Cameron Ford's Supreme Court case notes

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ADMINISTRATIVE LAW LICENCE – VALIDITY

In *O'Brien v Nicholas* [2015] NTSC 5, Blokland J allowed an appeal and permanently stayed a prosecution against a 'holder' of a firearms licence for failing to store firearms in accordance with the safe keeping and storage requirements in the *Firearms Act* on the basis it was doomed to fail. The licence was void ab initio because it did not have a photo and date of birth of the holder which the Act indicated, were crucial to validity (at [31]-[39]).

ADMINISTRATIVE LAW – PROCEDURAL FAIRNESS – WAIVER

In *Lawrie v Lawler* [2015] NTSC 19, Southwood J dismissed an application for judicial review of the findings of an inquirer appointed under the *Inquiries Act* (NT) to inquire into a previous Minister's decision to grant a lease of Crown land to Unions NT without a public call for expressions of interest. His Honour found at [10] that the Minister had been accorded procedural fairness, noting at [11] that the content of the duty to provide procedural fairness depends on all of the circumstances of the case and there are no immutable rules about the content. In any case, the Minister waived the right to any greater procedural fairness than was accorded her by making a conscious decision to change her strategy and "ignore, disengage and discredit" the Inquiry from a certain date: (at [142]). Waiver is an intentional act or conduct done with knowledge, whereby a person abandons a right by acting inconsistently with that right: at [143].

ADMINISTRATIVE LAW – MINISTERIAL REVIEW – NATURE OF

In *The Environment Centre Northern Territory (NT) Incorporated v The Minister for Land Resource Management* [2015] NTSC 30, Hiley J granted judicial review of two decisions of the Minister to grant water extraction licences under the *Water Act* on the grounds that the Minister had misunderstood his statutory task (at [5]) and as a result did not conduct the required merits review of an administrative decision (at [6]). The nature of a review depends on the terms of the relevant statute and will sometimes fall between the extremes of requiring error and a full merits review: at [69] and [83]. The "*Strange-Muir* presumption" no longer applies so there is no longer any relevant distinction of the kind made by McHugh J in *Strange-Muir v Corrective Services (NSW)* (1986) 5 NSWLR 234 between appeals or reviews to an administrative tribunal on the one hand and to a court on the other: at [92].

COMPANY LAW – PROVISIONAL LIQUIDATOR

In *Olive v Litchfield Trading Co. Pty Limited and Anor* [2015] NTSC 2, Hiley J initially refused an ex parte application made by one director/shareholder to appoint a provisional liquidator but later made the order after it was supported by the only other director/shareholder, which effectively meant the application was made by the company and there was utility in the appointment: at [37]-[39].

CONSTRUCTION – SECURITY OF PAYMENT – FUTURE LIABILITY

In *Lend Lease Building Contractors Pty Ltd v Honeywell Limited* [2015] NTSC 10, Kelly J upheld a determination of an adjudicator under the *Construction Contracts (Security of Payment) Act* on the basis that he did not misconstrue the Act and made a bona fide attempt to exercise his functions (at [42]). It was legitimate to make a determination on the basis of a future liability upon the provision of a bank guarantee as required by the contract: at [25].

COSTS – INTERLOCUTORY – IMMEDIATE PAYMENT AND TAXATION

In *Johnson v Northern Territory of Australia* [2015] NTSC 15 at [9], the Full Court found there were exceptional circumstances to warrant the ordering of the payment of the costs of an interlocutory application pursuant to RSC 63.03 and ordered immediate taxation under RSC 63.04(4) at [17] because the question was whether the substantive proceedings were statute-barred the point was of general interest to the unsuccessful defendant.

COSTS – INTERLOCUTORY – IMMEDIATE PAYMENT

In *Lexcray Pty Ltd v Northern Territory of Australia (No 3)* [2015] NTSC 41, Barr J refused an application under RSC 63.18 for costs of a two-day interlocutory application for discovery within an application to stay a taxation of costs because the application was not run-of-the-mill, there were no pleadings to define the issues and it would not be grossly unjust: at [6] and [10].

COURTS – APPREHENSION OF BIAS – CONDUCT AFTER JUDGMENT

In *Hagen Corporation Pty Ltd v Bikes Top End Pty Ltd* [2015] NTSC 23 at [54] et seq, Kelly J allowed an appeal on the basis of apprehension of bias on the part of the presiding magistrate who, after judgment but before costs were determined, asked his fellow magistrate if her husband's solicitors had picked up that his reasons for decision invited them to apply for indemnity costs (see [19] et seq). The communication was an implied indication that an application for indemnity costs may well be successful and could even have been construed as encouragement to make the application. That raised a reasonable apprehension that the magistrate may have been favouring or assisting the defendant and that he may not have been impartial in determining the substantive proceeding.

