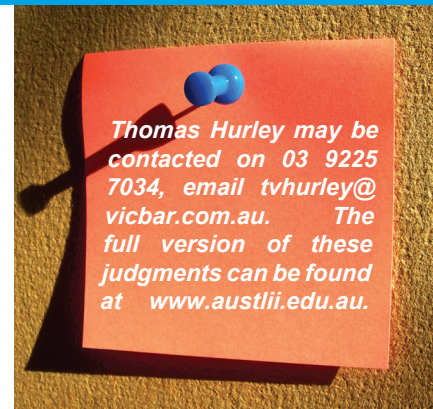


Federal Court

judgments:

May - July 2013



of the prosecutorial discretion as to which charge to proceed with was before the plea was entered. Appeal dismissed.

CRIMINAL LAW

- [Whether manslaughter open](#)
- [Decision of High Court in favour of co-accused](#)
- [Whether material difference](#)

In *Nguyen v Q* [2013] HCA 32 (27 June 2013), N and another (also named Nguyen) and a third person were charged with a murder. All were convicted. N and Nguyen both appealed to the Court of Appeal (Vic) contending the trial judge should have directed the jury that a verdict of manslaughter was open. The Court of Appeal allowed Nguyen's appeal but dismissed that of N. The prosecution was granted special leave to appeal against Nguyen's success and Nguyen cross appealed again contending the jury should have been directed that a verdict of manslaughter was open. This argument was accepted by the High Court: *R v Nguyen* [2010] HCA 38. The appeal by N was allowed on the basis that there was no material difference in his circumstances and those of Nguyen and the like direction should have been given: French CJ, Kiefel, Bell, Gageler, Keane JJ jointly. Appeal allowed. New trial ordered. ●

Federal Court Judgments

BANKRUPTCY

- [Validity of bankruptcy notice requiring payment to liquidator of creditor](#)

In *Lewis v Nortex Pty Ltd (In Liq)*

[2013] FCAFC 56 (3 June 2013) a Full Court concluded by majority that a bankruptcy notice that sought a debt be paid to the liquidator of a corporate trustee as the creditor was valid.

COPYRIGHT

- [Damages](#)
- [Assignment](#)

In *Insight SRC IPO Holdings Pty Ltd v Australian Council for Educational Research* [2013] FCAFC 62 (14 June 2013) a Full Court considered the measure of damages appropriate under s115(2) of the *Copyright Act 1968* (Cth) where the owner of copyright did not exploit it but supported a bare licensee to do so. It also considered whether a sub-assignee of copyright had sufficient standing to enforce claims that could be made by the original assignor.

CORPORATIONS

- [Powers of responsible entity under managed investment scheme](#)

In *ASIC v Wellington Capital Ltd* [2013] FCAFC 52 (28 May 2013) a Full Court concluded the primary judge had erred in concluding a responsible entity of a managed investment scheme under Chapter 5C of *Corporations Act 2001* (Cth) had power under a provision of its trust deed authorising it to make any distribution a natural person could make to make an in specie distribution of the assets of the fund and nor did it obtain this power from s124(1)(d) of the Act.

EXTRADITION

- [Disputed identity](#)

In *Marku v Republic of Albania* [2013] FCAFC 51 (3 June 2013) a Full Court concluded a magistrate exercising power under s19 of the

Extradition Act 1988 (Cth) and determining whether the person remanded under s15 is eligible for surrender was not authorised or required to determine the person's identity where the person claimed to be other than the person whose extradition was sought.

NATIVE TITLE

- [Res judicata](#)

In *WA v Fazeldean (No 2)* [2013] FCAFC 58 (6 June 2013) a Full Court considered whether the doctrine of res judicata was an appropriate vehicle to consider a native title claim made in 2010 in respect of land that had been the subject of a consent determination of native title in 2008. The court concluded it was not appropriate to summarily dismiss the second claim.

PATENTS

- [Revocation of patent orders](#)

In *Novozymes A/S v Danisco A/S (No 2)* [2013] FCAFC 55 (31 May 2013) a Full Court considered the orders needed to give effect to a decision to revoke some but not all claims in a patent.

