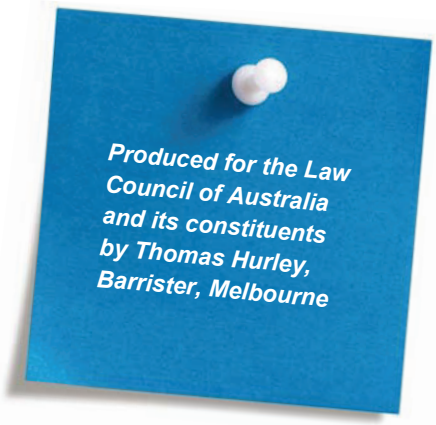
Thomas Hurley's High Court judgments



HIGH COURT JUDGMENTS FOR JANUARY / FEBRUARY 2015

CONSTITUTIONAL LAW

Kable – anti-bikie laws in Queensland – standing of club member to seek relief

In Kuczborski v Queensland [2014] HCA 46 (14 November 2014) various Acts of the Queensland Parliament including the Vicious Lawless Association Disestablishment Act 2013 (Qld) attempted to destroy various "bikie" gangs by making special penalties applicable to members convicted of certain offences; creating new "association" offences; and making it harder for members to get bail. K (a member of the Hells Angels Motorcycle Club) brought proceedings in the original jurisdiction of the High Court contending the legislation offended the principle in Kable v DPP (NSW) [1996] HCA 24 by involving state courts that had Constitution Chapter III responsibilities in state administrative decisions. The Court generally concluded that K did not have standing to challenge the laws or his interest was hypothetical: French CJ; Crennan, Kiefel, Gageler Keane JJ jointly; contra Hayne J in part. Questions in case stated answered accordingly.

CORPORATIONS

Managed investment schemes – role of responsible entity – distribution of scheme property "in specie"

In *Wellington Capital Limited v Australian Securities and Investments Commission* [2014] HCA 43 (5 November 2014) the High Court concluded that while a responsible entity for a managed investment scheme under Part 5C.1 of the *Corporations Act* 2001 (Cth) has all the powers of a natural person, the Federal Court had correctly concluded this did not include a power to distribute the scheme property (shares) to unit holders "in specie": French CJ, Crennan, Kiefel, Bell JJ jointly; sim Gageler J. Appeal dismissed.

CRIMINAL LAW

Appeal against sentence – change of law – whether substantial injustice

In *Kentwell v The Queen* [2014] HCA 37 (9 October 2014) K was sentenced in 2009 to a term of imprisonment that involved a non-parole period calculated in a way that was determined by the High Court in *Muldrock v The Queen* [2011] HCA 39 to be in error. In 2013 K applied to the Court of Criminal Appeal (NSW) for an extension of time to appeal against his sentence because of the change in the law. The Court accepted there was error but found there was no substantial injustice and dismissed the application. K's appeal to the High Court was allowed: French CJ, Hayne, Bell, Keane JJ jointly; sim Gageler J. The High Court concluded the Court of Criminal Appeal had erred by concluding it did not consider the aggregate sentence as excessive rather than whether the sentence might be different on re-sentencing. Appeal allowed.

In *O'Grady v The Queen* [2014] HCA 38 (9 October 2014) the High Court in a joint judgment restated the conclusion in *Kentwell* that in circumstances where a person is serving a sentence imposed in erroneous exercise of discretion it is an error to treat the principle of finality as a discrete factor weighing against the exercise of an extension of time to seek leave to appeal against it: French CJ, Hayne, Bell, Gageler, Keane JJ jointly. Appeal against orders refusing extension of time under *Criminal Appeal Act* 1912 (NSW) and *Criminal Appeal Rules* (NSW) allowed.

DAMAGES

Personal injury – injured person rendered incapable of managing affairs – cost of administering estate

In *Gray v Richards* [2014] HCA 40 (15 October 2014) the High Court in a joint judgment in an appeal from the NSW Court of Appeal reviewed authority as to when an incapacitated plaintiff is entitled to damages to compensate for the cost of administering a large lump sum of damages. The Court concluded such a plaintiff is not entitled to damages to compensate for the cost of administering the future income of the fund: French CJ, Hayne, Bell, Gageler, Keane JJ jointly. Appeal allowed in part.

