Essential Readings in Environmental Law
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Judgments on Environmental Law in Australia

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Land and Environment Court of New South Wales, Australia

OVERVIEW OF KEY JUDGMENTS

International environmental law/constitutional law

1. *Commonwealth of Australia v State of Tasmania[Tasmanian Dam Case]* [1983] HCA 21; (1983) 158 CLR 1

Aboriginal native title/constitutional law/criminal law

2. *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351

Environmental impact assessment

3. *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190; (2004) 134 LGERA 272 (Nathan Dam Case)

4. *Jarasius v Forestry Commission of New South Wales [No 1]* (1988) 71 LGRA 79

Precautionary principle/Ecologically Sustainable Development

5. *Tuna Boat Owners Association of SA Inc v Development Assessment Commission* [2000] SASC 238; (2000) 110 LGERA 1

6. *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 67 NSWLR 256

Climate change/Ecologically Sustainable Development

7. *Australian Conservation Foundation v Latrobe City Council* [2004] VCAT 2029; (2004) 140 LGERA 100 (Hazelwood Power Station case)

8. *Gray v The Minister for Planning* [2006] NSWLEC 720; (2006) 152 LGERA 258

Conditions of development

9. *Western Australian Planning Commission v Temwood Holdings Pty Limited* [2004] HCA 63; (2004) 221 CLR 30

Public notification and participation

10. *Scurr v Brisbane City Council* [1973] HCA 39; (1973) 133 CLR 242

Whaling/Biodiversity protection

Civil Enforcement/Civil Penalties

11. *Minister for the Environment and Heritage v Greentree (No 3)* [2004] FCA 1317; (2004) 136 LGERA 89

12. *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3; (2008) 165 FCR 510

Background

Australia has a federal system of government. There are nine jurisdictions, consisting of the Australian, six state and two territory governments. Environmental and planning law is predominately legislated and enforced in the states and territories. The *Australian Constitution* (1901) does not give the Australian Parliament explicit powers to make laws with respect to the environment. It is a residual power held by the states. The Australian Parliament has power to make laws with respect to the environment insofar as such laws are authorised by the specific heads of power in the Constitution, such as giving effect to an international agreement that the Australian Government has ratified. A number of cases below are merit appeals in which a broad range of remedies are available to an applicant, in contrast to judicial review proceedings (which also feature below) in which the role of the court is limited to, for example, granting declarations and injunctions. These cases demonstrate the importance of public law for environmental protection.

Cases

1. ***Commonwealth of Australia v State of Tasmania [Tasmanian Dam Case]*** [1983] HCA 21; (1983) 158 CLR 1 concerned the constitutional validity of the Australian Parliament's conservation and heritage protection legislation which sought to give effect to Australia's obligations under the *Convention for the Protection of the World Cultural and Natural Heritage*. If valid the Federal legislation stopped the Franklin River Dam from being constructed in Tasmania. The Franklin River had been declared a World Heritage site. The majority of the High Court of Australia upheld the constitutional validity of the Federal legislation which banned the construction of the dam and protected Aboriginal artefacts and relics. The Australian Parliament had power under the external affairs power

(s 51(xxix) of the *Australian Constitution*) to enact legislation that is reasonably conducive to the performance of a treaty obligation or reasonably capable of being considered appropriate and adapted to fulfil Australia's international legal obligations.

2. ***Yanner v Eaton*** [1999] HCA 53; (1999) 201 CLR 351 concerned an Aboriginal Australian (Mr Yanner) who had caught crocodiles without a permit and was charged with an offence against the State fauna conservation legislation in Queensland. In finding Mr Yanner not guilty and dismissing the charge, the magistrate at first instance held that Mr Yanner had a traditional hunting right that predated the common law in Queensland. A majority of the Court of Appeal of the Supreme Court of Queensland upheld an application to review that decision. In allowing Mr Yanner's appeal, a majority of the High Court of Australia found that Mr Yanner had hunting and fishing rights under the Federal native title legislation, which the State fauna conservation legislation did not extinguish. By virtue of the operation of the Federal native title legislation and the *Australian Constitution*, the State fauna conservation legislation did not prohibit or restrict Mr Yanner, as a native title holder, from hunting or fishing for the crocodiles he took for the purpose of satisfying personal, domestic or non-commercial communal needs.

