Australian Law Journal

GENERAL EDITOR Mr Justice P W Young AO

PRODUCTION EDITOR Cheryle King

ASSISTANT GENERAL EDITOR Dr Paul Gerber

The mode of citation of this volume is (2005) 79 ALJ [page]

The Australian Law Journal is a refereed journal.

Australian Law Journal Reports

PRODUCTION EDITOR Carolyn May

CASE REPORTERS Lachlan Cottom Clare D'Arcy Cathie Dickinson Paul Govind Kristin MacIntosh Stephanie Menear

The mode of citation of this volume is **79 ALJR [page]**

THE AUSTRALIAN LAW JOURNAL

Volume 79, Number 10

October 2005

CURRENT ISSUES - Editor: Mr Justice P W Young AO

New Constitution for Israel	599
Crown Appeals against sentence	599
Judges and journalists	600
Barns v Addy in Vanuatu	600
Too many judges are being assassinated	602
It will only take a few minutes to do it	603

CONVEYANCING AND PROPERTY – Editor: Peter Butt

Modification of covenant also modifies easement	604
No ancillary right where grant of easement "covers the field"	604
Easements by prescription: an update	605

PRACTICAL ADVOCACY – Editor: Prof John Harber Phillips AC QC

The master speaks: Chester Porte QC	607
-------------------------------------	-----

PEOPLE IN THE LAW – Editor: Geoff Lindsay SC

Justice R J C Benjamin (Cth)	609
Justice Andrew Greenwood (Cth)	610
Justice Antony Siopis	611
Mr Justice C S C Sheller (NSW)	612

RECENT CASES – Editor: Mr Justice P W Young AO

Constitutional law: Freedom of interstate trade	613
Reversing exercise of trustees' discretion	613
De facto judges	614
Asylum seeker's right to record interview	614

RECENT CASES – continued

Family law: Protection from arranged marriage	614
Delay in delivering judgment	615
Defamation: Publication, republication and the right to respond	616
Casenote "competition"	617
Discovery	617
Putative mortgagee subrogated to purchaser's lien	618

ARTICLES

"RESETTLEMENTS": REVENUE CONSEQUENCES OF VARYING DISCRETIONARY TRUSTS

John Glover

The discretionary trust is a conundrum in Australian jurisprudence. Powers and duties are blended in differing degrees with different legal consequences in the several forms of the device. Trust law principles for variations of discretionary trusts which lead to new trusts, or "resettlements", are outlined in this article, as well as applicable capital gains tax provisions of the Income Tax Assessment Act 1997 (Cth), and State and Territory duties and stamp duties legislation. 620

STRIKING OFF: CRIMINAL LAWYERS AND DISCLOSURE OF THEIR CONVICTIONS

Suzanne Le Mire

The Supreme Courts have an inherent power to admit and discipline lawyers. In exercising this power the courts must decide whether the lawyer is a fit and proper person to practise. This article considers a High Court decision allowing a practitioner convicted of serious offences to return to practice. The court appears to have softened the previous approach to a lack of disclosure of damaging material to the authorities. The decision is contrasted with previous cases in Australia and overseas. 641

BOOK REVIEWS	649
--------------	-----

OBITUARIES

Sir Harry Gibbs	651
Justice Graham Hill	654

The Australian Law Journal Reports

HIGH COURT REPORTS - Staff of Lawbook Co

DECISIONS RECEIVED IN AUGUST/SEPTEMBER 2005

Agtrack (NT) Pty Ltd (t/a Spring Air) v Hatfield (Aviation; High Court and Federal Court; Limitation of Actions) ([2005] HCA 38)	13
Air Link Pty Ltd v Paterson (Aviation) ([2005] HCA 39)	14
Bankstown City Council v Alamdo Holdings Pty Ltd (Local Government; Torts) ([2005] HCA 46)	15
Customs, Chief Executive Officer of v Granite Arms Pty Ltd (<i>Taxes and Duties</i>) ([2005] HCA 51)	16
Jarratt v Commissioner of Police (NSW) (Administrative Law; Constitutional Law; Police) ([2005] HCA 50)	15
Mule v The Queen (Criminal Law) ([2005] HCA 49)	15
Paterson v Air Link Pty Ltd (Aviation) ([2005] HCA 39)	14
Ruddock v Taylor (Citizenship, Immigration and Emigration; Torts) ([2005] HCA 48)	1:
Ruhani v Director of Police (High Court of Australia) ([2005] HCA 42)	14
Ruhani v Director of Police (No 2) (Citizenship, Immigration and Emigration)	
([2005] HCA 43)	14
Theodore v Mistford Pty Ltd (Mortgages) ([2005] HCA 45)	1:
Willett v Futcher (Damages) ([2005] HCA 47)	1:

C LAWBOOK CO.

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:
 - 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:
- Ricketson S, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, subscription service) at [16.340], <u>http://subscriber.lawbookco.com.au</u> 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: 1300 304 195 61 2 8587 7980 Fax: 1300 304 196 Web: www.lawbookco.com.au Email: LRA.Service@thomson.com

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