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Benchmark

Friday, 25 October 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)

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

Air Canada v Evans (NSWCA) - Air Canada's Tariff rules do not have the effect that, if damages for in-flight injuries are greater than the limit set by the *Montreal Convention*, a plaintiff can recover that amount from Air Canada, even if Air Canada can prove that the damages were not due to the negligence or other wrongful act or omission

Singh v Health Care Complaints Commission (NSWSC) - NCAT had erred in law by approaching the question of collusion between witnesses at too high a level of generality

Peers v Medical Board of Australia (VSC) - judicial review application dismissed against what was effectively an indefinite suspension of a doctor's registration as 'immediate action', on the basis of the doctor disregarding and undermining the Medical Board's position on covid vaccinations

Arch v Linfox Australia Pty Ltd (WASC) - the *Sentencing Act 1995* (WA) and the *Spent Convictions Act 1988* (WA) do not empower the courts to make a spent conviction order in respect of a corporate offender

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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]

Air Canada v Evans [2024] NSWCA 153
Court of Appeal of New South Wales
Leeming & Payne JJA, & Griffiths AJA
Aviation law - a mother and daughter were on an Air Canada flight when it encountered turbulence, causing them injuries - they sued Air Canada in the Supreme Court under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) and the applicable articles of the *Montreal Convention 1999* set out in Schedule 1A of that Act - Air Canada admitted that the Act and the Convention applied, but said that the quantum of the claims ought to be determined under the *Civil Liability Act 2002* (NSW), and that the cap on personal injury damages contained in Article 21 of the *Montreal Convention* also applied - the primary judge, *inter alia*, answered "yes" to the special question whether r105(C) of Air Canada's Tariff rules had the effect that, if the Court

assesses each plaintiff's damages as greater than the limit set by Article 21 of the *Montreal Convention*, the plaintiffs would be entitled to recover that amount from Air Canada, even if Air Canada could prove that the damages were not due to the negligence or other wrongful act or omission - Air Canada appealed against this answer - held: r105(B)(5) of the Tariff rules explicitly incorporated the *Montreal Convention* and provided that it prevails over any provision of the Tariff rules inconsistent with the liability rules in that Convention - even if the issue were one of construing the contract of carriage, it would be necessary to read that contract as a whole with regard to its commercial purpose - however, this was a case of merely construing a contract, as the Tariff regulated liability created by various international conventions, and was required to come into existence as part of the regulatory regimes in a number of countries governing international commercial aviation - when the Tariff was read as a whole, and in light of its purpose, and when the *Montreal Convention* which it incorporated was understood, the meaning of r105(C) was clear - the Tariff had to accommodate the reality that it would apply to some passengers whose carriage was governed by the Warsaw regime and others whose carriage was governed by *the Montreal Convention*, and that it also had to comply with a range of international regulatory requirements - the purpose of r105(B) was to ensure that the existing relaxation or waiver of Air Canada's entitlements under the Warsaw regime remained in place - the purpose of r105(C) was to comply with notification requirements under regulatory regimes including that imposed by the Federal Government of Canada - there was no conflict between r105(B) and r105(C) - appeal allowed, and special question answered "no".
View Decision
[From Benchmark Thursday, 24 October 2024]

Singh v Health Care Complaints Commission [2024] NSWSC 1307
Supreme Court of New South Wales
Griffiths AJA
Professional standards - a patient made two complaints against a chiropractor that he had engaged in inappropriate sexual communication and intimate physical touching - the NSW Civil and Administrative Tribunal found that the chiropractor had engaged in unsatisfactory professional conduct and professional misconduct within s139B and s139E respectively of the *Health Practitioner Regulation National Law* (NSW) - NCAT then cancelled the chiropractor's registration as a chiropractor pursuant to s149C(1)(b), and also made a prohibition order and fixed a non-renewal period of two years and six months - the chiropractor appealed on questions of law against both the findings of unsatisfactory professional conduct and professional misconduct and the sanctions imposed - held: the chiropractors two attempts at pleadings both did not clearly identify any question of law, but rather passed the responsibility of identifying questions of law to the Court, by setting out a series of claims that NCAT had erred in law in various ways, and a catch-all order requesting leave to appeal in relation to any ground that the Court did not consider raised a question of law - the clear identification of a question or questions of law is necessary as the identified question(s) of law constitute the subject matter of the appeal and, in that sense, define the Court's jurisdiction - further, as leave is required to appeal on a matter that is not a question of law, the Court must be able to identify the matters

for which leave is required so that it can apply the relevant principles concerning a grant of leave - whether a proper question of law is identified is a matter of substance, not form - NCAT had expressed its reasoning regarding collusion between witnesses at too high a level of generality - each case must be approached with close attention to its own facts and circumstances while constantly bearing in mind the seriousness of a finding of collusion and the need for restraint before making such a grave and serious finding - NCAT had erred in finding collusion based on its finding that there were substantial similarities in some relevant evidentiary statements - NCAT had also denied the chiropractor procedural fairness by finding collusion where the Health Care Complaints Commission had failed to put collusion to the chiropractor squarely in cross-examination - other grounds of law rejected and leave refused to appeal in respect of grounds that did not raise a question of law - appeal allowed, and matter be remitted to NCAT for rehearing according to law.
View Decision
[From Benchmark Monday, 21 October 2024]

