THE AUSTRALIAN LAW JOURNAL

Volume 95, Number 8

August 2021

CURRENT ISSUES – Editor: Justice François Kunc

Rethinking COVID-19 State Border Closures 579

From the Law Schools – A New Editor 579

Excluded: The Democratic Deficit in Interstate Border Closures 579

The Curated Page 587

FROM THE LAW SCHOOLS – Editor: Emeritus Professor David Barker

Australian Legal Education – Moving Forward in 2021 588

ADMIRALTY AND MARITIME – Editor: Dr Damien J Cremean

Admiralty and Maritime and the South China Sea 590

TECHNOLOGY AND THE LAW – Editor: Lyria Bennett Moses

Designing for Consumers: Australian Competition and Consumer Commission v Google LLC (No 2) 595

FAMILY LAW – Editor: Richard Ingleby

A Financial Agreements Conundrum 599

INTERNATIONAL FOCUS – Editor: Professor Stuart Kaye

Australia's New Foreign Relations Legislation 602

ARTICLES

ABORIGINAL AUSTRALIANS AND THE COMMON LAW

The Honourable Margaret Beazley AC QC

From the earliest days of the colony of New South Wales, the interaction of Aboriginal Australians with a system of law which was alien to them and conducted in a language which they did not speak was fraught. The wrongly attributed common law notion of terra nullius to the lands of which the British Crown took possession has been the source

of disadvantage to Aboriginal communities which has outlived its reversal in *Mabo v Queensland* (No 2). This article examines the early beginnings, and traces the history of, Aboriginal interaction with the common law through to the 21st Century in case law and legislation, with a focus on Aboriginal identity and sovereignty. The topic is huge and it was necessary to be selective. I trust, however, that the issues I have chosen will make a contribution to a fuller understanding of our history. 609

THE RISE OF THE ANTI-ARBITRATION INJUNCTION

Justice AS Bell 627

THE REQUIREMENT OF PROPERTY OR POSSESSORY RIGHTS FOR RELIEF AGAINST FORFEITURE

Fabian Di Lizia

There are broadly two "heads" of jurisdiction for relief against forfeiture in the modern context: where there is fraud, accident, mistake or surprise; or where the object of the relevant transaction is to secure a stated result. In respect of the latter, although not definitively resolved in Australia, the courts in England hold that the forfeited right must be sufficiently "proprietary" or "possessory" and not "merely contractual". It is argued that this approach should not be adopted in Australia. Such an approach is not required to uphold the underlying rationale of relief against forfeiture to mitigate against the unconscientious exercise of contractual power. It is unclear why the courts of equity should protect property rights above others. It also leads to courts engaging in confusing debates about what is sufficiently "proprietary" or "possessory" to enliven the jurisdiction to grant relief. 641

Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Thomson Reuters

DECISIONS RECEIVED IN JUNE/AUGUST 2021

KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ([2021] HCA 24) (*Citizenship and Migration; High Court and Federal Court*) 666

Price v Spoor ([2021] HCA 20) (*Limitation of Actions; Mortgages; Statutes*) 607

Taxation, Deputy Commissioner of v Shi ([2021] HCA 22) (*Evidence; High Court and Federal Court*) 634