(23 August 2013) Judge Phipps considered a 20 year marriage involving traditional roles which produced two children and an asset pool of about $400,000. The Court adjusted the parties' equality of contributions by 5 per cent in favour of the wife due to waste by the husband due to his "gambling and associated expenditure on alcohol and food" (para 52). Judge Phipps (paras 61-62) made a further adjustment of 20 per cent under s 75(2) given the small pool, the husband's construction of a house while the wife and children were renting, the wife's cost of the children over and above the husband's child support payments and disparity of income and earning potential.

PROPERTY

- ***Section 79A application***
- ***Wife alleged husband hid £250,000 overseas***
- ***Husband sought summary dismissal***
- ***Admission of evidence***

In *Paget & Dubois* [2013] FCCA 1746 (8 November 2013) the husband applied for summary dismissal of the wife's application to set aside property orders made in 2010. The wife alleged that it had come to her attention that during those proceedings the husband had hidden an overseas bank account containing £250,000. The husband denied that. The wife said that her informant could not obtain documentary proof, that the bank refused to answer a subpoena and would only provide information if the husband authorised it to do so (para 17). Judge Burchardt disagreed with the wife's submission that the husband could not rely on any affidavits at the hearing of his summary dismissal application, citing *Priestly v Godwin* [2008] FCA 1529. The husband conceded through his counsel that the court had power to order him to give the applicant the authorisation she sought to conduct her investigations (para 40). The Court directed the husband to do so, reserving its ruling under s 17A of the *Federal Circuit Court of Australia Act* until after those inquiries were conducted.

HighCourt judgments:

October - December 2013

COMPETITION LAW

- ***Misleading and deceptive conduct***

In *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54 (12 December 2013) the primary judge in the Federal Court found that certain of the respondents advertisements in 2010 as to using the consumer's telephone landline to achieve internet connection were misleading and deceptive contrary to ss52 and 53C(1)(c) of the Trade Practices Act 1974 (Cth) because of the disparity between a prominent headline showing an attractive price and the fine print that qualified the offer. The primary judge in the Federal Court accepted the advertisements failed to disclose a single price for the service and imposed a penalty of $2 million. These conclusions were set aside on appeal and the fine reduced. The appeal by the ACCC was allowed by the High Court by majority; French CJ, Crennan, Bell, Keane JJ jointly; contra Gageler J.

CONSTITUTIONAL LAW

- ***Marriage power***

In *The Commonwealth v Australian Capital Territory* [2013] HCA 55 (12 December 2013) the High

Court in a joint judgment accepted that interpretation of s51 (xxi) of the Constitution was not restricted to the meaning of "marriage" at Federation and the federal parliament could enact a law for same sex marriages. The Court concluded the Marriage Equality (Same Sex) Act 2013 (ACT) which purported to provide for same sex marriages in the ACT was invalid as being entirely inconsistent with the Marriage Act 1961 (Cth). Questions stated answered accordingly.

CONSTITUTIONAL LAW

- ***Implied freedom of communication***
- ***Whether limitations on political donations justified***

In *Unions NSW v New South Wales* [2013] HCA 58 (18 December 2013) s96D of the Election Funding Expenditure and Disclosure Act 1981 (NSW) prohibited a political party or election candidate from accepting a donation unless it was from an individual enrolled on the roll of voters. By s95G(6) the Act aggregated the amount spent on "electoral communication" by a political party as including that spent by its associates for the purposes of capping the expenditure. These provisions were stated to apply to state and local government elections only. In an action in the original jurisdiction various entities connected with the Australian Labor Party sought declarations these provisions were invalid as imposing a restriction on the implied right of political discussion arising from the Constitution recognised in Lange v Australian Broadcasting Commission (1997) 189 CLR 520. The High Court concluded the provisions were invalid: French CJ, Hayne, Crennan, Kiefel, Bell JJ jointly; sim Keane J. The Court concluded that it was not possible to identify a purpose in the provisions that was connected to the anti-corruption purposes of the Act that were said to justify them. Answers to questions stated accordingly.

