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ARTICLES

Criminalising Corporate Failures to Prevent Foreign Bribery by Non-Controlled Associates – A Net Cast Too Wide – *Mark Lewis*

The *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (Cth) introduces amendments to the *Criminal Code Act 1995* (Cth) designed to enhance Australia’s response to foreign bribery. This includes the creation of a new corporate offence of “failing to prevent” foreign bribery by commercial associates for the profit or gain of a corporation, which gives rise to absolute criminal liability subject to an “adequate procedures” defence. This article examines the scope of the proposed offence and its application to the conduct of non-controlled associates. It argues that the proposed offence suffers from overreach that will lead to unfair and ineffective outcomes, and the inefficient allocation of regulatory compliance burden. It concludes by considering changes to the proposed offence to ensure that the application of absolute criminal liability is limited to the conduct of a company’s associates that is within the company’s control and ability to prevent. 80

Bribes and Prejudice: The Limits of the Jury Secrecy Rule after Smith – *Edward McGinness*

In the 2018 decision of *Higgins v The Queen*, a majority of the NSW Court of Criminal Appeal accepted the possibility that evidence of racial prejudice by a juror might be used to impeach a verdict. This article considers possibilities for reconciling that decision with the centuries-old common law “jury secrecy rule”, which generally renders jury deliberations inadmissible on appeal. It suggests that, by displacing historical understandings of the rule, the High Court’s decision in *Smith v Western Australia* raised fundamental questions about the nature of “deliberation” that the rule seeks to protect, and the limits of finality. These questions find their clearest expression in, and may be resolved in the context of, juror prejudice. 96

Comparing Silence Rights in the Northern Territory and New South Wales – *Eugene Schofield-Georgeson and Torrington Callan*

Little is known about the use of the right to silence and its effect on convictions in Australian summary jurisdictions. Emerging research undertaken in New South Wales, however, has investigated these issues in the context of legally aided defendants. This study builds on that work, and researches the uses and effects of silence rights in the context of Aboriginal contact with the summary criminal justice system in the Northern Territory. The article compares results from both jurisdictions, revealing that Aboriginal people in the Northern Territory assert silence rights in higher proportions than their legally aided (and mostly) non-Aboriginal counterparts in New South Wales, but that numbers of convictions for both sample populations are roughly similar. Both studies observed patterns in the exercise of

silence rights correlating with convictions, leading to the conclusion that, more than the frequency with which silence rights are exercised, it is the consistency and manner in which those rights are exercised that most correlates with rates of conviction. In attempting to explain why, the article examines Aboriginal-police relations, the Anunga Rules, as well as the effects of a custody notification service in the Northern Territory. 110

Institutional Responses to the Sentencing Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse – Arie Freiberg

This article examines how Australian governments and courts have responded to three specific recommendations relating to sentencing made by the Royal Commission into Institutional Responses to Child Sexual Abuse in 2017. These recommendations related to the exclusion of good character as a mitigating factor in certain circumstances, cumulative and concurrent sentencing, and the relevance of sentencing standards in historical cases. It finds that these recommendations are relatively narrow and are likely to have limited effect on future sentencing practices due to the courts' cautious responses, the continued influence of previous sentencing practices and slow legislative responses to the recommendations. 127

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