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CURRENT ISSUES WITH CAVEATS: A PAN-AUSTRALIAN CONSPECTUS

Lee Aitken

Defending a caveat requires a detailed knowledge of both the rules of interlocutory practice, and, typically, the possible bases upon which an equitable interest over land may arise. The Torrens treatment of caveats is similar in every State, but only the boldest property practitioner would purport to advise with confidence on a caveat lodged in another jurisdiction. It is difficult, given the urgent basis on which most caveat matters are

argued, to keep abreast of the case-law which is uniformly ill-reported in any timely fashion. In this article, the common caveat themes which arise in each State as exemplified by the most recent cases are described and briefly analysed. 22

FETTERING THE FIDUCIARY DISCRETION BY AGREEMENT: BREACH OF
DUTY OR COMMERCIAL REALITY?

Jonathan Swil and Roger Forbes

The rule that a fiduciary may not fetter their discretion by agreement to act in a particular manner in the future is an important aspect of the fiduciary relationship. It traditionally found expression where trustees purported to grant options over trust property, but may now be of greater importance where corporate trustees purport to agree to exercise their fiduciary powers in a pre-determined manner. Despite its continued importance, the rule has received limited attention from the courts in recent years. Accordingly, this article explores the rule's provenance and its apparent content. The authors submit that while the rule should be qualified in certain circumstances, particularly in order to preserve a fiduciary's legitimate freedom of contract in complex commercial arrangements, the rule's importance implies that it must continue to play a role in a commercial fiduciary's dealings with third parties and not be rendered otiose by such commercial considerations. 32

SQUARE PEGS IN ROUND HOLES: ARE COMPUTER PROGRAMS REALLY
LITERARY WORKS?

Judith Thomson

Being in writing, computer programs are categorised as literary works, yet there are important differences between them and traditional literary works. This article examines the scope of traditional copyright in relation to protecting structure and the American and British approaches to protection of the very valuable non-textual elements which, in computer programs, form another "layer" between the idea and expression so characteristic of traditional literature. It considers the relationship of ideas to expression, programmers choice to expression, the American abstraction, filtration comparison test, the relevance of purpose/function, the British analysis of the relationship of business logic to plot, and the difference between ideas intrinsic to the purpose of the expression and extrinsic/"freight" ideas. Ultimately, it concludes that regarding computer programs as literary works leaves the most important elements of a program unprotected and that sui generis legislation would be helpful. 50

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