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THE STATE OF THE JUDICATURE

An address by the Chief Justice of the High Court of Australia delivered to the 32nd Australian Legal Convention (Law Council of Australia), Canberra, on 14 October 2001. The Chief Justice draws attention to the fact that modern judges have taken on board modern technology and produce judgments electronically accessible to the community. He considers worldwide standards for judicial conduct, noting that standards of professional behaviour are best developed by experience, not imposed by edict. He also briefly reviews other current developments affecting the judiciary. 24

— HON CHIEF JUSTICE MURRAY GLEESON AC

SOUTH AFRICAN JUDGES AND HUMAN RIGHTS

This article is an edited version of, and based substantially upon, an address given by the author to the Supreme Court History Society in the Banco Court, Supreme Court, Queensland on 4 July 2001. In this thought-provoking piece, the author deals with the problems of conscience faced by judges in the former South African regime. He then notes the legislative and practical changes in present-day South Africa and gives his vision for the future. At present, 27 per cent of the judges in the superior courts are persons of colour. 34

— HON MR JUSTICE RALPH H ZULMAN

WHAT CAN WE LEARN FROM THE FRENCH CRIMINAL JUSTICE SYSTEM?

There are many differences between the Australian and French criminal justice systems. This article discusses those differences, describes the French system focusing on its salient features, and suggests three criteria that might be applied in considering whether some procedures could beneficially be adopted into the Australian system. 49

— BRON McKILLOP

LIABILITY FOR PSYCHIATRIC INJURY: AN EVIDENCE-BASED APPRAISAL

A recent review by Ian Freckelton has assessed the issue of liability for damages for psychiatric injury following psychological trauma from a legal perspective. This article examines the legal constructs involved in this domain, from an evidence-based psychiatric approach. These constructs and the way they are applied in common law may varyingly discriminate against a plaintiff or a defendant depending on particular circumstances. Future determinations by superior courts in Australia may hopefully set precedents which increasingly eliminate these problems. 73

— PROFESSOR CHRIS TENNANT

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THE MYSTERIOUS WORD "SENTENCES" IN s 73 OF THE CONSTITUTION

Because of its brief expression and the difficulty of formal amendment, nearly every word of the Australian Constitution has been studied in the first century of its operation. But what is the meaning of "sentences" in s 73, in the list of judicial dispositions attracting the appellate jurisdiction of the High Court? On this there is little authority. One possible interpretation, given the history of the word in England, is that it refers to the orders of ecclesiastical courts. But as such jurisdiction was only briefly, if ever, exercised in Australia, does the word have a meaning more harmonious with its natural modern usage – the judicial disposition of criminal punishment? Read with today's eyes is it there to correct a judicial tendency (observed in earlier court decisions) to regard sentencing appeals as unfruitful or beneath judicial dignity? The author explores the possibilities as to the meaning of this mysterious and, in the view of some, redundant constitutional word. 97

— HON JUSTICE MICHAEL KIRBY AC CMG

A LAWYER LOOKS AT BAYES' THEOREM

Courts sometimes receive evidence that is explicitly statistical in character, and need to combine that evidence with other evidence in the case. Bayes' Theorem is a theorem of probability theory that addresses that sort of problem. While I do not suggest that courts should routinely apply Bayes' Theorem, I believe it is helpful for judges and trial lawyers to have some understanding of it. 109

— DAVID HODGSON

POWERS OF THE TAKEOVERS PANEL AND THEIR EFFECT UPON ASIC AND THE COURT

The commencement on 13 March 2000 of amendments to the then Corporations Law under the Corporate Law Economic Reform Program Act 1999 (Cth) results in major changes to company law. One of those changes is the rewriting of the former Ch 6 on takeovers. The Takeovers Panel is now the main forum for resolving takeover disputes during the bid period. This article analyses the new powers of the Panel and the resulting jurisdictional overlaps between ASIC, the Panel, and the court. The article also examines the tensions between ASIC and the Panel, and the court and the Panel created by the legislature's decision to bestow these powers on the Panel. An additional and significant issue is whether the Panel's powers offend the Constitution because the Panel may be exercising judicial power. 119

