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ARTICLES

LORD MANSFIELD AND THE CULTURE OF IMPROVEMENT

Hon J J Spigelman AC

This speech was delivered to an audience made up mainly of non-lawyers. It is however, also, a timely reminder to all lawyers of the significance of Lord Mansfield to our legal system. 764

PRESIDENT MASON'S FAREWELL SPEECH

Justice Keith Mason AC

At his farewell ceremony, the Hon Justice Keith Mason spoke of the judicial method and in particular, of the High Court stifling the potential of the lower appellate courts to develop the common law and of its increasing insular nature – its reluctance to consider relevant judicial decisions and academic writings from other countries. This has, as the reader would expect, caused controversy and much debate in the legal profession. As such, we now publish the speech and a response from Mr Norman O'Bryan SC and Mr Chris Young of the Victorian Bar addressing the "supposedly 'new and now binding' rule of precedent laid down by the High Court in 2007 and applicable to intermediate courts of appeal in Australia". Readers are encouraged to write their comments to the General Editor. 768

A VIEW FROM OUTSIDE THE VORTEX ON KEITH MASON'S RETIREMENT SPEECH AND THE AUSTRALIAN DOCTRINE OF JUDICIAL PRECEDENT

Norman O'Bryan and Chris Young

In his retirement speech, Justice Keith Mason criticised the judicial method adopted in a recent High Court decision and, particularly, a rule of precedent stated by the High Court for intermediate courts of appeal. Pursuant to that rule, an intermediate court of appeal should not depart from a decision of an intermediate court of appeal in another jurisdiction unless it is convinced the decision is plainly wrong. Contrary to his criticism of that rule as "new" and as likely to produce "stunted" judicial decision-making, the history of the rule shows that it has been adopted by many of Australia's intermediate appellate courts for themselves and has been approved by Mason P himself. The rule is a principled response to the fact that Australia's intermediate appellate courts are collectively engaged in the development and maintenance of the common law of Australia. 771

DAVID HICKS IN THE AUSTRALIAN COURTS: PAST AND FUTURE LEGAL ISSUES

Justice Brian Tamberlin and Lucas Bastin

The saga that was David Hicks' detention and treatment in Guantánamo Bay touched a deep-seated nerve in the Australian psyche. It also raised complex legal questions. Can the Australian Executive be compelled to repatriate an Australian national detained abroad by a foreign power? Can the writ of habeas corpus issue where Australia may have some influence over the ndividual's detention? Are such matters justiciable, or are the courts precluded from adjudicating matters touching on Australia's international relations? This article reviews the application which Mr Hicks brought before the Federal Court of Australia, and considers how these issues interact with the circumstances of his case. 774

THE CONSTITUTIONALITY OF NATIONAL PORT REGULATION

Gonzalo Villalta Puig and Michael Woods

The introduction of Infrastructure Australia heralds a new era of federal influence in national infrastructure planning. This article analyses port regulation as it exists at national and international levels and suggests four elements that would constitute the core business of a national port regulator. It argues that, for a national port regulator to be effective, the constitutional obstacles of Australian federalism must be surmounted with a whole of port approach which would ensure that, where the Commonwealth obtains strategic control of a port, clear lines of responsibility will exist between port authorities and the Commonwealth. To achieve effective national port regulation, we propose a system of declared regulated Australian sea ports controlled by an Australian sea port authority, and that the trade and commerce power in s 51(i) of the Constitution be used to establish these statutory bodies. Our proposal does identify several limitations to the operation of statutory bodies under the trade and commerce power. However, we argue that, if used in conjunction with other constitutional provisions, the trade and commerce power would provide a valid foundation for Commonwealth jurisdiction over ports. Once we establish the validity of Commonwealth jurisdiction, we argue that each of the four elements that would constitute the core business of a national port could be implemented and validly regulated by the Commonwealth through our proposed Australian sea port authority. We conclude that national port regulation, if based on a whole of port approach to the management of the four elements of port business, would be constitutional. 789

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