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### **DISCRETION AND THE RULE OF LAW IN THE CRIMINAL JUSTICE SYSTEM**

#### **Justice M J Beazley AO and Myles Pulsford**

Justice Beazley was invited to give a keynote speech at the World Bar Conference 2014 centred on the theme of “Advocates as Protectors of the Rule of Law”. Confronted by the breadth of discourse on the rule of law, we were interested to examine whether our legal systems’ compliance with the rule of law was more apparent than real; whether, to use the analogy of Hans Christian Andersen’s fairy tale, the cloth we wear is really woven with gold. This article examines that question of compliance by reference to discretion in the criminal justice system, a subject that has received frequent attention by the High Court of Australia in recent years. Identifying discretion as playing a central but complex role in the rule of law, the importance and rule of law concerns associated with the extent and allocation of discretion in, and between, the police force, prosecutors and the judiciary is examined. This issue is explored by reference to two areas of the New South Wales criminal justice system: first, the offence of consorting in the Crimes Act 1900 (NSW), s 93X which, at the time the speech was given, was the subject of a reserved High Court decision on its constitutional validity; and, secondly, the introduction of aggravated forms of existing offences which are coupled with mandatory minimum sentences which were considered by the High Court in *Magaming v The Queen* (2013) 87 ALJR 1060; [2013] HCA 40. .... 158

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IN DEFENCE OF MCCRACKEN: A RESPONSE TO “WHY DO COURTS CUT  
BACK ON STATUTORY REMEDIES PROVIDED BY PARLIAMENT UNDER  
CORPORATE LAW”

**Nishad Kulkarni**

The proper scope of s 1324 of the Corporations Act 2001 (Cth) continues to attract divergent views, with some commentators arguing that the courts have taken an unduly narrow approach to its interpretation. In the September 2014 issue of the Australian Law Journal, Professor Baxt expressed that view in respect of the Queensland Court of Appeal’s decision in *McCracken v Phoenix Constructions (Qld) Pty Ltd* [2013] 2 Qd R 27; (2012) 272 FLR 104. In the absence of consideration of the provision by the High Court, the view expressed by Professor Baxt is certainly not foreclosed. This article, however, contends that the two distinct propositions that emerge from *McCracken* regarding the interpretation of s 1324 are correct and find support in reasons outside those stated in the decision as well as from the authorities. .... 175

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**Brent Michael and Derek Wong**

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THE INTOXICATION DEFENCE: TOWARD A BETTER UNDERSTANDING OF  
CURRENT DOCTRINE AND REFORM

**Kenneth J Arenson**

This article deals with the contentious issue of the extent to which an intoxicated person, particularly one who has become inebriated of his or her own volition, should be permitted to escape liability on the basis that the degree of inebriation was sufficient to preclude the fact-finder from finding a volitional act or omission on the part of the accused and/or that he or she acted with the requisite mens rea, if any, as defined by the common law or statutory definition of the offence. In addressing this issue, the article embarks upon a thorough analysis of the House of Lords seminal decision in *Director of Public Prosecutions v Majewski* [1977] AC 443 which, despite some very harsh criticism of late, continues to be the leading authority on this question in the United Kingdom, United States and Australia. As part of this analysis, the article examines and ultimately attempts to resolve the longstanding controversy over what has proved to be the elusive distinction between crimes of basic or general intent and those of specific intent. The article concludes by rejecting the *Majewski* principles in favour of those enunciated by the High Court of Australia in *R v O’Connor* (1980) 146 CLR 64; 54 ALJR 349. In reaching this conclusion, the article notes various legislative and academic proposals for reform as well as statutory reforms in the United Kingdom, United States, Canada, and Australia. .... 190

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