CORPORATIONS LAW

- *Winding up*
- *Insolvency*
- *Disclaimer of property*
- *Lease*
- *Whether lease granted by corporation is "property"*

In *Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers Appointed) (In Liquidation)* [2013] HCA 51 (4 December 2013) the High Court concluded that s568(1) of the Corporations Act 2001 (Cth) was to be construed as giving a liquidator of a company power to disclaim a lease granted by the company to a tenant and such a lease was "property" for s568(1)(f). The Court concluded the provision was not restricted to leases where the company was the tenant: French CJ, Hayne, Kiefel JJ jointly; sim Gageler J; contra Keane J. Appeal against decision of Court of Appeal (Vic) dismissed.

CRIMINAL LAW

- ***Whether jury verdict supported by the evidence***
- ***Reasons of Court of Appeal***

In *BCM v The Queen* [2013] HCA 48 (27 November 2013) B was convicted by a jury of unlawfully dealing with a child. His appeal to the Court of Criminal Appeal (Qld) contending there was insufficient evidence to support the conviction was dismissed by that Court. His further appeal to the High Court was also dismissed: Hayne, Crennan, Kiefel, Bell, Keane JJ jointly. The Court concluded that whatever criticisms were made of the reasons of the Court of Appeal in explaining its decision there was evidence on which the jury could reach its conclusion. Appeal dismissed.

CRIMINAL LAW

- ***Malicious infliction of grievous bodily harm***
- ***Unauthorised surgical procedure***
- ***When miscarriage of justice***

In *Reeves v The Queen* [2013] HCA 57 (18 December 2013) R was a surgeon. In 2002 a patient CDW was referred to him for excision of a lesion in CDW's left labia minora. In the operation R performed a simple vulvectomy and removed CDW's genitals. R was convicted of a charge of malicious infliction of grievous bodily harm by performing a procedure without consent and benefit to the patient. The trial judge sentenced R on the basis that the jury had found he had operated without consent rather than that the surgery was unwarranted. R's appeal to the Court of Criminal Appeal (NSW) was dismissed: this Court found that R's guilt had been established beyond reasonable doubt on the "consent" basis regardless of the error of the trial judge in referring to the concept of "informed consent". As this Court found there was no miscarriage of justice it dismissed appeals against conviction and sentence. R's appeal to the High Court failed: French CJ, Crennan, Bell and Keane JJ jointly; sim Gageler J. The High Court concluded the Court of Criminal Appeal had not erred in the result it reached and that misdirection on a critical element of liability did not actually occasion a miscarriage of justice. R's appeal against sentence was allowed as the prosecution accepted material had been overlooked. Appeal allowed in part.

DAMAGES

- ***Breach of contract***

In *Clark v Macourt* [2013] HCA 56 (18 December 2013) in 2002 a medical practice involved in assisted reproduction (Dr C) entered an agreement to purchase assets from another practice (St George) for a total of $386,954. M guaranteed the performance of the vendor. The assets included 3513 "straws" of frozen sperm. Due to breach of warranty by the vendor only 1996 were usable. By 2005 the appellant purchaser had run out of usable straws. At this time the amount still outstanding and payable by the purchaser (Dr C) was $219,000. The vendor sued for this. The purchaser counter-claimed for the cost of acquiring usable straws. The primary judge

assessed the purchaser's loss at $1.2 million being the hypothetical cost of obtaining 1996 warranty compliant straws at the date of the completion of the contract in 2002. On appeal the Court of Appeal (NSW) viewed the agreement as a sale of business rather than a sale of goods. It concluded the loss was calculated as the cost of acquiring replacement stock less what had been recouped from patients but noted the purchaser had not sought this. It reduced the damages on the counter-claim to nothing. The purchaser's appeal to the High Court was allowed by a majority: Hayne J; Crennan with Bell JJ; Keane J; contra Gageler J. The majority agreed with the primary judge that the loss was the value of what was not received at the date of completion. Appeal allowed.