Peers v Medical Board of Australia [2024] VSC 630
Supreme Court of Victoria
Gorton J
Administrative law - in 2021, the Medical Board of Australia formed the view that the medical general practitioner plaintiff posed a serious risk to persons and that it was necessary to take immediate action to protect public health or safety, on the basis that the plaintiff was showing a complete disregard to, and undermining the Board's position on, covid vaccinations - it took 'immediate action' under s156 of the *Health Practitioner Regulation National Law* to suspend her registration and prevent her practising - the plaintiff sought judicial review of the Board's decision - held: as part of immediate action, matters where the Board reasonably believes a practitioner has committed professional misconduct must be referred to a responsible tribunal, which in this case was the Victorian Civil and Administrative Tribunal - however, the argument that the Board is required to refer a matter to VCAT immediately (or promptly) after making its decision to suspend a practitioner's registration has been rejected by the Court of Appeal - the test for professional misconduct is different for the test to justify immediate action - the issue of law for the Court was: does s156 of the National Law authorise the taking of immediate action that lasts for three or more years (or for an indefinite time)? - there is nothing inherently unlawful in the legislature setting up a regulatory regime that allows for a regulator to suspend registrations 'indefinitely' in the sense that the suspension does not have a fixed end date at the time it commences, on the basis of beliefs reasonably formed by the regulator that the practitioner poses a 'serious risk' to persons and that it is necessary to do so to protect public health or safety - the legislature had prioritised the objective of 'protecting the public' from risk above the interests of practitioners in continuing their practise or the risk of unfairness to any particular practitioner in any particular case - proceedings dismissed.
Peers
[From Benchmark Tuesday, 22 October 2024]

Arch v Linfox Australia Pty Ltd [2024] WASC 376
Supreme Court of Western Australia
Cobby J
Statutory construction - Linfox Australia Pty Ltd pled guilty to one charge of failing to comply with a loading requirement pursuant to r187 of the *Road Traffic (Vehicles) Regulations 2014* (WA), contrary to s29(1) of the *Road Traffic (Vehicles) Act 2012* (WA) - the Magistrate imposed a fine of $9,000 and made a spent conviction order - the prosecutor sought leave to appeal, contending that the Magistrate erred in in law because the courts lack power to make a spent conviction order where the offender is a corporation - held: a spent conviction order is a creature of statute - s39(1) of the *Sentencing Act 1995* (WA) provides that that section applies to an offender 'who is a natural person' - s39(2)(d) provides that a court sentencing an offender may make a spent conviction order - s45(1) provides that the Court must not make a spent conviction order unless it considers that the offender is unlikely to commit such an offence again, and, having regard to the trivial nature of the offence or the previous good character of the offender, it considers the offender should be relieved immediately of the adverse effect that the conviction might have - s45(2) provides that an order that a conviction is a spent conviction for the purposes of the Act has the effect that the order is a spent conviction for the purposes of the *Spent Convictions Act 1988* (WA) - s40(1) provides that that section applies where the offender is a body corporate - there is no mention of making a spent conviction order, or any reference to s45, in s40(2) - Linfox's contention that the legislature would have included a specific provision prohibiting the making of a spent conviction order where the offender is a body corporate if that had been its intention should be rejected - the text of the Sentencing Act made clear that Parliament did not intend that a spent conviction order could be made in respect of a body corporate, and Parliament drew a clear distinction in s39 and s40 between natural persons and bodies corporate - the starting point for determining the meaning of a statutory provision is the text of the statute whilst having regard to its context and purpose - a purposive approach to construction may allow reading a provision as if it contained additional words, but a construction which 'fills gaps disclosed in legislation', or make an insertion which is 'too big, or too much at variance with the language in fact used by the legislature' is unlikely to be justified - the *Spent Convictions Act*, in its terms, was also restricted to natural persons - the *Spent Convictions Act* does not invalidate or render void a conviction, but instead limits or provides relief from its adverse effects - a spent conviction order made in relation to a body corporate would therefore take effect in a very different manner than that contemplated by the *Spent Convictions Act* in respect of natural persons - leave to appeal granted and appeal allowed.
Arch
[From Benchmark Tuesday, 22 October 2024]

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 Bronte 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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