

THE AUSTRALIAN LAW JOURNAL

Volume 92, Number 9

September 2018

CURRENT ISSUES – Editor: Justice François Kunc

Family Court Restructure Debate Continues	659
Victorian Law Reform Commission Report on Class Actions	660
Indigenous Recognition – Much Consulting Going Where?	660
Commonwealth Targets for Briefing Female Barristers	662
Muslims and the Legal Process	662
Explanatory Note on the Judicial Process and Participation of Muslims Prepared by The Australian National Imams Council	663

ADMIRALTY AND MARITIME – Editor: Dr Damien J Cremean

Ownership of Unclaimed Wreck	667
------------------------------------	-----

FAMILY LAW – Editor: Richard Ingleby

Threats by Adult Children in Proceedings between Their Parents: Contempt or Miscarriage of Justice?	670
--	-----

STATUTORY INTERPRETATION – Editor: The Hon John Basten

Evidence Act s 165B: Interpretation in the Shadow of Longman	673
--	-----

PERSONALIA – Editor: Emily Vale

Commonwealth

Justice Gail Sutherland	677
-------------------------------	-----

Victoria

Justice Kevin Lyons	677
---------------------------	-----

Western Australia

Justice John Vaughan	677
Justice Jennifer Smith	678

ARTICLES

**ON TO STRASBOURG OR BACK TO TEMPLE? THE FUTURE OF EUROPEAN LAW
IN AUSTRALIA POST-BREXIT**

The Hon TF Bathurst AC and Bronte Lambourne

The decisions of the High Court in *McCloy v New South Wales* and *Murphy v Electoral Commissioner* represent a successive waxing and waning of the influence of European law on Australian public law. With Britain’s decision to sever its ties with the European Union, the question of whether Australian law will further embrace European principles remains a live issue. This article considers the way in which the European principle of proportionality has been received into Australian constitutional and administrative law and questions whether such a principle is compatible with the foundations of our legal infrastructure, specifically, the constitutional separation of powers, the absence of a Bill of Rights and the deductive methodological approach of the common law. 679

SEARCHING FOR THE SEARCHERS: THE AUSTRALIAN LEGAL PROFESSION AND THE OPERATION OF THE AUSTRALIAN RED CROSS MISSING AND WOUNDED ENQUIRY BUREAU IN WORLD WAR I

Tony Cunneen

The searcher is a worker apart. He solves the problem of the “missing”. Many aching hearts are lightened or deadened as the result of his labours. With quick perception, keen eye, and silent tread, he moves about the hospitals, convalescent camps, bases, and detail camps, containing in his hand a slip containing perhaps a query as this: “Private” – No 24,537, missing at Pozieres? 695

JUDICIAL DECISION-MAKING IN TIMES OF WAR AND RELATIVE PEACE

The Hon Susan Kiefel AC

During the two World Wars, the High Court gave a broad interpretation to the legislative power with respect to the naval and military defence of the Commonwealth and of the States. However, in some controversial decisions during World War II and in its aftermath, the Court held invalid statutory and regulatory measures. These cases may be seen to presage *Australian Communist Party v Commonwealth* (Communist Party Case), in which the Court said that what was necessary in time of war may not be in a time of ostensible peace. The Court’s discussion in the Communist Party Case of the role of the Court, in particular its role in determining constitutional facts, has assumed importance more recently in *Thomas v Mowbray*. That case may raise further questions for courts in the future. 708

THE CASE FOR CONTRADICTION IN APPROVING CLASS ACTION SETTLEMENTS

Jeremy Kirk

Class action settlements must be approved by the relevant court. The very fact of settlement means that there will in general be no legally represented persons before the court seeking to test the settlement, aspects of the settlement distribution scheme, or any common fund order. Such settlements involve the determination of legal rights of group members, who are not generally represented. The courts naturally look to representatives of the applicant for assistance, but the interests of all group members are not necessarily uniform nor the same as those of the applicant. Conflicting interests and duties are rife. In this context, this article argues that courts should readily require the appointment of a contradictor to test the settlement proposal, and proposes some guidelines in that respect. 716

BOOK REVIEWS – Editor: Angelina Gomez

<i>The Place of Practice, Lawyering in Rural and Regional Australia</i> , by Trish Mundy, Amanda Kennedy and Jennifer Nielsen (eds)	730
<i>Critical Perspectives on the Uniform Evidence Law</i> , by Andrew Roberts, Jeremy Gans (eds)	735

Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Thomson Reuters

DECISIONS RECEIVED IN AUGUST 2018

Acharya v Minister for Immigration and Border Protection (<i>Administrative Law; Citizenship and Migration</i>) ([2018] HCA 35)	798
Culleton, Re (<i>Constitutional Law; High Court and Federal Court</i>) ([2018] HCA 33)	775
DL v The Queen (<i>Criminal Law</i>) ([2018] HCA 32)	764
Ghimire v Minister for Immigration and Border Protection (<i>Administrative Law; Citizenship and Migration</i>) ([2018] HCA 35)	798
HFM043 v Nauru (<i>Citizenship and Migration; Statutes</i>) ([2018] HCA 37)	817
Hossain v Minister for Immigration and Border Protection (<i>Administrative Law; Citizenship and Migration</i>) ([2018] HCA 34)	780
Immigration and Border Protection, Minister for v SZVFW (<i>Administrative Law; Citizenship and Migration</i>) ([2018] HCA 30)	713
Nobarani v Mariconte (<i>Appeal and New Trial; Succession</i>) ([2018] HCA 36)	806
R v Falzon (<i>Courts and Judges; Criminal Law</i>) ([2018] HCA 29)	701
Shrestha v Minister for Immigration and Border Protection (<i>Administrative Law; Citizenship and Migration</i>) ([2018] HCA 35)	798
Taxation, Federal Commissioner of v Martin Andrew Pty Ltd (<i>Equity; Taxes and Duties</i>) ([2018] HCA 31)	746
Taxation, Federal Commissioner of v Thomas (<i>Equity; Taxes and Duties</i>) ([2018] HCA 31)	746
Taxation, Federal Commissioner of v Thomas Nominees Pty Ltd (<i>Equity; Taxes and Duties</i>) ([2018] HCA 31)	746