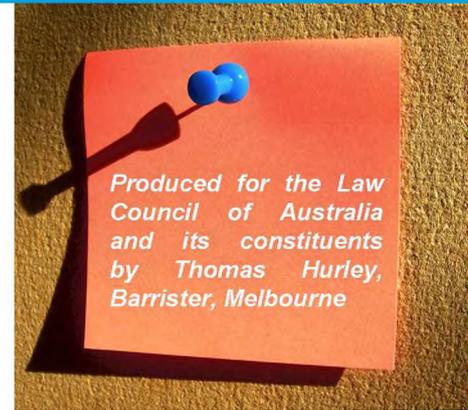


# High Court judgments: April - May 2011



## CRIMINAL LAW

- *Appeal*
- *Sentence*
- *Crown appeal*
- *Increase in sentence on Crown appeal without identifying error*

In *Lacey v A-G Queensland* [2011] HCA 10(7 April 2011) the High Court concluded that the jurisdiction given by s669A(1) of the *Criminal Code* (Qld) to the Queensland Court of Criminal Appeal to vary a sentence on an appeal by the Crown was only enlivened by that court identifying error on the part of the sentencing court as otherwise the distinction between trial and appellate jurisdiction would have no meaning. The High Court rejected the conclusion by the Court of Criminal Appeal that it had an “unfettered discretion”. Appeal allowed (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ; sim Heydon J). Orders of the Court of Criminal Appeal that increased the sentence for manslaughter set aside.

## NEGLIGENCE

- *Duty of care*
- *Party to illegal enterprise*
- *Joy riding stolen vehicle*
- *Plaintiff injured after refused permission to be let out of vehicle she stole*

In *Miller v Miller* [2011] HCA 9(7 April 2011) a person (DM) sued for injuries sustained as a passenger in a car that she had stolen to drive home. DM gave the driving role to a relative (MM) before she asked to be let out **[BUT THE DRIVER REFUSED?]**. The vehicle was then in an accident. DM’s claim for damages (reduced by contributory

negligence) was allowed by the trial judge who found the driver owed her a duty of care despite the illegality involved in the theft and driving of a stolen car. The WA Court of Appeal found that DM was owed no duty of care. The High Court allowed an appeal and restored the decision of the primary judge. The High Court found the defence of illegality ended when DM withdrew from the enterprise by asking to be let out of the vehicle: French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ; contra Heydon J. Appeal allowed.

## NEGLIGENCE

- *Elements of action*
- *Industrial accident*

In *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11(4 May 2011) K was injured while vacuum-cleaning a reactor at a steel mill when a cumbersome air hose (provided by a contractor) that he was operating became blocked. The High Court by majority concluded an employer was liable in negligence rather than the company that provided the vacuum-cleaning apparatus. The Court concluded a party-witness should not be found to be deliberately withholding evidence unless reasons are given and the person is given an opportunity to answer the criticism [67]. All members of the Court reviewed the elements of duty, breach and causation in an action in negligence. The majority concluded the WA Court of Appeal had erred in setting aside the judgment in favour of an injured worker against the employer’s insurers (see s601A

of the *Corporations Act* 2001 (Cth)): Heydon, Crennan, Bell JJ jointly; contra French CJ with Gummow J. Appeal allowed.

## CRIMINAL LAW

- *Propensity evidence*
- *Domestic violence*

In *Roach v Q* [2011] HCA 12(4 May 2011) the High Court dismissed an appeal that raised how propensity evidence was to be treated. The Court considered how this and relationship evidence was to be considered. Appeal dismissed: French CJ, Hayne, Crennan, Kiefel JJ; Heydon J sim.

## CRIMINAL LAW

- *Appeals*
- *Setting aside decision of jury that is unreasonable*

In *SKA v Q* [2011] HCA 13(4 May 2011) the High Court considered the NSW Court of Criminal Appeal had not undertaken the process of itself independently weighing all the competing evidence in considering whether the decision of the jury to convict was “unreasonable or cannot be supported by the evidence” within s60 of the *Criminal Appeal Act* 1912 (NSW): French CJ, Gummow, Kiefel JJ: sim Crennan J. The High Court rejected submissions that the Court of Appeal had erred by considering a transcript of evidence and not a video recording and that the Court of Appeal was obliged to have regard to the opinion of the trial judge that the jury verdict was unreasonable. Appeal allowed; retrial ordered.