EXTRADITION

- ***Whether extradition "unjust or oppressive"***

In *Commonwealth Minister for Justice v Adamas* [2013] HCA 59 (18 December 2013) the effect of s22(3) of the Extradition Act (Cth) and article 9(2)(b) of the Treaty annexed to the Extradition (Republic of Indonesia) Regulations 1994 (Cth) was that Australia could refuse to order extradition to Indonesia if in the circumstances extradition would operate in a way that was "unjust, oppressive or incompatible with humanitarian considerations". A was an Indonesian banker. In 2002 he was convicted in Indonesia in absentia of corruption crimes; his appeal against this was dismissed in 2003; a warrant for his arrest was issued in Indonesia; following a request for extradition he was arrested in Australia in 2009; in 2010 the appellant Minister determined A be surrendered to Indonesia. The primary judge and the majority of the Full Court of the Federal Court considered the Minister had erred by not analysing the question of oppression etc. by reference to "Australian standards". The High Court in a joint judgment concluded these Courts were in error and that while Australian standards were relevant they were not determinative: French CJ; Hayne; Crennan; Kiefel; Bell; Gageler; Keane JJ jointly. Appeal by Minister allowed.

FREEDOM OF INFORMATION (CTH)

- ***Documents not covered by the Act***
- ***When documents of the Governor General are of an "administrative nature"***

In *Kline v Official Secretary to the Governor General* [2013] HCA 52 (6 December 2013) s6A of the FOI Act 1982 (Cth) provided the FOI Act did not apply to the official secretary to the Governor General unless the "document relates to matters of an administrative nature". The High Court concluded the Full Federal Court and Administrative Appeals Tribunal had not erred in concluding documents relating to the administration of the Australian honours system were not documents relating to matters of an administrative nature and thus were not subject to the FOI Act: French CJ, Crennan, Kiefel, Bell JJ jointly; sim Gageler J. Consideration of when the functions of the Governor General are of an administrative nature. Appeal dismissed.

MIGRATION

- ***Migration***
  - ***Detention***
  - ***Detention for purpose of removal from Australia***
  - ***Whether detention lawful when removal unlikely***
- ***Administrative law***
  - ***Declaration***
  - ***Decision of Minister based on unlawful policy***
  - ***Decision sustained on other ground***
  - ***Person affected entitled to declaration***

In *Plaintiff M 76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53 (12 December 2013) P and her children were citizens of Sri Lanka and involved with the Liberation Tigers of Tamil Eelam. In May 2008 they arrived in Australia by boat and were detained; in July 2010 they applied for recognition as refugees under the Refugees Convention; if accepted as refugees the Minster was enabled by s46A(2) of the Migration Act 1958 (Cth) to authorise them to make a valid visa application; in March 2011 the Minister authorised detention in the community; in September 2011 they were found to be refugees; in December 2011 ASIO provided a negative security assessment; in April 2012 the plaintiffs were advised that because of the assessment they would never pass the public interest test in Public Interest Criterion (PIC) 4002; in May 2012 the plaintiffs were again detained under ss189 and 196 of the Act. These provisions authorised detention pending removal of unlawful non-citizens. Various countries declined to accept the plaintiffs and it was accepted before the Court that removal was not likely. The plaintiffs commenced an action in the original jurisdiction of the High Court and questions were stated for determination by a Full Court. The Full Court generally concluded that the detention of the plaintiffs for the purpose of removing them was lawful notwithstanding that purpose may not be achieved in the short term. The Court considered when it would re-open or depart from earlier decisions and declined to re-open its decision in Al–Kateb v Goodwin [2004] HCA 37. The Court noted that the decision not to invite the Minister to consider exercising the power under s46A was based on the effect of PIC 4002 which was found to be unlawful in September 2012 in M 47/2012 v Director General of Security [2012] HCA 46 and therefore this decision was affected by legal error. However the members of the Court found that while the fact of the security assessment justified what had happened (so the error was of no consequence) the plaintiffs were entitled to a declaration that there had been an error of law: French

CJ; Hayne J; Crennan, Bell, Gageler JJ jointly; Kiefel, Keane JJ jointly. Questions answered and declarations made accordingly.

