trial or to give reasons for upholding conviction — whether decision valid — Criminal Procedure Act 1985, s. 373(2)

Criminal procedure — judgment — requirements — trial in magistrate's court — magistrate entering conviction — judgment failing to address all issues raised — whether judgment complying with statutory requirements — elements required in judgment — whether judgment valid — Criminal Procedure Act 1985, s. 312(1) (Tanzania)

Dibagula v Republic [2003] 4 LRC 699 Court of Appeal

Criminal law — extradition — request by Australia for surrender of person in Poland to answer criminal charges in Australia validity of extradition request

Constitutional law — executive power — power to request surrender of alleged fugitive offender from foreign state — whether power abrogated by statute — whether limitations, conditions, exceptions or qualifications imposed upon power to request surrender whether power may only be exercised in relation to extraditable offences as listed in extradition treaty with foreign state — (CTH) Extradition Act 1988

Statutes — interpretation — executive power — power to request surrender of alleged fugitive offender from foreign state whether power abrogated by statute — whether statute abrogates power by express words or necessary implication — (CTH) Extradition Act 1988 (Australia)

Oates v Attorney-General (CTH) and Another 197 ALR 105 High Court of Australia (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ)

Crime — arson — mens rea — recklessness as to whether or not property would be destroyed or damaged — whether defendants' acts created obvious risk of damage to property - whether defendant's age and personal characteristics relevant in assessing obviousness of risk — Criminal Damage Act 1971 (c 48), s.1 (United Kingdom)

R v G and Another [2003] 3 WLR 1060 House of Lords

Criminal law — offences — structuring cash transactions meaning of "transaction" — whether two or more non-reportable cash transactions — (CTH) Financial Transaction Reports Act 1988 ss. 3, 4, 7, 31

Criminal law — appeals — evidence — whether Crown case split — whether error in allowing cross-examination by Crown on evidence of unexplained wealth — whether error in allowing Crown case in reply

Words and phrases — "transaction" (Australia)

R v O 'Driscoll (2003) 200 ALR 283 Supreme Court of New South Wales - Court of Criminal Appeal

116

115

117

Contents

Legislation	1
Constitutional Law and Human Rights Access to Information Act 2002 (Jamaica)	1
Constitution (Eighty-Sixth Amendment) Act, 2002 (India)	3
Criminal Law and Procedure	
Criminal Code Amendment (Offences Against Australians) Act 2002 (Australia)	4
Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Act 2002 (Australia)	5
International Criminal Court Act 2003 (Isle of Man)	6
Registration of Criminals (Amendment) Act 2002 (Singapore)	8
Finance, Trade and Economic Development	
Securities and Exchange Board of India (Amendment) Act, 2002 (India), Securitisation and Reconstruction of Financial Assets and	8
Enforcement of Security Interest Act 2002 (India)	12
Land	
Estate Duty (Amendment) Act 2002 (Singapore)	17
Medico — Legal	
Prohibition of Human Cloning Act 2002 (Australia)	18
Infections Diseases (Amendment) Act 2003 (Singapore) Infections Diseases (Amendment No. 2) Act 2003 (Singapore)	19 20
Medical Registration (Amendment) Act 2002 (Singapore)	21
(
Offices of the Ombudsman and Human Rights Commissions	21
Kenya National Commission on Human Rights Act 2002 (Kenya)	21
T 11 ' 1 IN ' '	24
Judicial Decisions	24
(see also under Legal Profession)	
Administrative Law	
Administrative law — judicial review — availability — statutory power of decision — written reprimand to civil servant — legislation authorising discipline for improper conduct, subject to	
<i></i>	

"no overlap" of members — whether registration requirements breach implied freedoms

Administrative law — political parties — review of eligibility for continued registration as political party — whether decision to review taken for improper purpose — validity of notice requiring information (Australia)

Mulholland v Australian Electoral Commission 198 ALR 278 Federal Court of Australia (Black CJ, Weinberg and Selway JJ)

Civil and political rights — discrimination racial discrimination — racial vilification — whether Pt IIA of Racial Discrimination Act 1975 (Cth) constitutionally valid — whether act "because of" race, colour or national or ethnic origin — whether relevant act of publication done reasonably and in good faith in course of discussion conducted for any genuine academic purpose or genuine purpose in public interest — (CTH) Racial Discrimination Act 1975 Pt IIA — Commonwealth Constitution s. 51 (xxlx) — International Convention on the Elimination of All Forms of Racial Discrimination Art 4

Constitutional law — Commonwealth Constitution — constitutional validity of Pt IIA of Racial Discrimination Act 1975 (Cth) — Racial Discrimination Act 1975 — Commonwealth Constitution s. 51(xxix) — International Convention on the Elimination of All Forms of Racial Discrimination Art 4

Words and phrases — "because of" (Australia)

Toben v Jones 199 ALR 1 Federal Court of Australia (Carr, Kiefel and Allsop JJ)

Courts Practice and Procedure

Contempt — contempt of court — penalties — failure to comply with court orders — orders sought requiring respondents to perform certain acts to transfer registration of domain name to Australian Competition and Consumer Commission — purpose of transfer to enable Australian Competition and Consumer Commission to post corrective advertising on website — whether transfer futile — warrant sought for committal of respondents to prison — respondent denied authority and jurisdiction of court — whether failure to comply with orders wilful