COURTS – APPREHENSION OF BIAS

In *Lawrie and Wyvill v Lawler* [2015] NTSC 40, Southwood J declined to disqualify himself from hearing an application for costs made on the basis that his Honour's wife was an administrative officer in the Attorney General's Department administering the procurement process for ad hoc legal representation. She had had communications with the solicitor for the defendant relating to fees and his engagement. The arguments were rejected that the wife would be embarrassed if the defendant were not awarded costs and that she was in the defendant's 'camp': at [127], [159], [163].

CRIMINAL LAW – "IN THE EXECUTION OF DUTY"

In *Rose v Huddle* [2015] NTSC 14, Blokland J quashed convictions of unlawfully assaulting a police officer in the execution of duty on the basis the magistrate should have entertained a reasonable doubt (at [51]). "In the execution of his duty" means whenever the police officer is doing something which can fairly and reasonably be regarded, given the existing circumstances, as a carrying out of his duty. Taking the appellant to the ground after pushing him was not in the execution of the police's duties when they had no intention of arresting him (at [50]).

CRIMINAL LAW – APPEAL – DISMISSAL OF INFORMATION – JURISDICTION

In *Rigby v PG* [2015] NTSC 12 at [12], Blokland J doubted the court had jurisdiction to entertain an appeal under s 163(3) of the *Justice Act* against an order dismissing an information when the appellant prosecution did not seek to overturn the dismissal but to establish a legal proposition.

CRIMINAL LAW – SEX OFFENDERS – "SERIOUS DANGER TO THE COMMUNITY"

In *The Attorney-General of the Northern Territory v JD* [2015] NTSC 28, Mildren AJ set a date for the hearing of an application for a final continuing detention order or a final supervision order under s 25 of the *Serious Sex Offenders Act*. His Honour found at [17] that the material, if proved, would satisfy a court to the *Briginshaw* standard that the respondent was a serious danger to the community due to the high degree of probability of further sexual offending, his history of offending, attitude towards and inability to take advantage of rehabilitation, personality disorder, lack of English skills, lack of education, lack of any employment history, history of binge drinking to the point of unconsciousness, probable homelessness or lack of community support, and the failure to comply with parole orders and with the conditions of court orders.

EVIDENCE – NEGOTIATION PRIVILEGE – EXCLUSIONS – OTHER EVIDENCE MISLEADING

In *Lexcray Pty Limited v Northern Territory of Australia* [2015] NTSC 11, Kelly J admitted correspondence over an objection of privilege under s 131(1) of the *Evidence (National Uniform Legislation) Act* relating to settlement negotiations. The proceeding was to stay a taxation of costs on the basis of delay and the tender was to explain the delay due to settlement negotiations (at [4]). The correspondence fell within s 131 since the parties were negotiating the amount of costs and a dispute over costs is a 'dispute' within s 131(5) (at [13]-[15]). The exclusion in s 131(2)(g) applied because other evidence would be likely to mislead the court if the correspondence were not admitted (at [32] and [48]).

CRIMINAL LAW – KNOWLEDGE

In *Rigby v Taing* [2015] NTSC 16 at [9], Hiley J held that the court has jurisdiction under s 163(3) of the *Justices Act* to hear an appeal from a dismissed complaint, citing *Peach v Bird* [2006] NTSC 14 and *Balchin v Anthony* [2008] NTSC 2. A woman had been acquitted of having commercially unsuitable mud crabs in her possession under s 42 of the *Fisheries Act* on the ground that the prosecution had not proved the mental element of possession, i.e. that she knew she had them. The ordinary meaning of possession includes the mental element of knowledge unless there is a contrary intention, even where the mental element is not expressly referred to in the definition: at [23]-[32]. Knowledge may be established in various ways and may include "wilful blindness": at [50].

CRIMINAL LAW – DEFENSIVE CONDUCT – TEST

In *Baxter v Conroy* [2015] NTSC 26, Hiley J dismissed an appeal against conviction and sentence, holding at [16] that the second limb of the test for defensive conduct in s 29(2)(b) of the *Criminal Code* requires the two steps of considering (1) "the circumstances as the person reasonably perceives them", then (2) whether "the conduct is a reasonable response in [those] circumstances." The first step is a mixed test, partly subjective, concerning the person's perception, and partly objective, as to whether such perception was reasonable (at [18]).

