> "If the businesses are worth $310 000 as the husband asserts and nothing else is missing then he is receiving about 38 per cent of the asset pool when an amount slightly over 50 per cent might otherwise have been ordered in light of his inheritance and the age difference between himself and the wife. If the businesses are worth $645 425 as the wife asserts and nothing else is missing then he is receiving 53.5 per cent of the asset pool which is within a range of just and equitable outcomes."

CHILDREN

Father took child from mother for 'respite', disappearing with paternal grandmother and child for five years

In *McLeod & Needham & Anor* [2015] FCCA 2808 (1 October 2015) Judge Terry heard a case between mother and paternal grandmother of an eight-year-old child ('X'). The parents began living together when the mother was seventeen and the father twenty, the mother deposing to violent and coercive conduct by the father ([6]). The case did not relate to their older child ('Y'). The father did not take part in the proceedings except to appear in-person on the first day of the hearing to say that he supported his mother. It was found ([10]-[15]) that the mother was unhappy in her relationship, did not cope well after X was born, that when X was three or four months old the father took X with the mother's agreement to give her some 'respite' but instead (in conjunction with the paternal grandmother who at trial claimed the mother had given the child up) "stole X away" to Queensland, remaining out of touch with the mother for the next five years. In that time the mother "struggl[ed] with alcohol abuse and began using cannabis" and, "struggling with her own issues," "did not make very strenuous efforts" to find the child ([21]).

The Court found, however, that "gradually over time the mother got her life back on track. She sought assistance for her depression and anxiety, she obtained a job and in due course she bought a house … subject to a mortgage and re-partnered with Mr C" ([23]). She began parenting proceedings and to spend time with X after hearing from child support that the father was in jail ([24]). X expressed a wish "to stay with the paternal grandmother [who] … needed her because the paternal grandfather had died," the report writer's view being that the child "had been coached to say that" ([94]-[95]). The Court declined to place weight on the child's views as she had had "insufficient experience of the alternative offered by the mother" ([100]). Upon ordering that the child live with the mother and that the grandmother have supervised time for the next twelve months, the Court said ([210]-[211]):

> "There is a very high risk that if X remains with the paternal family her relationship with her mother will fail to thrive due to the antagonism the paternal family feel for the mother and the mistaken beliefs they hold about her which could in turn lead to a failure to take X to changeovers and a failure to facilitate telephone communication. My major concern is that nobody in the [paternal] family is capable of protecting X from exposure to the father's drinking, drug use and violence. (…)"

Thomas Hurley's Federal Court Judgements

December 2015

CONSTITUTIONAL LAW

Implied freedoms – limitation on donations by property developers

In *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) the High Court concluded that provisions in the *Election Funding Expenditure and Disclosures Act 1981* (NSW) that placed a cap on the donations that property developers could make to political parties in NSW were not invalid as inhibiting the implied right to political discourse recognised in *Lange v Australian Broadcasting Commission* [1997] HCA 25. The Court concluded the provisions did not impermissibly burden the implied freedom: French CJ, Kiefel, Bell and Keane JJ jointly; Gageler J; Nettle J; Gordon J sim. Answers to stated questions given.

CONTRACT

Interpretation – background circumstances

In *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 (14 October 2015) the High Court considered a dispute in a 1970 written contract between iron miners in WA as to payment of royalties on ore extracted from different areas. The Court generally concluded the Court of Appeal (NSW) had adopted too narrow a construction of the agreement: French CJ, Nettle and Gordon JJ jointly; Kiefel and Keane JJ; Bell and Gageler JJ observed the matter did not raise the question on which intermediate courts were divided, namely whether ambiguity must be shown in a written contract before a court interpreting it can consider background circumstances as considered in *Codelfa Construction Pty Ltd v State Rail Authority NSW* [1982] 149 CLR 337.

COURTS

Powers – power of state court to make freezing orders in anticipation of registrable foreign judgment

In *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36 (14 October 2015) the High Court concluded that the Supreme Court WA had inherent power conferred by s. 39(2) of the *Judiciary Act 1903* (Cth) to make a freezing order under *Supreme Court Rules* (WA) ord 52A in respect of a prospective judgment that could be registered under the *Foreign Judgements Act 1991* (Cth). The Court concluded this power was relevantly applied by s. 79 of the *Judiciary Act* and there was no inconsistency: French CJ, Kiefel, Bell, Gageler, and Gordon JJ jointly; sim Keane and Nettle JJ jointly. Appeal from Court of Appeal (WA) dismissed.

CRIMINAL LAW

"Pervert the course of justice"

In *The Queen v Beckett* [2015] HCA 38 (23 October 2015) the High Court concluded that the offence of acting to pervert the course of justice found in s. 319 of the *Crimes Act 1900* (NSW) could be established by proof of acts designed to pervert a contemplated or future curial 'course of justice' and was not limited to existing court proceedings: French CJ; Kiefel, Bell and Keane JJ jointly; sim Nettle J. Appeal against decision of Court of Criminal Appeal (NSW) allowed.

INTELLECTUAL PROPERTY

Patents – genes – 'manner of manufacture'

In *D'Arcy v Myriad Genetics Inc* [2015] HCA 35 (7 October 2015) the High Court concluded that a patent that claimed specified mutations of genes that were indicative of cancer was not a patentable invention as disclosing a "manner of manufacture within the meaning of Section 6 of the *Monopolies Act* [1624 UK]" for s. 18(1)(a) of the *Patents Act 1990* (Cth): French CJ, Kiefel, Bell, Keane JJ jointly; sim Gageler and Nettle JJ jointly; sim Gordon J. Consideration of how the concept of "manner of manufacture within the meaning of Section 6 of the *Monopolies Act*" was to be ascertained. Appeal from Full Court Federal Court allowed.

LIMITATION OF ACTIONS

Asbestosis – when cause of action accrued

In *Alcan Gove Pty Ltd v Zabic* [2015] HCA 33 (7 October 2015) 'Z' was employed by the appellant between 1974 and 1977 and exposed to asbestos. To succeed in a claim for damages he had to establish that his cause of action in negligence had accrued before the commencement of the *Worker's Rehabilitation and Compensation Act* (NT) in January 1987. The primary judge found the cause of action accrued at the onset of malignant mesothelioma in about 2013 and the cause of action was barred. This conclusion was reversed by the Court of Appeal (NT) which concluded that the onset was inevitable after the fibres were inhaled between 1974 and 1977. The appeal by the employer was dismissed: French CJ, Kiefel, Bell, Keane, Nettle JJ jointly. Appeal dismissed.