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EDITORIAL 3

COMMENTS

Clarifying the in rem proceeding 6

Anton Piller doctrine restated 7

Open justice in civil cases 8

Substituted service 9

Expert witnesses in English law 12

ARTICLES

The early identification of issues – *Hon P A Keane*

A recent workshop, jointly sponsored by the Federal Court of Australia and the Law Council of Australia, addressed the topic: "The work of the Court: How it might or should be done." In this article Chief Justice Keane discusses some of the issues which were the focus of that workshop. In particular, he considers the vexed question of discovery and notes that in the course of the workshop it has become apparent that case management has progressed in the Federal Court whereby the judges and the profession have become more willing to devise and deploy case management techniques directed to curbing, if not slaying, the discovery dragon. The Chief Justice also notes that at the workshop a broad consensus emerged that the key to substantial improvements in the speed and efficiency of high value litigation is the early identification of issues. He argues that the benefits to be gained from the early identification of issues will flow through all the steps in the litigation process. For example, discovery will be more focused and less oppressive. Trials will be shorter and clients will be more engaged and hence more responsible. 14

Efficiency and cost in different legal cultures – relevance for civil litigation and ADR – *Hon Michael Kirby AC CMG*

The purpose of this article is to provide some little known information not only on the advantages of alternative dispute resolution (ADR) but, pertinent to international disputes, some material on particular disadvantages of domestic legal systems involving resort to court litigation. The author commences his analysis by pointing out that international commercial arbitration and other forms of ADR are clearly on the increase. Yet he points out that the Australian legal profession at least, has, so far, been somewhat hesitant in embracing such arbitration. He divides his article into three parts: Australian legal culture; international legal culture; and conclusions and lessons. As to the last, in particular, he suggests that two variables can be identified as affecting the attractions that national legal systems present as an alternative to international commercial arbitration. These are the level of economic and social development in the country concerned and the sophistication,

integrity and efficiency of its courts. His article seeks to establish that Australian lawyers must overcome any lingering hostility they may have to comparative and international law and must enhance their awareness of the world, and particularly of their region of the world. He observes that lawyers and other professionals in ADR need also to become more familiar with the features of the civil law tradition which, until now, has substantially been a mystery to those trained in the common law. 20

Security for costs against impecunious plaintiffs – quo vadis? – *Greg Reinhardt*

Costs are a perennial problem. It is expensive to litigate. It is costly – whether suing or being sued. That is why so many litigants, these days, are self-represented. The balance turns if someone is being sued by someone who has no funds. The party being sued, if successful, may get a costs order in its favour in the end but this could prove valueless. In the meantime, it may have paid out large sums in legal expenses. Hence the reason for security for costs applications – to ensure there is money at the end of the litigation if the party being sued is successful or, if such money is not put up, to terminate the case. But security for costs orders can work an injustice if a party is forced to terminate a case, for lack of funds, which it should, in justice, be able to put. These issues underlie the analysis undertaken by Professor Reinhardt in this article. His focus is on a Consultation Paper of the New South Wales Law Reform Commission issued in May 2011. In his analysis he considers the general rule, applicable to litigants in person, that security for costs should not be ordered on the ground of impecuniosity. He notes the different approach which applies to corporations and he looks at the position of a litigation funder – a relatively new phenomenon in Australia. His conclusion is to the effect that access to justice is also an important factor to be borne in mind in the case of natural persons who should not have to access the justice system in the fear that their action will be brought to an untimely end by an order for security. 32

Preliminary discovery, discovery to identify a party and non-party discovery – *Chris Gunson*

In this article the author considers the processes of preliminary discovery, discovery to identify a party, and non-party discovery. He examines the processes with particular reference to the *Supreme Court Rules 2000* (Tas) and the equivalent "harmonised rules" in the *Federal Court Rules 2011* (Cth). He concludes that whilst the existing law relating to preliminary discovery, discovery to identify a party and non-party discovery is applicable to applications brought in the Supreme Court of Tasmania, care must be exercised to ensure that subtle differences between the Supreme Court Rules and the Federal Court Rules are adequately addressed in such applications. 39

BOOK REVIEW – *Damien J Cremean*
How Judges Think by Richard A Posner 45