CRIMINAL LAW – INDICTABLE OFFENCE TRIED SUMMARILY

In *O'Neill v Rankine and Westphal v Foster* [2015] NTSC 24 at [35]-[40], Barr J held that a magistrate does not have power under s 131A the Justices Act to dismiss an information for an indictable offence capable of being tried summarily unless the magistrate first determines that the charge should not be prosecuted on indictment which would at least involve a consideration of the seriousness of the offending.

CRIMINAL LAW – MENTAL IMPAIRMENT – SUPERVISION ORDER

In *R v KMD* [2015] NTSC 31 at [61], Riley CJ made a custodial supervision order under s 47Z of the *Criminal Code* because the defendant was a danger to others which was the principal factor to consider (at [50]). She had been found not guilty by reason of mental impairment of eight offences including attempt to kill, recklessly endanger life and serious harm. To determine the 'appropriate sentence' under s 43ZG, normal sentencing principles are applied taking into account the defendant's mental condition: at [32]A risk assessment must be undertaken to weigh the likelihood and magnitude of harm occurring to the *Briginshaw* standard: at [39].

CRIMINAL LAW – RESTITUTION

In *Baxter v Hudson* [2015] NTSC 17, Hiley J dismissed an appeal against a restitution order, holding at [12] that a term of imprisonment does not need to be set at the time the order is made under s 93 of the *Sentencing Act* and that an offender may be given a further opportunity to comply with a restitution order on a show cause date and avoid being imprisoned.

CRIMINAL LAW – TRIAL IN ABSENTIA

In *R v Ferguson* [2015] NTSC 35 at [21], Mildren AJ allowed a trial to proceed under s 361(4) of the *Criminal Code* in the voluntary absence of the accused after the second day of trial and the victim and others had given evidence. The accused had waived his right to appear and to representation, his disadvantage was of his own making, the public interest and the particular interest of the victim and witnesses favoured the trial continuing, and there would be a long delay if the trial was halted: at [9].

CRIMINAL LAW – DEFENSIVE CONDUCT

In *Martin v Kendrick* [2015] NTSC 38 Kelly J dismissed an appeal against conviction on the basis it was not unsafe and unsatisfactory and nor was it wrong of the magistrate to prefer other evidence to a written statement of the accused's partner who was not cross-examined. Her Honour held at [18] that the test for defensive conduct in s 29 of the *Criminal Code 1983* (NT) essentially enacts the common law in relation to self-defence and is not a wholly objective test: it is the belief of the accused, based on circumstances as he perceived them to be, which must be reasonable.

CRIMINAL LAW – YOUTHS – DIVERSION

In *Firth & Ors v JM* [2015] NTSC 20, Barr J answered a case stated by the Youth Justice Court holding at [4] that the consent of a police officer is not required before the court may exercise its power under s 64 of the *Youth Justice Act* to refer a youth for re-assessment for inclusion in a diversion program or a Youth Justice Conference. Neither must a police officer consent to the diversion after the order is made (at [6]-[7]).

EVIDENCE – SPONTANEOUS STATEMENT BEFORE CAUTION

In *R v Yirrawala* [2015] NTSC 37, Kelly J declined under s 143 of the *Police Administration Act* to admit an officer's recollection of a spontaneous statement of an accused made before a caution was given which could be interpreted as an admission because the police officer's recollection differed from another officers note of the statement made after the event which cast doubts on the first officer's recollection. It would be unfair and contrary to the interests of justice to admit the evidence (at [28]).

LEGAL PRACTITIONERS – PRACTITIONER'S APPLICATION TO STRIKE OFF

In *In the matter of an application by Thong Sum Lee* [2015] NTSC 22, Barr J granted an application by a legal practitioner to remove his name from the roll on the basis he was 65 years old and had effectively ceased practising as a result of ill health. The court's power to remove a legal practitioner's name from the roll is an aspect of its inherent jurisdiction to control and discipline legal practitioners which is not affected by the *Legal Profession Act*: at [7]. The power to strike off is an incident of the power to admit. The name of a legal practitioner may be removed from the roll if the practitioner is, for any reason, not fit and proper person to practise law.

