

# THE AUSTRALIAN LAW JOURNAL

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## **CURRENT ISSUES – Editor: Justice François Kunc**

Chief Justice of New South Wales and President of the Court of Appeal .....	151
Chief Justice of the Australian Capital Territory .....	151
Chief Justice of Queensland .....	151
The “Australian Choice Model” for an Australian Republic .....	152
Educating Judges .....	154
The Curated Page .....	155

## **AROUND THE NATION: AUSTRALIAN CAPITAL TERRITORY – Editor: Justice David Mossop**

Twentieth Anniversary of the ACT Court of Appeal .....	156
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## **AROUND THE NATION: NORTHERN TERRITORY – Editor: Hon Dean Mildren AM RFD QC**

Northern Territory Law Reform Commission’s Report on Mandatory Sentencing and Community-based Options .....	159
Significant Changes to Office Holders .....	159
R v Rolfe .....	160
Criminal Lawyers Association of the NT (CLANT) Conference .....	161

## **INTERNATIONAL FOCUS – Editor: Professor Stuart Kaye**

Australian Professor Elected to UN Working Group on Outer Space .....	162
---	-----

## **PERSONALIA – Editor: Emily Vale**

Commonwealth	
Justice John Halley .....	165
Justice Helen Rofe .....	165
Justice Kylie Downes .....	165
Judge Advocate General and Deputy Judge Advocate General (Navy) .....	166

New South Wales	
Senior Counsel Appointments .....	166
Northern Territory	
Senior Counsel Appointments .....	166
South Australia	
Senior Counsel Appointments .....	166
Tasmania	
Senior Counsel Appointments .....	166
Victoria	
Justice Catherine Button .....	166
Justice Amanda Fox .....	167
Western Australia	
Justice Larissa Strk .....	167
Justice Marcus Solomon .....	167

## ARTICLES

### **According to the Length of the Legislature’s Foot – Equity and the Civil Liability Act** – *Christopher Chiam*

This article considers whether and how the *Civil Liability Act 2002* (NSW) (CLA) applies to equitable claims. I argue that it does and explore some of those consequences. I first consider Pt 1A of the CLA, and conclude that the provisions governing causation are potentially significant. I then consider Pts 2 and 3 of the CLA in the context of equitable claims involving mental harm. The settled understanding of Pt 3 is that it only applies to claims which require proof of negligence as an essential element, and accordingly it is difficult to see what role it could play. However, Pt 2 may operate to limit the recovery of compensation for claims of breach of confidence. Finally, I argue that equitable claims can be “apportionable”, and accordingly may be subject to the proportionate liability provisions of the CLA. .... 169

### **Fiduciary Duties of Representative Parties: Conflicting Case Law and Conflicting Interests** – *Daniel Meyerowitz-Katz*

There is conflicting authority in Australia as to the whether a representative plaintiff in class actions owes fiduciary duties to group members. A majority of the High Court has said in obiter that the plaintiff does owe such duties, but the Victorian Court of Appeal has said that no such duties are owed, in a decision affirmed by the High Court on other grounds. This essay attempts to resolve those positions by reference to the principles underpinning the doctrine of fiduciary duties and to the nature and history of representative litigation. It also looks to cases in the United States, where the law on this point is more developed. The essay concludes that there is a strong argument that fiduciary duties are indeed owed by representative parties, and gives some examples of situations where this may be of some significance. .... 185

### **Recurring Issues in Civil Appeals – Part 1 – Thomas Prince**

This is the first part of a two-part article addressing three of the most commonly recurring issues in modern civil appeals. It explores the historical development of the civil appeal both in England and Australia and in light of that development examines the “standard of appellate review” required in different kinds of appeal. Part 2 will address the circumstances in which an appellate court is justified in interfering with findings of fact made by a trial judge and when a point can be raised for the first time on appeal. .... 203

## **Australian Law Journal Reports**

### **HIGH COURT REPORTS – Staff of Thomson Reuters**

#### **DECISIONS RECEIVED IN FEBRUARY/MARCH 2022**

<i>Australia Pacific Airports (Launceston) Pty Ltd v Northern Midlands Council (Contracts; Equity; High Court and Federal Court)</i> ([2022] HCA 5) .....	234
<i>CNS Pharma Pty Ltd v Sandoz Pty Ltd (High Court and Federal Court; Intellectual Property; Trade and Commerce)</i> ([2022] HCA 4) .....	208
<i>H Lundbeck A/S v Sandoz Pty Ltd (High Court and Federal Court; Intellectual Property; Trade and Commerce)</i> ([2022] HCA 4) .....	208
<i>Hobart International Airport Pty Ltd v Clarence City Council (Contracts; Equity; High Court and Federal Court)</i> ([2022] HCA 5) .....	234
<i>Walton v ACN 004 410 833 Ltd (Formerly Arrium Ltd) (In liq) (Corporations)</i> ([2022] HCA 3) .....	166