3. ***Minister for the Environment and Heritage v Queensland Conservation Council Inc*** [2004] FCAFC 190; (2004) 134 LGERA 272 (Nathan Dam case) concerned an appeal from a decision by a judge of the Federal Court setting aside parts of a decision made by the Federal Minister for the Environment and Heritage (Minister) relating to a proposal to construct a large dam in Queensland on a river which flowed to the Coral Sea. The Minister considered that the proposed dam would be unlikely to have a significant impact on the Great Barrier Reef World Heritage Area or on migratory species. In dismissing the Minister's appeal, the Full Federal Court held as erroneous the Minister's view that downstream pollution, whether likely or not, was incapable of constituting an adverse impact of the proposed action being the construction and operation of the dam. The statutory words "all adverse impacts" include effects which are sufficiently close to the action to allow it to be said that they are, or would be, the consequences of the action on the matter protected by the relevant Act.

4. ***Jarasius v Forestry Commission of New South Wales [No 1]*** (1988) 71 LGRA 79 concerned a judicial review challenge to the decision of the respondent Forestry Commission of New South Wales to grant approval and licences to the other respondents to undertake logging activities in two areas of State forest. The applicant Ms Jarasius sought a declaration that a valid environmental impact statement (EIS) had not been prepared under the relevant State Act and an injunction retraining the respondents from engaging in logging activities until an EIS had been prepared. One respondent had prepared a draft and final EIS under the relevant Federal Act to renew its woodchip export licence, but declined to prepare a separate EIS pursuant to the State Act. The Land and Environment Court of New South Wales held that the logging activities were likely to significantly affect the environment and that the respondents had a duty under the State

Act to consider to the fullest extent reasonably practicable matters likely to affect the environment. The respondents had not discharged this duty. The EIS prepared for the Federal Act was not sufficient to satisfy the more stringent requirements of the State Act. The Court concluded that the logging activities should cease in the two areas of State forest until an adequate EIS had been prepared.

5. ***Tuna Boat Owners Association of SA Inc v Development Assessment Commission*** [2000] SASC 238; (2000) 110 LGERA 1 was an appeal on a question of law from the decision of the Environment, Resources and Development Court (ERD Court) that upheld an appeal from a decision to approve the establishment of tuna farms resulting in the refusal of consent. The Full Court of the Supreme Court of South Australia unanimously found that it was open to the ERD Court to consider the issue of ecologically sustainable development, which was included as an objective in the relevant local government plan, as the longer term consequences of the proposed development were not known.

6. ***Telstra Corporation Ltd v Hornsby Shire Council*** [2006] NSWLEC 133; (2006) 67 NSWLR 256 concerned a merit appeal by a telecommunications company against the local authority's refusal of its development application. The development application was primarily for the erection of antennas on top of a recreation club to address mobile telephone coverage needs in the area. Members of the public and the local authority voiced concerns about public health impacts, among other things. The Land and Environment Court of New South Wales reviewed the principles of ecologically sustainable development (one such principle being the precautionary principle) which applied to decisions being made under the planning legislation under which the local authority refused the development application. The Court considered that the need to take precautionary measures as required by the precautionary principle would be satisfied by two conditions precedent: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. If established, the precautionary principle would operate to shift the evidential burden of proof to the proponent of the economic or other development plan to show that a threat does not in fact exist or is effectively negligible. The precautionary principle did not apply in this case because there was no threat of serious or irreversible environmental damage. The Court allowed the appeal and approved the development application.

7. ***Australian Conservation Foundation v Latrobe City Council*** [2004] VCAT 2029; (2004) 140 LGERA 100 (Hazelwood Power Station case) concerned an application by the owner of Hazelwood Power Station in Victoria for approval to develop an additional coalfield to enable that power station to continue to operate beyond its expected lifespan. As approval required an amendment to the relevant planning scheme a panel was composed to conduct an enquiry into the amendment, instructed by terms of reference set by the State Minister for Planning (Minister). The terms of reference expressly stated that the panel was not to consider matters related to greenhouse gas (GHG) emissions of the power station. The Victorian Civil and Administrative Tribunal found that there was a sufficiently close nexus between the amendment to the planning scheme and the

environmental effects of GHG emissions from the power station as the amendment was necessary to allow the life of the power station to be extended. Submissions on the power station's GHG emissions were relevant to the amendment of the planning scheme, and the panel was required to consider them. The Minister did not have power to issue terms of reference to a panel in relation to its duty to consider submissions about an amendment to a planning scheme.

