



Friday, 25 October 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 (FCAFC) - appeal dismissed against the primary judge's refusal to restrain fuel management burns

FitzGerald v Foxes Lane (NSW) Pty Ltd (NSWSC) - dominant tenement owner was not entitled to construct a road along a right of carriageway

HABEAS CANEM

Habeus Halloween



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Summaries With Link (Five Minute Read)

Save Our Strathbogie Forest Inc v Secretary to the Department of Energy, Environment and Climate Action [2024] FCAFC 134

Full Court of the Federal Court of Australia

Moshinsky, Charlesworth, & Kennett JJ

Environmental law - 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 appellant 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 appellant sought a declaration restraining the burns without such approval - the primary judge held that the evidence did not establish that the low intensity burns set out in the delivery plans 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 grant the injunction (see Benchmark 9 April 2024) - the appellant appealed - held: the appellant had not established (on the basis of the primary judge's findings) that there was a real chance that the proposed action would adversely affect habitat critical to the survival of the Glider as a species - the primary judge had made no finding that the planned burn areas comprise or include habitat critical to the survival of the Glider within the description provided in the current Australian Government's Conservation Advice for the Glider - there had been no expert evidence to support such a finding - the primary judge had been correct to conclude that the appellant had not established that it was likely that the reduction in abundance of hollow-bearing trees would have a significant impact on the abundance of Gliders in the planned burn areas - appeal dismissed.

[Save Our Strathbogie Forest Inc](#)

[From Benchmark Thursday, 24 October 2024]

FitzGerald v Foxes Lane (NSW) Pty Ltd [2024] NSWSC 1312

Supreme Court of New South Wales

Peden J

Easements - FitzGerald owned land benefitting from a registered right of carriageway (ROC) and Foxes Land owned the land burdened by that ROC - FitzGerald alleged that Foxes Lane was growing crops on part of the ROC, and its method of farming was causing rutting and corrugation, making driving less comfortable, and he sought to construct a road along the ROC - Foxes Lane disputed his right to do so - held: a registered easement is to be construed by reference to the language of the easement itself, without having recourse to materials extrinsic to the Torrens register - the current physical characteristics of both the dominant and servient tenements can usually be considered when construing an easement, but not where the physical

features of the land in question have changed since creation of the easement, as this would involve taking matters into account that would be inaccessible to a third party inspecting the Torrens register - the owners of the dominant tenement hold those rights which are conferred by the express terms of the easement on its proper construction, as well as any ancillary rights that are implied by virtue of being reasonably necessary for the owners' enjoyment of their express rights - on the correct construction of the ROC in this case, FitzGerald could carry out such works which are reasonably necessary for him to enjoy access over the ROC - the fact that much of the servient tenement was used for grazing at the time of grant, and was using for cropping now, amounted to a material change in circumstances relevant to the construction of the easement - FitzGerald's proposed road works were not "reasonably necessary" in the circumstances where he had always been able to pass along the ROC in his utility vehicle - obstruction of a dominant owner's use of an easement is actionable as nuisance, but there must be a real and substantial interference - here, Foxes Lane had obstructed the ROC for a relatively short period of time when FitzGerald was threatening to bring a large grader onto the ROC, and the appropriate compensation was \$2,500 - as the Court had found FitzGerald had not been entitled to bring the grader onto the ROC to construct the road, his doing so had constituted excessive user, and thus a trespass and a nuisance - \$2,500 was also the appropriate amount of compensation to be awarded to Foxes Lane - it was not appropriate to extinguish or modify the ROC, as it did not hinder Foxes Lane to a real degree, and it was of practical benefit to FitzGerald.

[View Decision](#)

[From Benchmark Wednesday, 23 October 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

In the Matter of McAleenon (UKSC) - Supreme Court held that an individual had the right to compel judicial review of a government decision relating to landfill contamination even though a private right of action against the alleged polluter may have been available

Summaries With Link (Five Minute Read)

In the Matter of McAleenon [2024] UKSC 31

Supreme Court of the United Kingdom

Lord Lloyd-Jones, Lord Briggs, Lord Sales, Lord Stephens, & Lady Simler

Noeleen McAleenon resided near a landfill that was operated by a private firm. Ms McAleenon maintained that the Lisburn and Castlereagh Council had regulatory authority concerning nuisances like the landfill. She sought judicial review of how the Council had dealt with complaints about the landfill. The government argued that she could not seek judicial review of the Council's actions because she had available to her a private right of action against the alleged polluter. The Court of Appeal sustained this objection and held that there were suitable alternative remedies available to Ms McAleenon and that judicial review was not available to her. The Supreme Court reversed and found that the existence of a private claim in nuisance against the alleged polluter did not constitute a suitable alternative remedy to judicial review of the Council's conduct. The Court stated that the fact that different proceedings could have been brought against another party did not mean that there existed a suitable alternative so as to preclude judicial review. The Court further stated that it is not the courts' role to say that a claimant should have sued someone other than the branch of government whose actions were being questioned.

[In the Matter of McAleenon](#)



Poem for Friday

Life

By Charlotte Brontë (1816-1855)

LIFE, believe, is not a dream
So dark as sages say;
Oft a little morning rain
Foretells a pleasant day.
Sometimes there are clouds of gloom,
But these are transient all;
If the shower will make the roses bloom,
O why lament its fall ?

Rapidly, merrily,
Life's sunny hours flit by,
Gratefully, cheerily,
Enjoy them as they fly !

What though Death at times steps in
And calls our Best away ?
What though sorrow seems to win,
O'er hope, a heavy sway ?
Yet hope again elastic springs,
Unconquered, though she fell;
Still buoyant are her golden wings,
Still strong to bear us well.
Manfully, fearlessly,
The day of trial bear,
For gloriously, victoriously,
Can courage quell despair !

Charlotte Brontë was born on 21 April 1816, in West Yorkshire, UK. She was an English poet and novelist. She was the eldest of the three Brontë sisters. Her siblings were Emily Brontë, Anne Brontë, Branwell Brontë, Elizabeth Brontë, and Maria Brontë. She had a year of formal education at Clergy Daughters' School at Cowan Bridge. Thereafter she and her siblings learned at home, from each other and their parents, and aunt Elizabeth Branwell who lived with the family. She is famous for her novel *Jane Eyre*, which she first published under the pseudonym Currer Bell in 1847. She was married to Arthur Bell Nicholls from 1854 to 1855, for the last 9 months of her life. Nicholls had been the curate

to Charlotte's father, Patrick Brontë, an Anglican clergyman. Charlotte Brontë died on 31 March 1855 in Haworth, England.

Reading by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada. Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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