**COMPULSORY ACQUISITION**

- **Compensation**
- **Relevant matters**
- **Increase in value of adjoining land by reason of the works**

In *Springfield Land Corporation (No 2) Pty Ltd v Queensland* [2011] HCA15 (11 May 2011) the High Court considered a landowner whose land was acquired in Queensland for road works was to be compensated. The Court considered how the amount was to be assessed where it accounted for the increase in value of the adjoining land by reason of the works where the adjoining land was owned by the acquiring authority. Appeal dismissed.

**COMPETITION LAW**

- **Provision of services**
- **Implied term services to be provided with reasonable skill**
- **Australian tourist travelling in Europe on ticket**

**purchased in Sydney injured in bus**

- **Whether state law limiting liability applied by Trade Practices Act**

In *Insight Vacations v Young* [2011] HCA 16(11 May 2011) the High Court considered how s74(2A) of the *Trade Practices Act* 1974 (Cth) operated. The Court considered whether this provision operated to pick up s5N of the *Civil Liability Act* (NSW) which enabled liability to be limited or excluded for breach of implied warranties in supply of recreational service. The High Court concluded that the state provision was not picked up by reason of ss68A and 68B of the *Trade Practices Act* [26]. The Court also concluded that while the proper law of the contract for travel in Europe was NSW law, the contract was to be performed in Europe: French CJ, Gummow, Hayne, Kiefel, Bell JJ jointly. Appeal by travel agent against conclusion of NSW Court of Appeal

that it was liable for damages for personal injury dismissed.

**CRIMINAL LAW**

- **Securities crimes**
- **Creating false market in securities**
- **Defence that purpose of trades was not to create false market**

In *Braysich v Q* [2011] HCA 14 (11 May 2011) the High Court was divided on when a trial judge was required to leave to a jury a defence to the charge in s998(1) of the *Corporations Act* 2001 (Cth) of trading in securities to create a false market that the trades had an innocent purpose. The Court considered who bore the onus of proving the charge or negating the defence and whether the giving of character evidence for the accused required the matter to be considered by the jury. Appeal allowed: French CJ with Crennan and Kiefel JJ; contra Heydon with Bell JJ. ●

## Federal Court judgments

**COMPETITION LAW**

- **Third party access to mining infrastructure facilities**

In *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58(4 May 2011) a Full Court considered the operation of Part IIIA of the *Competition and Consumer Act* 2010 (Cth) (formerly the *Trade Practices Act* 1974 (Cth)) in relation to applications by Fortescue Metals Pty Ltd and its subsidiaries for declarations under that Act affecting access to ore railways in the Pilbara owned and operated by BHP Pty Ltd and Rio Tinto Ltd. The Court considered the nature of the appeal to the Federal Court given by s44H of the *Competition and Consumer Act*,

the nature of the decision made by the National [AUSTRALIAN] Competition Tribunal as a specialist tribunal, the criterion in s44H(4) by which the application to it was to be determined and whether the NCC [ACT] had denied procedural fairness. Appeal by Rio Tinto allowed; appeal by Fortescue refused.

**MIGRATION**

- **Whether failure of MRT to call witnesses**
- **Credibility findings made before assessing evidence in its reasons [SHIFT “in its reasons” to after “findings made”?]**
- **Whether jurisdictional error**

In *Chen v MIC* [2011] FCAFC 56(21 April 2011) a Full Court dismissed an appeal where it was contended the Migration Review Tribunal had committed a jurisdictional error by not calling witnesses as requested and assessing credibility before assessing the evidence in question.

**DAMAGES**

- **Loss of opportunity**

In *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2011] FCAFC 55(20 April 2011) a Full Court considered whether the trial judge erred by failing to consider as an element of damages the loss of the chance of the applicant to pursue a distributorship agreement as a result of sale of defective