

Thomas Hurley's High Court judgments



CRIMINAL LAW

- **Sentence**
- **Relevant matter**
- **Plea bargain with prosecution**
- **Court refusing to consider prosecution submission on penalty range**

In *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2 (12 February 2014) B and another pleaded guilty to Commonwealth offences involving importation of a commercial quantity of narcotics and were sentenced to lengthy periods of imprisonment. The pleas of guilty followed discussions with the prosecution authorities as to the “sentencing range” which was less than the sentences imposed. In sentencing the trial judge refused to hear from any party as to the appropriate sentencing range. B’s application to the Court of Criminal Appeal (Vic) for leave to appeal against sentence was refused. His application for special leave was granted by the High Court but the appeal dismissed: French CJ, Hayne, Kiefel, Bell JJ jointly; *sim* Gageler J. The High Court concluded the trial judge had not erred in not hearing from the prosecution and the prosecution was under no duty to make submissions on sentencing. The High Court therefore found the proceeding was not unfair nor had the trial judge failed to consider a relevant matter. The Court concluded the decision in *R v MacNeil-Brown* (2008) 20 VR 677 was wrong and overruled it. Appeals dismissed.

PARLIAMENT

- **Elections - petition**

In *Ludlam v Johnston* [2014] HCA 1 (21 January 2014) several petitions under the *Commonwealth Electoral Act* 1918 (Cth) were before the court disputing the validity of the 2013 Senate election in Western Australia. Hayne J struck out a petition by a successful candidate that sought orders in the event the election was set aside but did not actually dispute the result in terms as required by s355 of the *Commonwealth Electoral Act* 1918 (Cth).

BIRTHS

- **Whether person can register their sex as “non-specific”**

In *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 (2 April 2014) the High Court in a joint judgment concluded the *Births, Deaths and Marriages Registration Act* 1995 (NSW) allowed the Registrar to record the sex of a person as “non-specific” and did not require a choice between male or female: French CJ, Hayne, Kiefel, Bell and Keane JJ jointly.

CONTRACTS

- **“Best endeavours”**

In *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7 (5 March 2014), in litigation concerning agreements where a supplier of gas was required to use its “best endeavours” to supply gas but was able under the agreement to “consider all relevant commercial matters” in doing so, the High Court considered the operation of

a “best endeavours” clause. The Court concluded the term did not require the suppliers to supply gas where this was contrary to their own business interests: French, Hayne, Crennan, Kiefel JJ jointly; *sim* Gageler J. Appeal from Court of Appeal (WA) dismissed.

CRIMINAL LAW

- **Alternative verdicts**
- **Whether trial judge required to instruct jury to consider lesser charge in face of forensic choice by counsel**

In *James v The Queen* [2014] HCA 6 (5 March 2014) the High Court concluded that a trial judge is not under a duty to leave a lesser charge to a jury that is reasonably open regardless of the forensic choices of counsel: French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ jointly; *contra* Gageler J. Appeal dismissed.

CRIMINAL LAW

- **Sentence “contrary to law”**

In *Achurch v The Queen* [2014] HCA 10 (2 April 2014) A was sentenced for drug trafficking in June 2008. A crown appeal to the Court of Criminal Appeal (NSW) was allowed in August 2011. This Court calculated the non-parole period applying reasoning rejected by the decision of the High Court in *Muldock v The Queen* [2005] HCA 39 given in October 2011. A applied to have his appeal reopened on the basis it involved an error of law within s43 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW). This application was rejected by the Court of Criminal Appeal constituted by a bench of five in May 2007. A’s appeal to

the High Court was dismissed: French CJ, Crennan, Kiefel, Bell JJ jointly; *sim* Gageler J. The High Court concluded that the Court of Criminal Appeal had not erred in construing the provision as not requiring re-opening for any error of law or fact and the purpose of the provision was to only address sentences that were affected by the error in any event. Appeal dismissed.

NATIVE TITLE

- ***Whether native title extinguished by lease of Crown land that did not grant exclusive possession***

In *Western Australia v Brown* [2014] HCA 8 (12 March 2014) the High Court applied its decision in *Western Australia v Ward* [2002] HCA 28 and concluded that native title was not extinguished by the grant of leases to mine for iron ore that did not grant an unqualified right to exclusive possession: French CJ, Hayne, Kiefel, Gageler, Keane JJ jointly. Appeal from Full Court of Federal Court dismissed.

STATUTES

- ***Recovery of duty paid under mistake of fact***
- ***Recovery outside prescribed time***

In *Thiess v Collector of Customs* [2014] HCA 12 (2 April 2014) s167 of the *Customs Act* 1901 (Cth) provides that no action lies for the recovery of duty paid except for an action commenced within the time periods provided in s167(4). T owned a yacht that was imported into Australia in 2004 and duty paid according to its believed weight when no duty was payable for a yacht of its actual weight. T's action commenced outside the required time period and was dismissed by the primary court and the Court of Appeal (Qld). T's appeal to the High Court was dismissed in a joint judgment; French CJ, Hayne, Kiefel, Gageler, Keane JJ. The High Court referred to the construction of statutory provisions and concluded the limiting provisions were not to be limited to a valid assessment and expressed a scheme that required

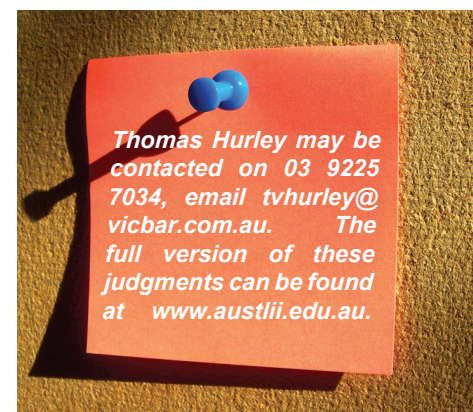
importers to be vigilant. Appeal dismissed.

PERSONAL INJURIES (NSW)

- ***Death***
- ***Damages***
- ***Who is claimant?***

In *Taylor v The Owners-Strata Plan No 11564* [2014] HCA 9 (2 April 2014) s12(2) of the *Civil Liability Act* 2002 (NSW) directed a court considering the award of damages for the death of a person to disregard the amount by which the "the claimant's income" exceeded three times the amount of average weekly earnings. In an action by a widow for damages for the death of her husband (a land surveyor) the primary judge answered a separate question to the effect that the reference to "the claimant's income" was directed to the deceased's income and not that of the plaintiff/widow. The Court of Appeal (NSW) agreed with this construction. The decision was reversed by the High Court: French CJ, Crennan, Bell JJ jointly; *contra* Gageler and Keane JJ jointly. Appeal allowed. ●

Thomas Hurley's Federal Court judgments



MIGRATION

- ***Unreasonableness***

In *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1 (4 February 2014) a Full Court reviewed authority as to "unreasonableness" when considering whether a refusal by the Migration Review Tribunal (MRT) to further adjourn an MRT hearing because the applicant

was one day late in filing material with the request for further adjournment was "unreasonable". The Court suggested there was an unreasonableness of "outcome" (considering the result of the exercise of a discretionary power) and reasonableness review (considering the stated reasoning process). The Full Court concluded the Federal Circuit Court had not

erred in setting aside the decision of the MRT.

WORKERS COMPENSATION

- ***Benefits***
- ***Medical treatment***
- ***Purchase and modification of a vehicle***

In *Heffernan v Comcare* [2014] FCAFC 2 (3 February 2014) a Full Court considered the definition