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Benchmark

Friday, 3 May 2024

Weekly Government Review

A Weekly Bulletin listing Decisions of Superior Courts of Australia covering government

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Executive Summary (One Minute Read)

Azimitabar v Commonwealth of Australia (FCAFC) - immigration detention in hotels while receiving medical treatment in Australia was validly authorised under the Migration Act 1958 (Cth)

Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd (Settlement Approval) (FCA) - Court approved settlement of class action, gave directions to deed administrators, and allowed certain costs claimed by a litigation funder

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

Tasevski v Westpac Banking Corporation (NSWSC) - Workers compensation Appeal Panel had erred in not concluding that there had been no error in a medical assessment

Box Hill OHP v Whitehorse CC (VSC) - Victorian Civil and Administrative Tribunal had not erred in affirming a refusal by Council to grant a permit for a service station

Munupi Wilderness Lodge Pty Ltd v Executive Director of Township Leasing (NTSC) - Local Court had not erred in ordering a tenant holding over under an expired lease granted an Aboriginal Land Trust to vacate

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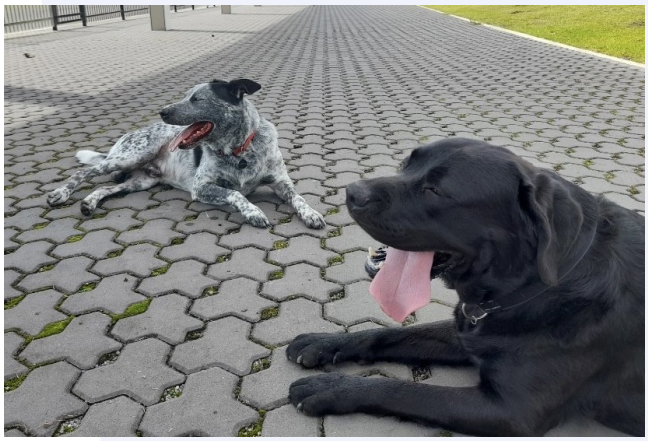
HABEAS CANEM

Panting pooches



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Summaries With Link (Five Minute Read)

Azimitabar v Commonwealth of Australia [2024] FCAFC 52
Full Court of the Federal Court of Australia
Rangiah, Anderson, & Button JJ
Migration - appellant was an unauthorised maritime arrival on Christmas Island and was detained there, and then at the regional processing centre on Manus Island, PNG - he was diagnosed with post-traumatic stress disorder and a major depressive episode and was transferred to Australia for medical treatment - during this treatment, he was detained at two hotels in Victoria - he commenced proceedings against the Commonwealth for damages, on the basis that his detention at the hotels had not been validly authorised under the *Migration Act 1958* (Cth) - the primary judge dismissed this claim - the appellant appealed - held: it was not in dispute that, from the appellant's medical transfer to Australia until he was granted a bridging visa, the appellant did not hold a visa to enter or remain in Australia, and was therefore an "unlawful non-citizen" under s14 of the Act, and that it was known or believed by the officers detaining him that he was an unlawful non-citizen - s189(1) of the Act provided that, if an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person - the definition of "immigration detention" in s5(1) of the Act includes being held by, or on behalf of, an officer "in another place approved by the Minister in writing" - this definition impliedly conferred power on the Minister to approve "another place" of immigration detention that was a de-facto detention centre - when Parliament explicitly gives a power by a provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power - however, this principle did not mean that the specific grant of power to establish detention centres granted by s273 of the Act meant that the Minister could not create de facto detention centres - the power to create de facto detention centres was delegable under s496(1) - the detention was authorised even if the expenditure involved was not lawfully authorised - close attention must be paid to what renders detention lawful, or unlawful, and identification of some element of illegality associated with detention does not, of itself, render the detention unlawful on the basis that it is no longer "immigration detention" under the Act - appeal dismissed.
Azimitabar
[From Benchmark Thursday, 2 May 2024]

Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd (Settlement Approval) [2024] FCA 386
Federal Court of Australia
Thawley J
Representative proceedings - DASS was a financial services provider within the E&P Group of companies, which, from about 2011, gave advice to its clients to invest in URF, a US-based property investment and development fund focused on residential property, primarily in New

