Federal Court of Australia

Clark v Minister for the Environment (No 2) [2019] FCA 2028 (6 December 2019)

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FEDERAL COURT OF AUSTRALIA

Clark v Minister for the Environment (No 2) [2019] FCA 2028

File number:	VID 885 of 2019
Judge:	ROBERTSON J
Date of judgment:	6 December 2019
Catchwords:	**ADMINISTRATIVE LAW** – proceedings for judicial review of a refusal by the Minister for the Environment to make declarations under ss 10 and 12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) in respect of an area and in respect of objects – whether, where the Court sets aside the decision of the Minister, the Court has power to issue an injunction to restrain a third party from taking any actions that would have the effect of causing injury to or desecration of the area or objects until the Minister makes a further decision according to law

ABORIGINAL HERITAGE – proceedings for judicial review of a refusal by the Minister for the Environment to make declarations under ss 10 and 12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) in respect of an area and in respect of objects – whether, where the Court sets aside the decision of the Minister, the Court has power to issue an injunction to restrain a third party from taking any actions that would have the effect of causing injury to or desecration of the area or objects until the Minister makes a further decision according to law

Legislation:

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) ss 10, 12
Administrative Decisions (Judicial Review) Act 1977 (Cth) s 16
Federal Court of Australia Act 1976 (Cth) s 23
Federal Court Rules 2011 (Cth) r 9.05

Cases cited:

Bropho v Tickner [1993] FCA 25; (1993) 40 FCR 165
Cardile v LED Builders Pty Ltd [1999] HCA 18; 198 CLR 380
Carter v Minister for Aboriginal Affairs [2005] FCA 667; 143 FCR 383
Clark v Minister for the Environment [2019] FCA 2027
Dates v Minister for the Environment, Heritage and the Arts [2009] FCA 1156; 180 FCR 368
Johns v Australian Securities Commission [1993] HCA 56; 178 CLR 408
Masri v Consolidated Contractors International (UK) Ltd (No 3) [2008] EWCA Civ 285; [2009] QB 503
Patrick Stevedores Operations v Maritime Union of Australia [1998] HCA 30; 195 CLR 1
Williams v Marac Australia Ltd (1985) 5 NSWLR 529
Williams v Minister for the Environment and Heritage [2003] FCA 535; 74 ALD 124
Williams v Minister for the Environment and Heritage [2003] FCA 627; 199 ALR 352
Williams v Minister for the Environment and Heritage [2004] FCAFC 58; 132 LGERA 368

Dates of hearing:	19 and 22 November 2019
Registry:	Victoria
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	27
Counsel for the Applicants:	Mr AT Strahan QC with Mr JJ Whelen
Solicitor for the Applicants:	Michael I Kennedy & Associates
Counsel for the State of Victoria:	Mr CM Caleo QC with Mr S Goubran
Solicitor for the State of Victoria	MinterEllison

ORDERS

VID 885 of 2019

BETWEEN:	**JIDAH CLARK**
	First Applicant
	MERIKI ONUS
	Second Applicant
	LORRAINE SANDRA ONUS (and another named in the Schedule)
	Third Applicant
AND:	**THE MINISTER FOR THE ENVIRONMENT**
	Respondent

JUDGE: **ROBERTSON J**

DATE OF ORDER: **6 DECEMBER 2019**

THE COURT ORDERS THAT:

1. The applicants' interlocutory application dated 8 November 2019 be dismissed.
2. The applicants pay the State of Victoria's costs of and incidental to the applicants' interlocutory application, as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ROBERTSON J:

1. In the substantive proceedings the applicants have succeeded in their application for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (***ADJR Act***) of a decision of the respondent **Minister** for the Environment dated 16 July 2019 not to make declarations under ss 10 and 12 of the *Aboriginal and Torres Strait Islander* ***Heritage Protection Act*** *1984* (Cth): see *Clark v Minister for the Environment* [2019] FCA 2027. The applicants had applied to the Minister seeking protection of an area and of certain objects (six trees) located in the area from a claimed threat of injury or desecration attributed to part of an upgrade of the Western Highway proposed by VicRoads.
2. These reasons concern the applicants' interlocutory application dated 8 November 2019, which was argued in the course of the substantive hearing. (That interlocutory application overtook an earlier one dated 21 August 2019.)
3. The interlocutory application seeks the following:

1. That pursuant to Rule 9.05(1)(b) of the Federal Court Rules 2011 the State of Victoria, represented by Major Road Projects Victoria, be joined as the Second Respondent to the proceeding.
2. The State of Victoria pay the costs of this application.

...

4. That rule provides that a party may apply to the Court for an order that a person be joined as a party to the proceeding if the person:

...

(b) is a person:

(i) whose cooperation might be required to enforce a judgment; or

(ii) whose joinder is necessary to ensure that each issue in dispute in the proceeding is able to be heard and finally determined; or

> (iii) who should be joined as a party in order to enable determination of a related dispute and, as a result, avoid multiplicity of proceedings.
>
> ...

