# Andrew Yuile's High Court Judgments

## NOVEMBER

**CONSTITUTIONAL LAW**

Legislative power – s75(v) of the Constitution – Migration decisions

*Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33 (6 September 2017) concerned s 503A of the Migration Act 1954 (Cth), which allowed the Minister not to disclose information to a court on judicial review of certain migration decisions. The visas of Graham and Te Puia were cancelled under s 501(3) of the Act. In making his decision in each case, the Minister considered information that was purportedly protected from disclosure by s 503A. Section 503A(2)(c) prevents the Minister from being required to divulge or communicate certain information to a court when the court is reviewing a purported exercise of power by the Minister under ss 501, 501A, 501B or 501C of the Act, to which the information is relevant. Graham and Te Puia argued that s 503A(2) is constitutionally invalid because it requires the relevant court to exercise judicial power inconsistently with the essential characteristics of a court; or because it is inconsistent with the right of individuals to seek judicial review pursuant to s 75(v) of the Constitution. A majority of the Court upheld the second point. The majority held that Parliament cannot enact a law that denies the High Court (or another court when exercising jurisdiction conferred under s 77(i) or (iii) of the Constitution) the ability to enforce the limits of a Commonwealth officer's power when exercising jurisdiction under s 75(v). In practical terms, s 503A prevented access to material relevant to the exercise of power under review and relevant to determination of whether the power had been exercised lawfully. It amounted to a substantial curtailment of the capacity of the court exercising jurisdiction. To the extent that it operated on the High Court in its exercise of jurisdiction under s 75(v), or on the Federal Court in the exercise of jurisdiction under ss 476A(1) and (2) of the Act, it was invalid. Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ jointly; Edelman J dissenting. Answers to Special Case given.

## MIGRATION LAW

Complementary protection – Meaning of 'significant harm' – Intention

In *SZTAL v Minister for Immigration and Border Protection; SZTGM v Minister for Immigration and Border Protection* [2017] HCA 34 (6 September 2017) the Court considered the requirements of intention for the purposes of assessing an applicant's case against the complementary protection provisions in s 36 of the *Migration Act 1954* (Cth). Those provisions allow for a protection visa to be granted to a person at real risk of suffering significant harm if returned to their home country. Significant harm includes being subject to cruel or inhuman treatment or punishment, or degrading treatment or punishment. The appellants had both claimed to be at risk of harm if they returned to Sri Lanka. The Refugee Review Tribunal (RRT) found that, if they were returned, they would likely be held in prison for a short time. It also accepted that prison conditions in Sri Lanka were such that the appellants might be subjected to pain, suffering or humiliation. However, the RRT found that there would be no intention in Sri Lankan authorities to inflict the pain or suffering. The question on appeal was whether 'intention' in this context requires subjective intention or whether it was sufficient that a person doing an act knew the act would, in the ordinary course of events, inflict pain or suffering or cause extreme humiliation recklessness sufficed. A majority of the Court held that actual subjective intention to bring about pain or suffering or humiliation was required. Kiefel CJ, Nettle and Gordon JJ jointly; Edelman J separately concurring; Gageler J dissenting. Appeal from the Full Federal Court dismissed.

## CRIMINAL LAW

Incitement to procure offences

In *The Queen v Holliday* [2017] HCA 35 (6 September 2017) the accused was serving a sentence for sex offences and was alleged to have offered another inmate, Powell, a reward in return for the inmate organising third parties outside the prison to kidnap two witnesses, procure statements exculpating the accused, then kill the witnesses. Powell reported this and did not go through with the plan. Counts 4 and 5 charged that Holliday "committed the offence of incitement in that he urged [Mr Powell] to kidnap" each witness. The jury convicted on those counts. The conviction was overturned on appeal; the prosecution appealed to the High Court. The issue was whether Holliday could be guilty of the offence of inciting another (Powell) to commit an offence given that the plan was for Powell to procure a third party to carry out the kidnapping. The High Court held that, at least where there had been no kidnapping, Holliday could not be convicted of urging Powell to commit that offence. A majority of the Court held that incitement requires the accused to urge a person to commit a discrete, substantive offence. However, there is no discrete offence of incitement to procure. Holliday could not, in the circumstances, be convicted of incitement. Kiefel CJ, Bell and Gordon JJ; Gageler J and Nettle J separately concurring in the orders of the majority. Appeal from the Supreme Court (ACT) dismissed.

