



FEDERAL COURT OF AUSTRALIA

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Kemp Attrill v State of South Australia [2026] FCA 1431

SUMMARY

In cases of public interest, importance or complexity, it is the practice of the Federal Court to prepare a summary of reasons for the Court's orders to assist the public to understand the outcome of the proceeding. This summary is not to be read as a complete statement of the Court's reasons, which are provided in the published judgment that will appear in due course on the Court's website.

In this proceeding the applicants sought declaratory and injunctive relief to restrain certain actions of the respondent occurring in the park lands surrounding the city of Adelaide.

The respondent is the State of South Australia. By the Department of Premier and Cabinet, it is undertaking a redevelopment of the existing North Adelaide Golf Course to create a course capable of hosting national and international tournaments.

The respondent's activities include:

- The expansion of an existing 18-hole golf course to a course constructed to international tournament standards.
- The reduction of another existing 18-hole golf course to a course of 9 holes.
- The demolition of a clubhouse building previously serving the North Adelaide Golf Club.
- The construction of a new clubhouse and car park on the park lands' perimeter in the vicinity of Strangways Terrace in North Adelaide.
- The construction of new or upgraded superintendent facilities.
- The construction of new irrigation facilities.
- The construction of a driving range facility and associated buildings, including two storeys of tee-off platforms and high netting extending for hundreds of metres around the range area.
- The associated conversion of the area of the driving range from passive use to active use, accessible by the public upon the payment of a fee.
- The removal of 585 trees in and around the area of the project, including large and mature trees classified as regulated and significant under State law.

The applicants alleged that the respondent has contravened and is threatening further contraventions of s 15B and s 18 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). Accordingly, they submitted that the actions are controlled actions within the meaning of s 67 of the EPBC Act, and thus prohibited under s 67A. The applicants invoke this Court's jurisdiction to restrain the activities and to order that damage caused by the activities thus far be remediated.

The statutory prohibitions do not apply to actions that have been referred to the Commonwealth Minister responsible for administering the EPBC Act for approval. It was common ground that the actions listed above have not been so referred.

Section 15B of the EPBC Act relevantly prohibits the taking of an action that has, will have or is likely to have a significant impact on the National Heritage values of a National Heritage place.

The park lands of Adelaide fall within a National Heritage place described as “The Adelaide Park Lands and City Layout”. It is referred to in the reasons for judgment as the Listed Place and is depicted in a map forming a Schedule to the reasons.

For the purposes of the EPBC Act, the National Heritage values of the Listed Place are those that are set out in a notice published by the Commonwealth Minister at the time that the Listed Place was included on the National Heritage List. They are referred to in the reasons for judgment as the Listed Values.

It formed no part of the Court’s task to decide whether or not the respondent’s activities were desirable, nor did it form any part of the Court’s task to express its own view about the value of the park lands to the South Australian community or any sector of it.

The task of the Court was to interpret the text of the Listed Values in accordance with established legal principles and to assess whether the respondent’s activities had, will have, or are likely to have a significant impact on the Listed Values, properly construed.

Much of the dispute between the parties centred around the interpretation of the Listed Values.

Among other things, the applicants submitted that:

- The Listed Values contemplated that the park lands will be preserved and maintained as a space that contributes to the ambience and aesthetics of the city and that the park lands be preserved “as a park”.
- The removal of 585 trees from the area of the park lands where the works are occurring (including many large and mature trees) impacted upon the Listed Values because it involved the destruction of trees that had contributed to the aesthetics of the park lands and the character and ambience of the city.
- The Listed Values required that certain features existing within the park lands at the time that the Listed Place was included in the National Heritage List must be preserved and maintained. The features included an old club house and remnants of landscape designs of historical gardeners evidenced by some of the removed trees.
- The Listed Values should be interpreted to include Indigenous heritage values, relating to the significance to the Kaurna people of a place known as Pirltawardli, described as “the place where the possums go”.
- The change of use of the area to be repurposed as a driving range was contrary to the Listed Values because it interfered with a principle that the public’s access to the park lands should be both physically and financially free.
- The reduction of one of the golf courses from 18 holes to 9 was likely to have the consequence that the utility of the park lands for members of the South Australian community would be diminished because of the reduced opportunity to play on an 18-hole golf course.

I have rejected many of the applicants’ arguments as to how the Listed Values should be interpreted.

The Listed Values are concerned with the preservation of an overall city layout and design recognised as a technical and creative achievement of Colonel William Light.

The Listed Place fulfilled a number of criteria for inclusion on the National Heritage List because of the features of Colonel Light's original design, and because of its significance in the course of Australia's colonial history.

On the proper construction of the Listed Values' text, the park lands can be identified as having certain features and serving certain purposes.

A feature of the overall design is that the park lands are to form an aesthetic layer encircling the city and North Adelaide. To achieve that function the design contemplates that they be predominantly comprised of landscape over built form. I have accepted the applicants' case to that extent.

However, that does not mean that the Listed Values should be interpreted to prohibit the construction of new built forms in the park lands, nor to prevent the removal of trees or the destruction of other things currently present there.

Another fundamental feature of the park lands is that they are dedicated to public purposes and are not to be alienated into private ownership. Alienation by transfer into private hands was not argued in this case. Nor did the applicants seek to establish that the development of the new course was undertaken for the purpose of private profit rather than public purposes.

The requirement that the park lands be dedicated to public uses does not preclude the imposition of a fee as a condition of public entry. No prohibition on the charging of a fee arises from the text of the Listed Values.

