

# Australian Bar Review (ABR)

## Volume 50 Part 1

(2020 Annual Plunkett Lecture, articles and book review included in this part are linked to the LexisNexis platform)

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The executive government may exercise powers to affect the rights and interests of an individual. Where the power is statutory, the execution of a statute, the identification of the legal boundaries and the supervision of them by the courts is familiar and relatively well-defined. Where there is no statutory basis for the exercise of power, this article seeks to identify the legal boundaries and the bases on which they may be supervised by the courts.

[Four more questions regarding precedent in federal courts](#)

— *Oliver Jones*

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Basic and important questions of the doctrine of precedent and the principle of comity continue to arise in federal courts. Each concerns the relationship between a lower court and a higher court in the absence of a line of appeal. The author has over some years of writing in the area sought to identify two general additions to the line of appeal as a requirement in the doctrine of precedent. The first, which may be called the 'alter ego rule', is derived from the relationship in precedent between the Law Lords and Australian courts. The second, which may be called the 'status principle', emerges from the relationship in precedent in New South Wales between a trial judge of the Supreme Court and the District Court. It also emerges from the ongoing effect in precedent, in New South Wales and elsewhere, of decisions of the Law Lords made during the currency of appeals to the Privy Council from Australia. The alter ego rule and the status principle suggest the alteration of, or provide a hitherto absent justification for, the answers to the recent questions in federal courts.

[The sacred cows of \*Henderson v Henderson\* and \*Anshun estoppel\* — Abuse of process by another name?](#)

— *Stuart Cobbett*

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The so-called rule in *Henderson v Henderson*, applied in Australian law through the doctrine of *Anshun estoppel*, precludes the raising of a claim or issue in a second action if it was unreasonable for that claim or issue not to have been raised in the first proceeding. The rule has been described as

an extension of the doctrine of *res judicata*, which bars the raising of claims or issues that have been decided. The regularity with which the doctrines are invoked is reflected by the fact that *Henderson v Henderson* is perhaps the most frequently cited 19<sup>th</sup> century English decision and the High Court of Australia case of *Port of Melbourne Authority v Anshun Pty Ltd* is among the 25 most frequently cited cases in Australia. Notwithstanding this apparent importance, this article argues that the doctrines of extended *res judicata* and Anshun estoppel are superfluous. The doctrine of abuse of process can instead be used to control the raising of claims or issues that should have been raised for determination in an earlier proceeding. This was demonstrated by the House of Lords case of *Johnson v Gore Wood & Co*, in which a broad merits-based judgment was applied to determine whether the process of the court was being abused. In *UBS AG v Tyne* the High Court of Australia applied the same merits-based judgment and acknowledged the overlap with the doctrine of Anshun estoppel, without resolving the issue of what ongoing role Anshun estoppel has to play. It is argued that abandoning extended *res judicata* and Anshun estoppel and using the doctrine of abuse of process alone would reduce uncertainty and duplication and avoid a blurring of the lines between the distinct legal principles of *res judicata* and abuse of process.

### Justifying the ‘principle of legality’

— *Nigel Porter-Dole*

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It is argued that the rule of construction now often known as the ‘principle of legality’ is predicated on both (1) a reasonable or probable assumption as to what the legislature intends; and (2) a rule of law requirement of express authorisation or strict legality. The justification in terms of (2) is required to explain the cases in which the rule operates to defeat rather than effect the legislative intention.

### Excessive judicial intervention

— *Matthew Groves*

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In recent times, many appellate courts have considered the consequences of excessive judicial intervention. Judges can, and often should, intervene in a hearing, but error can easily arise when judges intervene too often or too stridently. This article examines the basis for judicial intervention and those principles that have evolved to determine when excessive intervention causes legal error. The article examines the recent decision of *Serafin v Malkiewicz*, which suggests that the approach of UK courts is quite similar to that of Australian courts. It is argued that mechanical approaches, such as statistical calculations of the number of interventions, have been rightly rejected by the courts. The article concludes that the approach of appellate courts is a contextual one, which may sometimes appear vague but provides the most coherent approach.

### An analysis of the use of stepping stones liability against company directors and officers

— *Ian Ramsay and Miranda Webster*

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A controversial development in the law of directors’ duties has been the use by the Australian Securities and Investments Commission of the ‘stepping stones approach’ to directors’ liability whereby the Australian Securities and Investments Commission argues that a director or officer contravened their duty of care by causing or failing to prevent their company from contravening the Corporations Act 2001 (Cth). The growing controversy about this form of liability is reflected in the conflicting views of commentators, the increasing number of stepping stones cases, and the recent decision of the Full Federal Court in *Cassimatis v Australian Securities and Investments Commission*

in which the judges were divided on the merits of this form of liability. The authors discuss whether stepping stones liability is appropriate and the boundaries of this type of liability. They then provide the results of their study of all stepping stones liability cases. The issues studied include the Australian Securities and Investments Commission's success rate in its stepping stones litigation, the types of companies subject to this litigation, the statutory provisions alleged by the Australian Securities and Investments Commission to have been contravened by the companies, and the positions held by defendants in the companies.

## Judicial intervention in international commercial arbitration implicating competition law issues

— *Seunghun Lee*

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This article considers issues related to courts' intervention in international commercial arbitration of competition law claims after analysing the types of such claims. With regard to the interpretation of an arbitration clause in case where one party seeks to dismiss or stay a lawsuit on the ground of such clause, the exclusion of cartel-based damages claims from such clause is contrary to the parties' intent to resolve competition law disputes and other legal disputes by one arbitral tribunal. *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc* recognised the arbitrability of competition law claims, while at the same time establishing the doctrine of a second look at arbitral awards implicating competition law issues, and this formula is broadly accepted by many countries. The second look doctrine to reach a compromise between private autonomy and public regulation is in line with verification of 'flagrant, effective and concrete' infringement of public policy through reading the reasoning of such awards in principle.

## Book Review

*Heydon on Contract* by JD Heydon

— *Kevin Edmund Lindgren*

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