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Benchmark

Friday, 15 December 2023

Weekly Government Review

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

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Executive Summary (One Minute Read)

Mitsubishi Motors Australia Ltd v Begovic (HCA) - finding of misleading and deceptive conduct in placing a fuel consumption sticker on a car overturned, as the sticker had to be affixed in that form under other Commonwealth legislation

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

In the matter of Northern Minerals Limited (NSWSC) - Court granted an extension of time in which to hold a general meeting called by a foreign shareholder, where the Foreign Investment Review Board was investigating that shareholder's shareholding

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

Olympus Superannuation Fund (Tas) Pty Ltd v Recorder of Titles (TASFC) - Recorder of titles was entitled to exercise his power to amend the Register to correct errors where the alleged error arose from a previous exercise of that power

HABEAS CANEM

McGregor wishes you a happy and peaceful holiday season

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Summaries With Link (Five Minute Read)

Mitsubishi Motors Australia Ltd v Begovic [2023] HCA 43
High Court of Australia
Gageler CJ, Gordon, Steward, Gleeson, & Jagot JJ
Consumer protection - Begovic bought a new Mitsubishi MQ Triton 4x4 GLS DID Auto DC-PU from Northpark - he became dissatisfied with the fuel consumption exceeding the fuel consumption shown on a label attached to the windscreen - he filed a claim in the Victorian Civil and Administrative Tribunal, alleging that Mitsubishi and Northpark had contravened both s18 and s54 of the *Australian Consumer Law* in that the fuel consumption label was misleading or deceptive, and the vehicle was defective and therefore not of acceptable quality as required by the consumer guarantee - Begovic succeeded before the Tribunal, which ordered Northpark to pay Begovic the purchase price of the vehicle, on which the vehicle would become the property of Northpark - a single judge of the Victorian Supreme Court allowed an appeal on questions of law regarding s54 but dismissed an appeal regarding s18, holding that compulsory labelling can be misleading or deceptive if it inaccurately records information about the goods which it is obliged by law to describe accurately - Mitsubishi and Northpark appealed to the Court of Appeal regarding the s18 decision, which dismissed the appeal - Mitsubishi and Northpark were granted special leave to appeal to the High Court - held: as a part of a national legislative scheme, whether the *Australian Consumer Law* applies as a law of the Commonwealth, a law of the Commonwealth enacted as a law of the State, or as a law of the State, it is necessary to construe s18 of the *Australian Consumer Law* consistently with the provisions of the *Motor Vehicle Standards Act 1989* (Cth) which give effect to the *Vehicle Standard (Australian Design Rule 81/02 - Fuel Consumption Labelling for Light Vehicles) 2008* (Cth) as a safety standard under s106 of the *Australian Consumer Law* - where the conduct in trade or commerce said to contravene s18 is the same conduct which is required by another consumer protection law to be carried out only in a prescribed manner, the need to reconcile s18 with that other law cannot be avoided by characterising the conduct (such as presentation and supply) as voluntary - there was no evidence that either Mitsubishi or Northpark engaged in any conduct, save for applying the label in trade or commerce (that is, in importing, presenting and supplying the vehicle) - under the *Motor Vehicle Standards Act*, Mitsubishi could not import the vehicle or supply it to Northpark without the fuel consumption label being applied to it, and Northpark could not supply the vehicle to Begovic without the label attached - Mitsubishi was bound to apply and Mitsubishi and Northpark were bound to maintain the fuel consumption label on the vehicle, in order not to contravene s106 of the *Australian Consumer Law* - the form and content of the fuel consumption label as applied were dictated by the *Vehicle Standard (Australian Design Rule 81/02 - Fuel Consumption Labelling for Light Vehicles) 2008* - if Mitsubishi declared the values for fuel consumption in accordance with the requirements of *UN ECE Regulation 101 (Revision 2)*, then the standard operated to deem those declared values to be the values required to be reported - appeal allowed.
Mitsubishi Motors Australia Ltd
[From Benchmark Thursday, 14 December 2023]

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 the 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]

