Australian civil procedure (5th ed)

Bernard Cairns
Law Book Company 2002

Matters of civil practice and procedure face practitioners every day. Whether it be a decision as to who to commence proceedings against, where to commence those proceedings, or whether proceedings that have been compromised should be discontinued or dismissed. Often these problems are quite straightforward, but more often than not, they are not straightforward.

Most problems, whether they be straightforward or difficult, can usually be worked through by starting at first principles – a sound understanding of the principles on which the civil litigation system in which we practice is therefore fundamental.

There are few modern publications which provide a comprehensive explanation of civil litigation procedures in Australia. Those which do exist are either long out of date, or are contained in specialised loose leaf services which are specifically tailored to the subject matter of that service.

One publication which does provide a modern overview of the civil litigation system in Australia, is *Australian Civil Procedure* by Bernard Cairns, the 5th edition of which was recently published.

This book provides a comprehensive explanation of the civil litigation procedures applying across all Australian jurisdictions, both Federal and State. The book considers all aspects of procedure from the initial stages – jurisdiction, commencement of proceedings and service of process – to the final stages – appeals and execution. The 5th edition now also includes a useful chapter on settlement. The discussion on class actions or representative proceedings has also been expanded having regard to recent, principally Federal Court, decisions, and the section dealing with cross-vesting and cross-vesting procedure has been updated having regard to the decision of the High Court in *Re Wakim; ex parte McEnally* (1999) 198 CLR 511, and the legislative responses thereto.

As with all publications, some topics and cases are treated somewhat curiously. One example in the present text is the treatment of the decision of the High Court in *State of Queensland v JL Holdings Pty Limited* (1997) 189 CLR 146, which is discussed extensively in the section dealing with case management, although it does not rate a mention in the section dealing with amendments.

The book is in no way a substitute for a looseleaf service dealing with a particular jurisdiction. It does, however, have many practical benefits. In addition to providing a thorough explanation of the fundamental principles underlying civil litigation procedure, the book provides authorities, across all Australian jurisdictions. Often specialist looseleaf services concentrate on the authorities of that jurisdiction, in circumstances where there are very useful authorities to be found elsewhere.

The book is recommended to those practitioners requiring an easily accessible and comparatively inexpensive discussion of civil procedures in Australia.

Reviewed by Ian Pike

Environmental impact assessment in Australia: Theory and practice (3rd ed)

Ian Thomas
Federation Press 2001

Environmental impact assessment: 'One of the deceitful co-options of the concept of ecology and environment. Whilst sanctimoniously reciting the catechism of 'environmentalism' it anoints and blesses the 'process' of development'. Thus speaks one of the many reviewers (and critics) of environmental impact assessment considered by Ian Thomas in his third edition of *Environmental Impact Assessment in Australia.*

While this third edition follows, in general, the same structure as the first two editions of this analysis of environmental impact assessment in Australia, the content has been updated to take into account the primary legislative changes in each jurisdiction including, in particular, the introduction of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (' the EPBC Act') and the introduction of 'integrated development' into the New South Wales planning system by the 1 July 1998 amendments to the *Environmental Planning and Assessment Act 1979*.

The new section on the EPBC Act is particularly useful. In a little over 10 pages, Thomas effectively discloses the essential structure of the Act and explains, in clear terms, the concepts of a 'controlled' action (a form of action which triggers the requirement for approval under the Act), 'matters of national environmental significance' (one of the components of a 'controlled' action – namely that the action has, will have, or is likely to have a significant impact on a matter of national environmental significance) and the administrative guidelines, which provide criteria for determining whether or not any particular impact is 'significant'. Given the complexity of the EPBC Act, this section alone of the third edition makes it a valuable contribution to the understanding of environmental impact assessment in Australia.

There are two other primary attractions of the third edition. The reference list is extensive and enables the reader readily to locate more detailed information in respect of the topics of interest. This is particularly important given that Thomas's work reviews not only a comprehensive range of impact assessment procedures (Chapter three: 'The many faces of impact assessment'), but also the (vast) range of methods and models for predicting impacts (Chapter eight: 'Determining impacts for the EIS'). Given that the range of impact assessment procedures include economic impact assessment, energy analysis and greenhouse assessment, health impact assessment, regulatory impact assessment, risk analysis, social impact assessment, species impact assessment, technology assessment, cumulative impact assessment, strategic environmental assessment and integrated impact assessment, the reference list is essential.

The other particularly attractive feature of the third edition is that both the reference list and the text itself contain numerous references to Internet addresses, both of government and educational institutions, relevant to many of the topics

addressed. In particular, for each jurisdiction in Australia, the brief overview in chapter six ('EIA procedures in Australia') is supported by detailed references, as well as useful Internet addresses to obtain further information.

