Australian Law Journal

The mode of citation of this volume is
(2014) 88 ALJ [page]
The Australian Law Journal is a refereed journal.

Australian Law Journal Reports

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

THE AUSTRALIAN LAW JOURNAL

Volume 88, Number 3

March 2014

CURRENT ISSUES – Editor: Acting Justice Peter W Young AO

The holiday season 155
Respect for the judiciary 155
"I'm coming through" 156
Threats to democracy 157
Transcripts of court proceedings 157
Death of prominent lawyers 158

CONVEYANCING AND PROPERTY – Editor: Peter Butt

Disclaimer of lease by landlord's liquidator extinguishes tenant's leasehold interest 159
Landlord's measure of damages for tenant's default 161
Loose drafting leads to litigation 162

AROUND THE NATION: WESTERN AUSTRALIA – Editor: Justice Kenneth Martin

Western Australia v Rayney [2013] WASCA 219 163

PERSONALIA – Sienna Merope

Victoria

Justice Michael Croucher 167
Justice James Elliott 167
Justice Ginnane 167
Justice Joseph Santamaria 167
Justice Melanie Sloss 168

EQUITY AND TRUSTS – Justice Mark Leeming

Translating overseas trusts into the Australian legal system 169

RECENT CASES – Editor: Acting Justice Peter W Young AO

Trade marks: Foreign words 172
Income tax: Non-resident – Transaction involving sale of Australian company shares to non-resident – Consideration to be paid in Canadian dollars – Whether taxable in Australia 172

Crime: Manslaughter – Whether accused should foresee the precise harm which caused death 173
Companies: Winding up – Statutory subrogation when employees' debt is paid 173
Negligence (contractual): In a motor cycle training school – Whether Civil Liability Act (NSW), ss 5B and 5M apply 174
Marshalling: How far operation of principle restricted by contract 174

ARTICLES

LESSONS FROM A "CONVERSATION" ABOUT RESTITUTION

Hon Justice Susan Kiefel AC

In Australia, the law of restitution adheres to the approach exemplified by Lord Mansfield in Moses v Macferlan (1760) 2 Burr 1005; 97 ER 676. It does not recognise "unjust enrichment" as a definitive principle. In the late 20th century, the English courts recognised the principle and, shortly after, the defence of change of position. These developments may owe much to a "conversation" between English and German legal scholars. The German Civil Code (Bürgerliches Gesetzbuch, or BGB) has long recognised the defence, as a counterpoint to its broad "absence of basis" ground for liability. Notably, however, English law has not (yet) embraced such a broad ground for liability, and still requires a vitiating factor, such as mistake, to found a restitutionary claim. This article considers what implications the adherence to the considerations in Moses v Macferlan may have for the acceptance in Australia of the change of position defence as it is known to English and German law. 176

MURRAY GLEESON'S CONTRIBUTION TO THE DEVELOPMENT OF CRIMINAL LAW

Hon Justice Margaret McMurdo AC

In this article I deal briefly with Murray Gleeson's contribution to the criminal law as barrister and Chief Justice of the Supreme Court of New South Wales. But I focus principally on his contribution to the criminal justice system through his judgments, extra-curial speeches and leadership role whilst Chief Justice of the High Court of Australia. I discuss his first and last criminal decisions in the High Court. In between, I briefly analyse his dissents, his influence on the Tasmanian Jury Study, his role as leader of the Australian judiciary and review a representative selection of his judgments from all Australian jurisdictions. Before concluding, I consider how he dealt with the tension between community protection and individual rights and whether the label of black-letter conservative judge, which some gave to him, is apposite. 186

BETFAIR PTY LTD V WESTERN AUSTRALIA AND THE NEW JURISPRUDENCE OF SECTION 92

Michael Coper

Except for an immediate small flurry of cases, s 92 of the Australian Constitution went to sleep for 20 years after the High Court's ground-breaking decision in Cole v Whitfield (1988) 165 CLR 360. Then in 2008, this pivotal guarantee of free trade among the States in our 19th-century foundational document came into collision with new, 21st-century,

electronic ways of doing business, to which State geographical boundaries were largely irrelevant – except that it was the States that sought to regulate this business. In Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, involving State regulation of internet gambling, the High Court reminded us of the gospel according to Cole v Whitfield: the States cannot regulate in a way that discriminates against interstate trade so as to confer protectionist benefits on their own intrastate trade. In the age, however, of the new economy, and of national competition law, some commentators have asked whether the national "common market" is adequately fostered by confining s 92 to the prevention of State protectionism. Two further internet gambling cases in 2012 appear to squash any suggestion in the 2008 case that the High Court might stray from the true path of Cole v Whitfield and expand the ambit of s 92 beyond State protectionism – although a possible issue raised by laws that lessen competition without involving State protectionism was left to another day. In the author's view, s 92 is appropriately confined to the prevention of State protectionism, with broader protection of the common market best left to other mechanisms. 204

BOOK REVIEWS – Editor: Angelina Gomez

Tort Law Defences, by James Goudkamp 214

The Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Thomson Reuters

DECISIONS RECEIVED IN DECEMBER 2013-FEBRUARY 2014

Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd (*Intellectual Property*) ([2013] HCA 50) 261

Barbaro v The Queen (*Criminal Law*) ([2014] HCA 2) 372

Justice (Cth), Minister for v Adamas (*Extradition*) ([2013] HCA 59) 364

Milne v The Queen (*Criminal Law; Statutes*) ([2014] HCA 4) 395

Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship (*Citizenship and Migration; Constitutional Law; High Court and Federal Court*) ([2013] HCA 53) 324

Smith v Western Australia (*Criminal Law; Jury*) ([2014] HCA 3) 384

Zirilli v The Queen (*Criminal Law*) ([2014] HCA 2) 372