

---

# 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

Philip Claxton

Lachlan Cottom

Cathie Dickinson

Kristin MacIntosh

Colleen Tognetti

The mode of citation of this volume is

**79 ALJR [page]**

---

# THE AUSTRALIAN LAW JOURNAL

Volume 79, Number 9

September 2005

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

Busyness of the High Court.....	535
Minimal reasons in intermediate appellate courts .....	535
Law reform .....	536
Legal research.....	536
Melbourne legal precinct.....	537
Do we need silk? .....	537
The spectrum decision.....	537
Elected judges.....	538
Contempt of Parliament.....	538
Tribal punishment.....	539
Francis Forbes Society.....	539

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

Duality of leases .....	540
Death of party before registration.....	540
Photographic wills .....	542

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

Combating human trafficking: Australia's response to modern day slavery .....	543
---	-----

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

Damages: Betterment – How dealt with.....	553
Bankruptcy: Claims expressed in foreign currency – Conversion rate.....	554
Negligence: Duty of care by parole board.....	554
Death of plaintiff after consent judgment: Whether damages should be reduced on appeal	554
Cheques: Liability of signatories .....	555
Crime: Provocation.....	555

---

**Recent cases – continued**

Charities: Ministers of religion.....	555
A cause and the cause.....	556
Statute of Elizabeth and pay roll tax: A collision between two anachronisms? .....	558
Does switching off a mobile phone constitute “using” the phone? .....	559
Diminished intelligence and the capacity to marry.....	560

**ARTICLES**

**MARKET POWER, COLLECTING SOCIETIES AND THE ROLE OF THE  
COPYRIGHT TRIBUNAL**

**Justice K E Lindgren**

Collecting societies collect, for the benefit of their members, remuneration in respect of uses made of copyright material. They serve an important purpose in the interests of the copyright owners, and provide a procedural benefit to the users as well. They administer both voluntary licensing schemes and licences created in favour of particular classes of uses by the Copyright Act 1968 (Cth). Under that Act, the Copyright Tribunal is given the role, in various contexts, of determining amounts of ‘equitable remuneration’ payable by users of copyright material to collecting societies. This article considers the relationship between the effect of the societies’ market power on price and the role of the Tribunal in quantifying the amounts of remuneration that are “equitable”. It does so, in particular, in the light of a recent suggestion that the Australian Competition and Consumer Commission might issue “guidelines” in this respect. .... 561

**ARBITRABILITY OF COMPETITION DISPUTES IN AUSTRALIAN LAW**

**Max Bonnell**

It is presently unclear whether competition law disputes are capable of resolution by arbitration under Australian law. Although there is a pronounced international trend in favour of allowing such disputes to proceed to arbitration, and although a number of Australian cases have suggested that there should be no impediment to such arbitrations, in practice Australian judges have been reluctant to permit the arbitration of disputes under Pt IV of the Trade Practices Act. It would be consistent with international developments in arbitration law, and with the policy of party autonomy which is the foundation of Australian arbitration legislation, if competition law disputes were to be arbitrable under Australian law, notwithstanding the fact that arbitration may not always be the most suitable vehicle for resolving such disputes. .... 585

---

# The Australian Law Journal Reports

## HIGH COURT REPORTS – Staff of Lawbook Co

### DECISIONS RECEIVED IN AUGUST 2005

Customs, Chief Executive Officer of v El Hajje ( <i>Statutes; Taxes and Duties</i> ) ([2005] HCA 35) .....	1289
Immigration and Multicultural and Indigenous Affairs, Minister of, Re; Ex p Ame ( <i>Citizenship, Immigration and Emigration; Constitutional Law</i> ) ([2005] HCA 36) .....	1309
Polyaire Pty Ltd v K-Aire Pty Ltd ( <i>Intellectual Property</i> ) ([2005] HCA 41) .....	1387
R v Lavender ( <i>Criminal Law</i> ) ([2005] HCA 37) .....	1337
Roncevich v Repatriation Commission ( <i>Defence and War</i> ) ([2005] HCA 40) .....	1366

---

# 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: 1300 304 195**

**61 2 8587 7980**

**Fax: 1300 304 196**

**Web:** [www.lawbookco.com.au](http://www.lawbookco.com.au)

**Email:** [LRA.Service@thomson.com](mailto: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](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