Practice and procedure — jurisdiction — order sought requiring respondents to facilitate transfer of registration of domain name to Australian Competition and Consumer Commission — registrar of domain name outside jurisdiction — property subject of order sought outside jurisdiction — registrant of domain name within jurisdiction — Federal Court Rules O 37 r 3 (Australia)

Australian Competition and Consumer Commission v Purple Harmony Plates Pty Ltd and Others (No. 3) (2003) 196 ALR 576 Federal Court of Australia 92

94

96

хi

Constitutional law — fundamental rights — right to protection against unfair discrimination — sexual orientation — legislation legitimating child born to married couple as result of artificial insemination — no similar provision in respect of permanent same-sex life partners — applicants same-sex life partners — children "born to applicants as result of artificial insemination — legislation precluding applicants from registration as parents — whether legislation unconstitutional — appropriate remedy — "reading in" words in legislation — whether to be extended to all life partners — whether order to be suspended — relevant considerations — Children's Status Act 1987, s. 5 — Constitution of the Republic of South Africa 1996, s. 9 (South Africa)

J and another v Director General (Department of Home Affairs) and Another [2003] 4 LRC 184 Constitutional Court of South Africa

Fundamental rights — right to equality — right not to be unfairly discriminated against — gender discrimination — prostitution — statutory provisions criminalising prostitution — whether indirect discrimination — whether infringing fundamental rights — whether unconstitutional — Sexual Offences Act 1957, s. 20(1)(aA) — Constitution of the Republic of South Africa 1993, ss. 8(2), 33, 36(1)

Fundamental rights — right freely to engage in economic activity — right to pursue a livelihood — prostitution — statutory provisions criminalising prostitution and brothel-keeping — whether infringing fundamental rights — whether unconstitutional — Sexual Offences Act 1957 — Constitution of the Republic of South Africa 1993, s. 26

Fundamental rights — right to privacy — right to human dignity — right to freedom and security of the person — prostitution — statutory provisions criminalising prostitution — whether infringing fundamental rights — whether such infringement justifiable — Sexual Offences Act 1957 — Constitution of the Republic of South Africa 1993, ss. 10, 11, 13, 33(1)

Fundamental rights — right to freedom and security of the person — right to freely engage in economic activity — right to pursue a livelihood — brothel-keeping — statutory provisions criminalising brothel-keeping — whether infringing fundamental rights — whether unconstitutional — whether such infringement justiciable — Sexual Offences Act 1957, ss. 2, 3(b), (c) — Constitution of the Republic of South Africa 1993, ss. 11, 13, 26, 33, 35 (South Africa)

Jordan and Others v State [2003] 3 LRC 135 Constitutional Court of South Africa

Constitutional law — Commonwealth Constitution — implied freedoms of communication and association — registration of political parties — requirement that party have 500 members and

86

to criminal proceedings for purposes of immunity — Constitution of the Federal Republic of Nigeria 1999, s. 308(1)(a)

Administrative law — judicial review — remedies — mandamus — police — criminal investigation — failure of police to investigate alleged crimes — application for order of mandamus — absence of evidence of crimes — whether order of mandamus to be granted — whether in public interest

Administrative law — judicial review — standing — criminal investigation — failure of police to investigate alleged crimes — applicant seeking order of mandamus requiring police to conduct investigation — whether applicant having locus standi — appropriate test — relevant considerations — Criminal Procedure Law of Lagos State, s. 59(1) (Nigeria)

Fawehinmi v Inspector General of Police and Others [2003] 4 LRC 61 Supreme Court

Human rights — right to fair trial — requirement to pay costs — claimant required to pay outstanding costs as condition of pursuing claim at first instance — whether impairing very essence of right of access to court — Gibraltar Constitution Order in Council 1969, s. 8(8) (Gibraltar)

Ford v Labrador [2003] 1 WLR 2082 Privy Council

Constitutional law — fundamental rights — freedom of expression — whether encompassing right to vote — secret ballot — whether guaranteed — whether requiring absolute secrecy — effect of relevant international instruments — statute requiring presiding officer to mark voter's registration number on ballot counterfoil — voter alleging that presiding officer had marked ballot number opposite voter's name in register of voters — voter fearing that identity and selection capable of becoming known under existing provision — whether provision infringing fundamental right — Constitution of the Commonwealth of The Bahamas 1973, Arts 1, 23, 46, 48 — Parliamentary Elections Act 1992, ss. 6, 59(1)(b) — Ballot Act 1872 (UK), s. 2 — United Nations Universal Declaration of Human Rights 1948 — International Covenant on Civil and Political Rights 1966 — Convention for the Protection of Human Rights and Fundamental Freedoms 1950

Constitutional law — fundamental rights — freedom of expression — limitation by statute — validity — presumption of constitutionality — rebuttal — standard of proof — statute regulating voting at parliamentary elections — safeguards against abuse — whether infringing fundamental right — whether valid — whether reasonably required — whether reasonably justifiable — Constitution of the Commonwealth of The Bahamas 1973, Art 23 — Parliamentary Elections Act 1992, s. 59(l)(b) (The Bahamas)

Ingraham and Others v McEwan [2003] 4 LRC 270 Court of Appeal

80

81

84

ix

Constitution of the Co-operative Republic of Guyana 1980, Art 142

Constitutional law — fundamental rights — protection against deprivation of property — doctrine of eminent domain conferring capacity on state to acquire private property for public purposes — public purposes — meaning — restructuring of essential industry — whether property compulsorily acquired for public purpose — appropriate test — relevant considerations

