Australian Law Journal

The mode of citation of this volume is
(2012) 86 ALJ [page]

The Australian Law Journal is a refereed journal.

Australian Law Journal Reports

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

THE AUSTRALIAN LAW JOURNAL

Volume 86, Number 10

October 2012

CURRENT ISSUES – Editor: Acting Justice Peter W Young AO

Why publish law reviews or law journals? 659
Juries 660
Driver disqualification 661
Australia's leading legal textbooks 661

CONVEYANCING AND PROPERTY – Editor: Peter Butt

Liquidator of landlord unable to disclaim tenant's leasehold interest 663
Purchaser entitled to rescind when unable to sell own house 663
No compound interest on mortgage 664

OVERSEAS LAW – Editor: Ross Buckley

Can arbitration clauses prevent class actions? The implications of AT&T Mobility LLC v Concepcion 666

RECENT CASES – Editor: Acting Justice Peter W Young AO

Tracing: Whether spouse under court consent order a bona fide purchaser 670
Motor vehicles: Insurance – Due search and inquiry 670
Is a government entitled to disregard its own contracts? 671
Nuisance: Noise and smells – Easements to emit noise 673
Corporations: Piercing the corporate veil 673
Lien: Fruit of litigation lien – Priority 674

ARTICLES

GST: HOW BROAD IS "SUPPLY" – A PERSPECTIVE ON QANTAS

Eugen Trombitas

This article explores the Qantas GST case concerning forfeited deposits and offers a NZ practitioner's perspective. The NZ GST legislation defines supply widely to include all forms of supply. New Zealand courts have traditionally given supply a practical meaning. The Australian GST legislation also contains a broad definition of supply which, amongst other matters, refers to the creation of rights and the entry into of an obligation. The GST concepts in both countries' GST legislation are broad. The main issue in Qantas is how broad the concept of supply should extend in situations where a customer pays for the

ability to travel but does not show up for the flight. Does the definition of supply extend only to those rights which are the main object of the supply contract, or can it include less significant or incidental rights? The concept of supply is ever evolving and Qantas is an illustration of this. In brief, the Administrative Appeals Tribunal was prepared to read the concept of supply with reference to "rights" broadly whereas the Federal Court was prepared to interpret the ambit of "rights" and therefore "supply" in a more narrow way. The main GST first principles issue in Qantas is the "what" question: "What is supplied?" In the author's respectful submission, no supply in the relevant Australian GST sense takes place in situations when the traveller is a "no show". The main reason for this is the benefit bargained for (flight) is absent. The traveller is not paying for any rights separately from the flight, and there seems to be no market or value for such rights in any event. The author's submission is that the GST concept of supply can extend to certain rights but only if they are the main or dominant object of the transaction, so that they can exist on a stand alone basis. The Qantas case is without doubt the most significant GST case in Australia since the introduction of GST in 2000, and it will affect many businesses. 675

MIND THE GAP: THE POTENTIALLY INCAPABLE PATIENT WHO OBJECTS TO ASSESSMENT

Kerri Eagle and Christopher Ryan

The issues surrounding the patient who objects to necessary and possibly urgent treatment are contentious and often confusing for health care practitioners, particularly in the hospital setting. This article focuses on the situation in which a patient's circumstances would lead a reasonable person to conclude that he or she might lack capacity or be suffering from a mental illness and where treatment refusal would place the patient at risk of serious harm. We consider the current law and some of the underlying legal concepts impacting on the powers and duties of health care practitioners in the management of such objecting patients and conclude that in such circumstances the common law may provide a limited justification to detain the person for further assessment. 685

GUARDING AGAINST FOREIGN INSOLVENCY PROCEEDINGS: THE IMPORTANCE OF THE CENTRE OF MAIN INTERESTS IN TRANSACTION PLANNING

Stewart Maiden

The concept of the centre of main interests (COMI) is familiar to lawyers who deal with cross-border insolvency. But to those whose work is primarily transactional, the term may still be alien, or at least arcane. That should not be so. To a significant degree, COMI determines the jurisdiction and effect of insolvency proceedings that can be opened in respect of a debtor. It is an important concept that can affect the rights of all of a company's stakeholders, including its contractual counterparties. An understanding of the meaning and effect of COMI, the means available to alter a COMI, and the availability and efficacy of means by which a counterparty's COMI might be controlled, is essential to those responsible for negotiating and implementing commercial transactions with companies that have the capacity and potential incentive to manipulate their COMIs. This article describes the COMI concept, the reasons why COMIs are manipulated, and the means by which such manipulation can occur. It describes the issues that can arise when steps are taken to manipulate COMI, and some means by which counterparties might

mitigate against the risk of a shift in COMI undermining negotiated contractual rights. It then explores some of the complexities that might be raised by those mechanisms, and concludes that while it is uncertain that contractual prohibitions against COMI migration might be directly enforceable, they provide at least a deterrent to debtors and their advisers migrating COMI against the wishes of a counterparty in whose favour they have been drafted. 697

The Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Thomson Reuters

DECISIONS RECEIVED IN AUGUST/SEPTEMBER 2012

Andrews v Australia and New Zealand Banking Group Ltd (*Banking and Finance; Contracts; Equity*) ([2012] HCA 30) 1002
Baker v The Queen (*Criminal Law*) ([2012] HCA 27) 906
Board of Bendigo Regional Institute of Technical and Further Education v Barclay (*Industrial Law*) ([2012] HCA 32) 1044
Douglass v The Queen (*Criminal Law*) ([2012] HCA 34) 1086
Home Affairs (Cth), Minister for v Zentai (*Extradition; Public International Law*) ([2012] HCA 28) 930
Kaur v Minister for Immigration and Citizenship (*Administrative Law; Citizenship and Migration*) ([2012] HCA 31) 1019
Patel v The Queen (*Criminal Law*) ([2012] HCA 29) 954
Plaintiff S10/2011 v Minister for Immigration and Citizenship (*Administrative Law; Citizenship and Migration*) ([2012] HCA 31) 1019
Plaintiff S49/2011 v Minister for Immigration and Citizenship (*Administrative Law; Citizenship and Migration*) ([2012] HCA 31) 1019
Plaintiff S51/2011 v Minister for Immigration and Citizenship (*Administrative Law; Citizenship and Migration*) ([2012] HCA 31) 1019
PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission (*Private International Law*) ([2012] HCA 33) 1071