

# Australian Bar Review (ABR)

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#### Articles

##### [Succession in Roman Law and the common law — Similarities and contrasts](#)

— *Arthur R Emmett*

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Succession balances competing demands of family duty, testamentary freedom, religious obligation, and social expectations. The tension between these considerations is historically persistent and legal systems create rules to resolve them. This article compares Succession in Roman Law with the common law and examines how each responded to its respective context. It analyses how modern rules surrounding wills, intestacy, personal representatives, and family provision each have well-developed Roman Law counterparts. Although there are several significant differences, the similarities are striking. On the one hand, the shared institution of the Church may explain those similarities. England's ecclesiastical courts administered Succession using Roman Law, much of which intermingled with the modern common law. But on the other, each system independently reached similar conclusions about transferring responsibility and property between generations.

##### [A rational approach to the evaluation of harm in the sentencing calculus](#)

— *Mirko Bagaric and Theo Alexander*

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The harm resulting from a crime is an important consideration in determining the sanction that should be imposed for an offence. It is a key competent of the proportionality principle and can also be a standalone aggravating factor. Despite the cardinal importance of this consideration in the sentencing calculus, there is a lack of detailed analysis and clarity regarding how the scope and nature of harm which is attributed to an offender impacts on the choice of sanction. In particular, it is unclear whether harm which is not intended by an offender and which is not reasonably foreseeable should form part of the harm analysis and what level of harm is significant enough for it to aggravate offence severity. In this article, we argue that there is a need for greater jurisprudential rigour regarding the manner in which the harm resulting from an offence impacts on the choice of sanction. We recommend that the same principle of causation which operates in the substantive criminal law should also determine the breadth and type of harm which is attributable to offenders at the sentencing stage. It is also proposed that harm should be abolished as an aggravating factor. As the law currently stands there is considerable scope for harm to be double-counted by sentencing courts; first as part of the principle of proportionality and second as an aggravating factor. A clearer statement of the proportionality principle will incorporate all of the harm caused by an offender into the sentencing equation. The approach recommended in this article will enhance the coherency and rigour of sentencing law and practice.

## Legal professional privilege: A tale of two judgments

— *RJ Desiatnik*

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When two recent, unanimous High Court judgments involving the application of the doctrine of legal professional privilege to similar facts come to different conclusions, one's interest might well be aroused, particularly when both judgments concern misuse of computer technology. When one realises that one of those decisions concerns problems computers can cause to the process of discovery, a process which is intrinsic to litigation, particularly complex commercial cases, while the other one deals with the scourge of hacking, one's interest, or simple curiosity, must surely be heightened and a close examination of the two decisions, and, in the author's respectful view, their failings, is warranted. Hence this article.

## The liability of lawyers to the adversaries of clients

— *Joachim Dietrich*

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This article considers the circumstances in which a lawyer, when acting for client X, may owe obligations to a third party whose interests are adverse to those of client X — that is, an 'opposite' party. This question is an important one because where lawyers conduct themselves in ways such that obligations to parties in opposition with their clients arise, absent a retainer, they may be required to protect the interests of those opposite parties and perhaps even take positive steps to do so. Lawyers may therefore not be able appropriately to discharge their obligations to their clients as well as the opposite parties. Although circumstances in which such liabilities arise are rare, nonetheless such liabilities are at times imposed in tort law (and on other legal grounds), including where lawyers have expressly or impliedly accepted responsibility for adversaries and failed to protect such parties' interests by fulfilling professional and ethical duties.

## Good faith vs absolute and unfettered discretion in commercial contracts

— *Hayden Fielder, Barrister*

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Most common law jurisdictions, including Australia and the United Kingdom, have refused to accept that an overarching duty of good faith applies to the exercise of rights and obligations under a contract. While the duty of good faith has been considered by the courts frequently over a number of decades, the common law does not clearly identify the precise scope and content of the duty and the circumstances in which it will (or will not) be implied into a particular contract. The High Court of Australia is yet to make any substantive comment or determination on these matters. This article examines the meaning of the duty of good faith and the circumstances in which it will be implied into a contract, the role of absolute, sole and unfettered directions in contracts and the impact that the duty of good faith may have on such discretions, and the courts' contemporary approach to the duty of good faith.

## Efficiently, honestly and fairly: A norm that applies in an infinite variety of circumstances

— *Leif Gamertsfelder*

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The general obligation of an Australian financial services licensee to 'do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly'

constitutes a norm of conduct of very wide application. It can apply to all aspects of a licensee's activities, including business models, sales techniques, marketing, disclosures to customers and general risk management practices. It may also extend to matters like contractual terms and the way a licensee manages cybersecurity, data privacy and the use of artificial intelligence. The duty itself sets a standard of reasonableness which a licensee can discharge by being competent, being ethically sound and having regard to the interests of customers in providing financial services. A court may make a range of orders where a licensee fails to discharge the duty, including civil penalty orders. Civil penalties could be up to \$555 million per contravention. Individuals involved in a contravention can also be liable under recent changes to the law.

## Importance of the doctrines of frustration and force majeure in light of COVID-19

— *Kanchana Kariyawasam and Rangika Palliyaarachchi*

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The ongoing COVID-19 pandemic, and the measures to contain its spread, significantly impact contractual relationships in many ways. Unforeseen and uncontrollable events could be legitimate defences for being unable to execute obligations undertaken during better times. This article discusses two such defences in detail — frustration and force majeure — as applicable in Australia in the context of COVID-19. This article contends that while frustration and force majeure provide two possible defences for non-performance, the outcome will vary based on the circumstances of each case. Whether it is the application of the principles of frustration or force majeure, it is important to consider the commercial efficacy when applying these principles to contractual parties.

## Exploring the enforcement of s 121 of the *Family Law Act 1975* (Cth)

— *Sharon Rodrick, Adiva Sifris and Anna Parker*

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Section 121 of the *Family Law Act 1975* (Cth) prohibits the publication of accounts of proceedings in the family law courts if those accounts contain particulars that identify a party to the proceedings, a person who is related to or associated with a party or who is alleged to be in any other way concerned in the matter to which the proceedings relate, or a witness. The focus of this article is on enforcement of the prohibition. It considers four possible ways in which s 121 might be enforced, namely: by prosecution for an offence; by treating a breach of s 121 as a contempt of court; by the institution of a civil cause of action by a plaintiff who was identified in breach of the provision; and by an injunction which operates to prevent disclosure of identifying information, either entirely or prospectively from the time it is issued.