— BARBARA MESCHER

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EXCLUSION OF EVIDENCE ILLEGALLY OR IMPROPERLY OBTAINED

The exclusion of evidence illegally or improperly obtained has come to be seen as a means of disciplining law enforcement officers, maintaining integrity and public confidence in the courts, and protecting rights as well as to give effect to its original purpose, to avoid the risk of unreliability of evidence. This article contends that the exclusion of evidence is not an adequate means of giving effect to these purposes and may result in the exclusion of relevant and highly probative evidence of guilt. It is contended that a code of conduct for law enforcement officers and an independent system of determining breaches of such code and applying sanctions, leaving assessment of reliability of evidence to juries, would be a better solution. 170

— G L DAVIES

A DIARY OF TWO GERMAN CIVIL CASES

This article is a practical insight into the German civil code method of resolving civil disputes. It briefly reviews some of the substantial differences and similarities between the approach of courts to resolving civil disputes in Germany and the common law tradition, and suggests some aspects that might be useful to our system. It then gives tangible examples by reproducing diaries of the hearings of two German cases, one in the equivalent of a Magistrates Court and the other in the higher State Court, the equivalent of an Australian District, County or Supreme Court. 186

— DR ANDREW CANNON

CAUSATION AND AGENCY: A STUDY IN SEMANTICS

This article considers the problem of determining the causal connection between an agent's performance of the agency and the ultimate result, so as to entitle the agent to the agreed commission. Various tests have been proposed by courts in England, Canada and Australia. The purpose of this discussion is to consider those suggestions in the context of a recent decision of the High Court of Australia and compare the way in which such courts have dealt with the problem, with a view to suggesting that there appears to be no satisfactory answer. 195

— G H L FRIDMAN QC FRSC

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IN RESPONSE TO "TOWARDS A MORE COMPLIANT JUDICIARY?"

The Chief Justice of the Family Court of Australia is moved to write in response to the article by Justice Douglas Drummond, "Towards a More Compliant Judiciary?", which appeared, in two parts, in the May and June 2001 editions of the Australian Law Journal. 231

— HON JUSTICE ALASTAIR NICHOLSON AO RFD

JUDICIAL PERFORMANCE EVALUATION: ACCOUNTABILITY WITHOUT COMPLIANCE

This article examines judicial performance evaluation and argues that accountability can be achieved without creating a compliant judiciary, and that the traditional approaches to judicial accountability are flawed measures by which to evaluate the performance of individual judges. Whether performance evaluation methods used in the US and Nova Scotia can be readily transposed into the Australian context is discussed. It is argued that judges have an ethical duty to embrace self-improvement strategies to supplement traditional approaches to judicial accountability, and that court and administrative performance measurement, as used in the Family Court, is an essential tool for self-management and accountability for court resources. Judicial performance evaluation's association with judicial accountability, judicial independence and separation of powers is discussed. 235

— STEPHEN COLBRAN

THE ASSURANCE FUND: GOVERNMENT FUNDED OR PRIVATE?

The assurance fund is often seen as an essential component of the Torrens system. However, can an economics/law analysis support this? The inquiry raised by this article is whether private insurance, taken out by those parties who desire to protect their interest, would be a cheaper and superior way to compensate those adversely affected by the concept of indefeasibility of title. The conclusion is that the government funded assurance system does comfortably sit as one of the critical elements of the Torrens system. 250

— LYNDEN GRIGGS

MEDICAL CAUSATION

Reputable medical scientists claim that factor A may cause disease B. They do not claim to have proven that A causes B; they only claim to have evidence which suggests that it may. This article examines the circumstances in which a court may accept the evidence of those scientists as amounting to proof on the balance of probabilities that a plaintiff contracted B as a result of A. 258

