Three Things You Ought to Know about the Australian Legal System

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Introduction

Australia's legal system was derived from its origins as a colony of England. This meant that the common law applied from 1788. Since that time a number of significant initiatives have occurred or in one case has not occurred that may be interesting for an outsider. These initiatives or features are:

1. The torrens system
2. civil liability legislation
3. No bill of rights

Torrens Title

A significant legal initiative derived from Australia is a form of land title registration often called 'the Torrens system'. This system of land title is derived from a state of Australia namely South Australia. The system was devised by Robert Richard Torrens who was the Registrar- General of Deeds in the mid 1800's. Torrens was well versed in the limitations of what was called the "Deeds Registration System."[1] This was a voluntary registration system derived from England that provided priority based on the date of registration of deeds.[2] This system did not deal with the problem of void or forged transfers that could result in innocent parties being left with few remedies when their interest was unenforceable as a result of a fraudulent third party.

The Torrens system was introduced into the South Australian Parliament in 1858 and passed under the name *Real Property Act* 1858 (SA). Queensland was the first state to pass similar legislation in 1861with the enactment of the *Real Property Act 1861*(Qld).

The most important principle of the torrens system is outlined in a quote of Barwick CJ in *Breskvar v Wall*[3] where he states: "The Torrens system of registered title........ is not a system of registration of title but a system of title by registration." The crux of the Torrens system is that the act of registration provides title and does not rely on the validity of the transfer or interest effecting that registration. On registration a registered proprietor of an interest ie fee simple (ownership); a lease or mortgage is given what is referred to as 'indefeasible title.' Indefeasible title is generally free from attack. Although there are a number of significant exceptions to indefeasibility of title such as fraud a bona fide

[1] For a historical background refer to Torrens, The South Australian System of Conveyancing by Registration of Title (Adelaide, Register and Observer General Printing Offices, 1859).

[2] MacDonald, McCrimmon, Wallace and Weir, *Real Property Law in Queensland* (2nd edition 2005) 275.

[3] (1971) 126 CLR 376 at 385-386

registered owner has a considerable degree of security of title.

Another significant exception is the so called 'in personam' exception that means a registered owner cannot avoid contracts or trust relationships that party has entered into[4]. A registered owner is generally bound only by registered interests and not by unregistered interests. A purchaser is not bound to investigate the chain of title leading up to their vendor's title as the act of registration by a public official normally called a Registrar of Titles grants good title.

The other important pillar of the torrens system is the principle of compensation. If a party loses an interest by the registration of an indefeasible interest in another ie a forger transfers land to a bona fide registered purchaser the original owner may lose their interest. In that case the state should compensate for the loss of that interest. This deals with some of the injustices that can occur in these situations.[5] Under the old system or deeds registration system the owner deprived of an interest in land may have been left with a claim against the fraudulent wrongdoer, often a fruitless exercise.

The Torrens form of land title registration is significant as it is used in all states of Australia in relation to freehold land interests; it is also used in New Zealand; Malaysia; Canada; many states in the USA and Canada.[6] A significant body of evidence has now developed in relation to the Torrens system. Many jurisdictions draw upon the other in relation to significant case law.

Civil Liability Legislation

Australia is a country which derives it legal background from English law and accordingly has a clear common law background though statutory regulation has always had played a significant role in the Austalian legal system. In recent decades the Australian legal system has moved towards a more civil law approach to regulation involving statutory regulation of large areas of activity that what was previously dominated by common law concepts. This process has to some extent been hindered at a national level by constitutional limitations for the Commonwealth Government and its ability to pass laws binding throughout the nation. Nevertheless in recent years the states have passed almost identical legislation to permit the creation of a national scheme of statutory regulation in such areas as the law of defamation; corporations and consumer credit.

An example of this movement is provided by legislative responses to the apparent medical indemnity crisis in Australia in the early years of the 21 century. There was a perception at time that judges were being unduly generous in awards made in personal injury cases which was said to have contributed to the collapse of a major medical indemnity insurer. This along with changes in the insurance industry resulted in large increases in medical

[4] Eg s 185 (1) (a) *Land Title Act 1994* (Qld).

[5] MacDonald, McCrimmon, Wallace and Weir, *Real Property Law in Queensland* (2nd edition 2005) 426.