Constitutional law — fundamental rights — protection against deprivation of property — debt owed by government — debt discharged by issue of bonds — whether amounting to compulsory acquisition — whether substantial deprivation of property — Constitution of the Co-operative Republic of Guyana 1980, Art 142 (Guyana)

A-G v Caterpillar Americas Co [2003] 3 LRC 1 Supreme Court of Guyana

Constitutional law — constitution — public officer — superannuation benefits — entitlement — constitutional protection — retired public officer claiming benefits — state withholding payment of benefits — circumstances in which state permitted to withhold benefits — Constitution of the Co-operative Republic of Guyana 1980, Art 214 — Pensions Act, s. 4(1), (2), (3)

Constitutional law — fundamental rights — protection against deprivation of property — public officer — superannuation benefits — state withholding payment of benefits — whether amounting to deprivation of property — whether infringing fundamental rights — appropriate test — relevant considerations — Constitution of the Co-operative Republic of Guyana 1980, Arts 142, 153(2), 214

Constitutional law — constitution — enforcement — remedies — coercive order — retired public officer claiming payment of superannuation benefits — whether High Court having power to issue coercive order against the state — Constitution of the Cooperative Republic of Guyana 1980, Arts 153(2), 214 (Guyana) Baird v Public Service Commission and Another [2003] 3 LRC 41 Court of Appeal

Constitutional law — constitution — police — duties — investigation of crime — discretion — whether police having discretion in investigation of alleged crimes — relevant considerations in the exercise of such discretion — Constitution of the Federal Republic of Nigeria 1999, s. 214(1) — Police Act 1990, s. 4

Constitutional law — executive officer — immunity — criminal proceedings — state governor — immunity from criminal and civil proceedings, arrest and imprisonment — police investigation — whether police investigation of criminal allegations amounting

75

terms of collective agreement — agreement providing grievance procedure involve discussion with designated officer — specifying officer's decision final — officer's actions subject to judicial review — officer performed decision-making role and exercised statutory power

Judicial review — review not limited to statutory tribunals — legislation authorising discipline for improper conduct, subject to terms of collective agreement — agreement providing grievance procedure involve discussion with designated officer — specifying officer's decision final — officer's actions subject to judicial review, even if not exercising statutory power

Constitutional law — Charter of Rights — application — social worker in family and social services department publicly critical of government policy — manager issuing written reprimand — providing restrictive directions regarding future public comment — legislation authorising discipline for improper conduct, subject to terms of collective agreement — agreement providing for grievance procedure relating to written reprimands — charter applied — issuance of reprimand and directions and adoption of grievance procedure constituted government action — Canadian Charter of Rights and Freedoms

Freedom of expression — unjustified limitations on freedom of expression — restrictions exceeded civil servant's duty of fidelity (Canada)

Alberta Union of Provincial Employees v Alberta (2003) 218 DLR (4th) 16 Alberta Court of Appeal

Standing — departmental instruction — whether applicant, adviser on social security matters, had standing to challenge correctness of departmental instruction — (CTH) Judiciary Act 1903 s. 39B(1A) — (CTH) Social Security Act 1991 Pt 3.18 (Australia) Anstis v Secretary, Department of Family and Community Services (2003) 195 ALR 245 Federal Court of Australia

Administrative law — judicial review — whether inquiry into conviction of prisoner authorised by s. 475 of Crimes Act 1900 (ACT) — whether doubt or question about fitness to plead of convicted person capable of being doubt or question as to guilt — meaning of "guilt"

Statutes — interpretation — interpretation based on linguistic usage and language in statute — interpretation based on legislative history — interpretation based on purpose of legislation — meaning of "guilt"

Words and phrases — "guilt" (Australia)

Eastman v Director of Public Prosecutions (ACT) and Others 198 ALR 1 High Court of Australia (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

Constitutional law — act of state — fact-specific nature of act of state — statutory limits on executive's power to declare

64

65

of Australia (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ)

Trade and commerce — trade practices — whether arrangements or understandings made between corporation and AMAWA concerning terms and conditions of employment of doctors price fixing — whether individual doctors party to arrangement or understandings negotiated by AMAWA — (CTH) Trade Practices Act 1974

Public administration — Crown immunities — whether state carrying on business when providing free medical services to public patients — whether corporation providing on contract to state free medical services to public patients entitled to derivative Crown immunity (Australia)

Australian Competition and Consumer Commission v Australian Medical Association Western Australia Branch Inc and Others 199 ALR 423 Federal Court of Australia (Carr J)

Trade and commerce — trade practices — misuse of market power — refusal by supermarket chain in Victoria to acquire bread from bread manufacturers who supplied wholesale bread to independent retailers who sold at discounted retail prices — definition of market — whether substantial degree of power in market —whether taking advantage of market power — whether proscribed purpose of deterring or preventing person from engaging in competitive conduct — whether error by primary judge — (CTH) Trade Practices Act 1974

Trade and commerce — trade practices — exclusive dealing — refusal by supermarket chain in Victoria to acquire bread from bread manufacturers who supplied wholesale bread to independent retailers who sold at discounted retail prices — refusal to acquire goods from person because person has supplied goods to particular persons for particular prices — refusal to acquire goods from person who supplies discounters — classes of persons — whether necessary to plead "intention" to make arrangement or reach understanding — (CTH) Trade Practices Act 1974

