
Australian Law Journal

GENERAL EDITOR

Mr Justice P W Young AO

PRODUCTION EDITOR

Cheryle King

ASSISTANT GENERAL EDITOR

Angelina Gomez

Barrister-at-Law

The mode of citation of this volume is

(2010) 84 ALJ [page]

The Australian Law Journal is a refereed journal.

Australian Law Journal Reports

PRODUCTION EDITOR

Carolyn May

CASE REPORTERS

John Carroll

Diana van Breda

Laura Stefani

The mode of citation of this volume is:

84 ALJR [page]

THE AUSTRALIAN LAW JOURNAL

Volume 84, Number 4

April 2010

CURRENT ISSUES – Editor: Mr Justice P W Young AO

American Bar Association Sydney Conference	207
US forces in North Queensland in World War II	207
The Keane solution	208
Separation of powers: Possible new constitutional crisis	208
Crime and punishment	209
Loafing: Now judicially defined	209
“Three clear Sundays”	210
Norm & Narelle (No 3)	211

LETTER TO THE EDITOR	212
-----------------------------------	-----

CONVEYANCING AND PROPERTY – Editor: Peter Butt

Virtual assignments	213
How far down do you own?	213
Rights to underground water	214

PEOPLE IN THE LAW – Editor: Geoff Lindsay SC

Justice R A Hulme (NSW)	217
-------------------------------	-----

RECENT CASES – Editor: Mr Justice P W Young AO

Easements and profits à prendre	218
Jurisdictional error	219
Mining and the law of trespass	220
Criminal law: What is an act of indecency?	220
Wills: In contemplation of marriage	221
Wills: Soldier on active service	222
Compensation for loss of water allocation	222
Criminal law: Undertakings, mitigation and best practice	223

ARTICLES

THOUGHTS ON THE LAW OF EQUITABLE ESTOPPEL

Rt Hon Lord Neuberger of Abbotsbury MR

The author addresses generally equitable estoppel and after a brief history of the beginnings of equitable estoppel, summarises the three recent cases of the House of Lords, *Cobbe v Yeoman’s Row Management Ltd* [2008] 1 WLR 1752, *Thorner v Major* [2009] 1 WLR 776, and *Fisher v Booker* [2009] 1 WLR 1764, before focusing on the difference in approach in *Cobbe* and in *Thorner*. Through this focus, and a review of Australian authorities, the author then deals with issues such as the difference between

contract and estoppel, unconscionability in the commercial/domestic context, an Australian view of the domestic/commercial dichotomy, constructive trusts looking in detail at <i>Stack v Dowden</i> [2007] 2 AC 432, and finally ending with a look at the possibility of a unified theory of estoppel in equity.	225
---	-----

FURTHER THOUGHTS ON PROPRIETARY ESTOPPEL

Hon K R Handley AO

This article is a response to the various issues raised by Lord Neuberger in “Thoughts on the law of equitable estoppel” (above). The author briefly addresses the time lapse between the House of Lords considering proprietary estoppel in <i>Ramsden v Dyson</i> (1866) LR 1 HL 129 and then in <i>Cobbe v Yoeman’s Row Management Ltd</i> (2008) 1 WLR 1752, before exploring unconscionability in detail. The article then touches on the use of promise or assurance to refer to statements about the future and the scope of proprietary estoppel in domestic cases. In conclusion, the author comments on the possibility of recognising an overarching doctrine of estoppel.	239
--	-----

SCIENCE AND JUDICIAL PROCEEDINGS: SEVENTY-SIX YEARS ON

Chief Justice Robert French

The intersection of law and science, particularly in relation to causality and the legal concept of causation, were of considerable interest to Sir Owen Dixon. In this article, revisiting Dixon’s 1933 lecture “Science and Judicial Proceedings”, the Chief Justice refers to Dixon’s deep interest in science and the issues to which it can give rise in legal proceedings. The 1933 lecture followed shortly after the judgment of the High Court in <i>Australian Knitting Mills Ltd v Grant</i> (1933) 50 CLR 387 which involved consideration of expert testimony and causal connections between product characteristics and personal injury to the consumer.	244
---	-----

LIMITATION OF ACTIONS AND PRICE-FIXING CARTELS

Perry Herzfeld

This article considers the extent to which members of price-fixing cartels, sued for damages by consumers under s 82(1) of the Trade Practices Act 1974 (Cth), can rely upon the limitation period in s 82(2). It first considers when the cause of action accrues, concluding that it can accrue before a cartel is discovered. Secondly, it argues that equitable and common law doctrines do not prevent cartel members relying on the limitation period. Thirdly, it explains why s 87(1) cannot be used to circumvent the expiry of the limitation period. Finally, it concludes that the Act should be amended to delay commencement of the limitation period, at least in the case of breaches of Pt IV, where the action is based on fraud or the right of action is concealed by fraud, until the plaintiff discovers the fraud or could with reasonable diligence have discovered it.	254
--	-----

BOOK REVIEWS

<i>Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties</i> by Matthew Conaglen	273
<i>Coming to Terms: Aboriginal Title in South Australia</i> by Shaun Berg	274
<i>Yale Biographical Dictionary of American Law</i> by Roger K Newman	276

The Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Thomson Reuters

DECISIONS RECEIVED IN APRIL 2010

Amaca Pty Ltd v Ellis (<i>Torts</i>) ([2010] HCA 5)	226
European Bank Ltd v Evans (<i>Procedure</i>) ([2010] HCA 6)	239
Millennium Inorganic Chemicals Ltd v Ellis (<i>Torts</i>) ([2010] HCA 5)	226
MRR v GR (<i>Family Law and Child Welfare</i>) ([2010] HCA 4)	220
Muslimin v The Queen (<i>Primary Industry</i>) ([2010] HCA 7)	246
South Australia v Ellis (<i>Torts</i>) ([2010] HCA 5)	226

Submission requirements

All contributions to the journal are welcome and should be emailed to the Production Editor, *Australian Law Journal*, at LTA.alj@thomsonreuters.com for forwarding to the Editor.

