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CURRENT ISSUES – Editor: Mr Justice P W Young

High Court Centenary Conference	783
Re-enactment of first sitting of the High Court	783
The death penalty	784
Romalpa Clauses in the 21st century	784
Death of Stern v McArthur?	784
Part-time judges	785
English court “reforms”	786

CONVEYANCING AND PROPERTY – Editor: Peter Butt

“Proposals” affecting land	787
Obligation to repair common roof?	788
Torrens easement not capable of abandonment	788
Landlord’s liability in negligence	789

FAMILY LAW – Editor: Anthony Dickey QC

Effect of repudiating an arbitration agreement	792
Are changed circumstances required for variation of a provision for periodical payments in a child support agreement?	793

INTERNATIONAL FOCUS: Editor: Ryszard Piotrowicz

Can Kofi fix it? The United Nations in Iraq	795
---	-----

PEOPLE IN THE LAW – Editor: Geoff Lindsay SC

Appointment of Senior Counsel (NSW)	800
Bar Council elections (Vic)	800

RECENT CASES – Editor: Mr Justice P W Young

Names	801
Wills: Gift to trustee company.....	801
Restitution: Commercial benefit.....	801
What is a naming right?.....	802
The bell at St Augustine’s	802

ARTICLES

THE TENSION BETWEEN LEGISLATIVE SUPREMACY AND JUDICIAL REVIEW

Hon Sir Anthony Mason AC KBE

The subject of this article is one which demonstrates both Australia’s debt to the common law of England and the way in which our development of the English common law has resulted in some differentiation, without, in the author’s view, departing from the traditions of the English common law. Judicial review signifies judicial review of statutes for invalidity. It also signifies judicial review of administrative decisions. This article addresses both aspects of judicial review. Both have their origins in our English common law legacy. 803

THE HIGH COURT AND THE DEATH PENALTY: LOOKING BACK, LOOKING FORWARD, LOOKING AROUND

Hon Justice Michael Kirby AC CMG

For most of the first century of the High Court of Australia it presided over a legal system which imposed the sentence of death for capital crimes. In this article, the author reviews the 16 reported appeals against conviction carrying the death penalty. He examines whether the High Court observed an approach of “strict scrutiny” or “special vigilance” in such cases, as the Privy Council has lately done in Caribbean appeals and implies that most judges did not. He explores the reported increase in Australian support for the death penalty following the sentences imposed on the prisoners convicted of the Bali bombings of October 2002. He suggests three reasons why most Australian judges and lawyers continue to oppose the death sentence: their knowledge of imperfections in legal proceedings; the lack of evidence of significant deterrence; and their objection to being involved in a process that debases the community that carries it out. 811

AUSTRALIAN EXPERIENCE WITH SELF-REPRESENTED LITIGANTS

Hon Justice Robert Nicholson AO

The right of parties to appear personally is recognised, however, those self-represented litigants are not governed by the duties owed to a court by a legal practitioner. It is these duties upon which the operation of the court system is so highly dependent (duties of disclosure to the court, avoidance of abuse of court process, to not corrupt the administration of justice, and to conduct cases efficiently and expeditiously). If the

number of self-represented litigants became substantial, the potential could exist for the non-application on a large scale of the seminal principles upon which the Australian curial system operates. This could impact on the effective operation of common law courts as we now know them. This article outlines the points at which the courts, the legal profession and the public have given consideration to the interaction between the self-represented litigant and the Australian curial system. 820

NEW BOOKS 827

OBITUARY

Lord Shawcross GBE PC QC..... 830

The Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Lawbook Co

DECISIONS RECEIVED IN OCTOBER 2003

Hoyts Pty Ltd v Barns (*Appeal and New Trial; Negligence*) ([2003] HCA 61) 1934

Immigration and Multicultural Affairs, Minister for, Re; Ex p Applicant S154/2002 (*High Court and Federal Court*) ([2003] HCA 60) 1909

Romanos v Pentagold Investments Pty Ltd (*Equity*) ([2003] HCA 58) 1882

Tanwar Enterprises Pty Ltd v Cauchi (*Equity*) ([2003] HCA 57) 1853

Visy Paper Pty Ltd v Australian Competition and Consumer Commission (*Trade Practices*) ([2003] HCA 59) 1893

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- Proof pages will be sent to contributors. Authors are responsible for the accuracy of case names, citations and other references. Excessive changes to the text cannot be accommodated.
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 4. Austin RP, “Constructive Trusts” in Finn PD (ed), *Essays in Equity* (Law Book Co, 1985).
 5. Austin, n 4, p 56.

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 6. Sheehy EA, Stubbs J and Tolmie J, “Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations” (1992) 16 Crim LJ 220.
 7. Sheehy et al, n 6 at 221.

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