Australian Bar Review (ABR)

Volume 49 Part 3

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A secret interview with Sir Garfield Barwick
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Shortly before his retirement as Chief Justice of Australia, Sir Garfield Barwick participated in the National Library's Oral History Project. The result was an interview of more than 70 hours with his former parliamentary colleague, the Hon Clyde Cameron. Much has been and continues to be written about Barwick. However, until now, the content of the interview has largely been overlooked. It is particularly interesting because it was conducted on the basis that it would remain embargoed for a substantial period. It is full of frank and fresh information and insight. This article seeks to digest the interview, with a focus on Barwick's legal and judicial career, so that it can take its place alongside and supplement other accounts.

Impugning the Crown's prerogative to prorogue — An analysis of *R (Miller) v Prime Minister* and its application in Australia
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Prorogation came into the political and legal spotlight following the controversial decision of the Supreme Court of the United Kingdom in *R (Miller) v Prime Minister*. In a unanimous decision, the Supreme Court found that the matter of prorogation was amenable to judicial review, and that the prorogation which took place in the House of Lords was unlawful. This article discusses the principles relating to the prerogative power of prorogation and critically analyses the Supreme Court's decision, submitting that the Supreme Court failed to identify a number of critical considerations which demonstrate that the prorogation was not without reasonable justification, and that the Supreme Court was wrong in its narrow interpretation of art 9 of the Bill of Rights 1688 (1 Wm III & M II, c 2).

Judicial review of decisions not to prosecute
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In *Likiardopoulos v The Queen*, a five-judge plurality endorsed an earlier obiter statement that decisions whether or not to prosecute are insusceptible of judicial review. This article critically examines that affirmation in relation to decisions not to prosecute. Though the rule of insusceptibiity was presented as a modern restatement of an ancient principle necessary to maintain the integrity of the courts and the criminal justice system, in truth it is a new creation. It was formulated and reinforced

in obiter, divorced from any real examination of the nature and purpose of judicial review, and is at odds with the entrenched minimum of judicial review which is now axiomatic in Australia. While prosecutorial discretion may not be readily susceptible to judicial review in a practical sense, there is no good reason to declare decisions not to prosecute entirely immune from judicial review.

The new penalties doctrine and its application to employment contracts

— *Leigh Howard* 461

Following the judgments of the High Court of Australia in *Andrews v Australia and New Zealand Banking Group Ltd* and *Paciocco v Australia and New Zealand Banking Group Ltd*, and the UK Supreme Court's judgment in *Cavendish Square Holding BV v El Makdessi*, there has been a refashioning of the law applicable to penal stipulations in contracts. The refashioning of this doctrine, together with the changes to the way in which work is performed and how such disputes are litigated, suggests that there is a likely marriage of two areas of law that until now has been relatively unexplored in the academic literature. This article commences that exploration. The author's analysis demonstrates that there is significant potential for employment contracts to provide for liquidated damages or like stipulations in appropriate circumstances. In light of the changes to the doctrine, inclusion of such clauses is a useful way to properly allocate and minimise risk.

Accepting the unacceptable risk: A critical appraisal of the unacceptable risk test in contemporary Australian family law and finding a way forward

— *Rebecca Pierluigi* 479

This article outlines the current position, under law, as it relates to allegations of unacceptable risk in family law matters and explores whether the Family Law Act 1975 (Cth) requires amending so as to codify the case-based structure the court follows when dealing with such matters. It reviews the legislation and case law to ascertain whether the current approach is sufficient to protect and promote the best interests of the child. In identifying issues in the current approach this article outlines a way forward by proposing a legislative structure that courts are compelled to follow when considering allegations that amount to a potential unacceptable risk of harm.

A flatmate in a sharehouse — A tenancy or a licence to occupy?

— *Paul Latimer* 506

This article examines the rights of a flatmate in a sharehouse under the Residential Tenancies Act of each state and territory and/or at common law as tenant, subtenant, assignee, licensee, boarder, lodger, occupant, couchsurfer or squatter. The law is complex and the options not widely understood. This article seeks to provide awareness of the options open to flatmates. It is often said that a flatmate is a licensee and can be evicted with notice, but in law, a flatmate may be more than a licensee. If given exclusive possession by the landlord, a flatmate is a tenant at common law and a tenant under the Residential Tenancies Acts. The common law distinction between tenant and licensee is now largely swept away by the Residential Tenancies Acts which provide statutory rights and also obligations and procedures. Without compliance, a flatmate is a trespasser in their own home. In view of the importance of the *Swan v Uecker* case in this article, the article provides a short postscript to review the current regulation of short-stay rental accommodation.