5. I proceed on the basis that the joinder application is consequential to the question of whether interlocutory relief would be available against the State of Victoria.
6. I also proceed on the basis that there is a threat to the subject matter of the application to the Minister if interlocutory relief is not granted against the State of Victoria.
7. The terms of the order sought against the State of Victoria in the applicants' substituted further amended originating application is as follows:

2. *If the Court gives the relief sought in order 1 above*, an order that the Second Respondent, including its officers, agents, contractors and employees be restrained during the period commencing on the date of the order granting the relief sought in order 1 and concluding at 4 pm on the date that the First Respondent makes a decision in relation to the Application pursuant to the relief sought in order 1, from conducting any works in connection with the Section 2B Upgrade in the Specified Area save for work between Chainage 188400WBC and Chainage 192250WBC and within the Right of Way on each side of the alignment for the proposed highway duplication, as shown on the maps annexed to this Further Amended Originating Application marked "Map 3".

> (Emphasis added.)
>
> Order 1 sought an order quashing the decision and remitting the matter to the Commonwealth Minister for reconsideration in accordance with law. I have made orders today granting that relief.

8. "Map 3", referred to in order 2 of the applicants' substituted further amended originating application (see [7] above), is as follows:

9. The determination of the issue of interlocutory relief against the State of Victoria depends upon the reach of s 16 of the *ADJR Act* in its operation in relation to the *Heritage Protection Act* and, as put by Senior Counsel for the applicants, on the Court's inherent jurisdiction to protect its processes so that those processes not be stultified.

10. Section 16(1)(d) of the *ADJR Act* provides that the Court may, in its discretion, make "an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties."

11. The immediately relevant decisions are *Johns v Australian Securities Commission* [1993] HCA 56; 178 CLR 408 at 433-4 per Brennan J, Dawson J agreeing at 437, and Toohey J to the same effect at 458; *Bropho v Tickner* [1993] FCA 25; (1993) 40 FCR 165 per Wilcox J (decided before *Johns*); *Williams v Minister for the Environment and Heritage* [2003] FCA 535; 74 ALD 124 per Wilcox J; *Williams v Minister for the Environment and Heritage* [2003] FCA 627; 199 ALR 352 per Lindgren J; *Williams v Minister for the Environment and Heritage* [2004] FCAFC 58; 132 LGERA 368 per Gray J, with whom Tamberlin J agreed; *Carter v Minister for Aboriginal Affairs* [2005] FCA 667; 143 FCR 383 per Ryan J; and *Dates v Minister for the Environment, Heritage and the Arts* [2009] FCA 1156; 180 FCR 368 per Bennett J.

12. I accept that the application of *Johns* means that absent a right to relief against the State of Victoria in this proceeding, the Court does not have power under s 16(1)(d) of the *ADJR Act* to grant any injunction against it.

13. The matter then turns on the proper identification of the subject matter of the proceedings and whether the applicants have rights to relief (in which I include public law duties enforceable at the applicants' suit) under the general law, other than a right to have their application considered by the Minister according to law, given my order in the substantive proceedings that the decision of the Minister be set aside.

14. So far as concerns the *Heritage Protection Act*, I follow the judgments of Wilcox J and of Lindgren J (who found at [31] the contrary to be not arguable) in the *Williams* litigation and of Bennett J in *Dates* to the effect that the third party's activities are lawful at least until there is a valid declaration providing for the protection or preservation of the relevant site which the third party's activities threaten. For example, in *Bropho* at 181-2, having set aside the decision of the Minister to refuse to make a declaration under s 9 of the *Heritage Protection Act*, Wilcox J said:

> The applicant sought an interim order under s 15 of the *Administrative Decisions (Judicial Review) Act* restraining the second respondent from proceeding with construction work pending the Minister's decision. I saw no basis for such an order. This is not a case where the action of a third party is unlawful unless and until a valid administrative decision is made; as, for example, the grant of a consent under town-planning legislation. The second respondent's activities are lawful, in so far as the *Aboriginal and Torres Strait Islander Heritage Protection Act* is concerned, unless and until there is a valid declaration containing provisions for the protection or preservation of the site that are inconsistent with its activities. So far, no such declaration has been made. It may be that none will ever be made. If a declaration is made, it will be open to the Minister to apply under s 26 of the Act for an injunction restraining activities inconsistent with its provisions. If he decides to make a declaration, the Minister will presumably make such an application. If he does, the court will need to consider any discretionary matters advanced by the second respondent; although against the background that s 28 provides to affected landowners a compensation right under certain circumstances. I prefer to say nothing about these matters. They do not arise at this stage.

