
Australian Law Journal

GENERAL EDITOR
Mr Justice P W Young

PRODUCTION EDITOR
Cheryle King

ASSISTANT GENERAL EDITOR
Dr Paul Gerber

The mode of citation of this volume is
(2004) 78 ALJ [page]

The Australian Law Journal is a refereed journal.

Australian Law Journal Reports

TEAM LEADER
Carmel Jones

PRODUCTION EDITOR
Carolyn May

CASE REPORTERS
Lachlan Cottom
Clare D'Arcy
Paul Govind
Renu Prasad
Colleen Tognetti
Susan Waywood
Angeline Wong

The mode of citation of this volume is
78 ALJR [page]

THE AUSTRALIAN LAW JOURNAL

Volume 78, Number 4

April 2004

CURRENT ISSUES – Editor: Mr Justice P W Young

Sentencing of Aboriginal alleged paedophile	219
Contempt shown by journalists	220
Retrials in criminal matters.....	220
Law reviews	221
Administrative law: Henry VIII clauses	221
Custody of children	229
New South Wales State Arms Act.....	229

CONVEYANCING AND PROPERTY – Editor: Peter Butt

Purchaser's claim to possessory title thwarted	230
Nature of rights of pre-emption	231
Vendor's obligations to "proceed with all due expedition"	232
Severance of joint tenancy.....	233

RECENT CASES – Editor: Mr Justice P W Young

Public documents: Use of extrinsic evidence to aid interpretation	235
Construction of documents	235
Corporations: Administration - Meetings by video link	236
Deeds: need for delivery	236
Crown lands: Estoppels	237
Executor suing for damages caused to beneficiary.....	237
Embracery	237
A cause and <i>the</i> cause	238
Maintenance and champerty	240
Unconstitutional electoral distributions in Western Australia	240

NEW BOOKS	243
------------------------	-----

ARTICLES

TAMPA INCIDENT: SOME SUBSEQUENT LEGAL ISSUES

Michael White

The controversy surrounding the “Tampa incident” commenced in August 2001 and continues. This article concentrates on some legal issues arising from the incident. In particular, it describes and discusses the litigation in the Federal Court of Australia and High Court of Australia, the retrospective legislation removing substantive rights, and the interception of communications to and from the Tampa by the Defence Signals Directorate. Some conclusions about such matters are set out including that the Australian law on habeas corpus may need development for circumstances such as arose in the Tampa incident. Also discussed are concerns that the rule of law was denied the people on board the vessel, that the Australian Defence Force acted unlawfully and that no full and frank inquiry has been made into it, and that information unlawfully gathered by the Defence Signals Directorate and passed on to Australian government officers who had the conduct of the litigation for the Commonwealth may have been misused. 249

THE STATUTORY RIGHT OF ACTION IN REM

Michael Jonsson

One of the legacies of the tumultuous history of the High Court of Admiralty is the heavy reliance upon statute within the contemporary Anglo-Australian law of admiralty. This article will examine the statutory revival of the law of admiralty that has been progressing since the early 19th century, with an emphasis upon the Australian experience. While statute has, for the most part, provoked modernisation and reform of the jurisdiction, it will be seen that the contemporary formulation of the action in rem remains influenced by institutional pressures which preceded the judicature reforms. This feature of admiralty jurisprudence may possess a continuing relevance to the constitutional foundation of a significant part of the contemporary Australian jurisdiction. 262

SIMILAR FACT EVIDENCE: A PITTED BATTLEFIELD

Kylie Downes LLB (Hons), BCL (Oxon)

The High Court in *Pfennig v The Queen* (1995) 182 CLR 461 held that the trial judge, when faced with the tender of similar fact evidence, must ask whether there is a rational view of the evidence that is consistent with the innocence of the accused. This is an exercise in the assessment of the probability of the accused’s innocence in the light of the similar fact evidence. The decision to admit similar fact evidence in a criminal trial, in the absence of any legislation, has always required such an assessment. Additionally, and despite expressing opposition to such an approach, Courts have always permitted evidence to be tendered to encourage propensity reasoning. This article evaluates the approach taken by the courts to similar fact evidence and considers whether there has been any real development or change in this rule. 279

The Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Lawbook Co

DECISIONS RECEIVED IN FEBRUARY/MARCH 2004

Alexander v Perpetual Trustees WA Ltd (<i>Equity</i>) ([2004] HCA 7)	411
Bashford v Information Australia (Newsletters) Pty Ltd (<i>Defamation</i>) ([2004] HCA 5)	346
Broadcast Australia Pty Ltd v Minister Assisting the Minister for Natural Resources (Lands) (<i>Real Property</i>) ([2004] HCA 4)	339
Gattellaro v Westpac Banking Corporation (<i>Evidence; Guarantee and Indemnity</i>) ([2004] HCA 6)	394
Murphy v Overton Investments Pty Ltd (<i>Trade and Commerce</i>) ([2004] HCA 3)	324
Putland v The Queen (<i>High Court and Federal Court</i>) ([2004] HCA 8)	440
Silbert v Director of Public Prosecutions (WA) (<i>Constitutional Law; Criminal Law; High Court</i>) ([2004] HCA 9)	464
Whisprun Pty Ltd v Dixon [No 2] (<i>High Court</i>) ([2004] HCA 2)	321