— RICHARD TRAVERS

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COURT ETIQUETTE

There are a number of "rules" which are observed by all practitioners of good standing which are "lore" rather than "law". These are best described as rules of etiquette. They are basically the same for all courts and tribunals, but special practice or the rules of court in some places may mean that they need to be applied sub modo. This article sets out 44 rules of etiquette, the observance of which will aid the hearing of most cases in the courts. 303

— MR JUSTICE P W YOUNG

TREATY APPLICATION TO A CAPITAL GAINS TAX INTRODUCED AFTER CONCLUSION OF THE TREATY

The Australian Taxation Office issued a ruling on 19 December 2001 asserting that residents of countries with which Australia signed agreements for the avoidance of double taxation before the introduction of capital gains tax in Australia are not protected by those treaties from this Australian tax. This article takes the contrary view. 309

— HON JUSTICE GZELL

NON-COMPENSATORY DAMAGES FOR BREACH OF CONTRACT AND TORTS

The issue that this article focuses upon is one that the Full Federal Court recently confronted explicitly for the first time in Australian law. This was the question of the availability of two gain-based damages remedies, variously described as "restitutionary damages" and "disgorgement damages", in Australian law. Although it will be shown that both remedies have a strong historical pedigree, their relationship with each other and their nature had never previously been considered in any detail. 328

— DR JAMES EDELMAN

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JAMES BRYCE, "THE AMERICAN COMMONWEALTH", AND THE AUSTRALIAN CONSTITUTION

"The American Commonwealth" by James Bryce was the most frequently cited and most often admired book at the Australian Constitutional Conventions of the 1890s. It opened the delegates' minds to the possibilities of federalism and taught them how it had operated in the first century of the United States. Few people today realise that "The American Commonwealth" was the most influential book in the making of the Australian Constitution. 362

— MATTHEW N C HARVEY

PROOF OF DAMAGES IN PRIVATE COMPETITION LAW ACTIONS

A plaintiff contemplating a private action for a breach of one of the competition law provisions of the Trade Practices Act 1974 (Cth) will need to establish a theory of liability and a separate theory to support a claim for damages pursuant to s 82 or 87, or an injunction pursuant to s 80. The purpose of this article is to consider the principles for determining the private damages that are recoverable for anti-competitive conduct. It begins with a consideration of the way these issues are handled under United States antitrust law which was the initial inspiration for Australia's competition law. 374

— STEPHEN CORONES

IDEA/EXPRESSION DICHOTOMY: APPLICATION TO ARCHITECTURAL PLANS AND COMPUTER SOFTWARE

This article considers copyright of two troublesome categories of works: architectural plans for residential houses (plans) and computer software (programs). Both of these types of works are highly functional. Courts have struggled to fix the appropriate level of copyright protection due to the difficulty of separating idea from expression. This article considers the idea/expression dichotomy in depth. It reflects on the similarities and dissimilarities between plans and programs and analyses the application of the idea/expression dichotomy to those works. 389

— DANIEL SULLIVAN

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NEGLIGENCE: THE LAST OUTPOST OF THE WELFARE STATE

Public debate about tort law reform has intensified. A review of legislative intervention over recent decades reveals that statutory change has been underwriter driven. An alternative principle driven approach is available. 432

— HON J J SPIGELMAN AC

PSYCHIATRIC DIAGNOSES IN THE LEGAL CONTEXT

I receive requests from solicitors asking me to assess the psychological consequences of misadventures suffered by their clients. It is pointed out that I need to distinguish between a psychiatric disorder and what might be described as the normal consequences of such an event. This requirement is both logical and reasonable: the purpose of this article is to indicate some of the difficulties which stand in the way of satisfying it. 452

— DR JOHN ELLARD

RACE AND THE CONSTITUTION

In the High Court case of Kartinyeri v Commonwealth (1998) 195 CLR 337, it was accepted as received orthodoxy by the parties and judges considering the matter, that the race power in the Australian Constitution reflected a racist intention at the time to be able to pass discriminatory laws against non-whites. It is suggested that this is historically an unfair view to take of the framers of the Constitution and wrongly burdens our contemporary society with a racist Constitution. 456