[6] Ibid 269

insurance premiums and a medical indemnity insurance crisis (or the perception of a crisis) which potentially left many doctors uninsured or with prohibitive insurance premiums. The Federal Government commmissioned in 2000 the *Review of the Law of Negligence Report* (the Ipp Report). This report suggested statutory reforms to the law of negligence relevant to the liability of MD's and other professionals. The states have constitutional power in this regard and they passed similar (but not the same legislation) exampled by the *Civil Liability Act 2002* (New South Wales), *Civil Liability Act 2003* (Queensland) and *Civil Liability Bill 2002* (Tasmania) that preserves in statutory form legal tests for legal liability in tort for personal injury including professionals. The intention is to limit the expansion of the frequency and size of personal injury claims. This legislation deals with many matters but it includes the following:

- It states that if 'professionals' follow procedures deemed acceptable by their profession (even if there may be different views on the matter and the activity is not universally accepted) then they will be deemed to be not in breach of their duty. This applies as long as those procedures are not 'irrational.' New test is a return to a varied *Bolam v Friern Hospital Management Committee* [7]rule that relied to a substantial degree on approved professional practice in determining whether an act or ommission was or was not negligent practice. It move away from the trend exampled by the case of *Rogers v Whitaker*[8] which reserved for the court the decision of whether standard professional practice was or was not negligence. The exception for acts that are 'irrational' may be close to the common law exception identified in *Bolitho v City and Hackney Health Authority*[9] which acknowledged that in rare cases a court can reject a medical opinion if it is not reasonable or responsible.

- The statutes regulate apologies or statements of regret and indicate in some jurisdictions they are not admissible even if they contain admissions of guilt. For example in New South Wales s 69 of the *Civil Liability Act 2002* confirms an apology does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and is not relevant to the determination of fault or liability in connection with that matter.

- If the issue in a case is what would a patient have done if the defendant was not negligent ie failure to warn cases - then statements by person after suffering harm are inadmissible unless it is against their interest eg s 11 (3) *Civil Liability Act 2003* (Qld).

Bill of Rights

Australia is virtually alone in developed democratic countries in not having a

[7] [1957] 1 WLR 582

[8] (1992) 109 ALR 628

[9] [1998] AC 232

comprehensive Bill of Rights. Despite attempts on occasion to introduce legislation at a Federal level and the use of referenda to amend the Commonwealth Constitution these initiatives have been unsuccessful in entrenching of a Bill of Rights in Australia. In Australia the protection of human rights is through the following provisions:

- In Victoria the *Charter of Human Rights and Responsibilities Act 2006* provides protection for human rights that include the right to life (s9); freedom of movement (s12); expression (s 14) and property rights (s20). It should be noted these provisions can be overridden by parliament (s31) in exceptional circumstances and the legislation requires that legislation should be interpreted in a way consistent with this Charter (s32).
- Some state constitutions and the Commonwealth Constitution do include a provision against acquisition of property except on just terms.[10] In *Stephens v West Australian Newspapers Ltd* [11]the High Court found an implied freedom of political communication under the Australian Constitution based on our system of representative democracy. Some state constitutions enshrine certain rights such as voter equality or one vote on value eg s 77 *South Australian Constitution*.[12]
- Some statutes incorporate protection of human rights between individuals and governments. For example the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth) deals with unlawful discrimination in these subjects areas.[13] This legislation relies on the Commonwealth government using the 'external affairs' power under s 51 (xxix) of the Constitution. This allows the Commonwealth to pass legislation to implement Australia's obligations under international treaties and covenants. For example the *Racial Discrimination Act 1975* (Cth) relies on the International Convention on the Elimination of All Forms of Racial Discrimination.
- Common law [14]– although the protections of human rights under the common law may be subject to contrary legislation the common law does protect, for example, the right to counsel when facing a serious crime. *Dietrich v The Queen.*[15] The common law also requires very clear language before any fundamental freedom is restricted.
- International Law[16] – Australia is a signatory to many international instruments that foster human rights. It should be noted the ability to enforce these treaties is limited unless they are incorporated into duly enacted legislation - *Kiao v West.*[17]

[10] George Williams, *Human Rights under the Australian Constitution* Oxford University Press 1969, 8.

[11] (1994) 182 CLR 211

[12] Ibid 10

[13] Ibid 11

[14] Ibid 15

[15] (1992) 177 CLR 292

[16] Ibid 18

Arguments supporting a Bill of Rights in Australia suggest Australia inadequately protects human rights and it would be appropriate that Australia is brought into line with the international standard. It is said this will have the impact of assisting Australia to meet its international obligations to ensure the protection of less powerful members of the community. It is said a Bill of Rights would perform an important educative role and promote tolerance in the community.[18]

Contrary views suggest human rights are already well protected and the impact of a Bill of Rights would be to give unelected judges a political role in overturning the legislative process performed by elected representatives. It is argued a bill of rights would encourage expensive and wasteful litigation. To define a right is to limit a right.[19] There is currently limited agitation towards a Bill of Rights in Australia.

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[17] (1985)159 CLR 550.

[18] Williams, above n 17,257

[19] Ibid 257