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ARTICLES

JUDGES AND ACADEMICS: DIALOGUE OF THE HARD OF HEARING

Chief Justice Robert French AC

This article reflects upon the history of the relationships between the judiciary and the legal academy and the perceived gap that led to the establishment of the Australian Academy of Law in 2007. It identifies the complexity of different elements of the "legal community" particularly by reference to the judiciary, the practising profession and the legal academy. Points of difference between the judicial function in writing a judgment and the academic function in writing a paper about a particular area of the law are discussed. The author identifies the ways in which, notwithstanding those differences, judges can use academic writing, and the function of academic criticism. 96

AN AGE OF JUDICIAL HEGEMONY

Ronald Sackville AO QC

The opponents of the proposed Commonwealth statutory Charter of Rights identified its fatal defect as its propensity to transfer power from elected representatives to the "unelected" judges. However, the defeat of the proposal has not prevented the High Court from dramatically increasing its own authority at the expense of the powers of elected parliaments and governments. The vigorous assertion of judical authority is most evident in three areas: the constitutional entrenchment of judicial review of administrative action affected by "jurisdictional" error; the expansion of the court's Ch III jurisprudence founded on the purity of judicial power; and the broader reach of the implied freedom of political communication and other implications drawn from the system of representative and responsible government incorporated in the Constitution. In each area, the High Court has formulated the governing principles in such general terms that it has left ample room for even further extensions of judicial authority over the other branches of government. It is only a slight exaggeration to characterise the last two decades as an age of judicial hegemony. 105

COMMUNICATIONS WITH THE COURT

Richard Lilley SC and Justin Carter

Australian courts have recently issued directives directed to the obvious evil occasioned by improper ex parte communications with judges. These directives reflect the unfavourable judicial comments in relation to such practice, which persists notwithstanding its regulation by the barristers' conduct rules in most jurisdictions. This article considers the following aspects of improper ex parte communications: professional obligations under the barristers' conduct rules, reasonable apprehension of bias, contempt of court, professional misconduct, and personal costs orders. The article advances the proposition that compliance with the barristers' conduct rules imposes stricter requirements in relation to such communications than the judicial comments, principally in the context of reasonable apprehension of bias, suggest. 121

JURISDICTION CLAUSES SINCE AKAI

Richard Garnett

The inclusion of a jurisdiction clause in a contract is an important method for limiting the risk to a party of being sued in a foreign country's courts. Since the High Court decision in Akai v People's Insurance (1996) 188 CLR 418, Australian courts have increasingly had to consider the effect of such clauses. Examination of the decisions reveals a heightened appreciation among courts of the significance of such clauses both in the need to interpret them broadly and to restrict the circumstances in which parties can evade enforcement. Future adoption of the 2005 Hague Choice of Court Convention by Australia would likely continue this trend. 134

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