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Articles

Section 21(4)(b) of the Australian Consumer Law (and its equivalents) provides that a claim of statutory unconscionability may apply to a system of conduct or pattern of behaviour. Statutory unconscionability involves the application of a 'statutory norm of conscience', calling for a broad evaluative judgement considering all the circumstances of the case. Pleading and proving a claim based on a system of conduct or pattern of behaviour may fairly be seen as a high order skill. 'Systems cases' have no universally essential element; a claimant has a wide latitude in the framing of its case and in the selection of the manner in which it seeks to prove that case. After examining several recent decisions elucidating what a system of conduct or pattern of behaviour is and how it may be proved, this article canvasses some implications arising from the nature of such cases, for their presentation by practitioners and for their adjudication by judges.

The test of whether an entity is carrying on business in Australia is an important threshold for the application of many Australian laws. The meaning of this test in the context of the application of the Privacy Act 1988 (Cth) to a multinational corporation that operates an internet-based business has recently been considered by the Full Federal Court of Australia in Facebook Inc v Australian Information Commissioner. The authors analyse the case, evaluate its merits and identify several important implications. The implications include: (1) the court was able to find a prima facie case that Facebook Inc carried on business in Australia even though the company did not have a physical presence in Australia and the traditional indicia used by courts, such as whether there are employees and a fixed place of business, were absent; (2) the judgments show that in answering the question whether a company such as Facebook Inc is carrying on business in Australia it is a mistake to focus on the technological steps involved in modern business activity instead of viewing digital-based activities within the broader context of the relevant business; and (3) the decision has the benefit that multinational internet-based businesses are placed on the same footing, in relation to the application of national laws, as other types of multinational businesses.

This article explores the meaning of 'manner and form' in s 6 of the Australia Act 1986 (Imp & Cth) using largely a historical — although not an originalist — approach. The phrase 'manner and form'

was taken from the proviso to s 5 of the Colonial Laws Validity Act 1865 (Imp). The occasion for this investigation is the attempt by the Victorian Parliament to entrench a ban on fracking in the State's Constitution requiring a three-fifths majority in each House of Parliament for future amendments of the existing statutory prohibitions of that practice. At present, there is no binding authority on whether the words 'manner and form' embrace a super-majority (not an absolute majority, being simply more than half of the total number of members of the House, but a majority in excess of the usual one-half — in this case, three-fifths). It is suggested that the drafters of the phrase 'manner and form' did not mean to include super-majorities within that phrase.

The X7 line of crime commission cases in the High Court of Australia were not well decided on account of an incorrect understanding of the historical origins of the self-incrimination privilege and an incomplete understanding of the developing field of criminal discovery. The privilege did not arise as a reaction to the claimed excesses of the Court of Star Chamber which was abolished in 1641. Instead, it arose much later as a response to the over prescription of capital punishment in the 18th and 19th centuries. This article goes beyond a critique of what was argued and what could have been argued. The methodology of heavily relying on the past decisions of the High Court to provide the answers in each case, led to the errors. In order to avoid such errors, a more effective use needs to be made of amici curiae with expertise in areas such as legal history, comparative jurisprudence and legal theory. The High Court Rules should allow for written submissions by amici curiae without a requirement to appear and with a guarantee that no adverse costs order can be made.

In 1983, Murray QC published The Criminal Code: A General Review (colloquially referred to as 'the Murray Report'). The Murray Report made recommendations for the appeal, amendment and reform of the Western Australia Criminal Code. Some 20 years later, in 2003, the WA legislature passes the Criminal Code Amendment Bill 2003 (WA) to give effect to aspects of the Murray Report — in this case, introducing s 304 of the Criminal Code. This Bill was passed without any consideration to (1) the passage of time from the making of said recommendation; and (2) the subsequent experiences of other jurisdictions). The result, arguably, is a section of the Criminal Code, which is both inappropriately utilised and, at the same time, underutilised.

This article explores how s 304 can be redefined and redeployed, particularly in a post-COVID-19 world.

Book Launch