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ARTICLES

ENGINEERS: ONE HUNDRED YEARS OLD AND STILL GOING STRONG: A COMMENTARY

The Hon Sir Anthony Mason AC KBE GBM QC

The High Court's decision in Engineers stands for six propositions: (1) the rejection of the strong doctrine of State intergovernmental immunities, upheld in the earlier cases; (2) Commonwealth powers are not limited by State reserved powers; (3) the Constitution is an Imperial statute; (4) the Constitution should be interpreted in accordance with British principles; (5) the Constitution should be interpreted literally; and (6) Commonwealth powers are plenary. This comment explores each of these propositions and their current standing in Australian constitutional law. Like Professor Aroney, it suggests that several of these propositions lack ongoing force, but that propositions 1 and 2 retain full force, and thus evidence the enduring significance of the Engineers decision. 835

THE CONTINUED LEGACY OF THE ENGINEERS CASE: A DYNAMIC APPROACH TO FEDERAL POWER

Rosalind Dixon and Brendan Lim

We comment on Professor Nicholas Aroney's appraisal of the Engineers Case in the Australian Law Journal's September 2020 edition in which he argued for a "balanced interpretive perspective" for the construction of the Commonwealth's legislative powers in which "federal principles" receive greater consideration. According to Aroney, little of the reasoning in Engineers remains good law, such that this "balanced" constructional approach is ripe for rediscovery. We suggest that Aroney's argument insufficiently appreciates the enduring significance of what Engineers did, as distinct from what it said. Any contemporary agenda for devolution is necessarily committed to articulating a substantive conception of the federal structure and defending it by reference to contemporary constitutional values. That exercise would be an application of Engineers, rather than a repudiation of it. The Engineers Case endures because it recognised the federal structure's adaptability and gave effect to it in an enduring compromise of different values and traditions. 841

"WAIT[ING] FOR THE HEAVENS TO FALL": THE ENGINEERS CASE AND INTERGOVERNMENTAL IMMUNITY

Sarah Murray

This article responds to Professor Nicholas Aroney's anniversary contribution on the High Court's decision in the Engineers case. While accepting Aroney's statement that "the High Court has effectively abandoned the sweeping terms in which the idea of intergovernmental immunities was rejected in Engineers", it explores the degree to which this much-cited 1920 decision can still allow us to better understand the development of the intergovernmental immunity doctrine. In so doing, it traces the extent to which the doctrine's progress draws on, at least in some respects, observations made by the Court in the Engineers case. 849

MONEY HAD AND RECEIVED – AND RETAINED? THE ROLE OF RETENTION AT NOTICE FOR PERSONAL COMMON LAW LIABILITY

Eleanor Makeig

This article considers whether a volunteer's dissipating of the property of another prior to taking notice of its character as such affects that volunteer's primary liability under the common law claim for money had and received. A survey of the history of the action

suggests that the volunteer should be strictly liable for the whole of the property received, subject to the change of position defence. Recent decisions of Australian first instance and intermediate appellate courts suggest that is not the position. These decisions indicate the volunteer is primarily liable only for the property retained when the volunteer is put on notice. This article critiques the model relied upon in these recent decisions. First, it is demonstrated that it is unhistorical and not easily justified on the basis of precedent. Second, it is argued that the relationship drawn in recent decisions between the common law claim and equitable personal liability under Black v Freedman is problematic as a matter of principle. Third, the article considers whether the new model is to some extent capable of being reconciled with the orthodox model. The limitations of such a reconciliation are explored. 855

JUSTIFYING TRADE RESTRICTIONS UNDER S 92 OF THE AUSTRALIAN CONSTITUTION: A COMPARATIVE LAW-BASED PROPOSAL FOR A COHERENT DOCTRINE

Csongor István Nagy

This article, by means of comparative analysis of federal markets, proposes a general doctrine for the public interest analysis under s 92. The article uses the framework established by the jurisprudence of the High Court and carries out comparative law analysis from the perspective of what the Court perceives as the federal purpose of s 92. It demonstrates that an object-based public interest analysis would be incoherent, given that trade restrictions are usually based on both protectionist and legitimate considerations and, hence, the measure's object should have a supplementary role. It argues that in the Australian federal system the courts' mandate is to maximise the "federal surplus" and, hence, they should engage in evaluative balancing, which entails no unsurmountable difficulties. 874

Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Thomson Reuters

DECISIONS RECEIVED IN OCTOBER 2020

ABT17 v Minister for Immigration and Border Protection (*Citizenship and Migration*) ([2020] HCA 34) 928

AUS17 v Minister for Immigration and Border Protection (Administrative Law; Citizenship and Migration) ([2020] HCA 37) 1007

Golding, Re (*High Court and Federal Court*) ([2020] HCA 38) 1014

Hsiao v Fazarri (*Family Law and Child Welfare*) ([2020] HCA 35) 961

Northern Land Council v Quall (*Aboriginal and Torres Strait Islander Peoples; Corporations*) ([2020] HCA 33) 904

R v Abdirahman-Khalif (*Criminal Law*) ([2020] HCA 36) 981