> It is also part of my reasoning that, leaving aside as not relevant for present purposes the law of native title, the general law does not recognise Aboriginal persons as having a legally enforceable interest in a specified area able to be enforced or protected by injunctive relief and the right under the *Heritage Protection Act* of any Aboriginal person to apply for a declaration and to have their application considered according to law does not constitute such an interest. The reasoning of Ryan J in *Carter* is to a similar effect.

15. I do not regard myself as bound by the (obiter) observations of Gray J, with whom Tamberlin J agreed, on the costs application in *Williams*. In my view the observation there made that the Court has power to preserve the subject matter of the application to the Minister until the Minister's further decision is made misstates the power of the Court on judicial review under the *Heritage Protection Act* (and see also my further reasons at [17]-[21] below). I would also not

accept the obiter reference by Gray J to s 23 of the *Federal Court of Australia Act 1976* (Cth). I prefer the decision of Bennett J in *Dates* at [22] to the effect that s 23 does not confer a freestanding power to grant an injunction, unrelated to the identification of rights or duties otherwise existing. As a majority of the High Court said in *Cardile v LED Builders Pty Ltd* [1999] HCA 18; 198 CLR 380 at [33], s 23 does not "provide authority for the granting of an injunction where, whether under the general law or by statute, otherwise there is no case for injunctive relief."

16. In short, the present applicants have been unable to establish a basis under the *Heritage Protection Act* for their claim for an interlocutory injunction against the State of Victoria.

17. I also accept that no other source of power exists in the Court to grant the interlocutory relief sought by the applicants against the State of Victoria, that is, where there is no cause of action against the State of Victoria. I reject the submissions on behalf of the applicants that a source of power is to be found in "doctrines and remedies ... which protect the integrity of [the Court's] processes once set in motion", referring to *Cardile* at [40].

18. Having made an order in the application for judicial review setting aside the decision of the Minister and remitting the applicants' application under the *Heritage Protection Act* to the Minister for further consideration according to law, the exercise of this Court's jurisdiction is complete and the Court's processes are no longer engaged.

19. Similarly, there is no analogy with the *Mareva* or freezing order which has been developed for a particular purpose having nothing to do with the *Heritage Protection Act* or the rights under that Act to which I have referred, and which is really an illustration of the Court's power to protect the integrity its processes, as referred to at [17] above: see *Cardile* at [25]-[26], [40]-[41] per Gaudron, McHugh, Gummow and Callinan JJ; ***Patrick Stevedores*** *Operations No 2 Pty Ltd v Maritime Union of Australia* [1998] HCA 30; 195 CLR 1 at [35] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ. Bennett J rejected the analogy in *Dates* at [23]-[25].

20. Nor do I accept any broader analogy to or claimed relevance of *Patrick Stevedores* at 32 per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ. For the reasons I have given, there will be no abuse or frustration of the Court's process.

21. In summary, I accept the submission put by the State of Victoria that neither the area nor the trees are the "subject matter" of the proceeding because, until a declaration is made under the *Heritage Protection Act*, the applicants have no interest in the area or the objects (the trees) protected by the general law.

22. For the above reasons, I do not accept the applicants' submission that the power they seek to invoke exists as part of the Court's inherent power to prevent the stultification of its processes or to prevent the destruction of the subject matter of the proceedings.

23. It follows, on the basis identified at [5] above, that there is no occasion to join the State of Victoria as the second respondent. I note that in the *Williams* litigation, at trial the entity in the position of the State of Victoria in the present litigation was in fact a party, but that did not have the consequence that the power to grant interlocutory relief against it in relation to proceedings under the *Heritage Protection Act* existed: see *Williams* [2003] FCA 535; 74 ALD 124, [57] per Wilcox J; *Williams* [2003] FCA 627; 199 ALR 352 at [43] per Lindgren J; and *Dates* at [29]-[34]

per Bennett J. As Brennan J explained in *Johns* at 434: "If there be no right to relief against a person under the general law, that person does not become liable to have an adverse order made under s 16(1)(d) merely by reason of being joined as a respondent".

24. I do not regard as relevant to the present question two other decisions to which I was referred by Senior Counsel for the applicants: *Williams v Marac Australia Ltd* (1985) 5 NSWLR 529 and *Masri v Consolidated Contractors International (UK) Ltd (No 3)* [2008] EWCA Civ 285; [2009] QB 503.

25. On the view I take, there is no occasion to consider discretionary considerations which would arise if the Court had power to make the interlocutory order sought by the applicants.

26. I dismiss the applicants' interlocutory application dated 8 November 2019 2019.

27. As to costs, Senior Counsel for the applicants accepted that costs should follow the event, being the success or failure of the applicants' interlocutory application. In the result therefore I will order that the applicants pay the State of Victoria's costs of and incidental to the applicants' interlocutory application, as agreed or assessed.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson.

Associate:

Dated: 6 December 2019

SCHEDULE OF PARTIES

VID 885 of 2019

Applicants

Fourth Applicant: MARJORIE THORPE