Licences

- It is a condition of publication in the journal that contributors complete a licence agreement. Licence agreements can be downloaded at http://www.thomsonreuters.com.au/support/as_contributors.asp and emailed with the submission or mailed separately to the Production Editor, *Australian Law Journal*, Thomson Reuters (Professional) Australia Limited, PO Box 3502, Rozelle, NSW 2039.

Letters to the Editor

- By submitting a letter to the Editor of this journal for publication, you agree that Thomson Reuters, 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 or accepted for publication elsewhere, including for online publication.
- Personal details (name, qualifications, position) for publication and a delivery address, email address and phone number must be included with the manuscript on a separate page.
- Manuscript must be submitted electronically via email in Microsoft Word format.
- Manuscript should not exceed 10,000 words for articles or 1,500 words for section commentary or book reviews.
- An abstract of 100-150 words must be included at the head of articles.
- Authors are responsible for the accuracy of case names, citations and other references. Proof pages will be emailed to contributors but excessive changes cannot be accommodated.
- **Graphics** (diagrams and graphs) to be grayscale; in .jpeg format; no more than 12 cm in width; within a box; of high resolution (at least 300 dpi); font is to be Times New Roman, no more than 10pt. The heading for a graphic should be placed outside the box.

Peer review

- This journal complies with the Higher Education Research Data Collection (HERDC) Specifications for peer review. Each article is, prior to acceptance, reviewed in its entirety by a suitably qualified expert who is independent of the author.

Style

1. **Levels of headings** must be clearly indicated (no more than four levels).
2. **Unpointed style** is to be used – there are no full stops after any abbreviation or contraction.
3. **Cases:**
 - Where a case is cited in the text, the citation follows immediately after the case name, not as a footnote.
 - Authorised reports must be cited where published, and one other reference can be used in addition.
 - For “at” references use media-neutral paragraph numbers within square brackets whenever available.
 - For international cases best references only should be used.
4. **Legislation** is cited as follows:
 - *Trade Practices Act 1974* (Cth), s 51AC (including in full within footnotes).
5. **Books** are cited as follows:
 - Ross D, *Ross on Crime* (3rd ed, Lawbook Co, Sydney, 2006) pp 100-101.
 - In footnotes do not use *ibid* or *op cit*. Repeat author surname and add footnote reference to first mention.
 - ¹ Hayton D, “Unique Rules for the Unique Institution, The Trust” in Degeling S and Edelman J (eds), *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) p 284.
 - ² Hayton, n 1, p 286.
6. **Journals** are cited as follows:
 - Kirby M, “The Urgent Need for Forensic Excellence” (2008) 32 Crim LJ 205.
 - In footnotes do not use *ibid* or *op cit*. Repeat author surname and add footnote reference to first mention.
 - ³ Trindade R and Smith R, “Modernising Australian Merger Analysis” (2007) 35 ABLR 358.
 - ⁴ Trindade and Smith, n 3 at 358-359.
 - Wherever possible use official journal title abbreviations.
7. **Internet references** are cited as follows:
 - Ricketson S, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, subscription service) at [16.340], <http://www.thomsonreuters.com.au/default.asp> viewed 25 June 2007. Underline the URL and include the date the document was viewed.

SUBSCRIPTION INFORMATION

The *Australian Law Journal* comprises 12 parts a year.

The Journal is available for subscription via paper and/or online. An online subscription can include access to archived volumes of the Journal dating back to 1927 and has the following benefits: content is fully searchable; PDF versions are provided for convenience; users can subscribe to an RSS feed to be instantly informed of updates.

For further information on how to subscribe:

Visit www.thomsonreuters.com.au

Tel: 1300 304 195

Email: LTA.Service@thomsonreuters.com

Advertising inquiries:

Contact Andrew Parsons on (02) 8587 7462 or email a.parsons@thomsonreuters.com

Editorial inquiries: Tel: (02) 8587 7000

Customer service and sales inquiries:

Tel: 1300 304 195 Fax: 1300 304 196

Web: www.thomsonreuters.com.au

Email: LTA.Service@thomsonreuters.com

HEAD OFFICE

100 Harris Street PYRMONT NSW 2009

Tel: (02) 8587 7000 Fax: (02) 8587 7100



THOMSON REUTERS

© 2010 Thomson Reuters (Professional) Australia Limited ABN 64 058 914 668

Lawbook Co.

Published in Sydney

ISSN 0004-9611

Typeset by Thomson Reuters (Professional) Australia Limited, Pyrmont, NSW

Printed by Ligare Pty Ltd, Riverwood, NSW