MILITARY LAW

- ***Offences***
- ***Creating a disturbance***

In *Li v Chief of Army* [2013] HCA 49 (27 November 2013) the High Court considered what was required to establish the offence of "creating a disturbance" for s33(b) of the Defence Force Discipline Act 1982 (Cth). The High Court concluded a "disturbance" was the non-trivial interruption of order: French CJ, Crennan, Kiefel, Bell, Gageler JJ jointly. The Court concluded the judge advocate had not correctly directed the court martial as to the mental element of the offence which required a belief on the part of the accused that the actions would result in a disturbance. Appeal from the Full Court of the Federal Court allowed; matter remitted to Defence Force Discipline Appeal Tribunal.

PATENTS

- ***Patentable invention***
- ***Treatment or prevention of human disease***

In *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* [2013] HCA 50 (4 December 2013) the High Court concluded by majority that methods of preventing or treating human disease (such as surgery and the administration of drugs) can be patentable inventions for the Patents Act 1990 (Cth): French CJ; Crennan with Kiefel JJ; Gageler J; contra Hayne J. The majority concluded that to depart from the law as accepted in Bristol-Myers Squibb Co v FH Faulding & Co Ltd (2000) FCR 524 would be too great a departure from precedent. Appeal from the Full Court of the Federal Court dismissed.

ADMINISTRATIVE LAW

- ***Certiorari***
- ***Decision having legal effect***
- ***Medical panel***
- ***Opinion of panel given in statutory benefit proceedings not binding in common law proceedings***
- ***Requirements of statement of reasons***

In *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43 (30 October 2013) K claimed to have suffered an injury in 2006 in the course of employment. In May 2009 K made a claim for statutory benefits provided in Part IV of the Accident Compensation Act 1985 (Vic) (the Act). This was referred to the Magistrates' Court. In November 2009 K applied to the County Court for a finding that he had a serious injury which would enable him to sue at common law. The Magistrates' Court referred medical questions to a medical panel under the Act. The panel provided an opinion that the injuries were not compensatable and the claim for statutory benefits was dismissed by consent orders made in the Magistrates' Court. The employer foreshadowed it would rely on the opinion of the medical panel in the serious injury application. This prompted K to seek certiorari in the Supreme Court to quash the opinion of the panel. Certiorari was refused by the primary judge but granted by the Court of Appeal (Vic). The Court of Appeal concluded that s68(4) of the Act required the panel's opinion (obtained in the statutory benefit proceedings) be applicable in the serious injury application. The Court of Appeal found the reasons of the panel were inadequate and issued certiorari to quash it. The High Court allowed an appeal by the employer: French CJ, Crennan, Bell, Gageler, Keane JJ jointly. The High Court concluded s68(4) only required the opinion be applied in the statutory benefits proceedings and as the opinion had no legal effect certiorari, the Court erred in finding the reasons the panel gave did not satisfy the requirements for reasons set out in s68(2) of the Act. Requirements for proper reasons considered. Appeal allowed. Orders of the primary Supreme Court judge restored.

CRIME

- ***Duty of prosecutor to call relevant witnesses***

In *Diehm v Director of Public Prosecutions (Nauru)* [2013] HCA 42 (30 October 2013) a bench of three (French CJ, Kiefel, Bell JJ jointly) concluded that failure of the prosecution to call a Nauruan police officer present at the search of the accused's house was not a breach of any duty of the prosecutor or the Court to ensure there was no miscarriage of justice. Appeal dismissed.

MOTOR ACCIDENTS (NSW)

- ***Damages***
- ***Economic loss***
- ***Value of services provided gratuitously***

In *Daly v Thiering* [2013] HCA 45 (6 November 2013) Mr T was seriously injured in a motor vehicle accident involving D in NSW in 2007. Many of Mr T's needs were provided by his mother Mrs T under an arrangement between the mother and the Lifetime Care and Support Agency NSW. In an action for damages Mr T included a claim for the value of the care provided by Mrs T. In answer to a preliminary question the primary judge concluded that s130A of the Motor Accidents Compensation Act 1999 (NSW) did not preclude Mr T's claim for the value of services provided by his mother. On appeal by D this was reversed by the Court of Appeal (NSW). The High Court in a joint judgment allowed an appeal by D to reach the same result as the Court of Appeal but by providing a different answer to the question: Crennan, Kiefel, Bell, Gageler, Keane JJ jointly.