## CRIMINAL LAW

Criminal procedure – Jury directions – Standard of proof

The *Queen v Dookheea* [2017] HCA 36 (13 September 2017) concerned directions to the jury as to the standard of proof required to convict in a criminal case. The accused admitted that he had killed the deceased, but argued that he did not have the requisite intent. In the course of summing up to the jury, the trial judge stated that they needed to be satisfied of the accused's guilt "not beyond any doubt, but beyond reasonable doubt." On a number of occasions, the trial judge also used only the phrase "beyond reasonable doubt." The Court of Appeal held that by referring to "not beyond any doubt", the trial judge had erred in summing up. The High Court unanimously allowed the appeal. The Court held that what is a "reasonable doubt" is a question for the jury. It is generally undesirable to contrast "any doubt" with "reasonable doubt", but as a matter of principle it is not wrong to notice the distinction. Whether such a reference gives rise to error depends on all of the context. In this case, having regard to the circumstances, including the whole summing up and addresses, it could not "realistically be supposed that the jury might have been left in any uncertainty as to the true meaning of the need for proof beyond reasonable doubt." Kiefel CJ, Bell, Gageler, Keane, Nettle, and Edelman JJ jointly. Appeal from the Court of Appeal (Vic) allowed.

**CRIMINAL LAW**

Offence of persistent sexual exploitation – Where jury required to identify acts of exploitation

In *Chiro v The Queen* [2017] HCA 37 (13 September 2017) the accused was charged with persistent sexual exploitation of a child. That offence requires the commission of at least two acts of sexual exploitation (each of which could be the subject of a sexual offence charge) over less than three days. The jury was directed that it would be sufficient if the accused had kissed the complainant in circumstances of indecency (which was a particular of the offending), or had committed any of the other, more serious, acts particularised on more than one occasion within three days. The jury returned a verdict of guilty. No further questions were asked of them. A majority of the High Court held that the trial judge should have asked further, more specific questions of the jury, designed to understand which of the alleged acts of exploitation they had found proved. It would also have been open to give directions to the jury that they would, if a guilty verdict was returned, be asked those questions. However, the conviction of the accused in this case was not uncertain because that had not happened. The appeal on conviction was dismissed. However, in this case, because the trial judge did not know which acts of exploitation the jury had found proved, the accused should have been sentenced on the view of the facts most favourable to him; that is, on the basis that the least serious alleged acts had been proved. Because the trial judge sentenced the accused on another basis, the appeal against sentence was allowed. The matter was remitted for the accused to be resentenced. Kiefel CJ, Keane and Nettle JJ jointly; Bell J separately concurring; Edelman J dissenting. Appeal from the Supreme Court (SA) allowed in part.

**CRIMINAL LAW**

Offence of persistent sexual exploitation – Legality of actions relating to regional processing in PNG

*Hamra v The Queen* [2017] HCA 38 (13 September 2017) concerned the same persistent sexual exploitation of a child offence as *Chiro v The Queen* (above). This case was heard by judge alone. At the end of the prosecution case, the defence made a no case submission that was accepted. The judge held that it was not possible to identify two or more proved sexual acts or offences as required, given the general nature of the complainant's evidence. The Court of Appeal allowed an appeal, holding that it was not necessary for each act of sexual exploitation to be identified so as to be distinguishable from the others. The evidence, if accepted, was capable of proving the offence. The High Court agreed that, so long as two or more distinct acts committed in a three-day period could be identified, the acts do not need to be particularised beyond the period of the acts and the conduct constituting the acts. It would be sufficient, for example, if evidence was accepted that an act was committed every day over a two week period without further differentiation, allowing for a deduction that the acts occurred over not less than three days. The appeal on that point had to be dismissed. The High Court also held that the Court of Appeal had considered and decided whether to grant permission to appeal, though no reasons had been given. The Court also had not erred by failing to refer to double jeopardy as a factor weighing against a grant of permission to appeal. Kiefel CJ, Bell, Keane, Nettle, and Edelman JJ jointly. Appeal from the Supreme Court (SA) dismissed.