Trade and commerce — trade practices — whether arrangement or understanding between supermarket chain and bread manufacturer to fix or control retail price of bread — whether purpose or likely effect of fixing or controlling price of goods — (CTH) Trade Practices Act 1974

Practice and procedure — appeal — whether appellate court should entertain new point or argument raised on appeal — circumstances in which appellate court will interfere with findings of fact by primary judge

Practice and procedure — pleadings — whether applicant precluded from arguing claim on basis that claim beyond scope of pleadings

r 44.12 A, Costs Practice Direction, para 11.8 (United Kingdom)	
Halloran v Delaney [2003] WLR 28 Court of Appeal, Civil	
Division (Peter Gibson, Brooke and Tuckey LJJ)	232
Commonwealth Developments	233
Communiqué	
Good Governance and Human Rights	
Human Rights	254
Modernisation of the Laws of Evidence	259
Latimer House Guidelines On Parliamentary Supremacy and	212
Judicial Independence	312
Protection of Privacy	323
International Co-Operation to Combat Crime	
The Commonwealth Legal response to terrorism	342
Proposed Revision of the London Scheme on the Rendition	3.12
of Fugitive Offenders	348
Proposed amendments to The Harare Scheme on Mutual Assistance	· 4
in Criminal Matters	363
Model Law on Computer and Computer Related Crime	365
Strategies for Enhancing Democracy by Eliminating Legal Barrigrs	
to Development	207
Draft Model Law on the Protection of Personal Information	387
Strategies for Enhancing Democracy by Eliminating Legal Barriers	412
to Development	412
Law and Technology	
Draft Model Law on Electronic Transactions	437
Draft Model Law on Electronic Evidence	448
Round Table Discussion	
Current Legal Issues	452
The Evolving Role of Regional Courts Within the Framework of	
International Law with the Attendant Need for Intra Regional	
Harmonisation of Laws	452
Traditional and Cultural Knowledge and their Protection Under	156
Intellectual Property Rights Regimes	456
Training of Legislative Drafters	458 461
Eliminating Corruption in the Judicial System	465
Developing and Strengthening Legal Education Good Governance and Freedom of the Press	465
Creditors' Remedies	466
Cicultors Reflicules	700

xxvi

to allow recovery of success fee by way of percentage uplift — CPR

22.	Ralph Hume Garry (a firm) v Gwillim [2003] 1 All ER 1038 Court of Appeal, Civil Division (Ward, Mance LJJ and Sir Martin Nourse)
226	Solicitor — law society — intervention — compliance of Law Society's intervention procedure with human rights legislation — Human Rights Act 1998, Sch 1, Pt II, Art 1
	Human rights — right to peaceful enjoyment of possessions — intervention in solicitor's practice — compliance of Law Society's
	intervention procedure with human rights legislation — Human Rights Act 1998 (United Kingdom) Holder v Law Society [2003] 3 All ER 62 Court of Appeal, Civil
227	Division (Aldous, Carnwath LJJ and Sir Christopher Staughton) Judge — circuit judge — jurisdiction — judge authorised to sit as judge of Technology and Construction Court — sitting in Queen's Bench Division although not authorised to do so — judge and parties believing him to be authorised — whether judge's decision valid as decision of de facto judge — whether judge "tribunal established by law" — Human Rights Act 1998 (United Kingdom)
228	Coppard v Customs and Excise Commissioners [2003] 2 WLR 1618 Court of Appeal, Civil Division (Thorpe, Sedley and Mance LJJ)
*	Costs — order for costs — cost-sharing order — multi-party actions — amendment of order — whether cost-sharing order should provide for costs of common issues to follow determination of common issues — whether cost-sharing order should provide for liability for common costs for discontinuing or settling claimants to be determined at trial of common issues (United Kingdom) Sayers and Others v Merck SmithKline Beecham plc and Others
230	[2003] 3 All ER 631 Court of Appeal, Civil Division (Mummery, Buxton and Longmore LJJ) Costs — security for costs — foreign claimant — claimant ordinarily resident in United States with assets in Netherlands and Switzerland — whether appropriate to make order for security of costs against claimant — whether claimant "person against whom a claim can be enforced" — Civil Jurisdiction and Judgments Act 1982 (as amended by Civil Jurisdiction and Judgments Act 1991) (United Kingdom)
231	De Beer v Kanaat & Co (a firm) and Another [2003] 1 WLR 38 Court of Appeal, Civil Division (Jonathan Parker LJ and Rimer J) Costs — taxation — costs-only proceedings — claimant entering into conditional fee agreement with solicitors — agreement providing cover for "claim" for personal injury, enforcement proceedings and recovery of success fee from defendant — claim settled without issue of proceedings and defendant agreeing to pay reasonable costs — costs-only proceedings issued to recover success fee — whether agreement covering costs-only proceedings — whether court entitled

Practice and procedure — costs — security for costs — whether security should be ordered against representative party — factors to be taken into account — (CTH) Federal Court of Australia Act 1976 ss. 5, 33C, 33ZG(v), 43(1A), 59

Practice and procedure — service of documents — leave to serve out of jurisdiction — multiple causes of action — need to show prima facie case for relief — relief refers to remedy not cause of action — Federal Court Rules O 8 r l, O 8 r 2, O 4 r 3

