



Friday, 15 December 2023

## **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)

**Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 3)** (FCA) - costs followed the event in the usual way where the Environment Council had failed in public interest environmental litigation

**Kvelde v State of New South Wales** (NSWSC) - Supreme Court partially struck down laws prohibiting protest activity at major facilities, under the Commonwealth Constitution's implied freedom of political communication

## HABEAS CANEM

McGregor wishes you a happy and peaceful holiday season



## Summaries With Link (Five Minute Read)

### **Environment Council of Central Queensland Inc v Minister for the Environment and Water (No3) [2023] FCA 1532**

Federal Court of Australia

McElwaine J

Costs in public interest environmental litigation - coal miners applied to the Commonwealth Minister for the Environment and Water to extend their operations - the Minister's delegate determined that the proposed actions were controlled actions under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) - the proposed actions were approved at the State level pursuant to the Bilateral Agreement provisions in Part 5 of the Act - after a request by the Environment Council, the Minister decided not to revoke her decisions, as she was not satisfied that the proposed actions would cause any net increase in greenhouse gas emissions, and that, even if they would, the likely increase in global greenhouse gas emissions would be very small so that she could not conclude that the proposed actions would be substantial causes of adverse impacts on the world heritage values of declared World Heritage properties - the Environment Council sought judicial review of these decisions - the Court dismissed the application, rejecting the submission that it was not open to the Minister to engage in counter-factual reasoning by netting off likely emissions from the proposed actions from total global emissions from other sources in a hypothetical world where the controlled actions did not occur (see Benchmark 13 October 2023) - the mining companies sought costs, and the Minister sought her costs discounted by 50% - the Environment Council said costs should not follow the event on the basis that this was public interest litigation - held: sometimes public interest litigation of itself provides a basis to depart from the usual order as to costs - the Environment Council brought each proceeding in the public interest and, beyond satisfaction of achieving the outcome that it argued for, did not have a financial or proprietary interest that it sought to vindicate - the application raised an important question of statutory construction, with wide-ranging implications - however, the arguments in support of the construction of "likely" at s 78(1)(a) of the *Environment Protection and Biodiversity Conservation Act* were contrary to guiding authority - the central "future universe" contention, under which the Minister had to reason prescriptively by identifying possible futures and future worlds "starting with the input assumption that the action will be taken", was inconsistent with the broad discretion to assess the impacts of a particular proposed action - the precautionary principle argument could not be reconciled with a recent decision of the Full Court - the irrationality contentions failed to meet the high bar for that finding - the Environment Council had placed a large volume of scientific evidence before both the Minister and the Court, which was extraneous to the issues in dispute, as the Minister did not dispute the science of climate change, accepting that anthropogenic greenhouse gas emissions are the major cause of adverse climate change and an existential threat to a large number of Matters of National Environmental Significance - the *Hardiman* principle (that the interests of the Minister could not be distinguished from the public interest, and she ought to have played a more limited role where the mining companies were contradictors) was not applicable - where a Minister's decision is challenged on judicial review,

the ordinary course is that the Minister is represented by counsel and takes an active part - even though the mining companies acted as a competent contradictor, the Minister had a proper interest in the determination of the construction of her statutory powers - the Minister had appropriately proposed a discount of 50% of her costs to reflect the extent of her interest - costs should follow the event in the usual way, with the Minister's costs discounted by 50% as the Minister had proposed.

[Environment Council of Central Queensland Inc](#)

[From Benchmark Monday, 11 December 2023]

## **Kvelde v State of New South Wales [2023] NSWSC 1560**

Supreme Court of New South Wales

Walton J

Constitutional law - the *Roads and Crimes Legislation Amendment Act 2022* (NSW) introduced s214A into the *Crimes Act 1900* (NSW) - s214A(1) provided that a person must not enter, remain on or near, climb, jump from or otherwise trespass on or block entry to any part of a major facility if that conduct (a) causes damage to the major facility, (b) seriously disrupts or obstructs persons attempting to use the major facility, (c) causes the major facility, or part of the major facility, to be closed, or (d) causes persons attempting to use the major facility to be redirected - a number of railway stations, ferry and passenger terminals, and infrastructure facilities were prescribed as major facilities - the amending Act also made amendments to s144G of the *Roads Act 1993* (NSW), to prohibit similar conduct regarding the Sydney Harbour Bridge or any other major bridge, tunnel or road - r48A(1) of the *Roads Regulation 2018* (NSW) was amended to provide that any bridge or tunnel in the Greater Sydney Region, the City of Newcastle, or the City of Wollongong, or any bridge or tunnel that joins a main road, a highway, or a freeway, was prescribed major bridge or tunnel - the plaintiffs sought declarations that s214A and r48A(1) were invalid under the implied freedom of political communication in the Commonwealth Constitution - held: the plaintiffs invoked federal jurisdiction under s76(i) of the Constitution in any matter "arising under this Constitution, or involving its interpretation", which may be exercised by the Supreme Court under s39(2) of the *Judiciary Act 1903* (Cth) - the plaintiffs had standing as they were persons who had attended, organised, promoted, and planned many protest actions, and their freedom of action had been particularly affected by the impugned laws - there is a three-part test to establish whether a law contravenes the implied freedom: (1) does the law effectively burden the implied freedom in its terms, operation or effect? (2) if so, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? (3) if so, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? - protests over environmental issues do, as a general proposition, constitute political communication - the implied freedom extends beyond expressive conduct that a "hypothetical ordinary member of the community" may consider to be "reasonable" - the effective burden imposed by s214A was not so slight as to be inconsequential, insofar as it proscribed conduct of entering, remaining on or near a major





