
Australian Law Journal

GENERAL EDITOR
Justice François Kunc

THOMSON REUTERS EDITOR
Cheryle King

ASSISTANT GENERAL EDITORS

Nuncio D'Angelo <i>Solicitor, Sydney</i>	Angelina Gomez <i>Lawyer, Perth</i>	Ruth Higgins <i>Barrister, Sydney</i>	Clare Langford <i>Solicitor, Sydney</i>
---	--	--	--

The mode of citation of this volume is
(2017) 91 ALJ [page]

The views expressed in editorial comment, articles or notes are those of the author or contributor, and are not to be taken as being the views of, or endorsed by, the journal editors unless otherwise indicated.

The Australian Law Journal is a refereed journal.

Australian Law Journal Reports

PRODUCTION EDITOR
Carolyn May

CASE REPORTERS
Colleen Tognetti
Stefan Skopelja

The mode of citation of this volume is:
91 ALJR [page]

THE AUSTRALIAN LAW JOURNAL

Volume 91, Number 9

September 2017

CURRENT ISSUES – Editor: Justice François Kunc

A New Chief Justice for Victoria	703
Time to Amend s 44 of the Constitution?	703
Facts Lost in the Headlines	704
The Referendum Council Report	705
Voluntary Assisted Dying Bill to be Introduced in Victoria	705
Report on Memory in Child Abuse Cases	706
NSW Bar Association Proposes a Walama Court	707
Law Council of Australia’s Justice Project	707
National Conference on the Future of Australian Legal Education	708

CONVEYANCING AND PROPERTY – Editors: Robert Angyal SC and Brendan Edgeworth

Short-term Lettings in Strata Developments	709
Caveats	711
Gifts in Contemplation of Death	713

AROUND THE NATION: NORTHERN TERRITORY – Editor: Hon Dean Mildren AM RFD QC

A New Court House for Alice Springs	714
The New Local Court	715
NTCAT	715

CRIME AND EVIDENCE – Editor: Justice Phillip Priest

Developments in Tendency Evidence	716
---	-----

FAMILY LAW – Editor: Richard Ingleby

It Seemed Like a Good Idea at the Time: When Recording Conversations Backfires	719
--	-----

THE LEGAL OBSERVER – Editor: Michael Pelly

Playing Politics with the Politicians	721
---	-----

CORPORATIONS AND SECURITIES – Editor: Robert Baxt AO

Appropriate Penalties for Company Directors: The Flugge Case	725
--	-----

RECENT CASES – Editor: Ruth C A Higgins

United Kingdom: Statutory Rights of Employees – European Union Law – Prescribed Fees for Commencing Proceedings – Whether Fees Interfere Unjustifiably with the Right of Access to Justice	728
Migration: Regional Processing – Commonwealth Power to Enter into Arrangements Relating to Regional Processing – Commonwealth Power to Authorise Activities in Another Country Unlawful under that Country’s Laws	730
Evidence: Opinion Evidence – Exceptions to Opinion Rule – Proof of Assumption Rule – Basis Rule – Whether Assumptions Underlying Expert Opinion must be Proved for Opinion to be Admissible	732
Landlord and Tenant: Retail Premises – Premises Comprised Cold and Cool Storage Warehouse and Transport Facility – Meaning of “Retail Provision of Services” under Retail Leases Act 2003 (Vic)	734

ARTICLES

SUBROGATION TO THE TRUSTEE’S PERSONAL RIGHT OF INDEMNITY

Ahmed Terzic

It is settled that an unsecured creditor to whom a trustee has properly incurred a liability in the administration of a trust may be subrogated to the trustee’s right of indemnity out of the trust estate in circumstances where the trustee is insolvent or where obtaining judgment against the trustee would be futile. This is the only method available for the creditor to recover value from the trust estate. An alternative for the creditor to recoup its debt might be to seek subrogation to the trustee’s personal right of indemnity against the beneficiaries of that trust; however, Australian case law has proven this to be a murkier proposition. This article traces the judicial development of the unsecured creditor’s remedy of subrogation to the trustee’s personal indemnity in Australia. It contends that such a creditor may be subrogated to the personal indemnity without the need for it to exhaust all of its remedies against the trustee.

736

FAMILY PROVISION APPLICATIONS: A CRITIQUE

Anthony Gray

Legislation in all Australian jurisdictions provides for those disappointed with what they received, or did not receive, from the execution of a will, to challenge it. Originally conceived to protect wives and children from grossly unfair testamentary provisions of husbands and fathers, these provisions have substantially expanded from their original basis, to include many other types of claims, and claimants. As will be seen, the prospects of success of such a challenge are surprisingly high. It is the objective of this article to challenge the current orthodoxy, on the basis that the case decisions reflect, generally, an insufficient regard for the wishes of the testator. It is the author’s belief that, in such cases, the starting pre-disposition should be one of deference to clearly expressed wishes of any testator of full capacity and that judicial interference with such wishes should very much be the exception, rather than the norm.

750

FAMILY PROVISION LAW IN NEW SOUTH WALES: CELEBRATING ITS
CENTENARY

Tihana Mandic

Just over 100 years ago, the Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW) was enacted in New South Wales. It consisted of two parts, the first relating to what has become known as family provision law and the second relating to the guardianship of children. This article is limited to the former. 769

BOOK REVIEWS – Editor: Angelina Gomez

<i>Enrichment at the Claimant's Expense: Attribution Rules in Unjust Enrichment</i> , by Eli Ball	773
<i>Specialist Courts for Sentencing Aboriginal Offenders: Aboriginal Courts in Australia</i> , by Paul Bennett	777
<i>Interpretation of International Investment Treaties</i> , by Tarcisio Gazzini	778
<i>Jacobs' Law of Trusts in Australia</i> , by John Dyson Heydon and Mark James Leeming	780
<i>Judicial Review of Administrative Action and Government Liability</i> , by Mark Aronson, Matthew Groves and Greg Weeks	783
<i>Prosecuting</i> , by Raymond Gibson	785

CORRIGENDUM

In the January issue, at 13 and 43, the name of the Master of the Rolls was misspelt. He is Sir Terence Etherton. The Journal apologises for the error.

Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Thomson Reuters

DECISIONS RECEIVED IN AUGUST 2017

<i>IL v The Queen (Criminal Law)</i> ([2017] HCA 27)	764
<i>Taxation, Federal Commissioner of v Jayasinghe (Statutes; Taxes and Duties)</i> ([2017] HCA 26)	749