Practice and procedure — representative proceedings — whether every member of group must have claim against every respondent — whether substantial common issue of law or fact

Trade and commerce — trade practices — jurisdiction — action based on conduct engaged in outside Australia — operation of s. 5(1) of Trade Practices Act 1974 (Cth) — whether involving jurisdictional facts — (CTH) Trade Practices Act 1974 ss. 5, 45, 80, 86(1), 163A (Auatralia)

Bray v Hoffman-La Roche and Others (2003) 200 ALR 607 Federal Court of Australia

Practice and procedure — representative proceedings — application that proceedings should not continue as representative proceedings — whether common issues correctly identified — whether determination of common issues would advance claims of group members — whether representative proceedings more cost effective than individual proceedings — (CTH) Federal Court Act 1976 ss. 33C, 33N. (Australia)

Bright v Femcare Ltd and Another (2003) 195 ALR 574 Federal Court of Australia

Native title — whether native title application over adjoining lands should be consolidated under 0 29 r 5 of Federal Court Rules because evidence of witnesses to be called in first application related to parcels of land covered by both applications — whether adjoining landowners should be joined as parties to first native title determination application — Aboriginals and Torres Strait Islanders (Australia)

Wilson (on behalf of the Bandjalang People) v Minister for Land and Water Conservation (NSW) and Others 198 ALR 238 Federal Court of Australia (Hely J)

Criminal Law and Procedure

Criminal procedure — trial — summing up — evidence — tainted evidence — alleged confession — evidence of fellow prisoner — whether improper motive for giving evidence — whether inference that evidence tainted — whether need for caution in accepting evidence — appropriate direction required to jury

Criminal procedure — trial — prosecutor — presentation of prosecution case — need for balanced approach — xenophobic and inflammatory remarks — use of inadmissible and irrelevant material — effect — whether rendering conviction unsafe

98

99

upholding decision — applicant appealing to court — whether appeal to court by way of rehearing — Trade Marks Act 1994 (c 26), s. 76 — CPR r 52.11(1) (United Kingdom) Dyson v Registrar of Trade Marks [2003] 1 WLR 2406 Chancery Division	167
Law Reform	168
Companies and Corporate Bodies Registration of Security Interests: Company Charges and Property Other Than Land (United Kingdom)	168
Finance, Trade and Economic Development Dual Citizenship (Tanzania)	181
Trusts and Trustees Wills and Succession (Canada — Manitoba)	203
Legal Profession Judicial Decisions	215
Administration of justice — federal government having jurisdiction over criminal procedure — provincial government having jurisdiction over administration of justice, including regulation of lawyers — rule requiring prosecutors to make timely disclosure of evidence to accused — rule adopted under provincial law society legislation — whether rule unconstitutional — appropriate test Legal profession — law society — jurisdiction — alleged breach of ethical standards — criminal proceedings — prosecutorial discretion — rule requiring prosecutors to make timely disclosure of evidence to accused — alleged breach of rule — conduct reviewed by Attorney General — whether provincial law society having jurisdiction to review professional conduct of Crown prosecutor — whether jurisdiction infringing prosecutorial discretion (Canada) **Krieger v Law Society of Alberta** [2003] 3 LRC 249 Legal profession — barrister — immunity — whether barristers entitled to immunity from suit — whether restricted to conduct of	217
court proceedings — statute giving barristers the privileges of barristers in England — construction — scope of immunity — relevant considerations — Law Practitioners Act 1982, s. 61 (New Zealand) Lai v Chamberlains [2003] 4 LRC 558 High Court (Salmon and Laurenson JJ)	218

xxiii

boundaries — non-justiciability — doctrine of judicial restraint — whether dispute as to whether Commonwealth may grant title is "matter" — how legislation vests sovereignty over continental shelf — conclusive and evidentiary nature of certificate from executive — court's lack of jurisdiction to determine validity of grant by foreign government — consequence of non-justiciability — operation of s. 61 of constitution — consideration of Australia's domestic and external interests

Conflict of laws — foreign decrees — foreign governmental interests — when international law is proper law of transaction (Australia)

Petrotimor Companhia de Petroleos SARL and Another v Commonwealth of Australia and Others 197 ALR 461 Federal Court of Australia (Black CJ, Beaumont and Hill JJ)

Constitutional law — constitution — construction of privative clause in migration legislation — whether privative clause confers judicial power on non-judicial decision-maker — whether privative clause invalid — privative clause, jurisdictional error and denial of natural justice — whether "decision" includes purported decision

Constitutional law — constitution — statute limiting time for application to High Court — whether statutory provision invalid

Citizenship and migration — refugees — construction of privative clause in migration legislation purporting to limit jurisdiction of courts — whether privative clause invalid — whether "decision" includes purported decision (Australia)

Plaintiff S157/2002 v Commonwealth of Australia 195 ALR 24 High Court of Australia (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

Companies and Corporate Bodies

Company — director — fiduciary duty — claimant and defendant companies forming limited partnership — directors of claimant fearing take-over by third party — "poison pill" agreement entitling defendant to have its interest bought out by claimant in event of take-over — whether agreement improper use of directors' powers — whether defendant entitled to enforce agreement against claimant (United Kingdom)

Criterion Properties plc v Stratford UK Properties LLC and Others [2003] 1 WLR 2108 Court of Appeal, Civil Division