## DECEMBER

**CONSTITUTIONAL LAW**

Appropriations – Statutory construction

In *Wilkie v the Commonwealth; Australian Marriage Equality v Cormann* [2017] HCA 40 (28 September 2017) the High Court upheld the validity of the appropriation made to allow the Marriage Equality postal plebiscite to be carried out. On 9 August 2017, the Finance Minister Matthias Cormann announced that the government would proceed with a postal plebiscite to ask electors whether the law should be changed to allow for same-sex marriage. The Minister also announced that he had made a determination, under s 10 of the *Appropriation Act (No 1)* 2017-2018 (Cth), providing for an advance of $122m to go to the Australian Bureau of Statistics to conduct the plebiscite. On the same day, the Treasurer gave a direction to the Australian Statistician, to collect the data from the plebiscite. The plaintiffs argued that the appropriation under s 10 was constitutionally invalid; that s 10 should not be construed to allow for the actions taken; that the Finance Minister's Determination and the Direction to the Australian Statistician were invalid; and that the Australian Electoral Commission (AEC) had no authority to assist in the plebiscite. In relation to validity of the appropriation, the Court held that it was actually s 12 of the Act that made the appropriation. The Determination under s 10 is an allocation of funds already appropriated under s 12. The degree of specificity of purpose for the appropriation is a matter for the parliament. In this case, the appropriation was for an amount for a purpose that the parliament had lawfully decided could be carried out.

In respect of the preconditions of s 10, it was required that the Minister be satisfied the expenditure was urgent, not provided for and unforeseen. The Court held that it was not necessary for the need giving rise to the expenditure to arise from a source external to government. Further, whether expenditure was urgent and unforeseen was a matter for the Minister's satisfaction. The Minister had formed the necessary satisfaction in this case. Urgency and whether the expenditure was unforeseen had been dealt with separately and sufficiently. There was no error of law in the Minister's reasons or conclusion. The Court further held that the direction to the Australian Statistician was valid, as the information to be collected was 'statistical information', collected in relation to matters prescribed in the *Census and Statistics Regulation 2016* (Cth). There was nothing in the Act to prevent the Treasurer specifying from whom information was to be collected. Lastly, the Court held that the AEC was authorised to assist in the plebiscite. The Court did not address arguments on standing as it was unnecessary and inappropriate given that the substance of the matter had been fully argued and the Court had decided the grounds had no substance. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Answers to Special Case given.

## CONSTITUTIONAL LAW

### Implied freedom of political communication

In *Brown v State of Tasmania* [2017] HCA 43 (18 October 2017) the High Court held invalid sections of the *Workplaces (Protection from Protesters) Act 2014* (Tas). The Act prohibited 'protesters' from engaging in conduct on 'business premises'. Those premises relevantly included 'forestry land', including land on which 'forestry operations' were being carried out. The conduct was also prohibited in 'business access areas', being areas reasonably necessary to enter or exit business premises. Under the Act, police officers had power to direct people away from business premises or business access areas. It was an offence to return to the land after being directed away or not to comply with a direction to leave, in certain circumstances. Police had power to arrest or impose criminal penalties on persons who refused to leave such areas or who returned to such areas after being directed away. Former Senator Bob Brown and others were protesting in the Lapoinya Forest in North West Tasmania when forestry operations were underway. They were arrested and charged under the Act, but charges were later dropped. They argued that provisions of the Act impermissibly burdened the freedom of political communication implied by the Constitution. A majority of the High Court upheld that argument. Kiefel CJ, Bell and Keane JJ jointly held that the Act burdened the freedom. It also pursued a legitimate purpose. But the provisions were not reasonably appropriate and adapted, or proportionate, to the pursuit of that purpose in a manner compatible with the maintenance of the system of representative and responsible government. They were therefore invalid. Gageler J, writing separately, took a different view of the test to be applied, but ultimately agreed in the orders of the majority. Nettle J, also writing separately, also agreed in the orders of the majority, but for separate reasons. Gordon J held that one of the impugned sections was invalid, but dissented in respect of the others found to be invalid by the majority. Edelman J dissented in respect of all the impugned sections. Questions to special case answered. Kiefel CJ, Bell, Gageler, Keane, Nettle, and Edelman JJ jointly. Appeal from the Court of Appeal (Vic) allowed.