TRADE PRACTICES

- [Delay](#)

In *Knott Investments Pty Ltd v Winnebago Industries Inc* [2013] FCAFC 59 (7 June 2013) a Full Court allowed an appeal against orders preventing an Australian company from using the respondent American company's name where the respondent had known from 1985 its name was being used in Australia but did not commence proceedings until 2010. Consideration given to doctrines of acquiescence, laches and delay.

DISCRIMINATION

- [Services](#)

- **Police actions**
- **Association**

In *Robinson v Commissioner of NSW Police* [2013] FCAFC 64 (20 June 2013), a Full Court concluded that a police officer conducting an investigation did not provide the persons subject to it with a “service” for the purposes of the *Disability Discrimination Act 1992* (Cth). The Court also considered when a person can claim discrimination by reason of being an “associate” of a person who has a disability.

FREEDOM OF INFORMATION

- **When information on a computer “ordinarily available”**

In *Collection Point Pty Ltd v C of T* [2013] FCAFC 67 (3 July 2013), a Full Court concluded that where an agency was required to create a computer program to access documents on its computers to grant access under the *Freedom of Information Act 1982* (Cth) the information was not “ordinarily available” for the purposes of ss17(1) and 17(2) of that Act.

MIGRATION

- **When application a “further” application**

In *SZGIZ v MIC* [2013] FCAFC 71 (3 July 2013), a Full Court concluded an application for a protection visa

filed on 10 October 2012 was not invalid under s48A of the *Migration Act 1958* (Cth) by reason of being a “further” application for s48A(1) (a). The Court considered how the meaning of a provision was to be ascertained where the provision contained “a lack of textual comfort”.

PROCEDURE

- **Class actions**
- **Security for costs**

In *Madgwick v Kelley* [2013] FCAFC 61 (14 June 2013), a Full Court concluded the trial judge had erred in refusing to consider whether to order under s33ZG and s43(1A) of the *Federal Court of Australia Act 1976* (Cth) that the applicants (a group of investors in a forestry investment scheme) give the respondent financiers security for costs.

PROCEDURE

- **Appeal by non party**

In *Harmer v Oracle Corporation Pty Ltd* [2013] FCAFC 63 (20 June 2013) a Full Court refused a non-party (the solicitor for the applicant) leave to appeal against that part of the reasons given by the trial judge that addressed the effect of an offer of compromise. The Court considered the difficulties confronting a person who seeks to appeal under s24(1)(a) of the *Federal Court of Australia Act 1976* (Cth) against the reasons for

orders but not the orders.

TAXATION

- **Charities**
- **Rescue of wildlife**

In *Sea Shepherd Australia Ltd v C of T* [2013] FCAFC 68 (3 July 2013), a Full Court concluded (by majority) that the AAT had not erred in finding the Sea Shepherd organisation (devoted to the cessation of whale hunting) was not a charitable institution involved in providing “short-term care to animals . . . that have been mistreated or are without owners” or “the rehabilitation of orphaned sick or injured animals” for item 4.1.6 of the table to s30-45 of the *ITAA 1997* (Cth). Consideration of whether the provisions should be given a beneficial interpretation.

TAXATION

- **When shares are acquired**

In *Fowler v C of T* [2013] FCAFC 69 (3 July 2013), a Full Court considered when an employee acquired shares under an employee share scheme and the operation of administrative penalties under the *Taxation Administration Act 1953* (Cth). ●

BOOK SHELF

The following publications are currently available to the Law Society to be reviewed by practitioners, for publication in *Balance*. Should you wish to review one of these books, please contact Suzie Simmons at publicrelations@lawsocietynt.asn.au, to arrange for it to be ordered.

	AUTHOR	TITLE	EDITION
1	Bruce	Aust Competition Law	2nd
2	Keyzer	Principles of Aust Constitutional Law	4th
3	Pearce	Administrative Appeals Tribunal	3rd
4	Sweeney, O'Reilly & Coleman	Law in Commerce	5th
5	Wappett	Essential Personal Pty Securities Law	2nd
6	Ebejer	LN Q&A - Legal Practices & Ethics	1st
7	Harris, Hargovan & Adams	Aust Corporate Law	4th