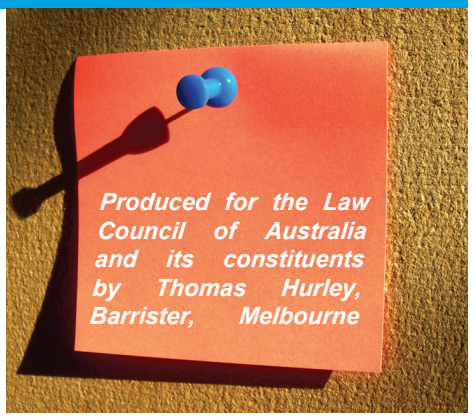
Thomas Hurley's High Court judgments



CONSTITUTIONAL LAW

- ***Judicial power***
  - ***Orders by court for confiscation of property of drug traffickers***
- ***Legislative power***
  - ***Acquisition of property on just terms***
  - ***Orders for confiscation of property of drug traffickers***

In *Attorney-General (NT) v Emmerson* [2014] HCA 13 (10 April 2014) the *Misuse of Drugs Act* (NT) and *Criminal Property Forfeiture Act* (NT) combined to authorise the Supreme Court NT to declare a person was a "drug trafficker" and for the DPP (NT) to apply to the Court for an order that the person's property be forfeited to the NT. Between 2007 and 2011 E was convicted of drug related offences. E was charged with further drug related offences in 2011 and interim orders were made freezing property he owned. Following his conviction in September 2011 E was declared a drug trafficker by the Supreme Court in August 2012. These orders were set aside by the Court of Appeal (NT) on the ground the statutory scheme was incompatible with the independence required by the Court as a repository of federal jurisdiction. The appeal by the Attorney-General was allowed: French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ jointly; contra Gageler J. The majority reviewed history of "forfeiture" type provisions and decisions of the High Court applying *Kable v DPP (NSW)* [1996] HCA 24 and concluded that nothing in the statutory scheme required the Supreme Court to act at the behest of the Executive. The High Court also concluded that by acting on conviction the scheme did not affect an acquisition of property under s51(xxxi) of the Constitution. Appeal allowed; orders of Court of Appeal (NT) set aside.

CONSTITUTIONAL LAW

- ***Executive power of the Commonwealth***
- ***Power to fund school chaplains***
- ***Whether chaplain scheme provides "benefits to students"***

In *Williams v Commonwealth of Australia* [2014] HCA 23 (19 June 2014) in *Williams v Commonwealth of Australia (No 1)* [2012] HCA 23 the Court held payments made by the Commonwealth to fund chaplains in schools was not supported by the executive power in s61 of the Constitution. Shortly after, the Commonwealth Parliament passed legislation to amend the *Financial Management and Accountability Act* 1997 (Cth) to validate past payments and authorise future payments for the chaplaincy and other programs. This purported to authorise payments specified in regulations where the Commonwealth did not otherwise have power.

The High Court observed that the appropriation of money in the budget under ss81 and 83 of the Constitution did not confer the power to spend the money. The Court concluded that the new provisions must be read to be within constitutional power (S15A of *Acts Interpretation Act* 1901 (Cth)) and did not, standing alone, provide a constitutional basis for expenditure: French CJ, Hayne, Kiefel, Bell, Keane JJ jointly; sim Crennan J. The Court concluded the payments were not authorised as "benefits to students" (Constitution S51 (xxiiiA)) as the payments were made to a scheme or program which some, all or no students may use and not to any individual students directed to the consequence of being a student. The Court also considered the extent the executive power of the Commonwealth may authorise contracts. Questions in case stated answered accordingly.

CORPORATIONS

- ***Managed investment schemes***
- ***Withdrawal or redemption of units***

In *MacarthurCook Fund Management Limited v TFML Limited* [2014] HCA 17 (14 May 2014) the High Court concluded that for the purposes of Part 5C.6 of the *Corporations Act* 2001 (Cth) a member of a managed scheme withdraws from it if the member so acts that the entity returns some or all of the member's contribution. The Court concluded a member does not withdraw merely by the entity exercising a power to acquire or redeem the interest: French CJ, Crennan, Kiefel, Bell and Gageler J jointly. Appeal from NSW Court of Appeal allowed.

