the mother had been the child's primary carer for much of his life; the father accepted that the mother was an appropriate carer; the child was born in Thailand, lived there for the first five months of his life, visited there in 2012, lived there for the last two years; and the child had been diagnosed as having autistic spectrum disorder requiring behaviour modification and speech therapy and had recently commenced school in Thailand (para 37).

The Full Court noted the father's concession that the child should 'primarily' live with the mother pending trial ([43]-[45]) and the mother's complaint that the court below had allowed s 60CC(2)(a) (child's relationship with father) to outweigh "the impact upon the child of being required to leave the settled environment in which he ha[d] been living" ([54]). The Full Court said ([66]) that "[s]ignificant weight must be placed on the fact that the child appears to be well settled in Thailand [being] of special importance because of his developmental delay", concluding (at [72]) that "the child's best interests will be better served by remaining in Thailand pending trial, rather than being uprooted and brought to Australia." The injunctions were discharged and it was ordered that the father spend time with the child in Thailand as agreed and via Skype.

SUBPOENA

Objection to production of a will where solicitor had deposed to its contents

In *Sadek and Ors & Hall and Anor* [2015] FamCA 23 (20 February 2015) the wife contended she did not know whether she had any interest in the estate of her deceased father whereupon the husband issued subpoenas to the wife's mother and three brothers ('the appellants') for production of the father's will and probate. The appellants objected, arguing that an affidavit sworn by their solicitor as to the relevant parts of the will obviated its production and that the primary judge could inspect the will to determine whether the affidavit fully disclosed the relevant information. Dawe J dismissed the objection, saying that such a course did "not overcome the obligation to produce the … document in its entirety if [it] is available" ([2]). On appeal the Full Court (Thackray, Strickland & Aldridge JJ) said (at [24]) that as "the appellants accept[ed] that the documents sought had apparent relevance to the proceedings, the subpoenas were appropriately issued" and ([26]) that it was "in the interests of justice for that relevant information to be provided to the husband." Before dismissing the appeal the Full Court added (at [28]):

> "Whilst it may be accepted that the solicitor for the appellants has, as far as he is aware, faithfully recorded what he regards as all relevant information from the will in his affidavit, it is possible that others might not take the same view."

PROPERTY

Expert disagreement as to value of property developer's minority interest in a group of entities

In *Morrow & Steele* [2015] FCCA 251 (13 February 2015) Judge Burchardt heard a property case where the husband, a property developer, held minority interests with other investors in "the [Steele] Group" and where each interest was held via a different company with different levels of interest in each. The valuation of those interests by the single expert ("Mr F") was $3.2m as "value to owner" or $2.8m as "fair market value" (the difference being explained at [30]) and by an alternate expert engaged by the husband ("Mr L") was $1.78m, the experts disagreeing (at [28]-[29]) as to the percentage to be allowed for the minority interest discounts and further discounts for lack of marketability. Mr F (at [36]) "was of the view that there was no real industry standard in respect of minority interest discounts", that "there's some crossover in terms … of what's accounted for under either of those discounts" (at [37]) and that "the minority interest made no difference at all in terms of marketability" ([39]). Upon accepting the lesser of Mr F's two valuations and applying no additional discount for lack of marketability, the Court concluded (at [69]):

> "Bearing in mind that both the experts clearly accepted that there is no precise range to establish minority interest exactly, one is left wondering how it is possible to say which of the rates is appropriate. In the end, however, I am more persuaded by Mr F's 12.5 per cent than Mr L's 16.5 per cent. The first point to be noted is that Mr F was engaged as a single expert witness. He, at all times, conducted himself in that style. Mr L was engaged with the clear aim of reducing the value to be ascribed to the interests of the [Steele] Group."

CHILDREN

Appeal by father against interim parenting order – leave to adduce evidence which he failed to tender at the interim hearing

In *Samson* [2015] FamCAFC 28 (27 February 2015) the mother applied for a recovery order when the father removed the children from the family home in Town B, taking them to the Blue Mountains where his family of origin lived. An interim parenting order was made by Judge Hughes that the father return to Town B and that the children spend nine days a fortnight with the father and five days a fortnight with the mother. On appeal Finn J rejected the father's grounds of appeal but granted his application to adduce evidence obtained by subpoena only some of which had been before Judge Hughes. The subpoenaed documents included material from the NSW Police as to "their involvement with the mother", from four hospitals as to the mother's admissions "for drug and alcohol overdoses" and "other problems" and from a clinic as to her admission "for detoxification" ([19]). Counsel for the father could not explain why the subpoenaed material which was available on the day of the interim hearing had not been tendered on that day ([20]). The mother and ICL opposed the application to adduce further evidence, arguing that the material should have formed the basis of "a further application to her Honour, which she had in fact invited … and not be sought to be adduced on appeal ([26]). Before setting aside the interim orders and remitting the case for re-hearing, Finn J said (at [29]-[30]):

> "In the present case, in my view, the consequences of not permitting the further evidence to be admitted at this interim stage (even though it would, no doubt, be relied on in the final hearing) may be so grave that it can well be argued that the children's best interests require its admission.
>
> I do not overlook the fact that much of the further evidence was available on 18 December 2014 and was not tendered on behalf of the father (or indeed by the ICL who, I was told, was relying on the father to do so). But I venture to suggest that that consideration could not be decisive in a case involving the safety of children."