INDUSTRIAL LAW

Union membership – prohibition on adverse action against union member for industrial action – adverse action for multiple reasons

In *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41 (16 October 2014) the High Court by majority concluded the Full Court of the Federal Court

had correctly concluded the reasons the employer gave for dismissing an employee (who was a union official) did not amount to a dismissal contrary to s347 of the *Fair Work Act* 2009 (Cth) because of that membership or participation in industrial activity. Decision of the Court in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [No1] [2012] HCA 32 applied: French CJ with Kiefel J; Gageler J sim; contra Hayne J and Crennan J. Appeal dismissed.

MIGRATION

Refugees – internal relocation

In *Minister for Immigration and Border Protection v SZSCA* [2014] HCA 45 (12 November 2014) the Refugee Review Tribunal found that SZSCA was not a refugee as he could live and work as a truck driver in Kabul without fear of persecution. This decision was quashed by the Federal Circuit Court. The Minister's appeals against this were dismissed by the Federal Court. The High Court dismissed the Minister's appeal to it: French CJ, Hayne, Kiefel, Keane JJ jointly; contra Gageler J. The High Court majority concluded the RRT had erred by not considering the impact on SZSCA of being required to stay in Kabul and not take his work as a truck driver out of it. Appeal dismissed.

NEGLIGENCE

Duty care – inconsistency between statutory and common law duties – release of mentally ill person under statute

In *Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon* [2014] HCA 44 (12 November 2014) PP was a mentally ill Victorian. While travelling he came to be detained in the appellant NSW mental health facility in 2004 as required by the *Mental Health Act* 1990 (NSW). The staff of the appellant decided to release PP into the care of R to drive PP to Victoria and other care. PP murdered R on the trip. R's relatives sued the hospital alleging breach of duty in releasing PP. The claim failed before the primary judge but an appeal was upheld by the NSW Court of Appeal. The hospital's appeal to the High Court was allowed: French CJ, Hayne, Bell, Gageler and Keane JJ jointly. The Court concluded that whatever common law duties could be contemplated they were subject to the hospital's obligation to detain PP only as required by the Act. Appeal allowed.

PATENTS

Extension of time to extend patent

In *Alphapharm Pty Ltd v H Lundbeck A-S* [2014] HCA 42 (5 November 2014) the High Court by majority decided that the Full Court of the Federal Court had correctly concluded the commissioner had power under s223(2) of the *Patents Act* 1992 (Cth) to extend the time in which an application under s70 for an extension of the term of a patent could be made calculated by reference to s71(2) (a), (b) and (c): Crennan, Bell and Gageler JJ; contra Kiefel and Keane JJ. Appeal dismissed.

HIGH COURT JUDGMENTS FOR DECEMBER 2014

CONSTITUTIONAL LAW

Implied freedom of political comment – whether implied freedom of personal association

In *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 (8 October 2014) s93X of the *Crimes Act* 1900 (NSW) made it an offence for a person to habitually consort with convicted offenders after a warning by police not to do so. T and others commenced proceedings in the NSW Supreme Court seeking declarations that this provision was invalid for impermissibly burdening the implied freedom of communication on political and governmental matters implied into the Constitution as a limit on legislative power. The proceeding was removed into the High Court and questions stated for a Full Court. The majority of the Full Court concluded the provision was not invalid on this ground: Hayne J; Crennan, Kiefel, Bell JJ jointly; Gageler J; contra French CJ. The majority also concluded there was no implied freedom of association other than that recognised for communication on government matters and the provision was not invalid for contravening any implied freedom of association arising from recognition by the Commonwealth of the International Convention on Civil and Political Rights. Questions answered accordingly.

NEGLIGENCE

Duty of care – economic loss – subsequent parties – whether builder of apartments owes duty to body corporate for latent defects in communal property

In *Brookfeld Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 (8 October 2014) the NSW Court of Appeal held that the builder of strata-titled serviced apartments owed a duty of care to the owners corporation (as the successor to the developer) to avoid that corporation suffering economic loss from latent defects in the common property which were structural, caused a danger to persons or rendered the apartments uninhabitable. All members of the High Court allowed an appeal and set this decision aside: French CJ; Hayne and Kiefel JJ; Crennan, Bell and Keane JJ; Gageler J. The High Court concluded that the sophisticated building contracts between the builder and the original developer contraindicated implication of duties of care on the builder to parties subsequent to the developer. Appeal allowed. ●