## CRIMINAL LAW

### Sentencing – Current sentencing practices

In *Director of Public Prosecutions v Charlie Dalgliesh (a pseudonym)* [2017] HCA 41 (11 October 2017) the respondent was charged with incest and sexual penetration of a child under sixteen against complainant A, and incest and indecent assault against complainant B. The respondent's act of incest against A also caused her to fall pregnant, which pregnancy was later terminated. In respect of the charge of incest against complainant A, the respondent was sentenced to three and a half years imprisonment. The Director appealed, arguing that the sentence was manifestly inadequate. In the Court of Appeal, at the Court's request, the parties made submissions on the adequacy of sentencing practices, to which the Court is required to have regard under the *Sentencing Act 1991* (Vic). The Court reviewed the sentencing information and concluded that current sentencing practice did not reflect the gravity of the offence or moral culpability of the offender. However, the Court held that the sentence in this case, although very lenient, was not outside the permissible range as demonstrated by the current sentencing practices. The High Court held that the Court of Appeal was correct to find that the current sentencing practices were manifestly out of step with the gravity of offending and moral culpability. But having done so, the Court should have corrected the effect of the error of principle it recognised. Further, current sentencing practices are just one of the matters for the Court to take into consideration—it is not the controlling factor. Kiefel CJ, Bell and Keane JJ jointly; Gageler and Gordon JJ jointly agreeing. Appeal from the Court of Appeal (Vic) allowed.

**CRIMINAL LAW**

Murder and manslaughter – Intention and wilful acts

In *Koani v The Queen* [2017] HCA 42 (18 October 2017) the deceased was killed by a single shot from a shotgun that had been loaded by the appellant, given to the deceased and almost fully cocked. The gun was modified such that it could go off when not fully cocked. The trial judge did not leave murder to the jury because he considered that the "act" causing death in a firearm case must be a deliberate act. The judge left the alternative case to the jury, that the accused would be guilty of murder if the accused failed to use reasonable care in the management of the gun at a time when he intended to kill or inflict grievous bodily harm. The appellant was found guilty. The High Court held that it was an error to leave the alternative case to the jury, because the act causing death and the required intention must coincide. On the alternative case, the intention occurred at a different time to the omission (the failure to use reasonable care) that caused the deceased's death. The Court also held that it would be open to a jury to conclude that the loading of the gun, presenting it and pulling back the hammer were all connected, willed acts that caused the deceased's death. The primary case could have been left to the jury. Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ jointly. Appeal from the Court of Appeal (Qld) allowed.

**ADMINISTRATIVE LAW**

Appeal from Supreme Court of Nauru – Migration

In *BRF038 v The Republic of Nauru* [2017] HCA 44 (18 October 2017) the High Court held that the Supreme Court of Nauru failed to accord the appellant procedural fairness. The appellant applied for refugee status in Nauru. The application was refused by the Secretary of the Department of Justice and Border Control of Nauru. An appeal to the Refugee Status Review Tribunal (RSRT) was dismissed. An appeal to the Supreme Court was also dismissed. The appellant argued that the RSRT had erred by applying the wrong test for persecution, by requiring a total deprivation of human rights; and by failing to accord procedural fairness, by failing to put to him country information about the tribal make-up of the police force in his home country. Procedurally, the High Court held that the Supreme Court was exercising original jurisdiction, meaning that an appeal to the High Court lay as of right. The Court rejected the wrong test argument, holding that the RSRT was not articulating an exhaustive test. However, the information about the police was integral to the reasons for refusing the application, and a failure to bring it to the appellant's attention was a breach of procedural fairness. The decision was quashed and sent back to the RSRT for reconsideration. Keane, Nettle and Edelman JJ jointly. Appeal from the Supreme Court (Nauru) allowed.

