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ARTICLES

IS ACCESS TO JUSTICE A RIGHT OR A SERVICE?

Steven Rares

The recent report by the Productivity Commission on Access to Justice Arrangements has made numerous recommendations, including that court fees should be charged on a differentiated basis having regard to the capacity of the parties to pay up to full cost recovery of providing the court to hear the case. At the same time governments have been increasing the levels of court fees particularly in civil and commercial matters. The author argues that equating the provision of the judicial system as a service that can and should be sold is antithetic to the fundamental principle, traceable to Magna Carta, that justice will not be sold or denied and to the rule of law. He asks whether a constitutional problem would arise if such significant fees were charged, as occurred in Canada last year. He also discusses other more appropriate suggestions in the report. 777

SOME JUDICIAL FALLACIES CONCERNING ENTIRE AGREEMENT CLAUSES

I M Jackman

The common inclusion in commercial contracts of an "entire agreement" clause presents a number of challenges to the current judicial trend for broad contextual approaches to the

law of contract, particularly in the significance now attached to pre-contractual negotiations. In principle, there should not be any tension between the parties' clearly expressed intentions and the judicial interpretation of their contract. That there is such a tension, however, is starkly illustrated in the reasoning of Australian intermediate appellate courts as to the extent to which entire agreement clauses: (a) do more than merely re-state the parol evidence rule; (b) negate the existence of collateral contracts; (c) preclude estoppels arising from pre-contractual negotiations; and (d) affect questions of construction generally. On all four of these issues, Australian appellate courts have tended to undermine the clarity and certainty that the parties plainly intend to achieve in their bargain by their express adoption of an entire agreement clause. 791

THE EX ANTE APPROACH TO ASSESSING MATERIALITY: TO WHAT EXTENT ARE SUBSEQUENT PRICE MOVEMENTS RELEVANT?

Andrew Eastwood

The assessment of materiality for the purposes of the continuous disclosure and insider trading provisions in the Corporations Act 2001 (Cth) is required to be undertaken on an ex ante, before-the-event, basis. However, current authority suggests that evidence of the market's reaction to subsequent disclosures constitutes a relevant "cross-check" as to the ex ante judgment formed. This article contends that that position should be reconsidered, and questions whether evidence of subsequent trading activity and price movements should be able to be used to establish materiality at the liability stage. 803

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