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Benchmark

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Weekly Government Review

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

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Executive Summary (One Minute Read)

Webster on behalf of Ngarigo Peoples v State of New South Wales (FCA) - Court refused restrain the NSW Government from horse culling in the Kosciuszko National Park where the statutory authority for this was alleged to be inconsistent with of the *Racial Discrimination Act 1975* (Cth)

Ierna v Commissioner of Taxation (FCA) - income tax objections allowed, as the purpose of the restructure of a business structure that predated the CGT regime was not to distribute profits as capital rather than dividend

M. & S. Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd (NSWCA) - summonses stated a wrong date for commission of an environmental offence, which was before the relevant section commenced - primary judge erred by dismissing the summonses and refusing leave to amend the date

Commissioner of Police v Attorney General for New South Wales (NSWCA) - public interest immunity abrogated by necessary intendment regarding production to the Law Enforcement Conduct Commission under notices under s114 of the *Law Enforcement Conduct Commission Act 2016* (NSW) for the purpose of oversight and monitoring of a critical incident investigation

Snowy Mountain Bush Users Group Inc v Minister for the Environment (NSWSC) - interlocutory injunction restricting wild horse culling operations in the Kosciuszko National Park refused - Court resisted the temptation to discount the significance of costs in a contest between government and well-meaning and passionate members of the community

HABEAS CANEM

Small dog, big surf

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Summaries With Link (Five Minute Read)

Webster on behalf of Ngarigo Peoples v State of New South Wales [2024] FCA 615
Federal Court of Australia
Raper J
Discrimination law - the applicant was a Ngarigo man, authorised to represent the Ngarigo peoples, who he asserted had existing and unextinguished common law Aboriginal property and water rights over the Kosciuszko National Park and surrounding areas, including the Australian Capital Territory - he sought urgent interlocutory relief restraining the NSW Government from culling wild horses and other native animals pursuant to the *Kosciuszko Wild Horse Heritage Act 2018* (NSW) - he claimed the Government had failed to recognise the Ngarigo peoples' rights over the land, inhibiting or limiting their enjoyment of it and are trespassing on it - he contested the validity of the *Kosciuszko Wild Horse Heritage Act's* authorisation of culling measures by reason of purported inconsistency with s10 of the *Racial Discrimination Act 1975* (Cth) - held: s78B of the *Judiciary Act 1903* (Cth) provides a mechanism by which the Court must be satisfied in matters arising under the Constitution that notice is given to the Attorneys-General of the Commonwealth and of the States, and does not provide justiciable rights nor protection - further, s78B(5) states that nothing in that section prevents the Court from proceeding without delay to hear and determine proceedings involving urgent interlocutory relief - the applicant had made no substantive application associated with his claims, and all that he had filed was the claim for injunctive relief - the applicant's submissions appeared to misunderstand the relationship between native title and the common law, and the meaning of common law recognition provided by s223 of the *Native Title Act 1993* (Cth) - to the extent that the applicant sought to rely on a native title interest recognised by the common law, assuming the Court had jurisdiction to determine such a claim (contrary to s213 of the *Native Title Act*, which provides native title must be determined in accordance with the Act), the applicant had not identified the nature of that interest - there was therefore no apparent basis for the claim of inconsistency with the *Racial Discrimination Act* - the applicant had not satisfied the Court there was a serious question to be tried - the balance of convenience did not favour the injunction being granted because of the weakness in the applicant's claim - further, grant of the injunction would cause significant prejudice and hardship to the Government, third persons, and the public generally, as a pause in the horse removal operations would result in: environmental degradation of a kind that the operations are specifically intended to reduce, including habitat loss, reduced water quality, soil compaction and erosion, and loss of vulnerable and endangered species; significant resourcing and personnel consequences for the National Parks and Wildlife Service, including on contracting arrangements; and (c) prolonging of the closure of parts of the National Park, comprising the ability of the public to enjoy the National Park - application for interlocutory injunction refused.
Webster on behalf of Ngarigo Peoples
[From Benchmark Monday, 17 June 2024]

