

JOURNAL OF CIVIL LITIGATION AND PRACTICE

Volume 1, Number 3

September 2012

COMMENTS

Indefeasibility of title	115
Private nuisance	116
Unincorporated associations	117

ARTICLES

Federal court practice and changes in discovery – *Hon Justice Bruce Lander*

This article discusses what is, in light of the plethora of documents typically available in 21st century commercial proceedings, commonly the most expensive interlocutory process – discovery. Justice Lander, Convenor of the Rules Revision Committee for the Federal Court Rules 2011 (Cth), discusses how those Rules have been designed to prevent, as far as possible, the burdensome cost, expense and delay caused by the discovery process, in line with the overarching purpose of the civil practice and procedure provisions. The article concludes by observing that parties to a proceeding are no longer entitled to make their own arrangements in relation to discovery. The court now claims responsibility for determining when, and how, discovery should be made, and an order for discovery will only be made where such an order is necessary for the just resolution of the proceeding as quickly, inexpensively and efficiently as possible. 119

Judiciary Act 1903 (Cth), s 79 – State law in federal jurisdiction – *Judge DJ McGill SC*

This article looks briefly at the background and purpose of the Judiciary Act 1903 (Cth), s 79, and then considers various aspects of its operation. It couches on when a State court is exercising federal jurisdiction, when State laws are applicable in the exercise of federal jurisdiction, the threshold requirement that the State law be valid, and the test to determine whether a Commonwealth law “otherwise provides”. The operation of the section is considered in the context of State statutes of limitation, and case management practices. 131

On proprietary trespass: The availability and application of hypothetical bargain damages – *Brian Mason*

Successful plaintiffs in proprietary trespass cases have a prima facie entitlement to a mandatory injunction. Alternatively, the courts may exercise their discretion to award damages calculated with reference to a price the parties theoretically could have agreed, but did not, in exchange for the plaintiff relaxing its infringed rights. The Victorian Court of Appeal in *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* (2007) 20 VR 311 considered the availability of these hypothetical bargain damages in lieu of an injunction, but indicated that this remedy is of marginal relevance in proprietary trespass cases given the limited circumstances in which a court will exercise its discretion to award them. A proper understanding of this remedy’s doctrinal foundations indicates that the Court of

Appeal adopted an unnecessarily restrictive attitude towards its application. Strategic plaintiffs in future proprietary trespass cases should therefore consider revisiting Break Fast to secure the potentially greater relief these damages may confer. 141

Proportionality: A cultural revolution – *Trevor CW Farrow*

Civil justice reform has been occurring at a significant pace around the world over the past several decades. A major part of that reform movement has been the introduction of the concept of proportionality into the rules of civil procedure of various jurisdictions. Proportionality is a mandate designed to push lawyers, judges and litigants to conduct civil cases in ways that are faster, cheaper, more efficient and that make sense in the context of – ie that are “proportional” to – the issues and/or amounts involved in legal proceedings. The fundamental motivation behind the introduction of proportionality is to improve the administration of, and access to, civil justice. Although relatively clear on face value, there are five points about proportionality discussed in this article – namely that proportionality is: widespread and here to stay; is different to the notion of efficiency; potentially militates in favour of improving access to the processes of civil dispute resolution; is a new element of legal professionalism and judicial ethics; and is becoming part of the current endgame of an increasingly efficiency-seeking world of civil justice. 151

The Czech Arbitration Court: Online forms of dispute resolution – *Tereza Bartoskova*

The Czech Arbitration Court based in Prague, Czech Republic, has been offering online dispute resolution services since 2004. There any several types of online disputes that it handles, from property disputes to special proceedings designed solely for domain name disputes. 160

BOOK REVIEW

Class Actions in Australia by Damian Grave, Ken Adams and Jason Betts 165