

# THE AUSTRALIAN LAW JOURNAL

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## **CURRENT ISSUES – Editor: Justice François Kunc**

Auschwitz and Lawyers .....	261
An Opening of Law Term Address Draws National Attention .....	262
Across the Pacific .....	263
Amendments to Hate Speech Laws .....	264
A New Assistant General Editor .....	264
The Curated Page .....	264

## **CONVEYANCING AND PROPERTY – Editors: Robert Angyal SC and Brendan Edgeworth**

“Joint Endeavour” Constructive Trust – Joudo v Joudo .....	265
--	-----

## **FAMILY LAW – Editor: Grant T Riethmuller**

Rethinking the Test for Bias in Family Law Proceedings .....	269
--	-----

## **ADMIRALTY AND MARITIME – Editor: Dr Damien J Cremean**

Caught by a Time Limit: Amended Hague Rules Art III r 6. ....	273
---	-----

## **PERSONALIA – Editors: Emily Vale and Saskia O’Neill**

Commonwealth .....	278
Justice Penelope Neskovicin .....	278
Justice Jane Needham .....	278
Justice Stephen McDonald .....	278
New South Wales .....	279
Justice Richard McHugh .....	279
Justice Tim Faulkner .....	279
Justice Belinda Rigg .....	279
Justice Andrew Coleman .....	279
Senior Counsel Appointments .....	280
Northern Territory .....	280
Senior Counsel Appointments .....	280
Queensland .....	280
King’s Counsel Appointments .....	280

South Australia .....	280
Senior Counsel Appointments .....	280
Tasmania .....	280
Senior Counsel Appointments .....	280
Victoria .....	281
Senior Counsel Appointments .....	281

## ARTICLES

### THE TRUSTEE’S DUTY OF CARE: TO FIDUCIARY OR NOT TO FIDUCIARY?

**Dr Glen Anderson**

There is a school of thought – preponderant at the time of writing – which holds that the trustee’s duty of care is not fiduciary. There is an opposing school of thought, however, which holds that the trustee’s duty of care is fiduciary. The long-running debate over the characterisation of the trustee’s duty of care stretches beyond equitable semantics, impacting limitation periods, causation tests, exemption clauses, proprietary relief and contributory negligence. Most importantly, it also impacts doctrines applicable to strangers in the non-trustee fiduciary context such as knowing receipt, knowing assistance and knowing procurement. After analysing the case law provenance of both schools of thought, and other important factors impacting the debate, the article concludes that a tractable argument can be made that the trustee’s duty of care should be characterised as fiduciary. .... 282

### THE DUTY TO HAVE REGARD TO CONTEXT AS A FORCE FOR CHANGE IN THE IDENTIFICATION OF INTERPRETATIVE FACTORS

**Jeffrey Barnes**

The duty to have regard to context is a central organising principle of contemporary statutory interpretation. It mandates that the context of words whose meaning is in question be fully considered in all cases, regardless of whether the meaning of the words, read in isolation, is plain. Significantly, context in this sense is both intrinsic and extrinsic. The author elaborates how acceptance of the principle has led to a great number of the previous restrictions on taking account of particular considerations being removed. The author argues that in *CIC Insurance Ltd v Bankstown Football Club* and following cases the High Court of Australia and other appellate courts have made a significant positive contribution in rationalising the rules for accessing interpretative factors in the course of statutory interpretation. .... 302

### THE STRAWMEN TRAP: NON-APPEARANCE AND THE PITFALLS OF PSEUDOLAW

**Joe McIntyre, Harry Hobbs and Stephen Young**

This article examines the growing phenomenon of self-represented litigants utilising the “strawman duality” form of pseudolegal argument, and the risk of trial judges grappling with the issue. It describes the emergence of a “strawman trap” whereby, attempts by unwary trial judges to cut the Gordian knot of the convoluted pseudolaw arguments may become an appealable error. It then outlines several different approaches that may be used by trial judges to avoid this trap, and to otherwise deal with pseudolaw challenges. It argues that pseudolaw is an increasingly problematic phenomenon detrimentally affecting both the administration of justice and the interests of litigants, but that a more informed approach can aid the effective diffusing of the threat posed by it. .... 319

**BOOK REVIEWS – Editor: Angelina Gomez**

*Reform: Australia's Golden Era of Social and Legal Reform 1965–1995, The Memoir of a Participant*, by Terry Purcell ..... 336

*National Security Law in Australia*, by Danielle Ireland-Piper ..... 337

## Australian Law Journal Reports

**HIGH COURT REPORTS – Staff of Thomson Reuters**

DECISIONS RECEIVED IN NOVEMBER 2024/ FEBRUARY 2025

Commonwealth v Stradford (a pseudonym) ([2025] HCA 3) (*Courts and Judges; High Court and Federal Court; Torts*) ..... 396

KMD v Chief Executive Officer of the Department of Health (NT) ([2024] HCASJ 40) (*High Court and Federal Court*) ..... 374

KMD v Chief Executive Officer of the Department of Health ([2025] HCA 4) (*Criminal Law*) ..... 474

Kumar v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ([2024] HCASJ 41) (*Citizenship and Migration; High Court and Federal Court*) ..... 380

Plaintiff M87/2023 v Minister for Immigration, Citizenship and Multicultural Affairs ([2024] HCASJ 42) (*Administrative Law; Citizenship and Migration*) ..... 387

Queensland v Stradford (a pseudonym) ([2025] HCA 3) (*Courts and Judges; High Court and Federal Court; Torts*) ..... 396

Vasta, His Honour Judge v Stradford (a pseudonym) ([2025] HCA 3) (*Courts and Judges; High Court and Federal Court; Torts*) ..... 396