
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

MANAGING EDITOR
Carmel Jones

PRODUCTION EDITOR
Carolyn May

CASE REPORTERS
Lachlan Cottom
Paul Govind
Colleen Tognetti
Angeline Wong

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

THE AUSTRALIAN LAW JOURNAL

Volume 78, Number 9

September 2004

CURRENT ISSUES – Editor: Mr Justice P W Young AO

Resolution of family disputes	555
Daily Telegraph's exposé of judges	556
Law students' funding deficiencies	556
Magistrates' MERIT system.....	557
Proportionality and the Trade Practices Act.....	557
Overseas conferences and lawyers	558
Drug Court New South Wales	558
Victorian Ethics Handbook	558
Control of mortgage brokers.....	558
Disposal of dead bodies	559

CONVEYANCING AND PROPERTY – Editor: Peter Butt

Planning principles vs private property rights: Environmental Planning and Assessment Act 1979 (NSW), s 28.....	560
---	-----

FAMILY LAW – Editor: Anthony Dickey QC

The new power to bind third parties	565
Cohabitation contracts for a sexual relationship	566

RECENT CASES – Editor: Mr Justice P W Young AO

Corporations: Liquidator gaining direction as to how much evidence he need place before the court	568
What is "just and equitable"?	568
International fraud: Tracing	569
Restitution: Change of position – Illegality	570
Paternity: Issue estoppel	570
Adoption: New forenames.....	571

RECENT CASES – continued

Costs: Refusal to engage in mediation.....	571
Power of executors to subdivide.....	572
Banks and freezing orders	572
Joint tenancy / tenancy in common	573

ARTICLES**WHAT IS WRONG WITH TOP-DOWN LEGAL REASONING?****Justice Keith Mason**

Judge Richard Posner identified “top-down” and “bottom-up” legal reasoning as legitimate and inevitable approaches to judicial decision making. The cool reception afforded to “top-down legal reasoning” in the High Court has done less than justice to Posner and overlooks its respectable pedigree in jurisprudence generally and Australian constitutional law in particular. Nevertheless, behind the slogans lie important issues about constitutional implications and the role of theory in judicial reasoning. 574

HEROES AND HERESY: MYTH MEETS LEGAL FUNDAMENTALISM**Hon Justice Michael Adams**

In two recent articles, legal academics excoriate the High Court for social, political and legal activism. Eschewing conventional legal analysis, the articles allege gross dishonesty and massive political ambitions on the part of the High Court. This critique proposes the theory that the arguments, in both style and content, are like accusations made by religious fundamentalists against theologians with whom they differ. 587

THEORY OF NEGLIGENCE ADVANCED IN THE HIGH COURT OF AUSTRALIA**Hon Desmond Derrington**

When a party negligently inflicts reasonably foreseeable harm on another, the questions arise as to whether there was a duty of care on the former in respect of the danger, and, if so, its extent. The High Court has developed a universal practical principle that indicates the methodology to be used and identifies the nature of the variable criteria that are to be applied to the widely diverse range of circumstances that come before the courts. The commandment is, “Thou shalt be reasonable”. In the process, the court has discarded the former “control mechanisms”, which were rigid in a way that sometimes produced unreasonable and unjust results. 595

NEW BOOKS	612
------------------------	------------

OBITUARIES

Hon Justice Sir Dorman Andrews Kt.....	615
Professor Peter Birks QC DCL FBA.....	615

The Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Lawbook Co

DECISIONS RECEIVED IN AUGUST 2004

<i>Al-Kateb v Godwin (Citizenship, Immigration and Emigration; Constitutional Law; Statutes)</i> ([2004] HCA 37)	1099
<i>Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs (Citizenship, Immigration and Emigration)</i> ([2004] HCA 36)	1056
<i>Immigration and Multicultural and Indigenous Affairs, Minister for v Al Khafaji (Citizenship, Immigration and Emigration; Constitutional Law; Statutes)</i> ([2004] HC 38)	1156
<i>Kuligowski v Metrobus (Estoppel)</i> ([2004] HCA 34)	1031
<i>Pacific Carriers Ltd v BNP Paribas (Contracts; Employment Law; Shipping and Navigation)</i> ([2004] HCA 35)	1045

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