preparation for marriage … In those circumstances, the wife signed the first agreement under duress … borne of inequality of bargaining power where there was no outcome [for] her that was fair or reasonable."

Judge Demack set aside both agreements, the second one being found ([96]) to be "simply a continuation of the first" and ordered the husband to pay the wife's costs.

**CHILDREN**

**Mother wins appeal against coercive interim order requiring her to relocate – Court's approach to interim hearings**

In *Eaby & Speelman* [2015] FamCAFC 104 (27 May 2015) the Full Court (Thackray, Ryan & Forrest JJ) allowed the appeal by the mother who after unilaterally relocating with children to a town 765 kilometres away was ordered to return at an interim hearing by Judge Turner who also ordered that the father spend time with the children. Ryan J (with whom Thackray & Forrest JJ agreed) said (at [13]-[15]) that "[H]er Honour did not make an order in relation to parental responsibility. Given that … the mother sought an [interim] order [as to parental responsibility] it is … surprising that no reasons are given for her Honour's decision not to address this issue" and that the mother "was entitled to have her application determined in accordance with the law." Ryan J continued (at [17]-[18]):

"( … ) On the basis that the parties' evidence was in conflict and/or lacked corroboration by an independent source, that evidence was disregarded. ( … ) It is true that in *Goode* [[2006] FamCA 1346] … the Full Court said that the circumscribed nature of interim hearings means that the court should not be drawn into issues of fact or matters relating to the merits of the substantive case where findings are not possible. However, that does not mean that merely because the facts are in dispute the evidence on the topic must be disregarded and the case determined solely by reference to the agreed facts. Rather, the proper approach to contentious matters of fact in the determination of interim hearings is as explained … [i]n SS & AH [2010] FamCAFC 13 at [100] … [where] the majority (Boland and Thackray JJ) said:

"The intuition involved in decision-making concerning children is arguably of even greater importance when a judge is obliged to make interim decisions following a hearing at which time constraints prevent the evidence being tested. Apart from relying upon the uncontroversial or agreed facts, a judge will sometimes have little alternative than to weigh the probabilities of competing claims and the likely impact on children in the event that a controversial assertion is acted upon or rejected. It is not always feasible when dealing with the immediate welfare of children simply to ignore an assertion because its accuracy has been put in issue."

**CHILDREN**

**No time given to father released from prison after serving a sentence for child pornography – Unacceptable risk of harm**

In *Stack & Searle* [2015] FCWA 44 (12 June 2015) Crisford J dismissed the father's application for parenting orders.He had been released from prison after serving a three-year sentence for indecent dealing with a child, possession of and supplying child pornography ([2]). Further charges of indecent dealing were pending. The mother was granted sole parental responsibility and an order that the father have no time and not communicate with the children and that their surname be changed to hers. Crisford J said (at [26]) that "[t]o be meaningful [within the meaning of s 60CC(2)(a) FLA] a relationship 'must be healthy, worthwhile and advantageous to the child' (*Loddington & Derringford (No 2)* [2008] FamCA 925)." The father alleged that "[when] the parties were together [the] children had a very meaningful relationship with him" [(32)] while "[t] he mother paint[ed] a completely different picture of the father, [saying that] he deliberately cultivated a close relationship with Child A [the eldest child] … in order to groom her ([35])," that he had allowed Child A to see him watching a pornographic video [44] and he was alleged by Child A to have sexually penetrated her [52]. The father had also uploaded images of three-year-old Child B to an international child pornography site ([42]).

The father relied on evidence from his treating psychologist that he had "completed two comprehensive sex offender programs and individual therapy" and that she "support[ed] the father spending supervised time with the children" ([63]) but Child A's therapist, a senior clinical social worker (Dr Hay), described "the father's 'position of denial and minimisation' as a cause for concern" and that despite "his completion of various courses and programs" he "ha[d] never admitted to the charges of sexual abuse of [Child A]" ([68]). The Court preferred Dr Hay's opinion, concluding (at [148]) that "there is an unacceptable risk of harm to the children … [that] some factors taken alone, such as the actual proven abuse and its ongoing impact are enough to say that the risk of harm outweighs the benefit of the children seeing the father."

**PROPERTY**

Parties did not have a de facto relationship despite having a child – No mutual commitment to a shared life

In H*arbrow & Boston* [2015] FCCA 1414 (28 May 2015) Judge Harland heard a threshold (jurisdictional) issue as to whether the parties were in a de facto relationship for the purpose of s 90RD of the *Family Law Act*. The parties were born in Ethiopia, met in Australia, had a wedding ceremony in Ethiopia and had a child together. The alleged de facto husband (the respondent) agreed that he participated in the ceremony but said that the applicant had asked him to fill in to save face when her then fiancé "stood her up". They flew back to Australia on the same flight ([35]) and two weeks later she told him she was pregnant [36].

