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DO THE LAW LORDS BIND LOWER COURTS?

Oliver Jones

This article examines whether decisions of the Privy Council and the House of Lords, given before the abolition of appeals to the Privy Council from Australia, are, in the absence of High Court authority, binding on all trial and intermediate appellate courts. Most, but not all, Australian authority has held that trial and intermediate appellate courts are no longer bound by any decision of the Privy Council or the House of Lords. Elsewhere in the common law world, pre-abolition decisions remain binding on every court except one of final appeal. The author argues that the latter approach should be embraced in Australia.

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BUILDING MANAGEMENT STATEMENTS AND STRATA MANAGEMENT STATEMENTS: UNHOLY MIXING OF CONTRACT AND PROPERTY

Cathy Sherry

Large-scale developments are increasingly subdivided between separate “stratum” owners who share common facilities. The rights and responsibilities of owners are regulated by a registered building management statement (BMS) or strata management statement (SMS). While BMSs and SMSs are negotiated by initial owners and stakeholders, they are not contracts. They are registered Torrens instruments, binding on all subsequent owners, and should be interpreted with reference to property law. Property law has always been reluctant to enforce agreements of predecessors in title, because they can be economically and socially stultifying. While we need mechanisms to ensure the upkeep of buildings, this does not change the fact that initial owners can make agreements that are suboptimal, or become so through the passage of time. Principles of property law have traditionally allowed courts to safeguard the utility of land and courts should continue to perform this role within the BMS and SMS statutory framework. 393

CIVIL PENALTIES AND PROCEDURAL PROTECTIONS

Matthew Lees

Uncertainty surrounding the procedural protections that apply in civil penalty proceedings creates real difficulties for practitioners and litigants. To understand better the reasons for this uncertainty, this article traces the history of civil penalties in England, Australia, the United States and the European Union. Particular attention is given to the parallel civil and criminal prohibitions under the Competition and Consumer Act 2010 (Cth) (relating to cartel conduct) and under the Corporations Act 2001 (Cth) (relating to directors’ duties) and the strategic regulation theory that purportedly underpins both sets of prohibitions. It is argued that the modern rise of civil penalties calls for corresponding developments in the procedural protections that apply in civil penalty proceedings, and that the rationale for parallel civil and criminal prohibitions is questionable. 404

CONTRACT, CONFIDENCE, AND THE FIDUCIARY RELATIONSHIP

Lee Aitken

A party relying on a detailed contract will often seek further to support its case by attempting to impose some fiduciary obligation on the counterparty. The courts for sound practical, and theoretical reasons, resist this attempt. What are the parameters for such an imposition, particularly where the fiduciary obligation is said to arise from the contractual relationship’s “particular” facts, rather than some pre-existing fiduciary category? Similarly, when does a duty of confidence arise “from the circumstances” rather than an employer-employee, or other category? What happens if that duty is inadvertently breached? May the recipient, say, of mistakenly disclosed confidential documents, use them? All these controversial topics have been examined in recent high authority, discussed in this article. 425

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