NATIVE TITLE

- ***Right to take fish***
- ***Relationship between state laws regulating activity and native title rights***

In *Karpany v Dietman* [2013] HCA 47 (6 November 2013) K and others were Aborigines charged with taking undersize fish contrary the Fisheries Management Act 2007 (SA). The Magistrates' Court at Kadina accepted they had fished

according to traditional custom and acquitted them. This was reversed by the Full Court of the Supreme Court of SA. Their appeal to the High Court was allowed. The High Court concluded that state legislation did not extinguish native title to take fish but only regulated it: French CJ, Hayne, Crennan, Kiefel, Bell, Gageler, Keane JJ jointly. Appeal allowed. Orders of Full Court set aside.

PRACTICE

- ***Privileged documents inadvertently discovered***

In *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 (6 November 2013) in 2011 solicitors acting for the appellants inadvertently disclosed about 13 privileged documents in discovery of 60,000 in proceedings in the Supreme Court of NSW. In answer to a request that the inadvertently released documents be returned, the solicitors for the respondents claimed privilege had been waived. The appellants commenced proceedings in the equitable jurisdiction seeking injunctive relief. The primary judge found the disclosure of nine documents was inadvertent and ordered their return. The Court of Appeal (NSW) allowed the respondent's appeal on the basis the mistake would not have been obvious. The High Court in a joint judgment restated the matters raised in AON Risk Services Australia Ltd v Australian National University (2009) CLR 175 as to the need after the commencement of the Civil Procedure Act 2005 (NSW) and the Uniform Civil Procedure Rules 2005 (NSW) to conduct litigation to achieve just, quick and cheap results: French CJ, Kiefel, Bell, Gageler, Keane JJ. The Court considered the dispute should not have been raised in proceedings in equity and the inadvertently released documents should have been ordered to be returned. Appeal allowed.

WORKER'S COMPENSATION (CTH)

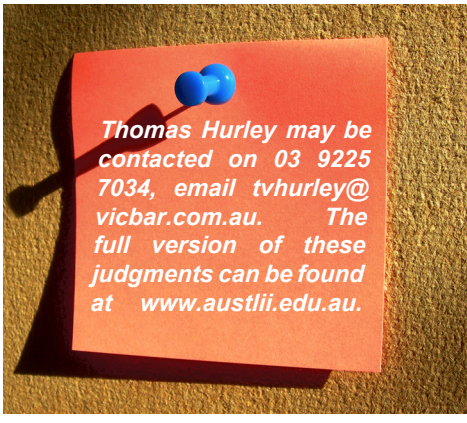
- ***Entitlement to compensation***
- ***Injuries arising in the course of employment***

In *Comcare v PVYW* [2013] HCA 41 (30 October 2013) the respondent was a Commonwealth public servant who was required to visit a NSW regional office of the department she worked for. Her employer arranged for her to stay overnight in a motel where she suffered injuries whilst engaging in consensual sexual activities. She claimed compensation under s4(1) of the Safety Rehabilitation and Compensation Act 1988 (Cth) contending the injuries arose "out of or in the course of her employment". She contended that because the injuries occurred at a place her employer required her to be (the motel), the injury arose in the course of employment. Her claim was rejected by the Administrative Appeals Tribunal (AAT) but upheld by the primary judge and the Full Court of the Federal Court. Comcare's appeal to the High Court was allowed by majority: French CJ, Hayne, Crennan, Kiefel JJ contra Bell J; Gageler J. The majority concluded that the injury must be connected to the inducement or encouragement of the employer that led the employee to be in the particular place, and this was not present. Appeal allowed. Decision of AAT restored.

Federal Court

judgments:

September - December 2013



ADMINSTRATIVE APPEALS TRIBUNAL

- ***Whether Administrative Appeals Tribunal made a "decision"***

In Commissioner of Taxation v Cancer and Bowel Research Association Inc (includes Corrigenda dated 10 and 13 December 2013) [2013] FCAFC 140 (25 November 2013) a Full Court concluded that the orders made by the AAT to remit back to the Commissioner a decision (revoking the charity status of the respondent) under s42D of the Administrative Appeals Tribunal Act 1975 (Cth) because the AAT was unable to reach a conclusion on the material before it, was not a decision that could be appealed