The applicant alleged a six-year de facto relationship, the respondent saying that they were just friends ([99]). The respondent said that he let the applicant live at Property E in lieu of him paying child support [and that] they keep in touch because of their child" ([37]). There was evidence of the applicant receiving Centrelink benefits "as a single mother" ([44]) and the parties going to Disneyland together with the child ([53]). The Court found that the parties did not live together ([100]) or have an ongoing sexual relationship ([102]), that the respondent had financially supported the applicant ([103]) but that while the "applicant may have been committed to a shared life … the respondent was not" ([104]). The Court concluded on all the evidence that the applicant had failed to discharge the onus of proving on the balance of probabilities that a de facto relationship existed ([109]). The application was dismissed.

# Thomas Hurley's High Court Judgments

## September 2015

**ADMINISTRATIVE LAW**

Tribunals – bias – panel of municipal council considering destruction of dog – panel member involved in prosecution of dog owner

In *Isbester v Knox City Council* [2015] HCA 20 (10 June 15) H was an officer of the respondent council and responsible for coordinating local laws. H was responsible for prosecuting the appellant (I) in the Magistrate's Court (Vic) under s 29(4) of the *Dog Act* (Vic) for owning a dog that had attacked a person. I was convicted on a plea of guilty. The Council had adopted a procedure of creating a panel to consider the separate question under s 29(12) of whether the dog should be destroyed. H was a member of the three-person panel (who were all relevant delegates) and actively involved in its deliberations. The panel held a hearing and I was heard. After the hearing one panel member/delegate K decided the dog should be destroyed and H agreed to provide a statement of reasons. I sought judicial review claiming the decision was affected by bias. She failed before the primary judge in the Supreme Court of Victoria and before the Court of Appeal (Vic). Her appeal to the High Court was allowed by all members of the Court: Kiefel, Bell, Keane, Nettle JJ jointly; sim Gageler J. The members of the joint judgment concluded that H's active interest as 'prosecutor' made her membership of the panel 'incompatible' with a fair hearing: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337. Appeal allowed.

## CONTEMPT

Corporation – Order that corporation charged with contempt produce documents

In *Construction, Forestry, Mining and Energy Union v Boral Resources* (Vic) Pty Ltd [2015] HCA 21 (17 Jun 2015) Boral Resources and others commenced proceedings in the Supreme Court of Victoria alleging the appellant union/corporation had acted in contempt of orders made by the Court. In the proceedings Boral sought discovery of documents under SCR Ord 29.07(2) relating to the employment of certain persons. The primary Associate Justice dismissed the application for discovery on the basis proceedings for contempt were criminal proceedings. This was rejected on appeal to the primary judge who made orders for discovery. The Court of Appeal (Vic) refused the union leave to appeal but it was granted special leave to appeal this by the High Court. The High Court dismissed the appeal: French CJ, Kiefel, Bell, Gageler, Keane JJ jointly; Nettle sim. The Court noted that a corporation did not have the privilege against self-incrimination. The Court rejected the CFMEU's characterisation of a right to silence as being part of the criminal trial process. The Court noted that while contempt proceedings were 'accusatory' they were not criminal proceedings and were subject to the civil rules of practice. Appeal dismissed.

## CRIMINAL LAW

Provocation – The 'ordinary man'

In *Lindsay v The Queen* [2015] HCA 16 (6 May 2015) after a long session of drinking alcohol the deceased N made sexual advances to L (an Aboriginal male) at L's home and in front of L's family. L killed N. At trial where provocation was an issue, L was convicted of murder. On appeal the Court of Criminal Appeal SA concluded there were deficiencies in the directions as to provocation but in light of the Court's firm view as to contemporary attitudes no ordinary person would have lost control as L had and the errors as to provocation had not resulted in an appealable error. L's appeal to the High Court was allowed by all members: French CJ, Kiefel, Bell, Keane JJ; sim Nettle J. The High Court reviewed the functions of the trial judge and juries in applying the 'ordinary man' test. Appeal allowed; retrial ordered.