The public purposes contemplated by the Listed Values expressly include both passive and active recreational uses, specifically sport. The Listed Values contemplate the construction of built forms that are necessary or ancillary to the park lands' uses, including sport. The applicants did not argue that the built forms contemplated by the respondent were neither necessary nor ancillary to the sport of golf.

A further feature of the park lands, discernible from the text of the Listed Values, is that by their dedication to a variety of uses, they are intended to meet the social and economic needs of the South Australian community. The Listed Values contemplate that the requirements of the community will not be fixed but will evolve over time.

It follows that the Listed Values do not themselves prescribe the manner in which the park lands are to be configured internally as between various recreational purposes or other contemplated purposes. In particular, the Listed Values do not require that a part of the park lands presently dedicated to passive use not be converted to an active use or *vice versa*. The conversion of a space to active use may have the consequence that it is no longer available for passive use and that it can no longer be freely accessed, in the physical sense, by all members of the public at all times. That is not inconsistent with the Listed Values.

I have mentioned that the Listed Values contemplate that the park lands be a place dominated by landscape over built form. However, that aspect of the Listed Values does not prohibit the removal of trees. Rather, the Listed Values contemplate that the park lands be a place that can be actively landscaped over time. They contemplate that there may be an absence of trees in parts of the park lands dedicated to the contemplated uses, including sporting fields. They do not require that all trees present in the park lands at the time that the Listed Place was included on the National Heritage List be preserved and maintained.

The applicants have not otherwise established that the respondent's activities interfere with the Listed Values insofar as they require that there be a predominance of landscape over built form, including at the park lands' perimeter. To the extent that the removal of trees has brought about a change of appearance in a part of the park lands, that change has been assessed in the context of the whole of the Listed Place. The evidence showed that at the completion of the project there will remain in the park lands more than 70,000 trees. The predominance of landscape has not been disturbed in a way that is likely to constitute a significant impact on the Listed Values.

I have also concluded that the Listed Values do not include the Indigenous heritage values as contended for by the applicants. Nothing in that finding should be understood as diminishing the significance of the park lands to

the Kaurna people, a fact not disputed by the respondent. The Court's task was to discern whether that undisputed significance was included in the Listed Values, properly construed. The Listed Values contain no reference to the Kaurna People, nor to Pirltawardli as a place of significance to them, nor to the significance of the possum in Kaurna culture. I am not satisfied that values relating to those matters can be implied.

The applicants also relied upon the words in the Listed Values referring to a pattern of community involvement and agitation that has preserved the park lands substantially intact over time. They submitted that the pattern of protection was itself a value that was impacted upon by the respondent's activities. I have concluded that the Listed Values should not be construed in that way, including because the applicants' preferred interpretation would render the operation of the Listed Values and associated provisions of the EPBC Act uncertain and unworkable.

For those reasons the applicants are not entitled to relief based on their allegation of contravention of s 15B of the EPBC Act.

Section 18 of the EPBC Act prohibits the taking of an action that has, will have or is likely to have a significant impact on listed threatened species included in the vulnerable category.

The Grey-headed Flying-fox is a listed threatened species for the purposes of s 18.

There exists a population of Grey-headed Flying-foxes in a breeding camp about 1.5 km from the area where the works are occurring. The camp is categorised as a nationally important camp for the purposes of a National Recovery Plan made under the EPBC Act. It is referred to in the reasons for judgment as the Botanic Park Camp.

The place from which the trees have been and are to be removed is a known foraging place for Grey-headed Flying-foxes from the Botanic Park Camp. They are nocturnal frugivores and nectivores, dependent for their survival on vegetation species that blossom or fruit, especially during the winter and spring period.

Among the removed trees are some species that provide reliable forage of that kind. In accordance with the National Recovery Plan, vegetation communities that contain certain species (including species pleaded by the applicants in this case) are to be regarded as "habitat critical to the survival of the species".

The applicants submitted that the respondent's action in removing the trees constituted the destruction or depletion of the critical habitat of the Grey-headed Flying-fox and so was likely to have a significant impact on the species within the meaning of s 18.

In order to assess the intensity of the impact in its proper context, it was necessary to have regard to the foraging resources remaining available to the Grey-headed Flying-foxes from the Botanic Park Camp. That was a factual enquiry undertaken not only by reference to the project site, but by reference to the whole of the park lands and by reference to a larger radius in which the animals are known to forage.

On the evidence before me (including the competing expert evidence), I am not satisfied that the applicants have discharged their burden of proof in connection with this aspect of their claim. In so concluding I have considered the likely impacts on the species as a whole, being a single population with a range extending from South Australia at its western extremity through to Queensland.

I have concluded that the evidence upon which the applicants relied did not sufficiently address the availability of food sources within the greater area of Adelaide as an urban environment.

The evidence showed that there remained a very large number of trees in the project site and in the park lands, including a very large number of trees that provide forage in winter and spring. The numbers are set out in several tables within the reasons for judgment. To the extent that there has been some depletion of foraging resources in the project area (including winter and spring resources), I am not satisfied that the depletion (and

proposed future depletion) is such that it has had, will have, or is likely to have a significant impact on the species as a whole.

For those reasons I have rejected the applicants' claims that the respondent has or is threatening to contravene s 18 of the EPBC Act.

It follows that the applicants are not entitled to relief by reference to s 67A and associated provisions of the EPBC Act.

Their originating application must therefore be dismissed.

CHARLESWORTH J

1 OCTOBER 2026, ADELAIDE

