective immigration controls and containing welfare expenditures were relevant considerations. There was also a public interest in maintaining British employment opportunities for those lawfully in the UK. The Court said that, given AM's serious criminal offences, his deportation was in the public interest, and his efforts to undermine that through fraudulent activity were also valid considerations. While AM was entitled to Article 8 protections, the Supreme Court concluded that his extended limbo status was a proportionate means of achieving the lawful aims of the British Government.

[R v Secretary of State for the Home Department](#)



Poem for Friday

Song of Hope

By: Thomas Hardy (1840-1928)

O sweet To-morrow! –
After to-day
There will away
This sense of sorrow.
Then let us borrow
Hope, for a gleaming
Soon will be streaming,
Dimmed by no gray –
No gray!

While the winds wing us
Sighs from The Gone,
Nearer to dawn
Minute-beats bring us;
When there will sing us
Larks of a glory
Waiting our story
Further anon –
Anon!

Thomas Hardy, (2 June 1840 - 11 January 1928), author and poet, was born in Dorset, England. His father was a stonemason, and his mother who was well read, educated Thomas to the age of 8, at which time Thomas commenced as a student at Mr Last's Academy for Young Gentlemen. On leaving school at the age of 16, due to his family's lack of finances to fund a university education, Thomas became an apprentice architect. Much of his work involved the restoration of churches. In 1862 he enrolled at King's College, London. He is best known for his novels, including *Far from the Madding Crowd*, (1874) and *Tess of the d'Urbervilles*, (1891). He was appointed a Member of the Order of Merit in 1910 and was nominated for the Nobel Prize in Literature in that year. He received a total of 25 nominations for the Nobel Prize for literature during his life. Thomas Hardy died of pleurisy on 11 January 1928. He had wanted his body to be buried with his first wife Emma's remains at Stinsford. She had died in 1912 and much of his poetry was inspired by his feelings of grief following her death. His Executor Sir Sydney Carlyle Cockerell compromised by having Thomas Hardy's heart buried with the remains of his first wife Emma, and his ashes interred at Poets' Corner, Westminster Abbey. At the time of his death his estate was worth 95,418 pounds, the equivalent of over 6 million pounds



today. One of the largest literary societies in the world is the Thomas Hardy Society, based on Dorchester, <https://www.hardysociety.org/>.

Song of Hope by Thomas Hardy, read by Dylan Pearse, Music by Irish Folk Group, Kern <https://www.youtube.com/watch?v=Q1qo8sWTi6M>

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