## MIGRATION

Visas – Cancellation on character grounds – Review by AAT – Applicant limited to evidence given two days before hearing – Unexpected evidence of previously unknown children given at AAT hearing – Whether AAT precluded from considering circumstances of these children

In *Uelese v Minister for Immigration and Border Protection* [2005] HCA15 (6 May 2015) Mr U's visa was cancelled on character grounds in September 2012 under s 500 of the *Migration Act 1958* (Cth). The delegate was informed U had three children with his partner Ms F. Mr U sought review by the AAT. Provisions of the *Migration Act* provided Mr U was not able to rely on written or oral evidence unless notice of it had been given to the Minister two days before the hearing and the review was to be completed in 84 days. A direction under the Act required that the interests of all children must be taken into account. In cross examination Ms F disclosed that there had been breaks in the relationship and that Mr U was the father of two other children by Ms V. The AAT concluded that as this evidence was given without the notice required by s 500(6H) it would be disregarded and affirmed the decision. Mr U's appeals to the Federal Court were dismissed but his appeal to the High Court was allowed by all members: French CJ, Kiefel, Bell, Keane JJ jointly; sim Nettle J. The Court observed that s 500(6H) did not affect the power of the AAT to grant adjournments and a resumed hearing was a 'hearing'. Appeal allowed; decisions of Full Court of the Federal Court and primary judge set aside; decision of AAT quashed.

## MIGRATION

Refugees – "threat to liberty" – any temporary detention

In *Minister for Immigration and Border Protection v WZAPN* [2015] HCA 22 (17 June 2015) the High Court concluded the reference to 'a threat to liberty' in s 91R(2)(a) of the *Migration Act* 1958 (Cth) did not include the prospect of future episodes of temporary detention: French CJ, Kiefel, Bell, Keane JJ; sim Gageler J. Appeal allowed.

## NATIVE TITLE

Effect of wartime occupation of land

In *Queensland v Congoo* [2015] HCA 17 (13 May 2015) the High Court concluded exclusive occupation of land in World War 2 by military officers (exercising power to do so under regulations made under the *National Security Act 1939* (Cth)) to use the land for live firing exercises did not extinguish native title: French CJ with Keane J; sim Gageler J; contra Hayne; Kiefel; Bell JJ. Appeal from like conclusion of Full Court of the Federal Court dismissed.

**NEGLIGENCE**

Duty of care – Motor vehicle accident – Passenger deceased – Passenger's brother claiming damages for nervous shock on hearing of accident – Whether driver owes duty to passenger's brother for nervous shock

In *King v Philcox* [2015] HCA 19 (10 June 2015) a passenger was killed in a motor vehicle collision at an intersection. P (the passenger's brother) passed through, or was diverted around, the intersection several times shortly after the collision but was unaware his brother was involved. On being told his brother had died, P suffered nervous shock from guilt that he had not stopped. P sued K for damages for nervous shock. The primary judge found P had suffered mental harm but was not entitled to damages for nervous shock as either he was not present at the time of the accident under s 53(1)(a) of the *Civil Liability Act 1936* (SA) or he suffered the injury when he was told of the death. P's appeal was upheld by the Full Court of the Supreme Court (SA). K's appeal to the High Court was allowed by all members: French CJ, Kiefel and Gageler JJ jointly; sim Keane and Nettle JJ. The High Court concluded the Full Court had erred in finding P was present at the scene and allowed the appeal. The joint judgment proceeded to consider whether a duty of care could be owed to siblings. Appeal allowed and decision of Full Court set aside (except as to costs orders).

## October 2015

**CRIMINAL LAW**

Limits of discretion to exclude evidence to avoid miscarriage of justice

In P*olice v Dunstall* [2015] HCA 26 (5 August 2015) the Full Court of the Supreme Court SA in *R v Lobban* (2000) 77 SASR 24 recognised a discretion to exclude evidence untainted by illegality or impropriety where admission of the evidence would render the trial of an accused an unfair trial. D was detected driving a vehicle with a blood alcohol content revealed by a police breathalyser to exceed the prescribed amount. D was taken by the police to a hospital where a blood test was taken. At the hearing before a magistrate D pleaded not guilty. In answer to the certificate of the police operator (which created a statutory presumption of the level of blood alcohol content) D would have relied on the analysis of his blood sample taken at the hospital. Evidence was given that due to an error at the hospital insufficient blood was taken and the sample was denatured. The magistrate relied on the *Lobban* discretion to conclude the medical error had denied D the opportunity to challenge the police evidence and this rendered the trial unfair unless the police evidence was excluded. The Magistrate excluded the certificates and D was acquitted. An appeal by the police to the Supreme Court (SA) was dismissed as was an appeal to the Court of Appeal (SA) (by majority). The appeal by the police to the High Court was allowed by all members: French CJ, Kiefel, Bell, Gageler and Keane JJ jointly; sim Nettle J. The Court concluded questions of unfair evidence were properly addressed by determining whether the circumstances warranted a permanent stay. Appeal allowed. Matter remitted to magistrate.