Thomas Hurley's High Court Judgements

June 2015

CRIMINAL LAW

Sentence – appeals – crown appeal – crown appeal that non-custodial sentence manifestly inadequate – sentence imposed with acquiesce of crown – onus on crown appeals again sentence – disclosure by offender of unknown guilt in pre-sentence assessments

In *CMB v Attorney-General for New South Wales* [2015] HCA 9 (11 March 2015) CMD pleaded guilty to child abuse offences. In undergoing a pre-sentence assessment for a diversion program he disclosed further child abuse offences. In 2013 CMB was sentenced to a non-custodial sentence by the District Court. This Court was under the impression that the regulations of the diversion program for offenders allowed further offences disclosed in the program to be dealt with under the diversion program. This was in error. The prosecution (conducted by the NSW DPP) accepted a non-custodial sentence was appropriate in any event as the offences disclosed in the diversion program were ones the victim could not recall. The NSW Attorney-General (as well as the NSW DPP) was authorised to prosecute and to conduct the appeals. The Attorney-General appealed to the Court of Criminal Appeal (NSW) contending the sentence was manifestly inadequate. In 2014 this Court upheld the appeal and substituted a custodial sentence. CMB's appeal to the High Court was allowed by all members: French CJ with Gageler; Kiefel, Bell and Keane JJ jointly. All members considered the limited

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role of crown appeals against sentence as being intended to lay down general principles and not to correct error in the subject case as in an offender appeal. The High Court concluded the Court of Criminal Appeal had erred by not requiring the Attorney-General to negate any reason (such as conduct at the sentencing hearing) why the Court of Criminal Appeal should not intervene. The High Court also allowed the appeal on the ground the Court of Criminal Appeal had also erred in finding it regarded the sentence imposed as unreasonably disproportionate to the offending rather than whether the sentencing judge could not have done so (s23(3) *Crimes (Sentencing Procedure) Act* 1999 (NSW)). Appeal allowed. Matter remitted to Court of Criminal Appeal (NSW).

CORPORATIONS

Winding up – voidable transactions – extension of time for liquidator to apply with respect to voidable transactions – extension of time where transaction not identified

In *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2015] HCA 10 (11 March 2015) the High Court in a joint judgment concluded that the power of courts to extend time in which a company's liquidator may apply for orders in relation to voidable transactions under the Corporations Act 2001 (Cth) s588FF(3)(b) was not limited to transactions identified at the time of the order but extended to transactions not able to be identified at the time of the order (known as "shelf orders"): French CJ, Hayne, Kiefel, Gageler and Keane JJ jointly. Appeal dismissed.

CORPORATIONS

Courts – powers – power under Uniform Civil Procedure Rules to extend time after time in Act has expired – whether time set under Corporations Act may be extended under Rules of Court

In *Grant Samuel Corporate Finance Pty Limited v Fletcher* [2015] HCA 8 (11 March 2015) s588FF(3)(a) of the *Corporations Act* 2001 (Cth) allowed a court to make orders in respect of voidable transactions of a company in liquidation where the liquidator applied for such orders within three years from the relation back day or 12 months from the appointment of the liquidator. Paragraph 588FF(3)(b) allowed orders within such longer time as the court may order on an application of the liquidator made within the times specified in paragraph 588FF(3)(a). F was appointed liquidator in June 2008. In May 2011 orders were made ex-parte in the Supreme Court of NSW under s588FF within the time allowed by paragraph 588FF(3)(a) to extend the time to October 2011. In September 2011 and after the time set by s588FF(3)(a) had expired these orders were varied ex-parte by orders made under r36.16(2)(b) of the *Uniform Civil Procedure Rules* 2005 (NSW). These orders varied the first to extend the time to April 2012. An application to set aside the orders as varied was dismissed by the primary Supreme Court judge and this was affirmed by a majority of the Court of Appeal (NSW). An appeal to the High Court was allowed in a joint judgment. The Court observed that the policy underlying s588FF(3) was certainty and that while the initial order to extend to May 2011 was valid the order of extending it [to September 2011 was not: French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ jointly. The High Court observed that the source of the *Corporations Law* meant that it did not provide a universal federal law but operated with s79 of the *Judiciary Act* 1903 (Cth) to provide state laws of procedure applied except as Commonwealth laws "otherwise provided". The High Court concluded s588FF(3) did "otherwise provide" within s79 of the *Judiciary Act* 1903 (Cth) so that the terms of UCPR were not picked up and applied by s79 of the *Judiciary Act*. Appeal allowed.

CONSTITUTIONAL LAW

Chp IV – finance and trade – Commonwealth laws not to give preference to one state or part thereof

In *Queensland Nickel Pty Limited v Commonwealth of Australia* [2015] HCA 12 (8 April 2015) the plaintiff mined nickel at a mine near Townsville in Queensland and was subject to the tax imposed by the *Clean Energy Act* 2011 (Cth) as an entity that emitted greenhouse gasses. In an action in the original jurisdiction it contended that the *Clean Energy Regulations* 2011 (Cth) contravened s98 of the Constitution by granting greenhouse tax credits by reference to an industry average of gasses emitted per unit of nickel produced and making no allowance for differences between the states. A case stated in the proceeding was determined by Nettle J (with whom French CJ, Hayne, Kiefel, Gageler and Keane JJ each agreed). The Court observed that while laws were to be analysed by practical effect as well as pure legal effect the mere fact that a law produced different outcomes in different circumstances did not mean the law gave preference. Questions stated answered accordingly.

CONSTITUTIONAL LAW

Trading corporation – "corporation"

In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11 (8 April 2015) the *Queensland Rail Transit Authority Act* 2013 (Qld) established an authority that supplied labour to Queensland Rail Ltd which was a corporation that ran the Queensland railways. The authority owned all the shares in the company. The Act provided the authority was not a body corporate and