Constitutional Law and Human Rights

Constitutional law — fundamental rights — protection against deprivation of property — doctrine of eminent domain — whether attribute of sovereignty — whether conferring capacity on state to acquire private property for public purposes — whether express constitutional provision required for such acquisition —

69

71

Trade Practices Act 1974 (Cth) — pre-emption doctrine (Australia)

Graham Barclay Oysters Pty Ltd and Another v Ryan and Others; Ryan v Great Lakes Council and Others; New South Wales v Ryan and Others 194 ALR 337 High Court of Australia (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

Tort — vicarious liability — whether school authority vicariously liable to pupil in respect of sexual assault of pupil by teacher — circumstances in which employer vicariously liable for intentional tort of employee — whether assault committed by teacher in course of employment

Tort — non-delegable duty of care — whether school authority owes non-delegable duty of care to pupil — nature and scope of non-delegable duty of care — whether non-delegable duty of care includes responsibility for intentional default by delegate

Practice and procedure — trial — trial of issues of liability and damage severed — inadequate findings of fact by trial judge (Australia)

New South Wales v Lepore and Another (S108 of 2002); Samin v Queensland and Others (B20 of 2002); Rich v Queensland and Others (B21 of 2002) (2003) 195 ALR 412 High Court of Australia

Negligence — liability — victims of priest's sexual assaults suing ecclesiastical corporations and bishops — trial judge finding bishops had knowledge of conduct — corporation of priest's diocese liable in negligence — former bishops and current bishop not personally liable — archbishop of neighbouring diocese to whom victim complained, his successor and their episcopal corporation not liable

Vicarious liability — charitable organisations — victims of priest's sexual assaults suing ecclesiastical corporations and bishops — policy reasons militate against finding vicarious liability against charitable organisation for torts committed by priest

Associations — religious associations — Roman Catholic Church is unincorporated association of individuals — not capable of being sued

Corporations — corporate identity — corporation sole — episcopal corporation is corporate embodiment of office of individuals constituted as corporation from time to time — corporation shields individual holders of office from personal liability — corporation's property not immune from liability (Canada)

John Doe v Benett (2003) 218 DLR (4th) 276 Newfoundland and Labrador Court of Appeal

Trade mark — registration — practice — registrar objecting to registration of mark following ex parte hearing — hearing officer

160

163

166

xxii

Words and phrases — "traditional laws and customs" "traditional" — "determination of native title" — "native title rights and interests" - "rights and interests recognised by the common law of Australia" (United Kingdom) High Court of Australia (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) 155 **Tort** Confidential information — disclosure — injunction — proposed disclosure in media of claimant's extramarital sexual relationships - claimant seeking interim injunction — whether interim injunction to be granted — Human Rights Act 1998 (United Kingdom) A v B plc and another [2002] 3 WLR 542 Court of Appeal, Civil Division 156 Defamation — publication — internet — material stored in computer server located in New Jersey and downloaded and printed in Victoria — whether publication occurred in New Jersey Defamation — publication — single publication rule Conflict of laws — choice of law — place of commission of tort action in defamation in relation to statements in documents uploaded onto world wide web in New Jersey and downloaded in Victoria — whether place of publication in New Jersey or Victoria Conflict of laws — stay of proceedings — whether Victoria inappropriate forum for trial of proceedings — (VIC) Supreme Court (General Civil Procedure) Rules 1996 r 7.01(1) (Australia) Dow Jones & Company Inc v Gutnick 194 ALR 433 High Court of Australia (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) 158 Negligence — duty of care — public authority — claim of contaminated oysters by consumers who suffered hepatitis A infection — whether state with statutory powers in respect of oyster industry owed duty of care to consumers — whether local council — with statutory powers in respect of pollution owed duty of care to consumers - (NSW) Fisheries Management Act 1994 s. 189 — (NSW) Local Government Act 1993 ss. 124, 189, 191, 192 — (NSW) Clean Waters Act 1970 s. 27

Product liability — defective products — contaminated oysters — whether breach of duty of care by growers or manufacturers of oysters

Negligence — breach of duty — finding of negligence by trial judge and intermediate appellate court — whether error of law — circumstances in which High Court will disturb finding of fact as to negligence

Negligence — general — relationship between common law claims and claims for relief in respect of contravention of provisions of

Housing — secure tenancy — claim for possession — local housing authority — granting joint tenancy of house to husband and wife — wife terminating joint tenancy by service of notice to quit — husband continuing to reside in house — housing authority seeking order for possession — whether order contravening husband's right to respect for home — Human Rights Act 1998 (c 42), Sch I, Pt I, Art 8 (United Kingdom)

Harrow London Borough Council v Qazi [2003] 3 WLR 792 House of Lords

Real property — valuation of land— assessment of unimproved value of improved parcel of land for purpose of assessing land tax— relevance of comparable sales— whether valuation by commissioner gave rise to question of law— (NSW) Valuation of Land Act 1916 s. 6A (Australia)

Maurici v Chief Commissioner of State Revenue (2003) 195 ALR 236 High Court of Australia

Aboriginals and Torres Strait Islanders — native title to land — determination of native title — native title rights and interests in s. 223(1) of Native Title Act 1993 (Cth) — possessed under traditional laws acknowledged and traditional customs observed in s. 223(1)(a) — (CTH) Native Title Act 1993 s. 223(1)(a)

