Australian Bar Review (ABR)

Volume 52 Part 1

(articles included in this part are linked to the LexisNexis platform)

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Articles

In search of certainty for military discipline
— *Pauline Collins* 1

In 2020, the High Court of Australia yet again addressed the reach of military jurisdiction for criminal offending by military members. This article considers the far-reaching decision in *Private R v Cowen* (2020) 383 ALR 1 in the context of the state of civil-military relations and discipline in the Australian Defence Force. Five out of the seven judges agreed the defence power under s 51(vi) of the Australian Constitution enables Parliament to decide how the control of the military can occur in disciplining service personnel. The article explores the court's reasoning and critiques the judgment and its consequences for the civil-military control principle, and the needs of service personnel. The article concludes the area is ripe for Parliament's attention in bringing military discipline up to 21st century standards.

Zombie laws in the territories
— *Marcel Delany* 21

This article examines an archaic Northern Territory and Australian Capital Territory provisions intended to discourage damages actions against police — s 162 of the *Police Administration Act 1978* (NT) and *Crimes Act 1900* (ACT). It argues that the original justification for these provisions no longer exists, that some aspects of it make no sense in a modern litigation context, that it causes difficulties for plaintiffs and defendants alike, and that it causes particular difficulties for Indigenous people in the Northern Territory because of the history and present reality of their being subject to overpolicing and high levels of incarceration. It appears the provisions continue in existence only because of the inadvertence of both Commonwealth and Territory governments. The laws should be repealed.

Advocacy in international arbitration: New tricks for an untapped frontier
— *Jesse Kennedy* 38

Too often, the Australian Bar can view and approach arbitration as simply a private and more expensive version of domestic litigation. As more barristers are briefed to appear in international arbitrations, the differences in styles and procedures used by experienced arbitration practitioners from London, New York or Singapore can then come as a surprise. This article seeks to challenge the old mindset that has arguably been holding the Bar back from being briefed and respected in arbitrations across the globe. It does so by highlighting the key differences in approaches to advocacy in the seven stages of an international arbitration, while providing tips and techniques that are used or promoted by some of the best international arbitration advocates. Embracing arbitration's differences and deploying some of these techniques will better enable the Australian Bar to be competitive and respected in the international arbitration arena.

The unification of Australian divorce law under the *Matrimonial Causes Act 1959* (Cth)

— *Henry Kha* 59

The enactment of the *Matrimonial Causes Act 1959* (Cth) was a significant moment in the history of Australian family law. The Act unified the divorce law under a single federal statute. The article argues that the introduction of the Act was driven based on modern conservatism. The Act promoted the social conservatism that was prevalent during the Menzies era of the 1950s by preserving many of the existing grounds for divorce and barring divorce to married couples in the first 3 years of marriage. On the other hand, it was a legal change driven by modernity and the unification of Australian divorce law was part of the project of nation building. Moreover, the Act introduced separation of 5 years as a no-fault ground of divorce. This eventually paved the way for the introduction of no-fault divorce in Australia under the *Family Law Act 1975* (Cth).

Common law in statute

— *Dan Meagher* 79

The parliamentary choice to incorporate a common law or general law concept in statute has important interpretive consequences. This article considers some of those consequences. It does so in light of a recent trio of High Court cases which examined the 'employment relationship' at common law in the context of the *Fair Work Act 2009* (Cth). Of particular interest is why the relevant statutory context (including its scope and purpose) has no impact on the meaning and development of the relevant concept. I call this interpretive proposition the orthodox judicial position. In terms of the three recent cases, it is suggested that there was a clear statutory interpretation justification for the orthodox judicial position. But the core argument made is that there is also a constitutional justification for it and this now quite common but complex interaction between common law and statute.

Staying court proceedings in the face of ADR clauses

— *Albert Monichino QC and Gianluca Rossi* 94

Nowadays, alternative dispute resolution clauses are common in contracts. They often provide for multitiered methods of dispute resolution of executive negotiation, mediation, expert determination and/or arbitration. Parties often do not comply with these clauses and commence court proceedings instead. The issue that then arises, is whether the court should stay its proceeding to allow the dispute to be resolved by the agreed contractual mechanism. This article will consider the issues that commonly arise in those circumstances, looking at each form of dispute resolution in turn. In doing so, it will consider the factors that a court will take into consideration when determining whether to stay its proceedings and refer the parties to their agreed form of alternative dispute resolution.