MEDICAL PRACTITIONERS – INVESTIGATION, SUSPENSION

In *Nitschke v Medical Board of Australia* [2015] NTSC 39, Hiley J set aside a decision of the Health Professional Review Tribunal that a medical practitioner be investigated under 160 of the *Health Practitioner Regulation National Law* and that his registration as a medical practitioner be suspended under s 156. The Tribunal had not accorded the practitioner procedural fairness and had acted on conduct which was merely a failure to act towards someone who was not the practitioner's patient: at [51], [74], [83] and [99]. There was no evidence that this was a breach of an appropriate professional standard: at [125], [134] and [140]. Clause 1.4 of the Code of Conduct for Doctors in Australia which says "Doctors have a responsibility to protect and promote the health of individuals and the community" does not impose a duty or standard: at [112-117].

PROBATE – COPY OF WILL – PRESUMPTION OF DESTRUCTION

In *The Estate of Brian Thomas Manning* [2015] NTSC 21, Barr J granted probate of a copy of a will, finding at [15] that the original had been lost and at [16] that the (slight) presumption of intended destruction to revoke the will was rebutted.

PROCEDURE – ORAL EXAMINATION

In *Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru (Italy)* [2015] NTSC 32 at [49], Master Luppino granted an application by a defendant under Order 31 that the plaintiff be orally examined because the real possibility of many follow-up questions in interrogatories meant that oral examination was more efficient: at [69].

SENTENCING – BENEFIT BY DECEPTION – PROVISO

In *Wheeder v Verity* [2015] NTSC 34, Mildren AJ held that a total sentence of 10 months suspended after two months on two charges of obtaining by deception a benefit of $11 150 for another from his employer was not excessive (and in fact was very lenient) for an unrepresented man of 34 years with no relevant prior convictions. A significant denial of procedural fairness might be a case where the proviso should not be applied: at [25]. The ultimate question is whether A substantial injustice actually occurred: at [29]. Consideration of the court's duty to unrepresented litigants at [14].

SENTENCING SUPPLY CANNABIS TO INDIGENOUS COMMUNITIES

In *R v Amital* [2015] NTCCA 1, the Court of Criminal Appeal allowed a Crown appeal against a sentence of 11 months suspended after three months for two counts of supplying cannabis in an indigenous community as manifestly inadequate and replaced it with a sentence of 15 months and a non-parole period of nine months.

SENTENCING – MANDATORY – EXCEPTIONAL CIRCUMSTANCES

In *R v Duncan* [2015] NTCCA 2, the Court of Criminal Appeal allowed a Crown appeal against a sentence of 18 months for causing serious harm suspended forthwith as manifestly adequate and replaced it with a sentence of three years suspended after six months. The offence was a level 5 offence under s 78CA(1) of the *Sentencing Act* with a maximum penalty of 14 years imprisonment and a minimum of three months actual imprisonment unless there were exceptional circumstances. The court considered, obiter, the interpretation and application of "exceptional circumstances" under s 78DI.

SENTENCING PRISON OFFICER – SUBVERTING ADMINISTRATION OF JUSTICE

In *R v Rudd* [2015] NTCCA 3, the Court of Criminal Appeal allowed a Crown appeal against a manifestly inadequate sentence of two years and six months suspended on home detention for one year for 12 offences relating to the administration justice and the supply of drugs as a prison officer. The sentence was replaced with one of five years partially suspended after nine months on conditions. Most of the offences involved a serious breach of trust and undermined the public's faith and trust in the criminal justice system, with the potential for harm coupled with the corruption of the correctional system being the gravamen of this type of offending: at [35]-[36].

SENTENCING – SUITABILITY FOR PAROLE

In *Namundja v Schaefe-Lee* [2015] NTSC 36 Blokland J allowed an appeal against sentence on the basis the magistrate did not consider a non-parole period in accordance with s 54(1) of the *Sentencing Act*. The magistrate found that the defendant was unlikely to be suitable for parole. This was a consideration for the parole board, not the magistrate. Suitability for parole is a vastly different question from the question of whether it would be inappropriate to set a non-parole period (at [38]). It is a rare case in which the court is justified in declining to fix a non-parole period: at [34].

STAMP DUTY – SHARE ISSUE – AMALGAMATED COMPANIES

In *Crocodile Gold Corporation & Anor v Commissioner of Territory Revenue* [2015] NTSC 13, Kelly J allowed an appeal against the imposition of stamp duty which had been imposed on the issuing of shares in a company which was an amalgam of two other companies on the basis that the issue of shares was in one of the pre-amalgamation companies (at [43]-[44]).