CRIMINAL LAW

- ***Sexual offences***
- ***Mental element***
- ***Recklessness***

In *Gillard v The Queen* [2014]

HCA 16 (14 May 2014) G was convicted of a number of charges of committing acts of indecency and non-consensual intercourse contrary to s92D of the *Crimes Act* 1900 (ACT). The charges related to females who intermittently resided with G (who was a family friend of their parents), at times when some were aged under 16. Section 67(1)(h) of the *Crimes Act* negated consent to an act of indecency where the consent was caused by the abuse of a position of trust in relation to the complainant. G's appeal to the Court of Appeal ACT was dismissed. His appeal to the High Court was allowed: French CJ, Crennan, Bell, Gageler and Keane JJ jointly. The High Court reviewed the mental element in the offences of rape and indecency in circumstances where the apparent consent of the victim was given to a person in "authority" over her. The High Court noted that the judge's charge to the jury accepted a path to find guilt (on the charges where consent was an issue) upon satisfaction G was reckless as to whether consent given was obtained by his abuse of a position of authority. A material misdirection had been given. Appeal allowed. New trial ordered.

CRIMINAL LAW

- ***Miscarriage of justice***
- ***Transcripts of evidence obtained under coercive powers published to DPP to anticipate examinees defence***

In *Lee v The Queen; Lee v The Queen* [2014] HCA 20 (21 May 2014) L and his son were examined by the Independent Commission Against Corruption (NSW)(ICAC) in 2009 in relation to possession of cash, chemicals and firearms before either were charged. ICAC directed under s13(9) of the *NSW Crime Commission Act* 1985 (NSW) that the record of their evidence not be published. The appellants were charged with drug trafficking offences. The transcripts were later provided to the DPP (NSW) by ICAC at the request of the DPP to anticipate any defences and negate any innocent explanation. While at trial the appellants knew the prosecution had the transcripts they did not know the reason for which they had been provided. The appellants were convicted in 2011 of various offences and appealed to the NSW Court of Criminal Appeal at which point they became aware why the transcripts had been provided. The Court of Criminal Appeal dismissed the appeals finding no miscarriage of justice had occurred. This was reversed by the High Court in a joint judgment: French CJ, Crennan, Kiefel, Bell, Keane JJ jointly. The High Court observed that possession by the prosecution of evidence obtained under coercive powers in the face of an order preventing publication was a miscarriage of justice and did not require practical unfairness be established. Appeal allowed and new trial ordered.

EQUITABLE CHARGES AND LIENS

- ***Entitlement of liquidator to equitable lien over proceeds of litigation***
- ***Litigation at expense of secured creditor***

In *Stewart v Atco Controls Pty Ltd (in liquidation)* [2014] HCA 15 (7 May 2014) the High Court reviewed the circumstances in which a liquidator's charge over property recovered in litigation will be displaced by the rights of a secured creditor. The High Court in a joint judgment concluded the circumstances did not warrant departure from the rule established in In *Re Universal Distributing* [1933] HCA 2: Crennan, Kiefel, Bell, Gageler, Keane JJ jointly.

EQUITABLE COMPENSATION

- ***Whether director received equitable damages on trust for company***

In *Howard v Commissioner of Taxation* [2014] HCA 21 (11 June 2014) H was involved in a joint venture to develop a golf course. He proposed that a company that he was a director of be involved in a business opportunity arising from the joint venture. Because of breaches of fiduciary duty by the other joint venturers the opportunity was lost. H sued his co-venturers and was awarded equitable damages. The Commissioner rejected H's contention that H held the funds on trust for the company (because otherwise H would be conflicted) and assessed the damages as part of H's income. Then H succeeded in an appeal to a single judge of the Federal Court but failed in the Full Court. His appeal to the High Court was dismissed: French CJ with Keane J; Hayne with Crennan JJ; sim Gageler J. Consideration by the High Court considered the nature of breach of equitable duties and the nature of compensation for such breach.

EQUITY

- ***Equitable estoppel***
- ***Acting in reliance on promise***
- ***Proof of detriment***
- ***Whether presumption of reliance***

In *Sidhu v Van Dyke* [2014] HCA 19 (16 May 2014) the respondent (a married female) claimed she acted to her detriment on promises of benefits made to her by the appellant (a married male) in their extra-marital affair and she claimed damages in equity. The primary judge found the respondent had not established she relied on the promises and dismissed the claim. The respondent successfully appealed to the Court of Appeal (NSW). The appellant's appeal to the High Court was dismissed: French CJ, Kiefel, Bell, Keane JJ jointly; sim Gageler J. The Court concluded that the burden on the plaintiff to establish reliance did not "shift" and the decision of Lord Denning in *Greasley v Cooke* [1980] 3 All ER 710 should not be followed in Australia. The Court considered there was no error in calculating the damages. Appeal dismissed.