**INCOME TAX**

Deductions – Whether payment on income or capital account

In *AusNet Transmission Group Pty Ltd v Federal Commissioner of Taxation* [2015] HCA 25 (5 August 2015) in 1997 the taxpayer acquired the assets of a Victorian state-owned electricity transmission company. The sale agreement required the taxpayer/purchaser to pay additional charges as imposed by notices under s 163AA of the *Electricity Industry Act 1993* (Vic) in addition to the price. The taxpayer made the payments and then self-amended its tax returns for 1999 to 2000 to claim the payments as a tax deduction. These claims were disallowed in amended assessments issued in 2008 and objections to these assessments were disallowed in 2012. The taxpayer's appeal under s 14ZZ of the *Taxation Administration Act 1953* (Cth) to the Federal Court was dismissed at first instance and on appeal. The taxpayer's appeal to the High Court was dismissed by a majority who concluded the charges were on capital account for s 8-1 of the *Income Tax Assessment Act 1997* (Cth) and not deductable from income: French CJ, Kiefel, Bell JJ jointly; sim Gageler J; contra Nettle J. Appeal dismissed.

## November 2015

**CONSTITUTIONAL LAW**

Judicial power – Whether Act passed to reverse effect of High Court decision interferes with integrity of state court

In *Duncan v Independent Commission Against Corruption* [2015] HCA 32 (9 September 2015) the High Court decided in April 2015 in *ICAC v Cunneen* [2015] HCA 14 that the definition of 'corrupt conduct' that the ICAC was given jurisdiction to investigate by the *ICAC Act 1988* (NSW) did not encompass conduct that did not compromise the conduct of public administration. In early 2015 D was seeking leave to appeal to the NSW Court of Appeal against a finding of a primary judge that a like report concerning

him and others was likewise beyond the jurisdiction of ICAC as it did not relate to any compromise of public administration. In May 2015 the NSW parliament passed the *ICAC (Validation) Act 2015* to introduce into the *ICAC Act* provisions intended to ensure the validity of ICAC's activities before April 2015. D amended his proceedings in the NSW Court of Appeal to challenge the effect of the amendments and this part of his proceedings was removed to the High Court. It was accepted that given *Cunneen* the ICAC report affecting D was affected at the time of publication by a misconstruction of the *ICAC Act* and affected by jurisdictional error. D contended the new provisions had failed to validate the invalid acts of ICAC and merely directed courts to treat invalid acts as valid in contravention of the principles in *Kable v DPP (NSW)* [1996] HCA 24 and also *Kirk v Industrial Court (NSW)* [2010] HCA 1. All members of the High Court rejected this contention holding the amending legislation had amended the definition as a matter of substantive law and neither Kable nor Kirk was offended: French CJ, Kiefel, Bell & Keane JJ jointly; Gageler J; Nettle & Gordon JJ jointly. The Court observed that amendments to substantive law did not involve any interference with judicial power where that law was the subject of proceedings. Those parts of the proceedings in the Court of Appeal (NSW) that were removed to the High Court were dismissed.

**EVIDENCE**

Inferences – Competing inferences

In *Fuller-Lyons v NSW* [2015] HCA 31 (2 September 2015) the appellant was injured when, aged 8, he fell from a train. No one saw how he fell. The primary judge found the appellant became trapped between the door of the train before it left the station and found the railway negligent for failing to keep a proper look out. The primary judge rejected the submission that the appellant's juvenile brothers were involved. The appellant was awarded $1.5million. The finding on liability was reversed by the Court of Appeal (NSW). The appellant's appeal to the High Court was upheld in a joint judgment and the initial verdict restored: French CJ, Bell, Gageler, Keane & Nettle JJ. The High Court concluded the primary judge's findings were correct notwithstanding that other explanations could not be excluded. Appeal allowed.

# Thomas Hurley's Federal Court Judgments

## September 2015

**ADMINISTRATIVE APPEALS TRIBUNAL**

Appeal on question of law – Review of AAT decisions by judicial review workers compensation – injury

In *May v Military Rehabilitation and Compensation Commission* [2015] FCAFC 93 (30 June 2015) and *Haritos v Commissioner of Taxation* [2015] FCAFC 92 (30 June 2015) a Full Court of five members concluded the right to appeal to the Federal Court from the AAT given by s 44 of the *AAT Act 1975* (Cth) was not to be narrowly confined and was an ample provision enabling appeals on questions of substance not form. Consideration of reviewing AAT decisions under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Review in Haritos of what is a 'question of law'; review in May as what is an 'injury'.