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

CONTENTS

Articles

[Cross-examination for prosecutors](#)

— *Judge Sydney Tilmouth*

1

It is conventionally understood that the rules of advocacy governing the effective cross-examination of witnesses are of universal application. That may well be the case for the parties to civil litigation, but it is not necessarily the case in the criminal court. On close reflection, the classic advocacy principles appear calculated to permit or encourage defence counsel to embark on a destructive cross-examination, rather than for the guidance of prosecutors.

Although the basic rules of cross-examination apply to both prosecuting and defence counsel, they may not apply equally. The special nature of the prosecutorial task and the special duties attaching to prosecuting counsel serve to hedge the nature and scope of the prosecutor's approach to cross-examining witnesses. Another major distinction between prosecution and defence counsel is that prosecutors have far less opportunities to cross-examine. When they do it is likely to involve the accused, their family or friends. When cross-examining persons having a potential interest in assisting the defence, prosecutors must tread carefully.

[National and international perspectives on climate change litigation](#)

— *Thomas Gray KC, Dr Beth Nosworthy and Astrid Gillam*

16

Court proceedings involving climate change issues have become increasingly frequent and often attract significant media attention. Courts, both in Australia and overseas, have grappled with the issue of what role, if any, the judicial system should have in responding to climate change and its effects. It has also been the subject of debate by the judiciary writing extra-curially, academics and practising lawyers. This article considers the approach of Australian courts and the common law jurisdictions of the UK, Canada and New Zealand as well as briefly touching on the Netherlands' experiences. A detailed analysis of decisions in this area shows that courts are reluctant to intervene on issues they consider best dealt with by Parliament. The article contrasts companies law in Australia, the UK and Canada in respect of directors' duties. The article concludes that in the jurisdictions considered, both directors' duties under companies legislation and 'greenwashing' under legislation prohibiting misleading and deceptive conduct are areas which are amenable to future climate change litigation proceedings.

[Reducing recidivism and incarceration through education](#)

— *Mirko Bagaric*

42

Incarceration levels in Australia have increased dramatically over the past 4 decades and are among the highest in the developed world. At the same time, Australia has one of the highest recidivism rates.

This is despite a large number of rehabilitation programs being trialled and implemented. Prison has some demonstrable benefits. It ensures that inmates do not commit crime in the community during their sentence and is a means of achieving the proportionality principle for serious offences. However, the cost of imprisonment is now nearly \$150,000 per year for each offender and this is not financially sustainable. This article proposes a partial solution to growing prison numbers. There is one trait that research clearly establishes will lower the likelihood of recidivism and incarceration numbers. People with higher levels of education are considerably less likely to be incarcerated. Despite this, the portion of prisoners in Australia undertaking education in prison has significantly declined in recent years. This is a policy failure. More resources need to be directed towards prisoner education programs. This will make the community safer and reduce the overall cost of crime to the community and the damage it does to victims of crime.

Fairness, legal reasoning and judicial technique

— *Joshua Thomson SC*

60

The same solutions often apply to similar legal problems across diverse areas of the law. The tendency of courts to use the same judicial techniques to solve similar problems reflects certain fundamental standards of legal fairness, which are not always stated. This article endeavours to identify some of those fundamental standards and show how they are a product of legal reasoning and judicial technique. By demonstrating this, the article shows that the concept of legal fairness is based upon well-accepted norms, rather than any idiosyncratic notions of what is just. It also shows that the application and adherence to these norms itself depends upon the process of proper legal reasoning and judicial technique.

Trust claims and third parties

— *Jonathon Moore KC*

74

The law reports are replete with cases of wrongful gains by trustees and other fiduciaries who seek to shield the gains from recovery by transferring them to family members. Despite that history, there appears to be little authority on a question arising when a claim is made against a third-party recipient after the claim against the errant trustee or fiduciary has been decided. Must the beneficiaries reprove against the third party the original breach of fiduciary duty already found to have been committed?

Enforcing Australian class action judgments against non-resident group members

— *Michael Legg*

97

The High Court in *BHP Group Ltd v Impiombato* [2022] HCA 33 concluded that the representative proceeding enacted in Pt IVA of the Federal Court of Australia Act 1976 (Cth) permitted the inclusion of non-resident group members. This article explains the High Court's reasoning. However, the High Court's decision gives rise to a further related question as to whether non-resident group members would be bound by the outcome of the representative proceeding at its conclusion. This article uses the proceeding against BHP to discuss the powers and practical steps that the Federal Court of Australia may employ to address enforcement in relation to non-resident group members, but also highlights the uncertainties surrounding enforcement.

Book Review

An Annotated Guide to the Human Rights Act 2019 (Qld),
Nicky Jones and Peter Billings

115

— *Stephen Keim SC*