

Australian Bar Review (ABR)

Volume 51 Part 1

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

CONTENTS

Articles

[Issues with *commorientes* and joint tenancy](#)

— *David Crocker*

1

In South Australia, in circumstances where the order of death of joint tenants cannot be proved, the common law prevails and the estate of each deceased is not subject to any disposition contained in the wills of the deceased persons and the legal personal representatives are each entitled to administer the joint property as if on an intestacy. What, if any, legislative changes should be made to the common law?

[A reasonable balance disrupted \(in New South Wales\): The New South Wales and Queensland Law Reform Commissions' reports about consent and culpability in sex cases involving adults — And the governments' responses](#)

— *Andrew Dyer*

27

In response to public concern about the operation of the law relating to offences such as rape and sexual assault, the New South Wales and Queensland governments recently required their respective Law Reform Commissions to consider whether Parliament should make reforms in this area. But, in 2020, each Commission issued a Report in which it advocated only relatively modest changes to the status quo. Crucially, both bodies rejected proposals under which it would be impossible, or at least practically impossible, for a person accused of such offending to rely successfully on honest and reasonable mistake of fact. While this predictably drew a negative response from some quarters, each Commission was clearly correct to recommend the retention of a meaningful culpability requirement for the very serious offences with which it was concerned. This is not to say that the Commissions' proposals were perfect. Indeed, each took an erroneous approach to the issues of consent, withdrawal of consent and fraudulently induced sexual activity. It is instead to say that their recommendations struck a reasonable balance between the interests of the complainant and those of the accused. It is regrettable that the NSW government decided to 'go further' than the NSW Law Reform Commission advised it to go. The 'affirmative consent' provisions contained in a Bill passed by the NSW Parliament on 23 November 2021 might be popular, but they also seriously depart from fundamental criminal law principles.

Rebutting the presumption of intentional revocation of a Will by destruction: An examination of electronically signed and remotely witnessed Wills

— *Christie Gardiner and Lee Aitken*

70

The introduction of electronic execution and remote witnessing and attestation of Wills by New South Wales, Victoria and Queensland in response to COVID-19 invites examination of a wide range of foreseeable probate issues. While wet ink Wills ordinarily result in a single static physical document, a Will executed under the interim measures may result in the production of a range of physical, digital or hybrid records.

In this article, the authors discuss whether and how this disrupts the common law presumption of intentional revocation of a Will by destruction when the original Will is last traced to the testator's possession but cannot be found on their death. They argue that the nature of electronic Wills can pose challenges for rebutting the presumption of destruction. These challenges include poor access to digital records, uncertainty as to which record is the original file and which the copy, and the risks associated with ambiguous document storage practices. However, they also suggest that electronic Wills can provide a level of assurance that can overcome some of these challenges, where at least a copy of the Will is available. Electronic signatures may even serve to displace the need for traditional witnessing requirements, potentially broadening access to Will-making in the community.

Public support for the rule of law

— *Matthew Groves, Ingrid Nielsen and Russell Smyth*

80

It is often said that the rule of law is enshrined in the Constitution and that it is the cornerstone of parliamentary democracy. When the High Court invokes the concept, it typically does so in the context of discussing the protection that the rule of law provides to the fundamental rights that we all enjoy to go about our everyday lives and seek to realise our goals. Yet, in Australia, we know virtually nothing about the extent to which the public supports the rule of law or the factors associated with support for the rule of law. Drawing on two recent surveys of representative samples of Australian adults, this article provides evidence on the level of support for the rule of law and the factors that are correlated with it. The authors find that support for the rule of law in Australia is relatively high, when compared with the results of comparable studies in Europe and the United States. They find that the public's confidence in public institutions, knowledge of the High Court and diffuse support for the High Court are all correlated with support for the rule of law and that of these factors, diffuse support for the High Court is the most important.

From Muziris to Alexandria: Contract law in Late Antiquity

— *Amrit MacIntyre*

107

Late Antiquity saw the implementation of major lawmaking projects from Rome to China. The codes and digests of the period saw the emergence of a comparable body of law governing commercial agreements, with concepts of contract, debt, loan, sale, purchase and partnership becoming well established in the legal systems of Rome, Iran, India and China. Commercial obligations in the distant past were understood as religious duties particular to the given faith tradition. However, by the time of Late Antique codifications of law, obligations governing the performance of contracts were no longer expressed as religious duties but in secular terms, even if law continued to operate within the framework of an overarching religious dispensation. This scheme of law is evidenced both in the

terms of the codes and digests but also in surviving contracts from Late Antiquity. This transformation of contract law settled basic concepts which remained influential in the later development of Medieval and modern contract law. This evolution took place during an era when large scale transcontinental commerce came to link the Eurasia from the Roman Empire in the West to China in the East. The role of merchants in the informal dissemination of a common body of contract law may explain the parallel development of contract law across the ancient world.

Love the sinner: The crime of attempted suicide in late 19th century Australia

— *Greg Taylor*

129

By the end of the 19th century, the former crime of attempted suicide was almost always not an occasion for punishing people who had infringed the moral code, but rather a means of checking on the welfare of would-be suicides by ensuring that they had people to care for them while also conveying to them that their lives mattered to the rest of the community and discouraging them from future attempts at self-destruction. There was some good in having an important state official convey the messages stated to a person who had attempted suicide. Only in rare cases, such as repeated suicide attempts, threats to renew the attempt or a lack of family and friends to care for the would-be suicide was anything beyond a nominal penalty usually imposed. Rather, people were given a jolly good talking-to along the lines indicated and released without further ado or after a short time in prison designed to ensure their welfare.