8. ***Gray v The Minister for Planning*** [2006] NSWLEC 720; (2006) 152 LGERA 258 concerned a judicial review challenge to a decision by the Director-General of the Department of Planning of New South Wales that an environmental assessment of a mining proposal prepared by a mining company addressed environmental assessment requirements (EAR). The applicant sought a declaration that that decision was void and without effect as the EAR did not include a detailed greenhouse gas assessment. The Land and Environment Court of New South Wales held that there was a sufficiently proximate link between the mining of thermal coal in NSW which was to be used as fuel in power stations, and the emission of greenhouse gases which contribute to climate change/global warming. The mining proposal required an assessment of the greenhouse gas contribution of the coal burnt in power stations in Australia and overseas. A decision that an environment assessment addressed the EAR requires consideration of the principles of ecologically sustainable development (ESD). There was a failure to take into account ESD principles, including the principle of intergenerational equity and the precautionary principle.

9. ***Western Australian Planning Commission v Temwood Holdings Pty Limited*** [2004] HCA 63; (2004) 221 CLR 30 concerned a challenge to the validity of a condition imposed by a planning commission in granting approval to a development application. The condition required the developer to cede a portion of the subject land to the Crown free of costs to and without payment of compensation by the Crown. The developer unsuccessfully appealed to the Town Planning Appeal Tribunal and then to the Supreme Court of Western Australia, but was successful on a further appeal to the Full Court of that Supreme Court. The planning commission successfully appealed to the High Court of Australia, a majority of which upheld the validity of the condition. The developer had failed to show that the Tribunal erred in law because the condition was imposed for an improper purpose. The condition was within power. Furthermore, the Tribunal was entitled to take the view that vesting a portion of the subject land in the Crown by way of the condition secured environment protection and appropriate foreshore management objectives.

10. ***Scurr v Brisbane City Council*** [1973] HCA 39; (1973) 133 CLR 242 concerned a challenge by objectors to the validity of the local authority's public advertisement of a development application for the erection of a large store. The relevant statutory provision required such an advertisement to set out the particulars of the particular application. The Local Government Court of Queensland and Full Court of the Supreme Court of Queensland dismissed the objectors' challenge. The High Court of Australia emphasised

the goal of the relevant statutory provision in making the local authority aware of the views of those that oppose an application and the opportunity for objectors to make their views known. The attainment of these goals depended on the giving of public notice of an application. The legislation made the giving of public notice a condition precedent to any consideration of an application by the local authority. In allowing the appeal the High Court unanimously held that the advertisement was inadequate and required a higher degree of particularity. This inadequacy vitiated the application.

11. ***Minister for the Environment and Heritage v Greentree (No 3)*** [2004] FCA 1317; (2004) 136 LGERA 89 concerned the imposition of civil penalties on the defendant and the defendant company after the Federal Court held in ***Minister for the Environment and Heritage v Greentree (No 2)*** [2004] FCA 741 that the defendants had taken action that had a significant impact on the ecological character of land designated under the *Ramsar Convention*. The Court was satisfied that the contravening conduct was deliberate and planned, and that the defendant knew that whatever ecological character the site retained as a wetland would largely be destroyed, at least for a lengthy period. The Court imposed large monetary penalties on the defendants.

12. ***Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*** [2008] FCA 3; (2008) 165 FCR 510 concerned an application by the non-government organisation for injunctive relief and declarations in relation to the whaling activities of the respondent, a company incorporated in Japan. The whaling activities were carried out in the Australian Whale Sanctuary (AWS) and within 200 nautical miles of the Australian Antarctic Territory (AAT). The relevant Act made it an offence to kill, injure, intentionally take or otherwise deal with a cetacean in the AWS. The Federal Court held that it was not its role to question Australia's claim to the AAT and the AWS and that the difficulty of enforcing the relief was not a reason not to grant relief. The whaling activities breached the relevant Act. The Court ordered that the respondent be restrained from further unauthorised whaling activities in the AWS. In ***Humane Society International v Kyodo Senpaku Kaisha Ltd*** [2015] FCA 1275 the Court found the respondent guilty of contempt of court for failing to comply with the earlier order and imposed a fine.