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# Federal Court of Australia

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## Minister for Sustainability Environment Water Population and Communities v Debono [2010] FCA 1497 (23 December 2010)

Last Updated: 24 January 2011

### FEDERAL COURT OF AUSTRALIA

#### Minister for Sustainability Environment Water Population and Communities v Debono [2010] FCA 1497

Citation:	Minister for Sustainability Environment Water Population and Communities v Debono [2010] FCA 1497
Parties:	<b>MINISTER FOR SUSTAINABILITY ENVIRONMENT WATER POPULATION AND COMMUNITIES v JOHN DEBONO</b>
File number:	ACD 49 of 2010
Judge:	<b>RARES J</b>
Date of judgment:	23 December 2010
Date of hearing:	23 December 2010

Place: Sydney  
Division: GENERAL DIVISION  
Category: No catchwords  
Number of paragraphs: 18  
Counsel for Applicant: T M Begbie  
Solicitor for Applicant: Australian Government Solicitor  
Counsel for Respondent: T Debono, appeared on behalf of the respondent

**IN THE FEDERAL COURT OF AUSTRALIA  
AUSTRALIAN CAPITAL TERRITORY DISTRICT  
REGISTRY  
GENERAL DIVISION**

**ACD 49 of 2010**

**BETWEEN: MINISTER FOR SUSTAINABILITY  
ENVIRONMENT WATER POPULATION AND  
COMMUNITIES  
Applicant**  
**AND: JOHN DEBONO  
Respondent**

**JUDGE: RARES J  
DATE OF ORDER: 23 DECEMBER 2010  
WHERE MADE: SYDNEY**

**UPON THE MINISTER BY HIS COUNSEL GIVING TO THE  
COURT THE USUAL UNDERTAKING AS TO DAMAGES:**

## **THE COURT ORDERS THAT:**

1. Up to and including 4 February 2011, the respondent by himself, his servants and agents be restrained from taking, permitting, or being in any way involved in any of the following activities namely:
  - (a) ploughing,
  - (b) land clearing,
  - (c) digging, blasting or moving of rock

in the part of the property, being lots 6 and 7 in LP 5327 Melton Victoria, known as 500 Parwan-Exford Road, Parwan, and labelled “Western Paddock” in the plan attached to this Order

1. The proceedings be transferred from the Australian Capital Territory District Registry to the Victorian District Registry.
2. On or before 31 January 2011, the respondent file and serve any affidavits and other evidence on which he proposes to rely in answer to the application to continue Order 1 made today.
3. The proceedings and the claim for interlocutory relief in the application be stood over to 4 February 2011 in Melbourne at 9:30 am.

Note: Settlement and entry of orders is dealt with in Order 36 of the [Federal Court Rules](#). The text of entered orders can be located using Federal Law Search on the Court’s website.

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**JUDGE:** RARES J  
**DATE:** 23 DECEMBER 2010  
**PLACE:** SYDNEY

## REASONS FOR JUDGMENT

1. These proceedings were started when the Minister for Sustainability, Environment, Water, Population and Communities sought short service of the application and supporting affidavit on the evening of 21 December 2010. The Minister has applied today, on the first return of the application, for an interim injunction under [s 475\(5\)](#) of the [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth). He seeks to prevent one of two registered proprietors of farmland at Parwan in Victoria, the respondent, John Debono, from taking, permitting or being involved in activities in the western paddock of his property, to do with ploughing, land clearing, digging and blasting or moving of rock. The Minister also seeks, at the final hearing, a permanent injunction and the imposition of civil penalties for contraventions of the Act. The circumstances in which the application has been made were deposed to in the affidavit of Andrew McLean, a compliance officer with the Minister's department.
2. The Minister served Mr Debono at 7.30 pm on 21 December 2010, as I have been informed by his wife, who is the other registered proprietor of the land and has appeared for him today. Mrs Debono has asked today for the proceedings to be adjourned until April 2011, because of the need for her husband to be able to make himself available to be at court and to prepare a defence.