Guidelines for Contributors

Submission and licence agreement instructions

All contributions to the journal are welcome and should be sent, with a signed licence agreement, to the Production Editor, *The Australian Law Journal*, Lawbook Co, PO Box 3502, Rozelle, NSW 2039 (mail), 100 Harris St, Pyrmont, NSW 2009 (courier) or by email to alj@thomson.com.au, for forwarding to the Editor. Licence agreements can be downloaded via the internet at http://www.lawbookco.com.au/authorsupport/d_authorJournals.asp. If you submit your contribution via email, please confirm that you have printed, signed and mailed the licence agreement to the attention of the Production Editor at the mailing address noted above.

Letters to the Editor

By submitting a letter to the editor of this journal for publication, you agree that Thomson Legal & Regulatory Limited, trading as Lawbook Co, may edit and has the right to, and may license third parties to, reproduce in electronic form and communicate the letter.

Manuscript

- Manuscript must be original, unpublished work that has not been submitted for publication elsewhere.
- Personal details (name, qualifications, position) for publication and a delivery address, email address and phone number must be included with the manuscript.
- Manuscript must be submitted electronically via email or on disk in Microsoft Word format.
- Manuscript should not exceed 10,000 words for articles or 1,500-2,000 words for section commentary or book reviews. An abstract of 100-150 words is to be submitted with article manuscripts.
- 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.
- Contributors of articles receive 25 free offprints of their article and a copy of the part in which the article is published. Other contributors receive a copy of the part to which they have contributed.
- This Journal complies with DEST Specification 4.3.4 for the peer review process. Each article is, prior to publication, reviewed in its entirety by a qualified expert who is independent of the author.

Style

1. Levels of headings should be clearly indicated (no more than four levels).

2. Cases:

- Case citation follows case name. Where a case is cited in the text, the citation should follow immediately rather than as a footnote. Give at least two and preferably all available citations, the first listed being the authorised reference.
- Australian citations should appear in the following order: authorised series; Lawbook Co./ATP series; other company series (ie CCH, Butterworths); media neutral citation.
- "At" references should only refer to the best available citation, eg: *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 34; 66 ALJR 408; 107 ALR 1.
- Where only a media neutral citation is available, "at" references should be to paragraph, eg: *YG v Minister for Community Services* [2002] NSWCA 247 at [19].
- For international cases best references only should be included.

3. Legislation should be cited as follows:

Trade Practices Act 1974 (Cth), s 51AC. The full citation should be repeated in footnotes.

4. Books should be cited as follows:

Macken JJ, O'Grady P, Sappideen C and Warburton G, *The Law of Employment* (5th ed, Lawbook Co, 2002) p 55.

- In footnotes do not use *ibid* or *op cit*. The following style is preferred:

4. Austin RP, "Constructive Trusts" in Finn PD (ed), *Essays in Equity* (Law Book Co, 1985).

5. Austin, n 4, p 56.

5. Journals should be cited as follows:

- Odgers S, "Police Interrogation: A Decade of Legal Development" (1990) 14 Crim LJ 220.

- Wherever possible use official abbreviations not the full name for journal titles.

- In footnotes do not use *ibid* or *op cit*. The following style is preferred:

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.

6. Internet references should be cited as follows:

- Rickatson S, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, subscription service) at [16.340], <http://subscriber.lawbookco.com.au> viewed 25 June 2002. Underline the URL and include the date the document was viewed.

For further information visit the Lawbook Co website at <http://www.lawbookco.com.au> or contact the Production Editor.

SUBSCRIPTION INFORMATION

The *Australian Law Journal* comprises twelve parts a year.

Customer Service and sales inquiries:

Tel: 1800 650 522

Fax: 61 2 8587 7200

Web: www.lawbookco.com.au

Email: service@thomson.com.au

Advertising inquiries:

JENNIFER OSBURN

National Advertising Manager

Tel: 61 3 9205 0606

Fax: 61 3 9853 0342

Email: jennifer.osburn@thomson.com.au

Editorial inquiries:

Tel: 61 2 8587 7000

HEAD OFFICE

100 Harris Street PYRMONT NSW 2009

Tel: 61 2 8587 7000 Fax: 61 2 8587 7100

THOMSON



LAWBOOK CO.

© Thomson Legal & Regulatory Limited ABN 64 058 914 668 trading as Lawbook Co.

ISSN 0004-9611

Typeset by Lawbook Co., Pyrmont, NSW
Printed by Ligare Pty Ltd, Riverwood, NSW