
Australian Law Journal

GENERAL EDITOR
Mr Justice P W Young AO

PRODUCTION EDITOR
Cheryle King

The mode of citation of this volume is
(2006) 80 ALJ [page]

The Australian Law Journal is a refereed journal.

Australian Law Journal Reports

PRODUCTION EDITOR
Carolyn May

CASE REPORTERS
Philip Claxton
Kristin MacIntosh
Stephanie Menear
Colleen Tognetti

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

THE AUSTRALIAN LAW JOURNAL

Volume 80, Number 2

February 2006

CURRENT ISSUES – Editor: Mr Justice P W Young AO

Open courts.....	83
Open courts: Security concerns	84
Justice in 1804	84
English Chancery judge retires early	84
That bottle of water	85
Judicial titles.....	85
Expert witnesses	86
Retirement ages of judges.....	86

CONVEYANCING AND PROPERTY – Editor: Peter Butt

Landlord's liability for defective premises.....	87
Vendor as trustee	88
Licence not effectively coupled with a grant.....	88
“Dealing” with an interest in property.....	89

PEOPLE IN THE LAW – Editor: Geoff Lindsay SC

Bar Council elections (NSW)	91
Appointment of Senior Counsel (Qld).....	91

RECENT CASES – Editor: Mr Justice P W Young AO

Schooling witnesses.....	92
Criminal law: Sexual assault – What is touching?.....	92
Expert evidence: Joint reports	92
Names of adopted children.....	92
Corporations law: Insolvent trading – Whether extends to trustee companies where trust assets are deficient – Subrogation – Purchaser's lien vs mortgagee.....	93
Admiralty: what property may be seized on arrest of ship	94

Breach of freezing orders: Liability for damages	94
Cost orders against witnesses	94
Precedent	94
Contract: Mistake mistake	95

ARTICLES

THE EXECUTIVE AND THE JUDICIARY: A POTENTIAL FOR CONFLICT

Hon Justice Peter McClellan

Tension between the Executive and the judiciary is always a possibility. In recent years that possibility has materialised in England where there have been strident and, from a distance, amusing exchanges over the issue of asylum seekers. In this article the author considers the position in England and contrasts it with experience in Australia, particularly in environmental law. The environment provides fertile ground for conflicts between the government of the day and the judiciary. He considers why there has been only minor controversy in New South Wales, generated by comment from the judiciary rather than politicians. The author confirms the legitimate role of the judiciary in the review of administrative decisions but emphasises that it depends upon the review body identifying and articulating the principles by which its decisions are made. 97

ACCESSORIAL LIABILITY FOR MISLEADING OR DECEPTIVE CONDUCT

Michael Pearce SC

This article reviews the circumstances in which a person will be liable under the Trade Practices Act 1974 (Cth) as an accessory for the misleading or deceptive conduct of another on behalf of whom the first person has acted, most commonly where company directors act as agents for their companies. The article reviews the limitations on accessorial liability imposed by the requirement of knowledge on the part of the accessory that the principal's conduct was misleading or deceptive. It also reviews other uncertainties about whether the knowledge may be constructive or must be actual, whether the accessory has the burden of proving that the principal had reasonable grounds for making a representation about a future matter and whether conduct by an accessory must occur wholly within Australia. Finally, it examines the corresponding State and Territory legislation to see whether it can avoid any of the limitations about the operation of the federal Act. 104

RECONSIDERING THE SCOPE OF THE EQUITABLE MORTGAGE ARISING FROM DEPOSIT OF TITLE DOCUMENTS

S Hepburn

This article examines the underlying fairness of applying equitable security presumptions to the deposit of title documents belonging to third parties. It argues that within such transactions, the focus of the equitable jurisdiction must be upon the intention of the

owner of the title documents rather than presumptions arising from the fact of the deposit. It suggests that there is no logic in applying equitable presumptions, founded on the principles of part performance, to infer a security intention in transactions involving third party title documents. The fact that the parties to a loan advance may have intended to create a mortgage between themselves does not mean that the third party owner of the title documents also intended to create a mortgage. In third party transactions, the objectives of the equity jurisdiction are best achieved through a comprehensive assessment of the intention of all parties and the abolition of presumptions based upon the bare fact of title deposit.	121
--	-----

LEGAL PROFESSIONAL PRIVILEGE AND THE FOREIGN LAWYER IN AUSTRALIA

Christopher Kee and Jeremy Feiglin

Legal professional privilege is very important to lawyers and clients alike. It has evolved within the common law world over a period of centuries. In a domestic Australian context the test to establish what attracts advice privilege has become reasonably well settled. However, the increasingly international character of commerce has revealed new challenges. Is the current test appropriate to determine whether advice given outside Australia by a foreign lawyer is privileged? This article considers that question in detail. After examining the historical development of legal professional privilege, the article discusses <i>Kennedy v Wallace</i> (2004) 208 ALR 424 (at first instance) and <i>Kennedy v Wallace</i> (2004) 142 FCR 185 (on appeal). The article concludes that the current test is both capable and appropriate if properly applied.	131
--	-----

The Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Lawbook Co

DECISIONS RECEIVED IN NOVEMBER/DECEMBER 2005

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (<i>Citizenship, Immigration and Emigration</i>)	228
Nader-One Pty Ltd v BP Australia Pty Ltd (<i>Contracts</i>) ([2005] HCA 71)	219
New South Wales v Bujdoso (<i>Criminal Law; Torts</i>) ([2005] HCA 76)	236
Ringrow Pty Ltd v BP Australia Pty Ltd (<i>Contracts</i>) ([2005] HCA 71)	219
Taxation, Federal Commissioner of v Sun Alliance Investments Pty Ltd (In liq) (<i>Corporations; Taxes and Duties</i>) ([2005] HCA 70)	202
Travel Compensation Fund v Tambree t/as R Tambree and Associates (<i>Trade and Commerce</i>) ([2005] HCA 69)	183
Ultimate Fuel Pty Ltd v BP Australia Pty Ltd (<i>Contracts</i>) ([2005] HCA 71)	219

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, 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: 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