

---

# 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  
Cathie Dickinson  
Paul Govind  
Renu Prasad  
Susan Waywood

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

---

# THE AUSTRALIAN LAW JOURNAL

Volume 78, Number 5

May 2004

## **CURRENT ISSUES – Editor: Mr Justice P W Young**

The Fate of the House of Lords as a Court.....	295
Retirement of Meagher JA .....	297
Judges' pensions.....	301
Articles of clerkship in Victoria .....	301
Appointment of silk in Victoria.....	301
Correction.....	301
How to write a first class legal article .....	302
Headless whore.....	303
General Editor's absence overseas .....	303
Privileged parking?.....	304

<b>LETTER TO THE EDITOR</b> .....	305
-----------------------------------	-----

## **CONVEYANCING AND PROPERTY – Editor: Peter Butt**

Enforcing set-off rights against landlord's successor .....	307
Tenant's liability continues after assignment .....	308
Forcing rent review.....	308
Two cases on vendor and purchaser .....	309

## **OVERSEAS LAW – Editor: Ross Buckley**

Shareholder nominations of directors .....	311
--	-----

## **INTERNATIONAL FOCUS – Editor: Ryszard Piotrowicz**

Australia's protection obligations under the Convention against Torture .....	315
---	-----

---

**RECENT CASES – Editor: Mr Justice P W Young**

Rectification of companies office register .....	318
Strata titles: Is window cleaning maintenance? .....	318
Evidence: How rulings to be made .....	319
Construction of documents .....	319
Prescriptive easements: Licence by inaction .....	319
Landlord and tenant: Whether tenant's conduct caused injury .....	320
Correction .....	320
Impersonation and the nemo dat rule .....	321
Flawed exercise of discretion by trustee .....	321

**ARTICLES****A PRIMER ON THE LAW OF COMPETENCE TO REFUSE MEDICAL TREATMENT****Cameron Stewart and Paul Biegler**

Competence is a key concept in medical law but it is poorly understood by health care practitioners and lawyers alike. This article examines the current law of competence assessment in the context of cases where patients refuse treatment. It attempts to clarify the test of competence and to provide guidance as to when and how competence should be assessed. The article also suggests some areas for reform including a proposal for a statutory defence of uncertainty for those situations where a doctor treats a patient against his or her wishes, when that patient is arguably incompetent. .... 325

**JUDICIAL CONSISTENCY AND ARTICLE 25 OF THE CONVENTION ON THE INTERNATIONAL SALE OF GOODS: A REPLY****Dr Bruno Zeller**

This article points to some important differences between the common law and international instruments. It attempts to address the way any international instrument, and specifically the Convention on the International Sale of Goods, has to be interpreted and implemented. It is by no means an extensive discussion of Art 25 of the Convention. .... 343

<b>NEW BOOKS</b> .....	348
------------------------	-----

---

# The Australian Law Journal Reports

## HIGH COURT REPORTS – Staff of Lawbook Co

### DECISIONS RECEIVED IN MARCH 2004

Johnson v The Queen ( <i>Criminal Law</i> ) ([2004] HCA 15) .....	616
Kelly v The Queen ( <i>Criminal Law</i> ) ([2004] HCA 12) .....	538
Network Ten Pty Ltd v TCN Channel Nine Pty Ltd ( <i>Intellectual Property</i> ) ([2004] HCA 14) .....	585
Pledge v Roads and Traffic Authority ( <i>Appeal and New Trial</i> ) ([2004] HCA 13) .....	572
Siemens Ltd v Schenker International (Australia) Pty Ltd ( <i>Aviation; Carriers</i> ) ([2004] HCA 11) .....	508
Truong v The Queen ( <i>Extradition</i> ) ([2004] HCA 10) .....	473

---

# 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](mailto: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](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](http://www.lawbookco.com.au)

**Email:** [service@thomson.com.au](mailto: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](mailto: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