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CURRENT ISSUES – Editor: Acting Justice Peter W Young AO

Welcome to the Journal for 2015	7
50 years ago	7
Too many commissions?	8
Delay in Family Courts	8
21st anniversary of the Laws of Australia	9

CONVEYANCING AND PROPERTY – Editor: Peter Butt

Statutory warfare? What happens when retail lease legislation collides with liquor licensing laws?	11
Date for assessment of damages	15

RECENT CASES – Editor: Acting Justice Peter W Young AO

Choice of law: Trans Tasman Treaty	17
Court orders: How construction must be approached	17
Insurance: Fire claim – Onus of proof	18
Specific performance: Claim by musicians to play at a theatre	18
Trusts: Variation – How far Court’s power to approved advantageous dealings can be employed to vary the trusts	19

ARTICLES

UNNECESSARY CAUSATION

James Edelman

One of the most difficult, but ubiquitous, issues in the law is the question of causation. Whether in criminal law or in civil law a person is not generally thought to be responsible for outcomes that he or she has not caused. The question of causation should not be understood as one of fact or of law. It is a question of metaphysics. The approach that should be taken to the metaphysical question is a counterfactual inquiry into whether the event which was the person’s action or inaction made a difference to the outcome. In other words, whether “but for” the event the outcome would have happened anyway. Once causation is understood in this way then it is possible to see a considerable number

of circumstances where persons are responsible without having caused an outcome. Attention can then be focused upon the reasons why the law allows responsibility where causation is unnecessary. 20

A CATTLE LIFTER’S BILL: NEMO DAT RULE AND THE INDIAN CONTRACT ACT

Gail Pearson

Who should own wrongfully obtained goods sold to a third party? The nemo dat rule for sale of goods is taken for granted but was not inevitable. There was a 19th century proposal to create a universal market overt for the buyer to gain title. Reform proposals oscillated between favouring the owner or the buyer. Mid-century English reformers suggested abolishing the market overt rule, then law commissioners drafting the Indian Contract Bill proposed a buyer should gain title from anyone in possession of the goods. This was rejected with a new proposal that a buyer could not gain ownership from any person in possession. In turn this was rejected and a proposal stating the nemo dat rule was accepted and became law in India, in turn influencing legislation in England and other common law countries. This story of property rights involves Romilly, Macpherson, Maine, Stephen and the ubiquitous cattle-lifters of districts in India. 31

POSSESSION OF LAND: MISSTEPS IN THE CONTROL ANALYSIS – PART 1

Chris Boge

Possession of an estate is one of the most important concepts in land law. And while it has been said that possession is difficult to define, it does have an internal consistency. Its true meaning concerns a relationship a person has with an estate; yet not infrequently it is wrongly used to describe physical occupation or control of land. This false approach has the potential to lead principle into irreversible error. Possessory remedies can sometimes protect a right of general control of land, even where that right is not sourced in a title. Indeed, such remedies are the core of general control. However, courts in England have seemingly adopted an approach which uses possessory remedies against third parties who do not owe any relevant duty to a “title-less” claimant not to interfere with the claimant’s right of occupation or use of land, sometimes referred to, nebulously, as effective control of land. Australian courts have also made missteps in the “control” analysis by suggesting that possession can be vindicated against limited third parties. Part 1 of this article explores the bases for these developments. Part 2 will consider more recent directions in the English and Australian positions and the parallel development of the idea of “possession for a purpose”. 49

Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Thomson Reuters

DECISIONS RECEIVED IN NOVEMBER 2014

Alphapharm Pty Ltd v H Lundbeck A/S (*Intellectual Property*) ([2014] HCA 42) 1
Gray v Richards (No 2) (*High Court and Federal Court*) ([2014] HCA 47) 113

Hunter and New England Local Health District v McKenna (<i>Health Law; Mental Health; Professions and Trades; Torts</i>) ([2014] HCA 44)	39
Hunter and New England Local Health District v Simon (<i>Health Law; Mental Health; Professions and Trades; Torts</i>) ([2014] HCA 44)	39
Immigration and Border Protection, Minister for v SZSCA (<i>Citizenship and Migration</i>) ([2014] HCA 45)	47
Kuczborski v Queensland (<i>Criminal Law; High Court and Federal Court</i>) ([2014] HCA 46)	59
Wellington Capital Ltd v Australian Securities and Investments Commission (<i>Corporations; High Court and Federal Court</i>) ([2014] HCA 43)	24