In the matter of Northern Minerals Limited [2023] NSWSC 1568
Supreme Court of New South Wales
Black J
Corporations - Northern Minerals Limited is a public company listed on the ASX - it is a heavy rare earth minerals producer, and rare earth minerals are treated as "critical minerals" for the purpose of the Foreign Investment Review Board's *Guidance 8: National Security*, which encourages consultation with the Foreign Investment Review Board by foreign persons proposing to undertake a "reviewable national security action" by investing in an entity involved in the extraction, processing, or sale of such minerals - Yuxiao Fund Pte Ltd is a foreign shareholder of in Northern Minerals, and had a voting power of at least 9.98%, although the extent of its voting power together with its associates was a matter the subject of ongoing investigation - Yuxiao Fund sought to increase its interest, and the Commonwealth Treasurer issued an order under s67 of the *Foreign Acquisition and Takeovers Act 1975* (Cth) prohibiting Yuxiao Fund from acquiring an additional interest - Northern Minerals' AGM was deferred pursuant to an extension of time granted by ASIC - Northern Minerals received a notice from Yuxiao Fund pursuant to s249D of the *Corporations Act 2001* (Cth) requiring it to call a general meeting to consider resolutions, including a resolution to remove an existing director of the company - Northern Minerals commenced proceedings, seeking an order under s1322(4) of the *Corporations Act* to extend the time to call and hold the general meeting requested by Yuxiao Fund - held: the power under s1322 is remedial and beneficial in nature and is to be interpreted liberally - before the Court makes such an order, it must be satisfied that no substantial injustice has been or is likely to be caused to any person - the Court considered that no substantial injustice would be caused to any person by the making of the relevant order where the Foreign Investment Review Board's investigations were ongoing and the interests of all persons would be best served by voting at a general meeting where the position as to Yuxiao Fund's entitlement to do so, in respect to any additional shares which it or persons linked to it may have purchased, had been clarified - the extension sought should be granted to maximise the prospect that the Foreign Investment Review Board's investigation would be completed and any uncertainties as to the status of Yuxiao shareholdings will be clarified, or, at least, the status of any proceedings that may arise from that investigation will be clearer, by the time of the meeting requested by Yuxiao Fund - the order sought by Northern Minerals should be made - the ultimate form of that order would be to provide for an extension which may travel with a further extension of the AGM which had been sought from ASIC, but only up until 30 April 2024.
View Decision

[From Benchmark Friday, 15 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]

Olympus Superannuation Fund (Tas) Pty Ltd v Recorder of Titles [2023] TASFC 6
Full Court of the Supreme Court of Tasmania
Wood, Pearce, & Brett JJ
Torrens title - Olympus Superannuation Fund (Tas) Pty Ltd and Bluehouse Corner Pty Ltd owned adjoining land in Hobart - an easement had purportedly been created by the reservation of a right of way over Olympus' land in favour of the then owners of Bluehouse's land when they sold the land to Olympus' predecessor in title in 1915 - both parcels of land were then under the general law system - the easement was recorded on Olympus' land when it was brought under the *Land Titles Act 1980* (Tas) in 1989 - however, when Bluehouse's land was brought under the Torrens system in 1923, the benefit of the easement was not recorded on the titles issued at that time - the Recorder registered the easement on Bluehouse's titles in 2019, pursuant to the power in s139 of the Act to correct errors and supply omissions in the Register - Olympus requested the Recorder reverse this decision and remove the easement from the Register, claiming that the instrument in question did not identify a dominant tenement, and hence was not an easement, but merely granted a personal licence to the individuals named in it - the Recorder refused to remove the recording - Olympus applied to the Supreme Court for relief pursuant to s144 of the Act - the primary judge dismissed the action, holding that the Recorder could not vary or reverse his decision (because the easement, once registered, was indefeasible) and did not find it necessary to address the underlying question - Olympus appealed - held: the Act confers substantial and varied powers upon the Recorder, and an important purpose of this conferral is to ensure that the Recorder has sufficient powers to maintain the accuracy of the Register - s139 provides the Recorder with a general power to correct errors in the Register or an instrument, including a plan, irrespective of the source of the error - the power of correction is not confined to administrative and clerical errors or omissions for which the Recorder or his staff are responsible, and the ultimate purpose of the provision is to ensure the accuracy of the Register - further, once the Recorder has exercised his power under s139 in respect of a particular asserted error, he is not *functus officio*, and unable to revisit that decision - the prima facie position in Tasmania is that a statutory authority or decision-maker has the power to vary or reverse a statutory decision, due to s20(a) of the *Acts Interpretation Act 1931* (Tas) - provided that the provisions of s139 are properly engaged in the circumstances, there is no reason why the Recorder cannot exercise power under that provision to revisit or vary an earlier decision made under that section - however, in determining whether to take action to correct an error under s139 which may have arisen as a result of an initial decision under that section, the Recorder was bound by the provisions of the Act which

implement the general principles of protection afforded by the Torrens system - the registered proprietor of land to which an easement is appurtenant has an indefeasible title to that land but not to the easement, so that the easement cannot be enforced unless the certificate of title of the registered proprietor of the servient tenement states that that title is subject to the easement, or unless the easement falls within one of the exceptions to indefeasibility - the answer to whether the easement was protected by the indefeasibility provisions in the *Land Titles Act* required the primary judge to assess the effect of the Memorial of Conveyance referred to in the Register, and, if part of the Register, the underlying instrument, to determine whether these created an easement, and in particular whether there was identification of a dominant tenement - appeal allowed, and matter remitted to the primary judge for a rehearing of the application.

Olympus Superannuation Fund (Tas) Pty Ltd

[From Benchmark Friday, 15 December 2023]

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 FletcherAlfred, 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

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=yPIqqvOM8Og

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

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