— ROBERT DUBLER

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LAW, VALUES AND CHARITY

In this article, originally presented to a Christian Lawyers' group, the former Chief Justice analyses the scope of law. All good citizens need to adopt values and these influence the content of a community's law. Law should not unnecessarily trespass upon individual freedom nor should it offend the values of any religious or cultural group in the community. The extent to which law should restrict economic freedom is a recurring question. However, all good citizens should realise that there is a duty of charity to protect the entitlement of everyone, especially the poor, to a life of dignity. 492

— HON SIR GERARD BRENNAN AC KBE

JUDGES' FREEDOM OF SPEECH

When judges speak or write extra judicially they enjoy no greater freedom of speech than do other members of the public. Extra judicial statements made by them may thus expose them to the risk of being sued for defamation, of being proceeded against for contempt of court, or of being prosecuted for some criminal offence. There are, however, some other inhibitions on what judges can properly say or write in an extra judicial capacity but which do not apply to others. These inhibitions stem from common law regarding the circumstances in which judges are disqualified from adjudicating because of apprehended bias on their part, and from conventions regarding judicial conduct. This article is concerned with these special inhibitions and the justifications for them. 499

— ENID CAMPBELL

DIRECT DISCRIMINATION IN THE DISABILITY DISCRIMINATION ACT

This article examines the meaning and operation of direct discrimination generally and specifically in the Disability Discrimination Act 1992 (Cth). The article provides close examination of English and Australian case law and finds that the courts have construed direct discrimination in a complex manner, which has narrowed rather than broadened its operation and application. 512

— GUS BERNARDI

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PUBLIC CONFIDENCE IN THE JUDICIARY

Criticism of judicial decisions has always occurred, and is healthy. Underlying public confidence is not affected by such criticism. Public confidence is upheld by the conduct of individual judges, and by institutional guarantees. Judicial independence ensures confidence; it is a right of citizens not individual judges. The guarantees of judicial independence, and its implications for judicial discipline are discussed. 558

— HON CHIEF JUSTICE MURRAY GLEESON AC

TENSIONS BETWEEN THE EXECUTIVE AND THE JUDICIARY

Speaking at the recent Australian Bar Association Conference in Paris, Justice Michael McHugh lamented that, while the doctrine of the separation of powers makes some tension between the Executive and the judiciary inevitable, continuing tension is neither a public good nor indicative of a healthy, well-oiled government. In recent years, tensions between the two arms of government have accelerated in the contentious field of immigration law. This area of the law has seen a "bipartisan governmental mistrust" of the role performed by the courts in reviewing migration decisions, with an increasing "desire of the Executive to exercise control over migration matters to the exclusion of the courts". While occasional conflict may do no harm, persisting tension may diminish the authority of the courts and undermine public confidence in the integrity of judges. The frustration of the Executive with applicants who abuse the judicial review system is understandable. However, continuing conflict may induce the executive government to prevail on the legislature to reduce or abolish judicial review, undermining the rule of law. Justice McHugh recalled the cautionary words of Sir William Wade that "to exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant dictatorial power". However, he said that judges also need to continually remind themselves that in judicial review cases their task is to review the legality and not the merits of administrative decisions. 567

— HON JUSTICE M H McHUGH AC

TURNING THE NEGLIGENCE JUGGERNAUT

Insurance has been the fuel for the imperious progress of the law of negligence. It has also had a subtle but hidden influence on the extension of liability especially in relation to personal injury. The recent public liability insurance crisis is just as likely to have the same hidden effect, but in the opposite direction. Recent decisions of the High Court would suggest that the negligence juggernaut is gradually being turned. It has to turn, if the fault-based system of compensation is to retain respect. 581

— KIERAN TAPSELL

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ARTICLES

MAORI AND THE NEW ZEALAND LEGAL SYSTEM

The Treaty of Waitangi of 1840 is the basis for claims for infringment of Maori rights. That treaty was a forward looking and optimistic statement. There were doubtless some different understandings by the parties as to the meaning of some terms used. There are also problems in freezing rights as at 1840 just after some successful inter-Maori coups. Despite this, as the Chief Justice of New Zealand shows in her comprehensive summary of Maori Rights, the Treaty has done its work well. 620

— RT HON DAME SIAN ELIAS GNZM

COMMONWEALTH-STATE CO-OPERATIVE SCHEMES AFTER HUGHES: WHAT SHOULD BE DONE NOW?