EQUITY

- ***Restitution***
- ***Payments made under***

mistake of fact
- ***Change of position by innocent recipient***
- ***Whether restitution inequitable***

In *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* [2014] HCA14 (7 May 2014) the High Court considered when a party that had received money paid to it by the mistake of the payer (induced by fraud of a third party) could resist a claim for repayment or restitution by proving it had changed position as a result of the payment by abandoning claims against the third party. The appellant (a finance company) paid money to each of the respondents (equipment suppliers) to enable a third party company (controlled by a fraudster) to "lease" or "hire" non-existent equipment. As a result of the payments the respondents abandoned claims against the third party. The appellant failed against one of the respondents at trial and failed against both before the Court of Appeal NSW. Its appeal against both to the High Court was dismissed: French CJ; Hayne, Crennan, Kiefel, Bell, Keane JJ; Gageler J. Consideration as to whether the actions of the recipients/respondents made it inequitable for the claim by the appellant to succeed. Appeal dismissed.

MIGRATION
- ***Visas***
- ***Determination of maximum number of visas in a class of visas to be granted in a year***
- ***Whether determination of maximum number of refugee visas invalid***

In *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* [2014] HCA 25 (20 Jun 2014) s85 of the *Migration Act* 1958 (Cth) authorised the Minister to determine the maximum number of visas to be granted in a year in a class of visas. By s65 the Minister was required to either grant or refuse a protection visa within 90 days. The plaintiff's application for a protection visa was not decided before the maximum number of visas for the year was reached. In a case stated, the High Court determined that the power in s85 did not apply to protection visas: French CJ; Hayne with Kiefel JJ; Crennan, Bell, Gageler and Keane JJ jointly. The Court rejected the submission that once the maximum was reached the Minister may neither grant nor refuse any further visas (as this would amount to a decision) as this prevented the operation of s65 that required the applications for protection visas be decided. Questions answered accordingly.

MIGRATION
- ***Visas***
- ***Protection visas***
- ***Refusal of protection visa where "serious reasons for considering" applicant had committed serious non-political crimes***

In *FTZK v Minister for Immigration and Border Protection* [2014] HCA 26 (27 June 2014) Article 1F(b) of the Refugees Convention excluded from the grant of refugee status a person of whom there were "serious reasons for considering" had committed serious non-political crimes. In reviewing a decision to refuse a visa the AAT referred to various factors that combined to satisfy it that there were serious reasons for considering the applicant had committed a crime in China. An appeal to the Full Federal Court was dismissed but the appeal to the High Court allowed: French CJ with Gageler J; Hayne J; Crennan with Bell JJ. The members generally concluded that most of the factors referred to were actions in Australia and had been referred to by the AAT as showing "consciousness of guilt" but were not logically probative to what had happened in China.

MIGRATION
- ***Whether designation of overseas processing centre "proportional"***

In *Plaintiff S156-2013 v Minister for Immigration and Border Protection* [2014] HCA 22 (18 June 2014) the High Court held s198AB of the *Migration Act* 1958 (Cth) (that authorised the Minister to designate another country as a regional processing centre for unauthorised maritime arrivals) was supported under the aliens power (Constitution s51(xix)). The Court rejected a submission that legislation needed to satisfy a "proportionality test" to be supported by a power and be valid: French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ jointly. The Court observed it was not necessary to consider any other head of power. Questions in case stated answered accordingly.

WORKER'S COMPENSATION (NSW)
- ***Transitional provisions in regulations***

In *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18 (26 May 2014) G suffered an injury at work and made a claim in 2010 that included a claim for compensation for permanent impairment. Amendments in June 2012 to the *Worker's Compensation Act* 1987 (NSW) introduced a threshold requiring workers establish a 10 per cent permanent impairment before being entitled to lump sum compensation. The transitional provisions of the amending Act protected claims made before 19 June 2012. The Act permitted regulations that gave the Act different operation at different times. G lodged a specific claim for the impairment on 20 June 2012. His impairment was assessed at 6 per cent. The Court of Appeal (NSW) concluded that the transitional regulations did not apply the new provisions to G's claims. The High Court allowed the appeal on behalf of the insurer: French CJ, Crennan, Kiefel, Keane JJ jointly; sim Gageler J. The High Court concluded the effect of the transitional regulations was to apply the new amendments to G's claim. Appeal allowed on the basis on which special leave was granted: that the insurer paid costs. ●