facility which causes the partial closure of major facilities (contrary to part of s214A(c)) or persons attempting to use the major facility to be redirected (contrary to s214A(d)) - the purpose of these provisions was legitimate - however, those provisions were not reasonably necessary, as an alternative proposed by the plaintiffs would have achieved effectively the same objectives while imposing a significantly lesser burden upon the implied freedom - the adverse effect of s214A(1)(c) and (d) on the implied freedom in terms of deterring otherwise lawful protests significantly outweighed the benefit sought to be achieved by more effectively deterring any conduct that may disrupt major facilities - s214A(1)(c) was therefore partially invalid, and the invalid part could be the subject of partial disapplication - s214A(1)(d) was invalid, and could be severed - the challenges to the balance of s214A and r48A(1) failed - declarations made that s214A(1)(c) was invalid to the extent that it makes it an offence for persons engaged in the conduct to cause part of the major facility to be closed, and that s214A(1)(d) was invalid.

[View Decision](#)

[From Benchmark Friday, 15 December 2023]

## INTERNATIONAL LAW

### Executive Summary and (One Minute Read)

**Minnesota v Torgerson** (MINSC) - Odor of marijuana on its own without other facts did not constitute probable cause for warrantless search of vehicle

### Summaries With Link (Five Minute Read)

**Minnesota v Torgerson 995 N.W.2d 164 (2023)**

Supreme Court of Minnesota

Gildea CJ, Anderson, & McKeig JJ

A motor vehicle was stopped by the police because it had too many lights mounted on the grill. When the driver gave his license to the police, the officer stated that he smelled marijuana emanating from the vehicle. When questioned, the driver denied possessing marijuana. After conferring with a second officer, the police ordered the driver and passengers out of the vehicle and conducted a search. In the course of the search, the police discovered a canister of what was later found to be methamphetamine. At trial, the defendant sought to suppress the evidence obtained from the vehicle search on the grounds that there did not exist requisite probable cause for the search. The trial court suppressed the evidence and dismissed the matter. This was affirmed by the Minnesota Court of Appeals. The Minnesota Supreme Court stated that both the US and Minnesota Constitutions protect against unreasonable searches and seizures. Warrantless searches are *per se* unreasonable unless one of the exceptions to the warrant requirement applies. One of these exceptions is the automobile exception which permits the police to search a vehicle without a warrant if there is probable cause to believe the search will result in the discovery of evidence. The Court said that probable cause requires more than suspicion but less than the evidence necessary for conviction. A warrantless search must be based on objective facts and not the subjective good faith of the police. The Court noted that both industrial hemp and medical cannabis were lawful in Minnesota and the possession of a small quantity of marijuana was a petty misdemeanour and not a crime. The Supreme Court stated that, while the odour of marijuana can be a fact that supports probable cause, it is insufficient on its own because of the lawful right to possess medical cannabis under certain circumstances. As there was nothing else to support probable cause, the facts were insufficient to establish a fair probability that the search would yield evidence of criminal conduct. The suppression order was affirmed.

[Minnesota](#)



## Poem for Friday

### **In Memoriam, (Ring out, wild bells)**

**By:** Alfred, Lord Tennyson (1809-1892)

Ring out, wild bells, to the wild sky,  
The flying cloud, the frosty light:  
The year is dying in the night;  
Ring out, wild bells, and let him die.

Ring out the old, ring in the new,  
Ring, happy bells, across the snow:  
The year is going, let him go;  
Ring out the false, ring in the true.

Ring out the grief that saps the mind  
For those that here we see no more;  
Ring out the feud of rich and poor,  
Ring in redress to all mankind.

Ring out a slowly dying cause,  
And ancient forms of party strife;  
Ring in the nobler modes of life,  
With sweeter manners, purer laws.

Ring out the want, the care, the sin,  
The faithless coldness of the times;  
Ring out, ring out my mournful rhymes  
But ring the fuller minstrel in.

Ring out false pride in place and blood,  
The civic slander and the spite;  
Ring in the love of truth and right,  
Ring in the common love of good.

Ring out old shapes of foul disease;  
Ring out the narrowing lust of gold;  
Ring out the thousand wars of old,  
Ring in the thousand years of peace.

Ring in the valiant man and free,



The larger heart, the kindlier hand;  
Ring out the darkness of the land,  
Ring in the Christ that is to be.

Alfred, Lord Tennyson was born on 6 August 1809, in Somersby, Lincolnshire, England. *Ring Out, Wild Bells*, was part of *In Memoriam*, written to Arthur Henry Hallam, who died at 22. The poem was published in 1850, the year Tennyson was appointed Poet Laureate. The poem is inspired by the English custom to have the ring of bells, muffled to ring out the old year, and then, with muffles removed, to ring in the new year. *Ring Out, Wild Bells*, has been set to music including by Charles Gounod and Percy Fletcher. Alfred, Lord Tennyson died on 6 October 1892.

**Ring Out, Wild Bells**, Gounod, sung by the Mormon Tabernacle Choir  
[https://www.youtube.com/watch?v=TVEAt8v7b\\_g](https://www.youtube.com/watch?v=TVEAt8v7b_g)

**Ring Out, Wild Bells**, from *The Passing of the Year* by Jonathan Dove, Andrew Hon, conductor, sung by the Yale Glee Club  
<https://www.youtube.com/watch?v=yPlqqvOM8Og>

Bell Ringing in the Belfry at Great St. Mary's, Cambridge  
<https://www.youtube.com/watch?v=KNMFvNZIsCM>

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