The judgments of the High Court in R v Hughes (2000) 202 CLR 535 have given rise to continuing and fundamental uncertainties about the validity of Commonwealth-State co-operative schemes. The Commonwealth and States have made unsuccessful attempts to solve these problems. This article suggests that the problems could be solved simply by ensuring that the Commonwealth disciplinary provisions relating to misconduct apply to the performance of both State and Commonwealth functions under the schemes 631

— DENNIS ROSE AM QC

BUSH COURTS OF REMOTE AUSTRALIA

How do people living in remote Aboriginal communities, sometimes several days' drive from the nearest township, "go to court"? "Bush Court" is the name given to the Magistrates Court circuiting these communities once a month or in some places, once quarterly. However, a number of dilemmas are posed by its current operation. These issues arise from the manner in which its procedure vastly differs from that of the familiar urban Magistrates Court. The author details these anomalies as they relate to Bush Courts in the Northern Territory and Western Australia. 640

— NATALIE SIEGEL

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ARTICLES

THE SEVEN PILLARS OF CENTRALISM: ENGINEERS' CASE AND FEDERALISM

The "literalist" Engineers' Case (1920) 28 CLR 129 interpretation method disregards context, history, substance and basic principles of legal interpretation. It has violated the sovereign people's wishes as consistently expressed in referendums and subverted the right of State communities to govern themselves. It has denied the people the benefits of competitive federalism, increasing the burden, cost and remoteness of government. The High Court has discarded Engineers in other contexts. Preserving it solely for division of powers cases is unjustifiable and anachronistic. 678

— PROFESSOR EMERITUS GEOFFREY de Q WALKER

THE PATH OF THE LAW

On 8 December 2002, it will be exactly 100 years since the great American jurist Justice Oliver Wendell Holmes was sworn in as an Associate Justice of the Supreme Court of the United States. Some six years earlier, he had delivered a seminal and influential address entitled "The Path of the Law", which heralded the beginning of the legal realist movement in the United States and which has resonated down the ages. In this article, Dean Michael Coper of the Australian National University Law School celebrates the power of Holmes' stylish writing and the prescience of his famous dissents. Professor Coper argues that, despite recent criticism of Holmes for his extreme scepticism about values, his elegant insights into the judicial process remain as fresh and as inspirational as they were over a century ago. 716

— MICHAEL COPER

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ROLE OF SUPREME COURT OF QUEENSLAND IN THE CONVERGENCE OF LEGAL SYSTEMS

Sir Samuel Griffith drew substantially on international jurisprudence in his contribution to the early development of Australian common law. On the statutory side, the blueprint for his Criminal Code was the Italian Zanardelli Code. Griffith's Code subsequently served as the template for many overseas codes. This article addresses the extent to which the law of overseas jurisdictions has influenced the development of the law of Queensland and Australia, and vice versa. 749

— HON P de JERSEY AC

NO COMMENT: THE LOST DEFENCE

In this article the author discusses the significance of the defence of fair comment before examining how it has been required to operate in New South Wales pursuant to the Defamation Act 1974 (NSW). He then examines the role of two central features which are peculiar to New South Wales in the operation of the defence, namely, imputations and material for comment, before turning to whether the High Court decision in Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 may have some role to play in the development of a constitutional dimension to the defence of comment. 761

— STEVEN RARES SC

FOREIGN MARITIME LIENS: SHOULD THEY BE RECOGNISED IN AUSTRALIAN COURTS?

The High Court of Australia has recently altered the manner of distinguishing between substance and procedure for the purposes of the conflict of laws. This article considers the potential impact of that development on the recognition of foreign maritime liens. 775

— MARTIN DAVIES and KATE LEWINS

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