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ARTICLES

1361 AND ALL THAT

Rt Hon The Lord Judge

The author traces through our shared legal history, that of England and Wales, Australia and New Zealand, focusing on 1361, a key year with the passage of the Justice of the Peace Act 1361. In explaining the significance of that event, the author emphasises that the preservation of peace, traced from the King's Peace, 800 years in our history, is of fundamental importance and is as relevant today as it was in 1361. It links with the community's involvement in the rule of law and with the responsibility for keeping that peace. 676

HYPOTHETICAL JURISDICTION: A REPLY TO JUSTICE MARK LEEMING

Brendan Lim

The author's defence of hypothetical jurisdiction in his article in the Journal last year, The case for hypothetical jurisdiction: Postulating jurisdiction in unmeritorious civil proceedings (2012) 86 ALJ 616, attracted a response from Justice Mark Leeming in his work, Authority to Decide: The Law of Jurisdiction in Australia (2012). This is the author's reply. For a court to postulate, without deciding, that it has jurisdiction can be useful in cases where, although there is doubt about the existence of jurisdiction, there is no doubt about the lack of merit in the moving party's claims. The practice recognises the importance of jurisdictional limits, while permitting a pragmatic measure of flexibility in their observance. 680

HYPOTHETICAL JURISDICTION: A REJOINDER

Justice Mark Leeming

My principled objection to the exercise of "hypothetical jurisdiction" – dismissing a case on the merits when it is not clear whether there is jurisdiction – is not only that it is a breach of a court's "first duty", but also that it tends to obscure the fact that dismissing a claim amounts to an exercise of jurisdiction just as much as acceding to it. Further, I doubt that the difficulties in practice are as large as has been portrayed. Certainly, they are not so great as in the United States. A decision of the United States Supreme Court earlier this year illustrates as much, and suggests caution before adopting an element of "substantiality" into Australian law of federal jurisdiction. 685

ADMINISTRATIVE LAW IN THE SUPERANNUATION CONTEXT

Hon Kevin Lindgren AM, QC

The financial advice and superannuation industries are heavily regulated. Perhaps this is inevitable and as it should be. But the rapidity of relevant recent changes to corporations and superannuation legislation and the diversity and complexity of the conferral of relevant regulatory powers are alarming. This article, based on a paper presented at the Law Council of Australia Superannuation Conference, "Safe Harbour or a Bridge too Far", held 28 February – March 2013, surveys the morass of recent provisions and the relationship between them. It also notes the legislation's recognition that inconsistencies may exist, and its unsatisfactory solution of simply ordaining a hierarchy of prevalence which it leaves to the reader to apply. 688

THE RECOGNITION, ADMINISTRATION AND ENFORCEMENT OF FOREIGN TRUSTS

David Russell QC

Globalisation brings other countries' entities and legal relationships into Australia, as well as the goods and services they produce – often of a very different character to those to which our courts are used. They may have to be regulated, and they almost certainly will need to be taxed. For trusts, the Hague Convention provides a useful touchstone, but it does not apply to interstate, as opposed to international trusts notwithstanding wide disparities within Australian jurisdictions such as the abolition of the Rule against Perpetuities in South Australia. The author suggests some surprising results of this interaction may be possible. 699

DEVELOPMENT OF SOLICITORS' POSSESSORY LIENS

Paul Collins

This article traces the development of the general lien for solicitors which saw by the 1820s a greater recognition of the solicitor's lien when the client discharged the solicitor. In the opposite case, when the solicitor discharged the client, the lien was postponed on transfer of the file. However, recent developments have seen, where a solicitor has discharged the client, a greater inclination to impose payment terms conditioned on transfer of the file. Other developments have reached the point where a lien can be lost through misconduct. Apart from the event of changing solicitors, a lien can be overridden by the interests of justice, in an echo of early chancery practice. The article discusses whether a lien can ordinarily restrict a new solicitor's right to make copies for the client on transfer of the file. 710

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