## JANUARY/FEBRUARY

**CONSTITUTIONAL LAW**

Section 44(i) – Parliamentary elections – Qualification to be elected

In *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45 (27 October 2017) the High Court considered the proper interpretation of s 44(i) of the Constitution and whether persons referred to the Court were incapable of being chosen or sitting as a Senator or Member of Parliament. The ultimate question was whether any of the referred persons were "under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power" as at the time of their nomination to the Parliament. Four different constructions of s 44(i) were argued. Three of those impliedly included a mental element informing the acquisition or maintenance of foreign citizenship, but varied with respect to the degree of knowledge required and whether a voluntary act of acquiring or retaining foreign citizenship was necessary. The Court rejected those approaches, holding that knowledge of foreign citizenship was not required for a person to come within s 44(i). The Court also held that the reasonableness of steps taken by candidates to inquire as to whether their personal circumstances gave rise to disqualification under s 44(i) was immaterial to the operation of s 44(i). The only question was whether a person had the status of foreign subject or citizen, as determined by the law of the foreign power in question. If a person had that status when they nominated, they would be disqualified unless the foreign law in question is contrary to the 'constitutional imperative' that an Australian citizen not be irremediably prevented from participation in representative government. That exception is engaged where a person can show that they took all steps within their power and that are reasonably required by the foreign law to renounce his or her citizenship. The Court went on to apply these principles to the facts of the references. The Court held that Mr Ludlam, Ms Waters, Senator Roberts, Mr Joyce MP and Senator Nash were disqualified; Senator Canavan and Senator Xenophon were not disqualified. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Answers to Questions Referred given.

## CONSTITUTIONAL LAW

### Section 44(iv) – Qualification to be elected – Holding an office of profit under the Crown

In *Re Nash [No 2]* [2017] HCA 52 (orders 15 November 2017, reasons 6 December 2017) the High Court held that Hollie Hughes was disqualified from being elected as a Senator for New South Wales to fill the vacancy left by the disqualification of Senator Fiona Nash. Ms Hughes failed to win a seat in the Senate after contesting the 2016 election. On 1 July 2017, she was appointed as a part-time member of the Administrative Appeals Tribunal (AAT). On 27 October 2017, the High Court declared Ms Nash to be disqualified from being elected as a Senator, with the vacancy to be filled by a special count of the ballots. That same day, Ms Hughes resigned her position in the AAT. Ms Hughes was ascertained to be the candidate that should fill the vacancy left by Ms Nash. The Attorney-General for the Commonwealth sought an order that Ms Hughes be declared duly elected as a Senator. The issue before the Court was whether Ms Hughes was 'incapable of being chosen' pursuant to s 44(iv) of the Constitution because she held an office of profit under the Crown. There was no dispute that her position with the AAT was an office of profit; the issue was whether the 'incapability' imposed by s 44(iv) extended past the original day of polling to the time Ms Nash was disqualified. The Court held that the processes by which electors choose Members of Parliament and Senators do not end with polling, but continue until a candidate is determined. That would normally end with the declaration of the result. In this case, however, because of the disqualification of Ms Nash, the process of choice had not been completed. In the intervening time, Ms Hughes accepted an office that disqualified her from being chosen as a Senator. Accordingly, the Court refused to make the order sought. Kiefel CJ, Bell, Gageler, Keane, and Edelman JJ jointly. Answers to Questions Referred given.

