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Articles

- The Rights of Diplomatic and Consular Employees in Australia
— *Richard Garnett* 1

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This article examines a group of employees who have been rarely considered in Australian court and tribunal decisions and scholarly commentary to date: diplomatic and consular workers. While persons employed by foreign states in their embassies and consulates generally enjoy favourable rights of access to justice under the Australian law of foreign state immunity, those retained personally by individual diplomats (commonly domestic servants) stand in a much worse position due to the excessively wide rules of diplomatic immunity. After discussing the current legal regimes in Australia and other jurisdictions, the author suggests possible strategies for improving the situation of such employees.

- The Shifting Work-related Connecting Factors in New South Wales’
Workers’ Compensation Scheme — *Jacqueline Meredith* 22

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The need for a definable nexus between a worker’s employment and the injury they sustain is an axiomatic component of workers’ compensation law. In New South Wales, various ‘connecting factors’ in the Workers Compensation Act 1987 (NSW) define the specific work-related connection that is required in any factual scenario. This article traces the evolution of these connecting factors since the implementation of New South Wales’ first no-fault workers’ compensation legislation. It is argued that the connecting factors have been used as a tool by Parliament to control access to New South Wales’ workers’ compensation scheme throughout the 20th–21st centuries. In recent years, this has resulted in the proliferation of increasingly complex and ambiguous connecting factors, and seen the statutory scheme fail to strike an appropriate balance between its competing policy objectives. It is concluded that the legislation should be amended to require simpler and less restrictive work-related connections.

Why the High Court Went Too Far in Rejecting the Implied Term of Trust and Confidence in Its Entirety, in the Context of Constructive Dismissal Claims — *Lauren Hillbrick*

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In *Commonwealth Bank of Australia v Barker*, the High Court of Australia unanimously held that there is no term of mutual trust and confidence implied by law (MTC term) in Australian employment contracts. Using the concept of 'constructive dismissal', this article explores why the High Court went too far in rejecting the MTC term in its entirety. The MTC term's rejection represents a significant loss because the term is concerned with maintaining, and not destroying, the employment relationship. The High Court went too far in rejecting the MTC term because the term played a role in grounding contractual and statutory constructive dismissal claims in the past. Now, many employees are unable to bring a constructive dismissal claim, despite being subject to intolerable, trust-destroying behaviour by their employer. The article concludes that the High Court should not have rejected the MTC term in its entirety, because a contained 'negative' version of the MTC term could have been workable in Australia. The article concludes by suggesting that there are some tentative lessons to be learnt from this experience, which may be of (possible) value to an Australian audience.

The Commodification of Labour in the Australian Football League: What is the Impact of Free Agency? — *Matt Nichol*

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Players in the Australian Football League like athletes in other sports have limited control over their labour. Teenagers are drafted by a club and must accept the uniform contract and mandatory minimum wage or sit out of professional football for one year and wait until the next draft. These players have limited rights to choose their employer and can be traded at any time to another club. Such labour systems violate the principle that labour is not a commodity and tend to commodify labour by treating labour as property that is capable of ownership. However, free agency, a labour control that was developed in Major League Baseball gives players who work for a designated period of time that ability to choose their employer, and in doing so decommodifies labour. Free agency, like other legal rules and institutions, can be transplanted from a country or legal system to another system. This occurred in 2012 when the AFL introduced free agency through collective bargaining. This article will explore the effects of free agency on the treatment of labour as a commodity, examine how convergence and divergence can occur when free agency is transplanted from Major League Baseball to the Australian Football League and identify the role of collective bargaining in the evolution of free agency.