Aboriginals and Torres Strait Islanders — native title to land — determination of native title — consequences of sovereignty — whether traditional laws and customs observed must originate in pre-sovereignty laws and customs — effect of development of or changes in traditional laws and customs since sovereignty — whether proof of continuous acknowledgment and observance of traditional laws and customs required — effect of interruption to continuous acknowledgment and observance of traditional laws and customs — whether substantially uninterrupted acknowledgment and observance is sufficient — whether traditional law and customs need only be presently acknowledged and observed — whether continuous existence of claimant society required — effect of cessation of claimant society on acknowledgment and observance of traditional laws and customs

Aboriginals and Torres Strait Islanders — native title to land — native title rights and interests — meaning of rights and interests recognised by common law of Australia — Whether there are common law requirements of native title — (CTH) Native Title Act 1993 s. 223(1)(c)

Aboriginals and Torres Strait Islanders — native title to land — extinguishment of native title — whether s. 223 of Native Title Act 1993 (Cth) incorporates notions of extinguishment of native title — whether concepts of "abandonment" or "expiration" of native title can be applied — (CTH) Native Title Act 1993 ss. 223, 225

Aboriginals and Torres Strait Islanders — native title to land —

Aboriginals and Torres Strait Islanders — native title to land — evidence — proof— oral and written testimony

150

Intellectual property — copyright — computer programs — actions in relation to circumvention devices — whether programs protected by technological protection measure — whether relevant device prevented or inhibited infringement of copyright in programs by particular means — significance of purposes of relevant device — whether inhibiting occurs where device deters or discourages infringement — whether storage of part of program in random access memory (RAM) constitutes reproduction of substantial part of literary work in material form — whether storage of part of program in RAM constitutes reproduction of substantial part of cinematograph film — (CTH) Copyright Act 1968 ss.10(1), 14(1), 31(1)(a)(i), 86(a), 116A

Intellectual property — trade marks — infringement — whether offering for sale and selling unlawful copies of electronic games involved using as trade marks signs substantially identical to registered trade marks in relation to goods in respect of which trade marks registered — (CTH) Trade Marks Act 1995 s. 120(1)

Consumer protection — fair trading — misleading or deceptive conduct — whether sale of unlawful copies of electronic games involved representation that they had particular sponsorship, approval or affiliation — (NSW) Fair Trading Act 1987 s. 42

Words and phrases — "technological protection measure" — "material form" (Australia)

Kabushiki Kaisha Sony Computer Entertainment and Others v Stevens (2003) 200 ALR 55 Federal Court of Australia

Land Law/Landlord and Tenant

Business premises (security of tenure) — application for new tenancy —landlord sending notice of termination of tenancy by recorded delivery — tenant's application for new tenancy to be made within four months of service of landlord's notice — whether landlord's notice irrebuttably deemed to have been served — whether served when posted or delivered — whether application for new tenancy out of time — Landlord and Tenant Act 1927 s. 23 — Recorded Delivery Service Act 1962 — Interpretation Act 1978 s. 7 (United Kingdom)

Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd [2003] 1 WLR 2064 Chancery Division

Land Law — contract of sale — inconsistent remedies — on purchaser's substantial default, vendor may either (a) terminate contract in reliance on clause permitting retention of deposit and paid instalments, or (b) enforce contract and sue for unpaid instalments as damages in lieu of specific performance — may not do both, even if option to terminate expressly without prejudice to other remedies (Cayman Islands)

Golfco Limited v Borden [2002] CILR 1 Grand Court

146

145

148

xix

Papua New Guinea Independence (Australian Citizenship) Regulations 1975 reg 4 (Australia)

Minister for Immigration and Multicultural and Indigenous Affairs v Walsh 189 ALR 694. Federal Court of Australia (Heerey, Mansfield and Hely JJ)

Citizenship and migration — visas — decisions concerning visas — construction and effect of privative clause — judicial review of privative clause decisions — Hickman principle — (CTH) Migration Act 1958 ss.116, 128, 129, 131, 474

Administrative law — judicial review — construction and effect of privative clause (CTH) Migration Act 1958 s. 474

Constitutional law — Commonwealth constitution — whether privative clause invalid — (CTH) Migration Act 1958 s.474 (Australia)

NAAV v Minister for Immigration and Multicultural and Indigenous Affairs; NABE v Minister for Immigration and Multicultural and Indigenous Affairs; Ratumaiwai v Minister for Immigration and Multicultural and Indigenous Affairs; Turcan v Minister for Immigration and Multicultural and Indigenous Affairs; Minister for Immigration and Multicultural and Indigenous Affairs v Wang 193 ALR 449. Federal Court of Australia (Black CJ, Beaumont, Wilcox, French and von Doussa JJ)

Intellectual Property

Intellectual property — subsistence of copyright — respondent produced telephone directories requiring expenditure of significant time and financial resources — "industrious collection" — whether factual compilations comprising directories met threshold requirement of originality in Australian copyright law — whether headings books developed by respondent attracted copyright protection — "Whole-of-universe" compilation — (CTH) Copyright Act 1968 ss. 10(1), 32 — Commonwealth Constitution s. Sl(xviii) — United States Constitution Art I §8 cl 8

Intellectual property — infringement of copyright — whether appellant reproduced substantial part of respondent's copyright telephone directories and headings books in appellant's database — actual copying from directories and headings in directories admitted — whether visual similarity an essential element of infringement — (CTH) Copyright Act 1968 ss. 14, 31