## CRIMINAL LAW

### Appeal against conviction – Fresh and compelling evidence

In *Van Beelen v The Queen* [2017] HCA 48 (8 November 2017) the High Court considered s 353A of the *Criminal Law Consolidation Act 1935* (SA), which allows the Full Court of the South Australian Supreme Court to determine a second or subsequent appeal against conviction where there is fresh and compelling evidence that should, in the interests of justice, be considered. The appellant was convicted of the murder of a schoolgirl in 1973. Appeals against conviction were dismissed. After a petition for mercy, the case was referred to be heard as if on appeal. That appeal was also dismissed. The new appeal concerned evidence relied on by the Crown at trial, which specified the time of death based on gastric emptying (the speed at which food is processed by the body). That evidence had been relevant in putting the appellant at the scene of the victim's death. It was argued that scientific research since the 1970s showed the inaccuracy of the gastric emptying technique, undermining the evidence placing the appellant at the scene. The Full Court accepted that the evidence was fresh, but held it was not 'compelling' because it only confirmed evidence given at the trial by an opposing defence expert. The High Court unanimously held that the evidence was compelling and should have been considered in the interests of justice. It went on to review the evidence, finding that there was a window of about twenty minutes after the appellant left the scene, during which it could not be excluded that the deceased had died. However, the Court held that this did not significantly reduce the improbability of a person other than the appellant being the killer. There was not a significant possibility that a properly instructed jury, acting reasonably, would have acquitted the appellant even absent the Crown's original evidence about the time of death. Bell, Gageler, Keane, Nettle and Edelman JJ jointly. Appeal from the Supreme Court (SA) dismissed.

## FAMILY LAW

### Pre and post-nuptial agreements – Undue influence and unconscionable conduct

In *Thorne v Kennedy* [2017] HCA 49 (8 November 2017) the High Court held that pre and post-nuptial agreements in substantially identical terms should be set aside. The appellant was an Eastern European woman with almost no assets. The respondent was an Australian property developer with assets of between $18 and 24m. The couple met online and the appellant came to Australia to be with the respondent. The respondent told the appellant that he would marry her if he liked her, but she 'would have to sign paper'. The appellant did not see the content of the pre-nuptial agreement until about ten days before the wedding. She obtained independent advice to the effect that the agreement should not be signed and protected only the interests of the respondent. By this time, the wedding arrangements were made, including guests having flown in from overseas. There was also evidence that the appellant believed she had no choice but to sign the agreement, which she did four days before the wedding. The post-nuptial agreement in the same terms was signed shortly after the wedding. The couple separated approximately four years later. The appellant sought to have the agreements set aside as void for duress, undue influence or unconscionable conduct. The Federal Circuit Court at first instance set the agreements aside; those orders were overturned by the Full Family Court. The High Court reinstated the original orders. The Court upheld the factual findings of the primary judge and overturned a ruling of the Full Court that there was a fair and reasonable outcome available. The Court said that the vitiating factors were better described as undue influence than duress, so there was no need to assess the extent to which the pressure came from the respondent, nor whether the pressure exerted was improper or illegitimate. It was open to the judge to find that the appellant considered that she had no choice or was powerless other than to enter the agreements. Kiefel CJ, Bell, Gageler, Keane and Edelman JJ held that the agreements were void for undue influence and unconscionable conduct. Nettle J concurred. Gordon J held that the agreements were vitiated by unconscionable conduct only. Appeal from the Full Family Court allowed.

## ADMINISTRATIVE LAW

### Appeal from Supreme Court of Nauru – Migratione

In *HMF045 v The Republic of Nauru* [2017] HCA 50 (15 November 2017) the High Court held that the Nauru Review Status Review Tribunal (Tribunal) failed to accord the appellant procedural fairness. The appellant is a Nepalese citizen who sought refugee status in Nauru after being transferred there under regional processing arrangements. The application was refused by the Secretary of the Department of Justice and Border Control of Nauru. An appeal to the Tribunal was dismissed. An appeal to the Supreme Court was also dismissed. In coming to its conclusion, the Tribunal referred to a report published on the website of the Nepalese army. The appellant argued that he had been denied procedural fairness because the report had not been put to him. He also argued that the Tribunal had applied the wrong test in determining his complementary protection claim. The Court held that the Tribunal had erred by not putting the appellant on notice of the significance that it proposed to attach to aspects of the report and giving him the opportunity to address the issue. The Court rejected the argument that the wrong test had been applied. There was no reason to decline relief. The decision was quashed and sent back to the Tribunal for reconsideration. Bell, Keane and Nettle JJ jointly. Appeal from the Supreme Court (Nauru) allowed.

**Andrew Yuile** is a Victorian barrister, telephone (03) 9225 7222, email *ayuile@vicbar.com.au*. The full version of these judgments can be found at www.austlii.edu.au.