The statutory scheme

1. Under [s 18\(6\)](#) of the Act, a person must not take an action that has, will have or is likely to have a significant impact on a listed threatened ecological community included in the endangered category. For an individual, a civil penalty of 5000 penalty units or somewhere in the order of over \$250,000, may be imposed for a contravention. Thus, any action that has, will have or is likely to have, a significant impact on that community will amount to a

contravention of [s 18\(6\)](#) of the Act.

2. On 31 March 2010 the then Minister included grey box (*eucalyptus microcarpa*) grassy woodlands and derived native grasslands of south-east Australia (“**the listing**”) in the list of threatened ecological communities, maintained under [s 181](#) of the Act. The listing was included in the endangered category. The schedule to the listing did not limit this community to its specification of open forest with a tree canopy layer dominated by eucalyptus. The schedule also included in the community, patches of the ecological community that might occur as derived grassland where the tree canopy and shrub layers had been removed, but the native ground layer remained largely intact. On the material before me the western paddock of the Parwan land appears to fall into this latter category.

The basis of the claim to an interim injunction

1. In his affidavit, Mr McLean set out a history of the Minister’s Department’s dealings earlier this year, including in March, prior to the listing of the threatened ecological species, in which Mr Debono had been asked not to continue with clearing work that he was then undertaking in the eastern paddock on the Parwan land. No complaint is made about activity in the eastern paddock.
2. Mr McLean visited the property on 6 May 2010 observing the nature of the work that had been done on the eastern part of the land. He said that the western paddock did not appear to have been subject to any significant rock removal or vegetation clearing on that occasion. He told Mr Debono that it was important he stop all rock removal and vegetation clearing on the property until the Department advised him otherwise. He said that Mr Debono agreed that he would not do any more clearing on the property, but wanted things sorted out because he was clearing the rocks out to control rabbits.
3. On 22 July 2010 Mr McLean visited the property again, this time, in company with an ecological expert, Warren Tomlinson. Mr Debono then permitted them to inspect the property. When Mr McLean looked at the western paddock he observed what appeared to have been relatively recently ploughed areas across a large portion of it, and an unattended plough at the southern fence line of the paddock. He took a photograph of the plough which is in evidence. On the next day Mr McLean telephoned Mr Debono and advised him that it

was likely that his property contained a listed ecological community that was protected under national environmental law. He mentioned that he had seen the ploughing in the western paddock and told Mr Debono not to do any more work. Mr Debono responded that it had been ploughed before, but agreed he would not do anything more until things were sorted out. The Department wrote to Mr Debono on 26 July advising him that the preliminary view of the expert was that at least one ecological community protected under the Act was present on the property and strongly suggested that no further clearing activity take place. Mr Debono was invited to obtain independent legal advice.

4. Mr Tomlinson prepared a report of the July visit in late September 2010. He considered that nearly 18 hectares of listed habitat appeared to have been disturbed in July 2010. In his report he referred to having viewed an aerial photograph dated 11 July 2010 that did not show disturbance in the western paddock, but that when he and Mr McLean had inspected that area 11 days later, on 22 July, there was evidence of ploughing and other disturbance. He surmised that this disturbance had occurred subsequently to the depiction in the aerial photograph. That photograph was not in evidence. Mr Tomlinson seemed to have considered that the vegetation in the western paddock, that he observed, consisted of scant remnant grey box and eucalyptus macrocarpa that were present in low numbers distributed across the lower flats and higher rocky rises. He noted a high cover of perennial indigenous grasses being present, including some spear grasses, weeping grass and wheat grass. Those grasses were within the species described as ground layer in the listing. The presence of those grasses in the ground layer suggested to Mr Tomlinson that both disturbed and undisturbed portions of the western paddock, contained species that could form part of derived grassland that could be part of a threatened ecological community. Mr Tomlinson identified in his report a total of about 83 hectares of the grey box listed ecological community as having been disturbed within the area on the property that he looked at, including an area of about 43.5 hectares in the western paddock that had been disturbed in July 2010 as a result of ploughing.
5. A copy of Mr Tomlinson's report was sent by the Department to Mr Debono on 12 October 2010, with a letter that also told him that the

Department considered the ploughing activities on the property to be in breach of the Act. The letter invited Mr Debono's comments concerning Mr Tomlinson's report and sought to have him engage with the Department in an attempt to resolve the matter.

