Australian Bar Review (ABR)

Volume 48 Part 1

(editorial, president's report and articles included in this part are linked to the LexisNexis platform)

CONTENTS

Editorial 1

President's Report 2

Articles

In defence of legislative intention
— *Philip Sales* 6

This article defends the use of the concept of legislative intention in statutory interpretation. The idea of legislative intention is coherent and its use in the interpretation of statutes is defensible. There is no reason to reform the longstanding practice of the courts to refer to it. In fact, it is constitutionally important that the courts should interpret legislation with reference to legislative intention. The article examines what this means in practice. It explains how the principle of legality, as an approach to interpretation, can and should be understood as a doctrine which is integrated into the concept of legislative intention.

The constitutional significance of the Australian Bar
— *Walter Sofronoff* 23

It is established that the relationship between Bench and Bar is one of 'intimate collaboration' and that barristers and judges, carrying out their distinct functions, together engage in the administration of justice in our courts. The *Kable* doctrine states that the Constitution guarantees the continued existence of state Supreme Courts (and other state courts) in their essential characteristics. Having regard to the substantial dependence of courts upon an independent bar, does it not necessarily follow that the continued existence of an independent legal profession is also constitutionally guaranteed?

Prorogation and the prerogative
— *William Gummow* 34

The United Kingdom, unlike Australia, lacks a written and 'rigid' constitution. The issues this presents for justiciability have been illustrated by recent decisions of the Supreme Court dealing with the departure of the United Kingdom from the European Union. The most recent decision, *R (Miller) v Prime Minister*, turned upon the interpretation by the common law of the 'prerogative' of 'prorogation' of the Parliament and the justiciability of the dispute between the Executive and the Parliament. The adjustment in that relationship illustrates the analysis given by Sir Owen Dixon in 1935 of the operation of the common law upon the structure of the British Constitution. It is doubtful whether in the Australian system, at federal and state level, an issue respecting prorogation would arise for adjudication as it did in the United Kingdom.

Disclosure by the prosecution in a criminal case
— *Peter Norman* 43

It is of fundamental importance that in any criminal case great care and attention are to be exercised by both prosecution and defence concerning the issue of prosecutorial disclosure: the duty of disclosure is ethical in nature and is an obligation owed to the court. It is a significant aspect of the administration of criminal justice that accused persons are entitled to know the case against them, the evidence to be adduced and whether there is any other material which may be relevant to the defence of the charges, including material relating to the credibility or reliability of a prosecution witness. The consequences of the prosecution not making proper disclosure are significant, and can lead to the quashing of convictions. Even when this does not occur, very considerable public resources can be incurred in investigating a failure of the prosecution to disclose information. The duties of disclosure require that it be undertaken in a timely manner as delays in the provision of documents and information by the prosecution will inevitably hold up the whole trial process. The duty extends not only upon prosecutors to disclose appropriate material to the defence, but also to police to disclose to the prosecution all documentary material that might reasonably be expected to assist the respective cases for the prosecution or the defence. This article examines the duties as to disclosure, the nature of the material to be disclosed, the limits to disclosure obligations, the breadth of sources of documents to be considered, matters to be considered, the timing of disclosure, the form of disclosure, public interest issues, legislative and regulatory obligations, prosecution policies, and the mechanisms available to enforce disclosure.

The mens rea for sexual assault, sexual touching and sexual act offences in New South Wales: Leave it alone (although you might consider imposing an evidential burden on the accused)
— *Andrew Dyer* 63

Following the New South Wales Government's decision to cause the New South Wales Law Reform Commission to review s 61HE of the Crimes Act 1900 (NSW), various commentators have argued that Parliament should alter the mental element for the offences to which that section applies. Some have advocated the adoption of a provision that would criminalise all those who engage in non-consensual sexual activity without first obtaining from the complainant a clear indication that s/he is consenting. Others have argued that the wording of s 61HE should be tightened. By contrast, the New South Wales Bar Association has argued that the mental element should be made more stringent, not less. This article opposes all of these proposals. But it also argues that an accused should be required to discharge an evidential burden before s/he is entitled to a direction about mens rea in a sexual assault, sexual touching or sexual act case.

A question of reasonableness: A review of the Small Business Fair Dismissal Code under the *Fair Work Act 2009* (Cth)
— *Victoria Lambropoulos* 95

The Small Business Fair Dismissal Code is unique to Australian labour law. It was introduced by the Australian Labor Party in 2009 with the introduction of the Fair Work Act 2009 (Cth). However, there has been little academic discussion about it. This article addresses this gap by examining the Code and the associated case law. It is timely to examine the Code as, it was reported, that soon after the 2019 federal election the Small Business Commissioner made calls to overhaul unfair dismissal laws as they apply to small business. Whether this will transpire into changes in the law is unknown at the time of writing. The article also explores the use of reasonableness as a legislative tool to curb the employer's power to dismiss employees. The unfair dismissal regime from the United Kingdom is examined as a vehicle of comparison. The article focuses upon the interpretation of reasonableness in the Code, however, the principles discussed apply generally where reasonableness is adopted as a standard of review.