Ierna v Commissioner of Taxation [2024] FCA 592

Federal Court of Australia
Logan J
Income tax - before the commencement of the CGT regime, two men founded a street wear business through a unit trust - in 2016, the units in the trust were disposed of as part of a restructure - the Commissioner took the view that, even though the units were pre-CGT assets, s45C of the *Income Tax Assessment Act 1936* (Cth) applied to a capital benefit of $26million derived by each founder, and that capital benefit was therefore taken to be an unfranked dividend and part of assessable income - the Commissioner disallowed objections, and the founders appealed to the Federal Court - held: the language of s45B(8)(a) is narrow in that the existence of profits in a company or associate must actually be a contributory cause of a decision to return capital - amendments to income tax legislation have "tracked" the amendments to corporations legislation - s45B is an anti-avoidance measure to ensure companies do not distribute profits as capital rather than dividend - the question was whether, objectively, the capital benefit received was "attributable to" (in the sense of actually caused by or sourced in) the relevant company's share capital account, or was it, as the Commissioner contended, sourced in an increase in value of the units (from $1 to about $2.5million each) realised by the restructure - the Commissioner's position did not survive an objective examination of the whole of the circumstances, informed by reference to considerations in s45B(8) - the relevant company was newly formed, and had no pattern of distributions of dividends, bonus shares and returns of capital or share premium, and neither did any associate - even looking at pre-existing entities within the group, there was no pattern of dividend payments which, objectively, would support a conclusion that the $52million was a substitute for a payment from profits - s45B had no application to the "scheme" as postulated by the Commissioner, and so there was no basis for a determination under s45C - Part IVA of the *Income Tax Assessment Act 1936* also had no application - from any objective examination of the facts in light of the considerations specified in s177D, the dominant purpose of the "scheme" was never avoid the inclusion of a $26 million dividend in each assessable income - objectively, the dominant purpose was always to use pre-CGT assets, namely units in the unit trust, to repay Division 7A loans made to the founders - appeals allowed, objection decisions set aside, and objections allowed in full.
Ierna
[From Benchmark Thursday, 20 June 2024]

M. & S. Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd [2024] NSWCA 151
Ward P, Mitchelmore JA, Preston CJ of LEC
Environmental law - M&S commenced proceedings, charging the defendants with each committing an offence against s144AAA of the *Protection of the Environment Operations Act 1997* (NSW) by unlawfully disposing of asbestos waste - the summonses stated that the offence was committed during a particular period - this period was before the Act had been amended to add s144AAA - M&S sought to amend the summonses to alleged breaches after s144AAA commenced, and the defendants applied to have the summonses dismissed - the primary judge

dismissed the summonses - by two applications, M&S sought to appeal from and sought review of the primary judge's decision - held: s15(2) and s16(1) and (2) of the *Criminal Procedure Act 1986* (Cth) provided that the summonses were not "bad, insufficient, void, erroneous or defective" on the ground that they stated time wrongly or stated an "impossible day", and that no objection could be taken to the summonses on the grounds of any alleged defect in substance or form - the general rule is that a statement in an indictment or other process by which criminal proceedings are commenced, including a summons, of the date on which the offence was committed is not a material matter, unless it is actually an essential part of the alleged offence - contrary to the primary judge's finding, the summonses did disclose an offence known to law, and so were not nullities for failing to do so - the stated date of the offence may have been "an impossible day" on which to commit the offence, but that did not make the offence one that is now not known to the law - the primary judge erred in deciding to dismiss M&S's notice of motion seeking leave to amend the summonses - appeal allowed.
View Decision
[From Benchmark Friday, 21 June 2024]

Commissioner of Police v Attorney General for New South Wales [2024] NSWCA 150
Court of Appeal of New South Wales
Ward P, Gleeson, & Adamson JJA
Public interest immunity - the Law Enforcement Conduct Commission (LECC) is currently monitoring two critical incident investigations pursuant to Pt 8 of the *Law Enforcement Conduct Commission Act 2016* (NSW), each incident involving the death of a person during a police operation - the LECC issued notices to two offices calling for a copy of the State Technical Investigation Branch surveillance records and iSURV logs relating to the first critical incident and a copy of the Less Lethal Manual and iSURV logs relating to the second critical incident - the Police Commissioner and the two officers sought declaratory relief from the Court of Appeal as to the proper construction of s114(3)(d) of the Law Enforcement Conduct Commission Act 2016 (NSW), and in particular whether the officers could decline to produce the documents sought on the grounds of public interest immunity - held: on the proper construction of s114(3)(d), read in the context of the legislation as a whole and having regard to the objects and purpose of the legislation, public interest immunity had been abrogated by necessary intendment in relation to the production of material to LECC under notices issued under s114 for the purpose of oversight and monitoring of a critical incident investigation - declarations sought by the Commissioner and the officers not made.
View Decision
[From Benchmark Friday, 21 June 2024]

