
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
(2012) 86 ALJ [page]

The Australian Law Journal is a refereed journal.

Australian Law Journal Reports

PRODUCTION EDITOR
Carolyn May

CASE REPORTERS
John Carroll
Clare Tuckerman

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

THE AUSTRALIAN LAW JOURNAL

Volume 86, Number 3

March 2012

CURRENT ISSUES – Editor: Mr Justice P W Young AO	
Opening remarks	147
Constitutional amendment to recognise indigenous people	148
Laypeople and the law	148
Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)	150
Getting the balance right	150
LETTERS TO THE EDITOR	152
CONVEYANCING AND PROPERTY – Editor: Peter Butt	
Contract and strata title: A view from another jurisdiction	156
Easements: Abandonment and interpretation	158
Notice properly served although not received	159
Three recent English cases	160
No amendment of caveat	161
FAMILY LAW – Editor: Anthony Dickey QC	
Further consideration of a de facto relationship	163
Is an “intended parent” under s 60H a parent for the purpose of the Family Law Act?	164
INTERNATIONAL FOCUS – Editor: Ryszard Piotrowicz	
Obligations towards trafficking victims	166
RECENT CASES – Editor: Mr Justice P W Young AO	
Appointment of receivers	170
Criminal procedure: Counsel’s incompetence	170
Equitable estoppel	171
Tort: Assault and battery – Whether contributory negligence a defence	172
Partners as joint tenants at law	172
Sovereign states: Immunity from suit	173
Undertakings to the court: Limitation of use	173

ARTICLES

THE ENDURING IMPORTANCE OF THE RULE OF LAW IN TIMES OF CHANGE

Hon Justice Brian J Preston

In light of examples of government action to circumvent compliance with environmental and planning laws, by executive fiat or legislative amendment, this article takes a timely look at the enduring importance of the rule of law. Formulations of the rule of law fall into formal and substantive versions. Formal versions include: rule by law, formal legality and legality with democracy. In its most formal sense (rule by law), the rule of law involves two components: the government must abide by currently valid law and the government may only change law within the legal constraints of the law making power. The formal legality conception goes further and recognises that, in order for the rule of law to be realised, the law must conform to certain standards, including certainty and predictability; there must be adequate machinery to enforce the law, including an independent and impartial judiciary; and there must be congruence between action and the law. Formal legality and democracy further prescribes the democratic procedure by which the content of the law is determined. Substantive formulations of the rule of law incorporate the formal requirements of formal versions of the rule of law but add requirements about the content of the law. These include human rights. Substantive formulations are more controversial. The article concludes that, despite its elusive meaning, the rule of law serves as an anchor in the swirling currents of change. 175

ARRESTING A “SHIP”: BOATS, BUNKERS AND BAROMETERS

Matthew N C Harvey

What is a ship? What property on board is part of a ship? These questions are critical, when an in rem proceeding is commenced against a ship. Frequently, little attention is paid to these questions; however, whether a vessel is a ship, whether it is used in navigation, and whether it navigates waters have been vexing questions, producing different answers. This article examines the statutory elements of the definition of “ship” in the Admiralty Act 1988 (Cth) and the differing judicial interpretations given to them. ... 189

THE EVOLVING OFFICE OF THE NEW SOUTH WALES ATTORNEY GENERAL

John Hatzistergos

The office of the Attorney General of New South Wales is one of the oldest offices in the State. However, sitting at the junction of law and politics has its challenges. The distinct responsibilities which attach to the office set it apart from other ministries and give rise to certain expectations of its holders. In this article, the recently retired Attorney General, John Hatzistergos, traces the evolving nature of the office and recounts his own personal reflections and experience. 197

BOOK REVIEWS – Editor: Angelina Gomez

Case Management and Complex Civil Litigation, by Michael Legg 211

The Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Thomson Reuters

DECISIONS RECEIVED IN FEBRUARY/MARCH 2012

Australian Education Union v Department of Education and Children’s Services (Education) ([2012] HCA 3)	217
Bui v Director of Public Prosecutions (Cth) (Criminal Law) ([2012] HCA 1)	208
Waller v Hargraves Secured Investments Ltd (Mortgages; Primary Industry) ([2012] HCA 4)	229