York - at the same time, other companies in the E&P Group were being paid fees for managing the URF's assets and renovating its properties - this gave rise to an apparent conflict of interest - the URF did not perform well - applicants began a class action against DASS and deed administrators of DASS applied for directions and orders under s90-15 of the *Insolvency Practice Schedule (Corporations)*, being Schedule 2 to the *Corporations Act 2001* (Cth) - a settlement was agreed in the class action, and the applicants sought the Court's approval - a UK litigation funder applied for approval of part of the legal costs that it paid in relation to a competing class action which was stayed, as a form of common fund order - the deed administrators applied for orders approving their proposed process for the adjudication of claims to be made by DASS' creditors and the distribution of the deed fund once those claims have been assessed - held: the central question regarding settlement approval was whether the settlement was fair and reasonable in the interests of the group members as a whole - the terms of settlement reflected a fair and reasonable compromise of the group member's claims against the respondents - the settlement distribution scheme was fair and reasonable to the claimants - the Court allowed legal costs of a little over 80% of what was claimed for professional fees as recorded in the itemised account, together with full allowance for the 25% uplift - settlement approved - directions should be made in the terms sought by the deed administrators - the return likely to claimants under the settlement were already very small compared to the losses which they have sustained, and, while this was unfortunate, the evidence indicated that this was as much as was ever likely to be recovered - as to the UK litigation funder's claim, there was nothing unjust in funders wearing costs expended in their own pursuit of a commercial gain in circumstances such as the present - there is much which would be unjust in visiting the costs of unsuccessful funders on group members, particularly where there are many unsuccessful funders - there will be circumstances in which it would be "just" to order such costs, an obvious case being where there was a benefit obtained by group members from the funder's activities, particularly where the work was not duplicative and the benefit derived by group members is enduring - the litigation funder bore the onus of establishing that any amount was "just" - the costs of preparing a report that had been of assistance to the group members should be allowed - it was also just to allow certain costs associated with an application for leave to intervene in proceedings brought by ASIC, as this had lead to benefit for group members - other costs were not allowed.

Watson & Co Superannuation Pty Ltd

[From Benchmark Monday, 29 April 2024]

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]

Tasevski v Westpac Banking Corporation [2024] NSWSC 401
Supreme Court of New South Wales
Schmidt AJ
Workers compensation - Tasevski was employed for many years by Westpac, most recently as a head teller, when she suffered a psychiatric injury at work which resulted in her seeking lump sum compensation under s66 of the *Workers Compensation Act 1987* (NSW) - a medical assessor found that Tasevski had suffered both PTSD and a major depressive disorder from which she had not recovered and which were now chronic, but that her whole person impairment was only 10%, which was below the 20% statutory thresholds for compensation - an Appeal Panel dismissed Tasevski's appeal - Tasevski applied for judicial review - held: there was no issue that the Panel had misunderstood the legal test which it had to apply on the appeal, but whether the result was that the Panel had failed to exercise its statutory functions in accordance with applicable law and had issued a certificate which did not accord with the

statutory scheme remained in issue - the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* specify the method which must be used for assessing psychiatric impairment - behavioural consequences of psychiatric disorders must be assessed according to six scales that evaluate separate areas of functional impairment: self care and personal hygiene; social and recreational activities; travel; social functioning (relationships); concentration, persistence and pace; and employability - the assessor had concluded that the self and personal hygiene scale fell into Class 2, whereas, on the evidence, the correct classification was Class 3, the impairment being moderate, not mild - on an appeal where the grounds advanced are application of the wrong criteria or making a demonstrable error in the conclusions reached about the severity of the impairment, the Panel has to consider the assessor's conclusion about the correct class of any disputed scale, by confining itself to the conduct relevant to that scale and the requirements of the Guidelines - even if the Panel identifies that the evidence raised matters about which reasonable minds might differ, it cannot resolve what is in issue about a disputed scale by an observation that what arose to be considered concerned matters about which reasonable minds might differ, or by a finding that the assessor's conclusion was open - the Panel must rather consider and determine whether the assessor applied the incorrect criteria in arriving at his or her conclusion, or whether there was a demonstrable error in the conclusion reached about that class assignment - the Panel had erred, and another panel, approaching the appeal in accordance with applicable law, might reach a different conclusion about the grounds of appeal advanced - Appeal Panel's decision set aside, and matter remitted to a differently constituted appeal panel to be considered according to law.
View Decision
[From Benchmark Monday, 29 April 2024]