Legal practitioners who deal with environmental impact statements as part of their legal practice will also be particularly interested in parts of chapter seven: 'Contents of the EIS', including chapter 7.7: 'Monitoring, surveillance and auditing – Checks on the EIS and EIA process'. In this section, Thomas analyses various approaches to monitoring, surveillance and auditing the content of EISs. The vast array of processes and methods for determining environmental impacts in chapter eight will also be a revelation for many readers, including (which was certainly a relief to the reviewer) Table 8.6: 'Overview of methods and their applicability to stages of an environmental impact assessment'. This table, at a glance, summarises the methods available to assess environmental impacts, their strengths and deficiencies.

Given, as Thomas states, that EIA processes have been adopted by governments worldwide (and in every jurisdiction in Australia), it is important that the theory (and values) which support EIA receive detailed scrutiny. Thomas fully recognises the risk that EIA runs; that rather than leading to a better decision making, EIA may descends into a form of 'ritual' falling between, on the one hand, developers who may seek it as a mechanism for assisting the approval of proposals and, on the other hand, communities, who expect that it will protect the environment.

While the primary interest of the third edition will be for practitioners of environmental impact assessment itself, it contains much of interest for legal practitioners involved in environmental and planning law. As Thomas notes, EIA has become institutionalised and has formed an industry to look after it. By analysis of the role of EIA, Thomas re-emphasises EIA as a social tool, with a recognised place in the politics of decision making. The reminder is timely.

Reviewed by Jayne Jagot

Reshaping the judiciary: Law in context special issue, Vol 18(1) 2000

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Controversies about the independence of the judiciary are not a recent phenomenon. The substantial caselaw on bias, for example, suggests that litigants have been questioning the independence of judges for hundreds of years. Nor are attempts to make courts more accountable entirely new[1]. However, there can be no doubting the claims of Dr Chris Corns, in his introduction to *Reshaping the Judiciary*, that the past twenty years have seen an unprecedented array of challenges to the judiciary and, in particular, to judicial independence and accountability. Given the recent popular profile and high stakes of these challenges, the collection of essays in *Reshaping the Judiciary* is a topical and compelling contribution to the debate. Now is, as Dr Corns suggests, an opportune time to reflect on these challenges.

But what, exactly, are the challenges to which Dr Corns refers? Anecdotally it seems clear enough to most practitioners (and, no doubt, to judges) that there is increasing pressure on the judiciary to be accountable. Such pressure comes from all quarters but not least from the executive government. Citizens and politicians want to know how judges go about their business and how much it costs for them to do so. One might have thought, however, that such simple principles as conducting proceedings in open court would deal with, at least, the first question. As for the second question, experience suggests that questions of cost, although perhaps a sticking point in relations with the executive, hardly warrant any wholesale reshaping of the way judges go about their business.

Elizabeth Handsley, in 'Can public sector approaches to accountability be applied to the judiciary' asks the pertinent question: what, exactly, do we mean by 'judicial accountability'? The answer, unsurprisingly, is not at all clear. Most notions of accountability, when used in this context, derive from attempts to make executive government more open, more disciplined, less corrupt and better managed. All of these are, of course, goals that most of us would wish the judiciary also to pursue. However, Handlsey cautions that the mechanisms for achieving these goals in the public service do not easily translate to the judiciary. Goals such as efficiency and openness are laudable as far as they go but, Handsley suggests, beg the question.

Handsley's rigorous appraisal of the terminology, criteria and concepts of attempts to achieve public service accountability, and their application to the judiciary, is enlightening. Her conclusion, that judicial accountability is best valued by reference to the public trust upon which judges hold office, avoids the contradictions that are part and parcel of popular debate on this matter (such as calls for judges to follow the rule of law) and provides a starting point for further thought on how accountability can be improved.

One of the more concrete measures adopted in pursuit of judicial accountability in New South Wales recent years has been the introduction in 1986 of the Judicial Commission. Ivan Potas, the Commission's Director of Research, argues in his paper that the complaints function of the Commission has been effective in contributing to public confidence in the judiciary. Potas counters claims that the Commission is a toothless tiger by emphasizing its role in filtering out trivial and insubstantial complaints without referring them to parliament. As it is only Parliament that ultimately has powers of sanction over judges, Potas suggests that the complaints function, whilst perhaps technically 'toothless', is predicated upon strong notions of judicial independence, upon which there is no transgression except in the most serious circumstances.

Professor Allars' paper on the bias rule identifies and explores a number of themes in the debate about judicial independence. Allars examines the rationales for the bias rules, starting with the apparent oddity of the pecuniary interest test for bias (which involves disqualification where there is neither actual nor apprehended bias on the part of the judge), and questioning the various rationales for the rule. She concludes that the pecuniary interest test is ready to be discarded in favour of a single