Snowy Mountain Bush Users Group Inc v Minister for the Environment [2024] NSWSC 711
Supreme Court of New South Wales
Harrison CJ at CL
Administrative law - an environment group sought a declaration that aerial horse culling

operations in the Kosciuszko National Park contravened of s10 of the *Kosciuszko Wild Horse Heritage Act 2018* (NSW), an injunction prohibiting those operations, and a declaration that the *Amended Kosciusko National Park Wild Horse Heritage Management Plan* was invalid - the plaintiff also sought urgent interlocutory relief prohibiting culling operations where it appeared this would reduce wild horse numbers below 3,000 - held: although the plaintiff's prospects were no more than arguable, its case did not seem hopeless or doomed to fail - the outcome would depend upon a detailed analysis of what the Plan, on its proper construction, required, and then a comparison with the activities in fact taking place - there was therefore a serious question to be tried - whether the plaintiff had standing should await a more detailed exploration with the benefit of cross-examination and a better understanding of the role the plaintiff played in consultations with the government - the plaintiff conceded it did not have sufficient financial resources to meet an adverse costs order - the Court must resist the temptation to discount the significance of costs in a contest between government and an incorporated body representing well-meaning and passionate members of the community with genuinely held and commendable concerns - the absence of an undertaking as to damages weighed heavily in favour of refusing interlocutory relief - the balance of convenience favoured refusing interlocutory relief - there was no evidence to satisfy the Court on the balance of probabilities that horses were being killed in a way that caused them unnecessary and unjustifiable pain, and aerial culling operations had been ongoing for some considerable time, and had been, and would be, subject to observation and assessment by the RSPCA - further, suspension of the control operations threatened the environment, with feral horses being recognised as a key risk to the park, including a number of vulnerable species - interlocutory injunction refused.
View Decision
[From Benchmark Wednesday, 19 June 2024]

Executive Summary and (One Minute Read)

Food and Drug Administration v Alliance for Hippocratic Medicine (SCOTUS) - Plaintiff pro-life doctors and medical associations challenged Food and Drug Administration (FDA) decision to relax prescribing restrictions on a drug used to terminate pregnancies. The Court held the plaintiffs lacked standing to challenge the FDA decision

Summaries With Link (Five Minute Read)

Food and Drug Administration v Alliance for Hippocratic Medicine [2024] 602 US ___
Supreme Court of the United States
In 2021, the Food and Drug Administration (FDA) relaxed regulations for prescribing mifepristone, an abortion drug, to make the drug more accessible to women. The plaintiffs, consisting of pro-life doctors and medical associations, brought suit, alleging that the FDA regulations violated the *Administrative Procedure Act*. The District Court granted plaintiffs an injunction. The Court of Appeals found that plaintiffs had standing to sue and were likely to win on the merits. Reversing the lower courts, a unanimous Supreme Court held that the doctors and medical societies lacked standing to bring suit. Article III of the US Constitution limits the jurisdiction of federal courts to actual cases and controversies. The Court said that this is a matter of separation of powers. General complaints about how the government conducts its business are matters for the legislative and executive branches, not the judiciary. To establish standing, a plaintiff must demonstrate that (1) the plaintiff will likely suffer an injury in fact; (2) that the injury would likely be caused by the defendant; and (3) that the injury can be redressed by judicial relief. The plaintiffs are pro-life and do not prescribe the abortion drug. Nothing contained in the FDA regulations requires doctors to prescribe this drug. In short, the plaintiffs are acting to restrict the availability of the drug to others. While plaintiffs argued that they have suffered injury because doctors may suffer conscience objections when forced to perform abortions or perform abortion related treatment, the argument failed because federal conscience laws explicitly protect doctors from being required to perform abortions or other treatment that violates their consciences. The Court also rejected arguments that, if plaintiffs were not allowed to sue, then no one would have standing to challenge the FDA's actions. The Court said that even if this were true, it could not create standing and that some issues must be dealt with through the political and democratic processes and not the courts.
Food and Drug Administration

Poem for Friday

"Hope" is the thing with feathers (314)

By Emily Dickinson (10 December, 1830-15 May, 1886)

Hope is the thing with feathers -
That perches in the soul -
And sings the tune without the words -
And never stops - at all -

And sweetest - in the Gale - is heard -
And sore must be the storm -
That could abash the little Bird
That kept so many warm -

I've heard it in the chillest land -
And on the strangest Sea -
Yet - never - in Extremity,
It asked a crumb - of me.

Emily Dickinson https://en.wikipedia.org/wiki/Emily_Dickinson
Emily Dickinson Museum https://en.wikipedia.org/wiki/Emily_Dickinson_Museum

Hope is the thing with feathers, sung by Nazareth College Treble Choir, Linehan Chapel, Nazareth College
https://www.youtube.com/watch?v=gDlSo4hEzmE

Recitation 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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