Australian Law Journal

The mode of citation of this volume is
(2008) 82 ALJ [page]

The Australian Law Journal is a refereed journal.

Australian Law Journal Reports

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

THE AUSTRALIAN LAW JOURNAL

Volume 82, Number 9

September 2008

CURRENT ISSUES – Acting Editor: Hon Paul de Jersey AC, Chief Justice of Queensland

Chief Justice of Australia 587
Co-operative federalism 587
A national judicial complaints commission 588
Ensuring a fair trial 588
A commercial hub 589
Technology update 589
An Orwellian twist 590
Decentralisation 590
All eyes on China 591
Advice for unrepresented claimants 591
A pro bono profession 592
And yet 592

CONVEYANCING AND PROPERTY – Editor: Peter Butt

Watch what you witness 593
What is a "use" of land? 595
Running of covenants: A drafting reminder 596
Letter to Editor 597

PEOPLE IN THE LAW – Editor: Geoff Lindsay SC

Stephen Gageler SC, Solicitor-General (Cth) 598

RECENT CASES – Acting Editor: Hon Paul de Jersey AC, Chief Justice of Queensland

Aurukun rape appeals 599
Enforcing the equity of expectation 600
Statutory construction 603
Habeas corpus rights for Guantanamo Bay detainees 604
Legislative intrusion into traditional concepts: "Selling" land and "entering upon" a sale . 604
Witness anonymity and the right to a fair trial 605

ARTICLES

ASPECTS OF THE EVOLUTION OF THE JUDICIAL FUNCTION

Hon P de Jersey AC

Increasingly, legislatures are obliging courts of law to make decisions which do not sit comfortably within the traditional judicial pattern. Not infrequently, the subject matter of those decisions is sensitive and potentially controversial. While it may suit executive governments to invoke the court's reputation for dispassionate determination, they must be careful not to impair public confidence in the discharge of the core judicial function. Courts must themselves be astute to avoid any unnecessary blurring or compromise of that judicial function, although measured assistance to executive government in surveying draft legislation potentially affecting courts should not create undue risk, or breach the supervening separation of powers. The high level of public confidence in the courts, and the expertise and experience which inform their judgments, should warrant circumspection in any transfer of decision-making from courts to tribunals. 607

JUDICIAL HONORIFICS

Hon B H McPherson CBE

In a society with a cultural heritage that stresses law as the foundation of legitimate government, judges attract formal marks of respect. Consequently, the judicial honorific "your Honour" is used countless times every day in courts all around Australia. But what is the origin of this practice? Why do we, New Zealand and the United States use, "your Honour", while judges in England and elsewhere in the Commonwealth are addressed as "my Lord"? This article marshals the historical material and offers possible explanations for the difference as it now exists. 614

JUDICIAL REVIEW: THE COURTS AND THE ACADEMY

P A Keane

The decisions of the High Court in NEAT Domestic Trading Pty Ltd v AWB Ltd (2003) 216 CLR 277 and Griffith University v Tang (2005) 221 CLR 99 have been criticised by academic lawyers. Some of these criticisms exhibit a failure to appreciate the forensic context in which the decisions came to be made. Other criticisms reflect a failure to accept that the Administrative Decisions (Judicial Review) Act 1977 (Cth), in providing only for judicial review of administrative decisions "made under an enactment", imposed a limitation on the scope of judicial review which was well-settled by decisions of the Federal Court prior to the decisions of the High Court. And some of the academic criticism of the decisions of the High Court reflects a deficient understanding of the legal milieu in which public decision-making occurs and a failure to appreciate that, when governmental agencies exercise rights which they enjoy equally with private entities, the Act is not concerned with the quality of the decision-making which led to the exercise of those rights. 623

MILITARY COMMISSIONS: SHOULD AUSTRALIA HAVE SOME?

H G Fryberg

During the 20th century, increased attention was paid to how justice is administered by military authorities to people under their control who are not subject to military law or to trial by court-martial. This article examines aspects of the most sophisticated system so far developed, the United States military commission. The current United States model

embodied in the Military Commissions Act 2006 (US) is discussed and some legal and procedural features are identified and questioned. The article addresses the question in the title in relation to Australia's current and foreseeable defence strategy. 636

INTERMEDIATE APPELLATE COURTS: THE MULTIPLE ISSUES DILEMMA

Ronald Sackville

Intermediate appellate courts are frequently presented with appeals raising multiple issues of fact and law. These appeals can create a dilemma for the court concerned. Busy courts are reluctant to expend scarce time and resources in addressing issues which are unnecessary to decide. Yet in a series of cases the High Court has indicated that intermediate appellate courts should consider dealing with all grounds of appeal, not just the decisive ones, to accommodate the possibility that the losing party will apply successfully for leave to appeal to the High Court. An examination of the cases shows that the High Court has transformed a specific procedural observation made in the context of a patent case into a general statement of wider significance for intermediate appellate courts. The court has done so without fully considering the resource implications for intermediate appellate courts, particularly having regard to the low numbers of successful civil special leave applications in any given year. This article argues that the High Court should rethink its approach to the multiple issues dilemma in order to avoid imposing undue burdens on intermediate appellate courts. 650

BOOK REVIEW

State Constitutional Landmarks by George Winterton 658

OBITUARY

Hon John Murtagh Macrossan AC 659

The Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Lawbook Co

DECISIONS RECEIVED IN JULY/AUGUST 2008

Burrell v The Queen (*Criminal Law; Procedure*) ([2008] HCA 34) 1221

CGU Insurance Ltd v Porthouse (*Appeal and New Trial; Insurance; Professions and Trades*) ([2008] HCA 30) 1135

Copyright Agency Ltd v New South Wales (*Copyright*) ([2008] HCA 35) 1244

Northern Territory v Arnhem Land Aboriginal Land Trust (*Aboriginals; Primary Industry*) ([2008] HCA 29) 1099

Shi v Migration Agents Registration Authority (*Administrative Law; Citizenship and Migration*) ([2008] HCA 31) 1147

Taxation, Federal Commissioner of v Futuris Corporation Ltd (*Administrative Law; Constitutional Law; Income Tax and Related Legislation*) ([2008] HCA 32) 1177

WR Carpenter Australia Pty Ltd v Federal Commissioner of Taxation (*Taxes and Duties*) ([2008] HCA 33) 1211

WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation (*Taxes and Duties*) ([2008] HCA 33) 1211