6. Mr Debono responded in a handwritten letter of around 26 October 2010. He said that he was not aware of any wrong that he was doing in ploughing. He said that he had gone to the local shire council and asked whether he needed a permit to do so and was informed that he did not. He also said that he had inquired as to whether he needed a permit to remove rocks and again was told he did not. He complained of feeling singled out and harassed. He suggested that instead of hiring a solicitor, he might want to raise what he regarded as harassment with the media. Unfortunately, that does not appear to have been a very wise choice of his response.
7. The Department asked him to reconsider his attitude in the letter it sent to him on 8 November, but did not receive a further response.
8. After learning, on 6 December 2010, of the possibility that some further work was being done on the property Mr McLean attended it on 14 December 2010. On that occasion, he observed that there had been significant vegetation clearing and rock removal in the western paddock area as compared to his previous visits to the property on 6 May and 22 July this year. He observed that very little vegetation remained at the eastern end of the western paddock. He said that a single rock pile that he had observed in that paddock on 6 May had, by 14 December, grown to nearly twice the previous size and that there were an additional 33 large piles of rock present in that paddock.

## Consideration

1. I am satisfied on the evidence presently before me that the Minister has established a sufficient likelihood of success to justify, in the circumstances, an order preserving the *status quo* for a period. Clearly, if further ploughing or rock removal activity were to occur on the property, the grey box threatened ecological community present on it would be disturbed in a manner likely to alter fundamentally the present nature of that community. Mr Tomlinson said that it was likely that the 43.5 hectares removed since the community was listed would not recover to a pre-disturbance state.

He also said that the fragmentation of the community would lead to further edge effects on adjacent areas that was likely to lead to further degradation in the future. He considered that rock removal, ploughing and the creation of small drainage channels were likely to have a minor impact on surface water drainage patterns and unlikely to have significantly affected the ground water levels. However, he considered that the ploughing had caused a substantial reduction of the quality and the integrity of the grey box threatened community on the land.

2. Given that Mr Debono does not appear to have appreciated the significance and importance of the inclusion of the grey box threatened community that appears to be present on his land, he has not understood, on the material as it appears to me at present, the foolhardy nature of his continuing to disturb it by ploughing, removing rocks, and engaging in associated activity.
3. Mrs Debono told me that she is appearing for her husband and that he does not object to the grant of an interim injunction. I do not wish to cast any doubt on Mrs Debono's good intentions in seeking to appear for her husband. However, I am mindful that the person sought to be bound by the orders that the Minister seeks is not present in Court, or represented by a lawyer.
4. In all of the circumstances, and particularly because the matter has come on at short notice two days before Christmas, and where Mr Debono is apparently not able to be present because of prior commitments in his work, I think the better course today is for me to grant an injunction that will remain in place up until and including 4 February 2011. I have in mind offering Mr Debono and opportunity to put on evidence that might be used to resist the continuation of an *ex parte* injunction, which in substance, is what I am granting today, albeit that he has had notice of the hearing and chosen not to appear. In the period up until then, hopefully, Mr Debono will obtain legal advice and investigate whether and to what extent there are *bona fide* issues in the proceedings that require a contested hearing or whether there are matters which may be able to lead to an earlier resolution. But in any event, by bringing the matter back to the Court on 4 February 2011, the docket judge in Melbourne to be able to identify the most appropriate procedural way forward and to, if he or she is so minded, on the material that is put before

him or her, determine whether the injunction should continue.

#### Undertaking as to damages

1. The Minister has offered an undertaking as to damages, but has also properly referred to decisions in which the Court has held that a regulator seeking an interim injunction, in the public interest, may not be required to give one. In the circumstances of the present case, it seems to me that the Minister's offer is one that is appropriate and that I should accept the undertaking. Because of the circumstances and urgency in which the injunction has been sought, Mr Debono may not have had an opportunity fully to explore the issues in the proceedings with a view to determining whether or not there is any matter of serious contest. If he does have some ground for substantive resistance to an interim injunction, an injustice might be done if he were deprived of the ability otherwise to use his property as he wishes without recourse to the benefit of the usual undertaking as to damages. In those circumstances, it appears to me to be fair and just that I accept the undertaking as to damages.

2. I will make orders to give effect to these reasons.

I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 19 January 2011