

**Remedies in Equity**  
**The Laws of Australia**  
 Edited by David Wright and  
 Samantha Hepburn  
 Published by Thomson Reuters,  
 Lawbook Company  
 426pp \$97.30  
 Reviewed by BJM

Let me start with three questions.

1. Would you say, Mareeva Injunction or Mareeva Order?
2. What is the fundamental difference between a Search Warrant and an Anton Piller order?
3. Apart from obtaining an Order for specific performance, what other remedies are available in equity?

I ask these questions because they represent the three major areas of enlightenment which I gained through reading this book. Oh, and if you don't know the answers, the first is Mareeva Order, the second is that an Anton Piller does not provide a right of entry on property without the consent of the respondent, although by refusing he or she is likely to be in contempt and as to the third, you will have to read the book for yourself as the answer is too complex to be summarized succinctly in a book review.

I have been involved in obtaining Mareeva Orders on several occasions, as have I been involved in advising a recipient of an Anton Piller Order, but this book has made me realise how woefully inadequate was my knowledge of those two remedies.

In terms of damages, we tend to be raised on a diet of common law remedies, with the backstop of seeking specific performance where a party refuses to complete a contract or the like. But think about concepts of "tracing" assets which have been disposed of, or merged with other assets, constructive trusts, seeking return of property, etc and we start to realise that we are familiar with other equitable remedies. And, what of Injunctions and seeking Restitution?

This book is, I must emphasise, written at a level of detail which puts it right up in the top echelons of research material for practitioners. It is not a student level text but, in my view is a formidable and first rate research text which all will find useful, be it as solicitor, counsel or judge.

As you would expect, it has copious citations of authorities and extensive footnotes. It would be a mistake to simply read the text and ignore the footnotes. I found myself being drawn to them in

order to understand better, through a more detailed explanation, what is often a brief statement in the body of the text.

The outside back cover contains an overview of this book, which includes the following summary with which I entirely agree:

"Extensive case examples and factual discussion complement a thorough examination of established principles. This includes coverage of the latest judicial decisions and any statutory modification of the remedies in equity. This work also identifies the critical matters which can affect the exercise of a court's discretion and when remedies in equity may or may not be available".

I conclude by noting that it seems that the text is up to date as of June 2010. It is also published as Subtitles 15.5-15.12 in Title 15 of the Laws of Australia Encyclopedia (and accordingly contains many references to past editions thereof).

This book is highly recommended.

**Open Constitutional Courts**  
 Patrick Keyzer  
 The Federation Press  
 208pp \$80.00  
 Reviewed by Duncan Kerr SC

This is a sustained work of well-researched advocacy. The central thesis of this small but valuable book is that the traditional common-law rules of costs and standing deriving from a private law paradigm have raised inappropriate and unnecessary barriers against those who have sought to agitate constitutional issues within the Australian legal system.

Keyzer argues that standing rules and the indemnity rule of costs derived from private law norms should 'be replaced with a rule that any person with a serious, arguable question of constitutional law is entitled to access to a constitutional court; and so long as they do not engage in an abuse of process in doing so, they should be entitled to be heard.'

He argues for what he calls a 'new democratic rationale' for judicial review in Australian constitutional cases.

Here I think Keyzer slightly over-eggs the omelette. It is one thing to urge that a constitutional court should approach public law remedies, and more particularly, constitutional review, by different standards than flow from the private law paradigm he so convincingly attacks; it is another to assert that allowing citizens open access to raise

constitutional issues is a vindication of popular sovereignty—or that judicial review must be an integral part of the system of representative government.

I have a lot of sympathy for the outcomes Keyzer advocates— his proposition that the importance of enforcing constitutional norms transcends the existence or non-existence of a legal right in a particular individual in a particular case seems self-evident. If that is so there is much to say in favour of liberalising standing rules and abandoning the indemnity costs principle for such cases.

However, as Keyzer himself highlights (at 142,143), it is awkward to conceptualise the Australian Constitution as the product of the Australian people's autochthonous democratic national choice.

If authority flowing from democratic legitimacy is the touchstone, it is hard to see why the text of an ancient document, based on deliberations within the Australian colonies that excluded more than half of the then adult residents, and given force not by their will but by a law passed by the Imperial Parliament, should prevail over laws passed by modern Commonwealth and State Parliaments elected on fair and universal franchise. Other arguments, which Keyzer also makes, for supporting the outcomes he supports are more persuasive.

Yet a reader need not agree with this, or any other aspect of Keyzer's thesis, to enjoy and benefit from his book. The argument stands on solid research. His scholarship and elegant analysis of the cases will reward anyone seeking to understand this somewhat complex area of Australian law.

Keyzer provides a comprehensive overview of the law governing the threshold right to seek non-statutory public law remedies. That includes not only an examination of costs and standing rules but also consideration of the role of the Attorney-General in granting or declining to grant a fiat and the opportunity for non-parties to be heard as *amicus curiae*.

It is a tight well-written book and a welcome addition to the library of any practitioner with either a practical interest in public law remedies or the theory of Australian constitutional law.