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ARTICLES

UNDERSTANDING CONTRACT LAW THROUGH AUSTRALIAN LEGAL HISTORY: WHATEVER HAPPENED TO ASSUMPSIT IN NEW SOUTH WALES?

Geoff Lindsay SC

The existence and nature of “contract law” in Australia cannot be wholly disassociated from the court systems that have administered it. There may yet be life in “causes of action” derived from English law that have been displaced, at least in the popular imagination, by the concept of “contract”. The history of “contract law” in New South Wales may offer practical insights into broader questions about Australian law. This article focuses light on: first, the development of contract law in Australia; secondly, the common law system of “issue pleading” retained in New South Wales after England and other Australian jurisdictions had embraced equity’s “fact pleading” system in

conjunction with the joint administration of law and equity in a Judicature Act system in the 19th century; and, thirdly, the importance of court practice and procedure in the development of substantive law. 589

THE CASE FOR HYPOTHETICAL JURISDICTION: POSTULATING
JURISDICTION IN UNMERITORIOUS CIVIL PROCEEDINGS

Brendan Lim

Faced with difficult jurisdictional questions, and relatively easy merits questions that would properly be resolved against the party asserting jurisdiction, may a court assume, without deciding, the existence of its jurisdiction on a hypothetical basis? Unremarkable instances of this practice suggest so, but they lack an explicit conceptual basis and are contradicted by persuasive obiter dicta in other cases. The author defends the practice against diverse objections arising out of the constitutional significance of jurisdictional error, the requirement in federal jurisdiction for a “matter”, the doctrine of res judicata, and the scope of statutory powers to award costs. The author concludes that principled objections fail and pragmatic considerations favour judicial discretion to assume “hypothetical jurisdiction” in appropriate cases. The analysis draws in part on comparisons with practice in the United States. 616

SHAREHOLDER CLASS ACTIONS: ARE THEY GOOD FOR
SHAREHOLDERS?

Paul Miller

The frequency of shareholder class actions in Australia has steadily increased over the past decade to the point where it has been observed that corporations in Australia face a higher risk of a shareholder class action than in any other jurisdiction apart from the United States. The dual benefits of shareholder class actions – compensating investors who suffer loss when corporations breach their disclosure obligations and deterring corporations from breaching them in the future – have largely been taken for granted. However, the effectiveness of shareholder class actions in delivering these benefits warrants closer scrutiny. 633

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