Australian Law Journal

The mode of citation of this volume is
(2013) 87 ALJ [page]

The Australian Law Journal is a refereed journal.

Australian Law Journal Reports

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

THE AUSTRALIAN LAW JOURNAL

Volume 87, Number 3

March 2013

CURRENT ISSUES – Editor: Acting Justice Peter W Young AO

New South Wales Administrative Tribunal 159
Paperless courts 159
Trash and confidentiality 160
The Queensland floods 160
Keeping a balance 160
The right to silence 161
Dangers of exaggeration 161

CONVEYANCING AND PROPERTY – Editor: Peter Butt

When is an interest vested? 159
Claim under proprietary estoppel vests in official receiver in bankruptcy 159
Is a houseboat a fixture? 160
Assignment of part only of leased premises 160
Adverse possession: Stopping time running 161
Mandatory injunction to prevent tree root damage 162
Delivery of deeds 163

RECENT CASES – Editor: Acting Justice Peter W Young AO

Tort: Assault – Elements 167
Crime: Defence of accident – Onus 167
Solicitor: Personally interested in transaction – Draws up documents for both parties – Whether retained by other party 168
Bailment: How far is a bailee an insurer 168
Land law: Partition or sale of jointly owned property 168
Insider trading 169

ARTICLES

HAS ADVOCATES' IMMUNITY FROM SUIT SURVIVED THE AUSTRALIAN CONSUMER LAW?

Richard Douglas SC and Simon Cleary

When the Australian Consumer Law commenced on 1 January 2011 it introduced a regime of statutory consumer guarantees. That regime differs markedly from its

equivalent predecessor provisions in the Trade Practices Act 1974 (Cth). Whereas the old regime implied statutory terms into contracts as the mechanism for protecting consumers from poor quality services, the Australian Consumer Law creates statutory guarantees. This article considers whether that statutory regime applies to the provision of legal services, and if so whether it makes obsolete the common law immunity from suit of advocates for work connected with court. 172

BETFAIR AND SPORTSBET: THE REMAINS OF THE FEDERAL PURPOSE OF S 92 OF THE AUSTRALIAN CONSTITUTION

Gonzalo Villalta Puig

This article analyses the interpretation of s 92 of the Australian Constitution by the High Court in Betfair v Racing New South Wales and Sportsbet v New South Wales. Both cases apply the Cole v Whitfield test for invalidity under s 92, which rules out discriminatory burdens of a protectionist kind. They confirm the subject of the freedom in s 92 to be interstate trade rather than interstate traders. With these two cases, the High Court blocks a return to the individual rights theory that informed the interpretation of s 92 for much of the period before Cole v Whitfield. The High Court is wrong, however, to associate the criterion of discrimination with the idea of free enterprise behind the now defunct theory. The High Court marginalises the significance of discrimination to the test only to promote protectionism as the all but exclusive criterion of constitutional invalidity. An interpretation of s 92 as an anti-protectionist norm is inconsistent with the federal purpose of the section to establish a national market for Australia because it can allow laws and measures that discriminate against interstate trade if they are not protectionist. Only a non-discrimination norm can translate the idea of free trade into a principle of market access. The High Court does, in that respect, hint at a future re-interpretation of s 92 into a principle of market competition without the requirement for protectionism. As a principle, market competition is not the same as market access but the removal of protectionism from the test may well have the same effect in practice. 178

WHAT IS KIRBY'S INTERPRETIVE PRINCIPLE REALLY ABOUT?

Luke Beck

This article critically assesses Michael Kirby's interpretive principle to reveal the assumptions underlying it and suggests that the principle is not really about international law but rather about moral claims regarding human dignity and the role of the judge. The article proceeds in three main parts. First, the interpretive principle is articulated, its different forms noted and its limitations considered. Secondly, the article reflects upon what the interpretive principle reveals about how Kirby sees the role of the judge and how this informs the interpretive principle. Finally, the article considers the emphasis Kirby places on human rights values and how international law fits into the interpretive principle. 200

"BULK LODGMENT" AND PROTECTION FROM LATER LODGED CAVEATS

Jerome Entwisle

The recent decision of Ball J in Barlin Investments Pty Ltd v Westpac Banking Corporation (2012) 16 BPR 30,671; [2012] NSWSC 699 has revealed a deficiency in the practice of the New South Wales Registrar-General known as "bulk lodgment". His

Honour held that a dealing which is bulk lodged rather than lodged face-to-face is not considered to be "lodged" for the purposes of the Real Property Act 1900 (NSW) until it is later processed and given a distinctive reference. This conclusion has important implications for bulk lodging parties as it may deprive them, for a time, of the protections provided by the Act to parties who have "lodged" dealings in registrable form – in particular, the protection from later lodged caveats. This article summarises the decision in Barlin Investments and provides a detailed discussion of the operation of the provisions of the Real Property Act that the case considered. It then compares the position in New South Wales to other Australian jurisdictions before canvassing three options to remedy the current prejudice to bulk lodging parties in New South Wales. 210

The Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Thomson Reuters

DECISIONS RECEIVED IN FEBRUARY 2013

Google Inc v Australian Competition and Consumer Commission (*Trade and Commerce*) ([2013] HCA 1) 235
Police, Commissioner of v Eaton (*Industrial Law; Police; Statutes*) ([2013] HCA 2) 267