Box Hill OHP v Whitehorse CC [2024] VSC 199
Supreme Court of Victoria
Watson J
Planning law - OHP applied to Whitehorse City Council for a permit for a proposed service station - Council refused the application - OHP filed an application for review of the Council's decision with the Victorian Civil and Administrative Tribunal, which affirmed Council's decision to reject OHP's application and determined that no permit should be issued for the proposed service station - OHP sought leave to appeal from the Tribunal's decision - held: the prospects of the appeal were real and not fanciful, so the Court would grant leave to appeal - under the *Whitehorse Planning Scheme*, the land as in a residential growth zone and also in a substantial change area - in determining whether the Tribunal had made an error of law, the weight to be given to the various considerations which may be relevant on the one hand, and to particular facts bearing on those considerations on the other hand, is not fixed by the planning scheme but is essentially a matter for the decision maker - for a residential growth zone and a substantial change area the planning policy provides relatively more encouragement for housing use and less encouragement for a service station - when regard was had to the totality of the Tribunal's reasons, the better characterisation of the Tribunal's decision was that it permissibly

gave weight to the policy objectives of the *Whitehorse Planning Scheme* and its prioritisation and encouragement for increased density of housing use in the area in which the land is situated as part of an overall weighing of the various factors which were relevant on the application for the permit - the Tribunal's finding was not legally unreasonable having regard to the Tribunal's other findings regarding the proposed service station use - the Tribunal had not impermissibly treated the service station proposal's consistency with 'the planning policy and strategic vision' as a threshold issue prior to and without regard to its amenity impacts - the Tribunal had not failed to consider whether a service station was an 'acceptable' outcome under the planning scheme, and had not impermissibly considered the application by reference to an ideal or optimal use, being higher density housing - the Tribunal had not fallen into any error of law - leave to appeal granted but appeal dismissed.
Box Hill OHP
[From Benchmark Thursday, 2 May 2024]

Munupi Wilderness Lodge Pty Ltd v Executive Director of Township Leasing [2024] NTSC 36
Supreme Court of the Northern Territory
Brownhill J
Equitable leases - Munupi operated a fishing lodge as a tourism business from land on Melville Island - from 2005, Munupi occupied the land pursuant to a lease granted by the Tiwi Aboriginal Land Trust, which was an Aboriginal Land Trust that held the fee simple title to Melville Island pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) - from 2010, Munupi occupied the Land pursuant to rights and interests arising in equity in the form of an equitable lease on the same terms as the original lease, including provision for a five year term with an option to renew - the equitable lease expired in 2015, and Munupi did not exercise the option to renew - Munupi then occupied the land under a holding over clause in the equitable lease as a quarterly tenant - Munupi did not pay rent from 2016, and the parties were unable to negotiate a new lease - in 2017, the Trust granted EDTL a lease over the township of Pirlangimpi which included Munupi's land - this lease was under s19 of the *Aboriginal Land Rights (Northern Territory) Act*, which preserved rights existing before commencement of the lease - EDTL issued Munupi with a notice to quit - the Local Court ordered Munupi to vacate the premises - Munupi appealed on questions of law - held: the grounds of appeal were not framed as questions of law, but at their heart were two questions of law: (1) is the EDTL the 'agent' of the Commonwealth within the meaning of s125 of the *Business Tenancies (Fair Dealings) Act 2003* (NT) such that written authority, outside of s20C of the *Aboriginal Land Rights (Northern Territory) Act*, was required from the Commonwealth for the EDTL to issue the notice to quit? and (2) was there no evidence on which to find that the requirements for consultation in cl23 of the township lease had been met in relation to the EDTL's issuance of the notice to quit? - the provisions of Part 13 of the *Business Tenancies (Fair Dealings) Act* applied to the interests of Munupi under the holding over provision in the equitable lease - the fact that estates or interests granted by Land Trusts which exceed 40 years require the Commonwealth Minister's consent does not mean that, as a consequence, the Land Trust, which owns the fee simple, is acting as

the Commonwealth's agent in respect of the estate or interest granted - the ordinary meaning of the word 'administer', read in its statutory context, clearly extends to the determination of a quarterly tenancy created under the holding over clause in the equitable lease - even if Munupi could establish that there was no evidence that the EDTL consulted with a Consultative Forum regarding issuing the notice to quit, the Local Court's conclusion that the requirements for consultation under the township lease were satisfied sas not an error of law which vitiated the decision - appeal dismissed.

Munupi Wilderness Lodge Pty Ltd

[From Benchmark Friday, 3 May 2024]

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 Novel 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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