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ARTICLES

WHY IS THERE "BUT ONE COMMON LAW IN AUSTRALIA"?

Lucas Clover Alcolea

The High Court has repeatedly confirmed that "There is but one common law in Australia which is declared by this court as the final court of appeal" so the fact that "Different intermediate appellate courts within that hierarchy may give inconsistent rulings upon questions of common law" does not mean that "there are as many bodies of common law as there are intermediate courts of appeal" rather it merely means "that not all of these courts will have correctly applied or declared the common law". Moreover, that common law exists even before the High Court's declaration of it. However, why (and how) is that so?? In order to answer this question, we analyse two competing theories of the common law, classical common law theory, and positivist common law theory. Ultimately, we suggest that the High Court's approach is firmly entrenched in, and can only be explained by, classical common law theory. 530

GOING OUT ON A LIM: RECONCEPTUALISING THE CONSTITUTIONAL LIMIT ON PREVENTIVE DETENTION

Zachary Gomes, Aryan Mohseni and Charlie Ward

NZYQ did much to return the constitutionality of preventive detention to the principles worked out in Chu Kheng Lim (Lim). However, the High Court did not go far enough. The introduction of a unifying test of being reasonably necessary for a "legitimate" non-punitive purpose provokes questions about the work "legitimate" is to do. The Court has also persisted with the language of "punishment" – an unsatisfactory standard which is difficult to apply. There is a danger, in integrating the exceptions to the rule within the

rule itself, with allowing the growth of an originally confined list of exceptions. This article grounds Lim in the values which underpinned it: the uniqueness of detention in constitutional history, and the role of judicial process in mediating that interaction between the individual and the State. These values should be borne steadily in mind, lest Lim's promise of a categorical prohibition on non-judicial detention be diluted. 550

THE DOCTRINE OF ELECTION BEFORE AND AFTER ALLIANZ – PART II

The Hon Kevin Lindgren AM KC and Elisa Holmes SC

In this, the second part of this two-part article, we consider the content of the two necessary elements of an effective election to affirm: the unequivocality of the affirmer's words or conduct, and the nature of the knowledge that the affirmer is required to possess. Then we address the High Court decision in Allianz, and venture to suggest that the rationale offered for the doctrine of election in pre-Allianz cases (called the "Dominant Rationale" in Allianz) seems to be the only proffered rationale that justifies the continued existence of the doctrine. Despite proffering an alternative rationale which might suggest its elimination as a practical matter, the majority of the High Court disavowed any intention to replace election with estoppel. 565

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