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Truth and justice, and sheep — *Stephen Gageler* 205

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This article is a reflection on the nature of and relationship between truth and justice according to the rule of law. Within the Western legal tradition, and even within the common law system, the concept of truth and the concept of justice as reflected in available forms of civil procedure have not remained constant. The relationship between truth and justice has evolved through many phases.

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*Nelson v Nelson* contains a dictum, adopting a statement of Scott, that when a presumption of advancement is rebutted the outcome is a resulting trust. Scott puts that statement on two bases. The first is that as a matter of 17<sup>th</sup> century legal history, rebuttal of a presumption of advancement led to a resulting trust. The second is that some North American cases support it. This article contends that Scott's statement is true sometimes but not always. His proposition of legal history is not supported by the cases on which he bases it, and the North American cases on which he relies are not persuasive precedents for Australian law. It contends that sometimes when rebuttal of a presumption of advancement occurs the doctrine that a statute cannot be used as an instrument of fraud becomes operative, leading to a constructive trust. Sometimes rebuttal of the presumption leads to an express trust. There are other possibilities also. Sometimes equitable doctrines other than those concerning trusts decide the outcome.

Anti-suit injunctions in Australia in aid of an arbitration agreement  
— *Lee Carroll*

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By an anti-suit injunction, a court orders a party to refrain from bringing a claim, or suspend a claim brought, before the court of another state or before an arbitral tribunal. An anti-suit injunction may facilitate the arbitral process (by restraining foreign court proceedings brought in breach of an arbitration agreement or protecting an arbitration against foreign injunctions) or obstruct it (by preventing an arbitral tribunal from hearing a claim or by obstructing the enforcement of an arbitral award). This article is concerned with the former — the grant of anti-suit injunctions which facilitate or protect the arbitral process. In Australia, an anti-suit injunction is granted in a court's inherent equitable jurisdiction although superior courts have statutory powers to grant injunctive relief in respect of foreign proceedings under the Federal Court of Australia Act 1976 (Cth). This statutory power does not derive from the International Arbitration Act 1974 (Cth), but is consistent with that legislative regime. This article considers when an Australian court should exercise its discretion to enjoin foreign proceedings brought in breach of an arbitration agreement and the extent to which the feelings of the foreign court may be relevant. This article also considers to what extent the eventual enforceability or otherwise of the anti-suit injunction is relevant.

Litigation preclusion: To what extent could (or should) a litigant  
be barred by prior litigation to which it was not a party?  
— *James O'Hara*

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A central precept of the Australian legal system is the opportunity to be heard. Without access to courts, rights and remedies become meaningless. The rule of law relies on vindication of rights. But access to justice does not accord carte blanche to litigate. It is fettered. The principles of *res judicata*, cause of action estoppel, issue estoppel, Anshun estoppel and abuse of process ('closure rules') are such a fetter. But procedural rules are not ends in themselves, only a means to an end, which is the attainment of justice. So just how far do the closure rules go in serving that end? Where a litigant was a party to previous litigation, the justice of barring them from subsequent relitigation is clear. The person has already had an opportunity to present evidence and arguments. Duplicative relitigation is manifestly unfair and brings the administration of justice into disrepute. But to what extent could or should a person be barred by prior litigation to which it was not a party? This article answers that question. It structured in five parts. First, it expresses the legal principles for dealing with duplicative litigation. Second, it considers the breadth of the closure rules. Third, it returns to the underlying rationale of the closure rules. Fourth, it identifies the extent to which a non-party to prior litigation can be barred. Fifth, it explores the extent to which a non-party to prior litigation should be barred.

Privacy in Australia from Federation to Framework —  
Will the notifiable data breach regime breathe new life?  
— *Nigel Wilson*

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At the start of the 21<sup>st</sup> century the legal concept of privacy was just short of dead in Australia. Despite longstanding suggestions of support for the concept in its disparate forms — including the potential

for a common law, or even a statutory, cause of action — no enduring legal criteria had been identified. The European-based privacy principles in the Privacy Act provided a limited source of privacy protection but with little teeth. The near final nail in the coffin has been the recent lack of application to metadata of the Australian Privacy Principles. More recently, developments in 2012 in relation to the Human Rights Framework have given no substantive content to the existence or protection of privacy in Australia. However, the recent enactment of the notifiable data breach legislation has potentially resurrected privacy in Australia. New life has been breathed into privacy protections which are reportable to the Australian Information Commissioner, the subject of significant penalties and, most importantly, involve the very real potential of judicial involvement.

Damages for breaches of discrimination law —  
The contemporary Australian jurisprudence and practice  
— *Kenneth Yin*

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This article critiques the oft-quoted proposition that tort principles should be applied to the assessment of damages for unlawful discrimination. We argue that the jurisprudential foundation for the recovery of damages for unlawful discrimination differs to that for damages in tort, and explain how this difference can lead to practical differences in their assessment. While it is legitimate to be guided by the principles in analogous tort cases, there is a fault line beyond which the application of tort principles must yield to the statutory direction for the assessment of damages for unlawful discrimination. We identify this fault line in our article. The remainder of the article is devoted to exploring the contemporary jurisprudence in the practical assessment of damages for unlawful discrimination. We incorporate here a discussion of the broad principles that apply to the discretion to award damages, followed by a brief analysis of the criteria that govern the award respectively of aggravated and exemplary damages.