Intellectual property — infringement of copyright — whether copyright in work produced pursuant to statutory obligation — impact of policy in area of factual compilations (Australia)

Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd 192 ALR 433 Federal Court of Australia (Black CJ, Lindgren and Sackville JJ)

136

139

or pleaded case — whether pleadings embrace case as presented (Australia)

Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd and Another 198 ALR 657. Federal Court of Australia (Heerey, Sackville and Emmett JJ)

131

Immigration

Citizenship and migration — detention — mandatory detention of unlawful non-citizen pending removal from Australia — whether legislature intended to curtail right of personal liberty where no reasonable prospects of removal — whether continued detention authorised where no real likelihood or prospect of removal in reasonably foreseeable future — (CTH) Migration Act 1958 ss.189, 196, 198, 486C

Statutes — interpretation — right to personal liberty — whether legislature intended to curtail right of personal liberty where no reasonable prospects of removal — whether statute to be read in conformity with treaty obligations

Foreign relations — international conventions — International Covenant on Civil and Political Rights — interpretation of statute consistently with established rules of international law and in accordance with Australia's treaty obligations — International Covenant on Civil and Political Rights Art 9

Practice and procedure — competency of appeal — respondent removed from Australia — standing (Australia)

Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri 197 ALR 241 Federal Court of Australia (Black CJ, Sundberg and Weinberg JJ)

Citizenship and migration — refugees — refugee review tribunal — appeal from decision of single Federal Court judge — whether respondent a convention refugee pursuant to 1951 Convention relating to the status of refugees by reason of having voluntarily left Syria for political reasons — construction of Art 1(D) of Convention — tribunal made incorrect findings of historical facts — whether court bound to accept tribunal's findings — convention relating to the Status of Refugees 1951 Art 1(D) (Australia)

Minister for Immigration and Multicultural Affairs v Wabq 197 ALR 35 Federal Court of Australia (Hill, Moore and Tamberlin JJ)

Citizenship and migration — application for registration of -Australian citizenship — Papuan born applicant — whether applicant ceased to be Australian citizen on independence of Papua New Guinea — whether applicant entitled to citizenship by descent — whether applicant "born outside Australia" — (CTH) Australian Citizenship Act 1948 ss. 10(1), 10B, 10C, 11—

134

135

xvii

r .			7
Envi	ronme	ental	Law

- Environment pollution marine pollution discharge of oil from ship whether ship's owner liable for discharge caused in consequence of damage to ship or its equipment (NSW) Marine Pollution Act 1987 s. 8
- Statutes interpretation treaties International Convention for the Prevention of Pollution from Ships 1973
- Words and phrases "damge ... to ship or its equipment" (Australia) Morrison v Peacock and Another 192 ALR 173 High Court of Australia (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ)

119

Family Law

- Succession family provision deed between husband and wife mutual wills executed pursuant to deed effect of deed and wills upon family provision claim whether property the subject of deed and wills available as part of estate out of which provision made whether deed invalid for reasons of public policy (SA) Inheritance (Family Provision) Act 1972 s.7
- Practice and procedure precedent High Court and Privy Council conflict between two Privy Council decisions circumstances in which High Court should depart from Privy Council decisions where decision of Privy Council was on matter of state law in appeal directly from primary judge in state Supreme Court, rather than High Court (Australia)
 - Barns v Barns (A68 of 2002 and A69 of 2002) (2003) 196 ALR 65 High Court of Australia
- Family Law financial provision equality court's provisional view of appropriate division to be checked against principle of equal division principle to be departed from only for good reason departure not justified by (i) husband's generous expenditure in maintaining children and home between separation and divorce, or (ii) aim of placing parties in relative financial circumstances similar to those before marriage (Cayman Islands)

 Doak v Doak and Ridley [2002] CILR 224 Court of Appeal

123

121

Financial Trade and Economic Development

- Trade and commerce trade practices unconscionable conduct whether conduct of lessor in negotiating of lease unconscionable condition of renewal that lessee abandon legal claims against lessor
- Equity unconscionable conduct whether special disadvantage or disabling condition or circumstance on part of claimant whether unconscientious advantage taken of claimant's special disadvantage (Australia)
 - Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd and Others 197 ALR 153 High Court

Criminal procedure — appeal — right of appeal — loss of right of appeal — trial — appellant acquitted of murder — appeal by prosecutor held in appellant's absence — appeal allowed retrial ordered — appellant appealing to Privy Council appellant failing to answer bail on different charge — appellant outside jurisdiction — whether appeal to be denied — whether such denial disproportionate to breach of order relating to bail on different charge (British Virgin Islands) Benedetto v R; Labrador v R [2003] 4 LRC 382 Privy 103 Criminal law — murder — attempt — sentence — life sentence inappropriate unless exceptional circumstances, e.g. accused shows severe mental instability indicating risk to public if released, or previous convictions for similar offences Criminal Law — murder — attempt — sentence — starting point same whether victim is spouse/partner or stranger — abuse of trust inherent in domestic assault is aggravating factor — major principles general deterrence and social disapprobation, but specific deterrence and accused's rehabilitation also important may exceed English sentence for comparable offence to reflect Islands' problem of spousal abuse (Cayman Islands) R v Bernard [2002] CILR 445 Grand Court 105 Criminal procedure — trial — direction to jury — accused making cautioned statement to police — statement contradicting evidence of prosecution witness — trial judge failing to put discrepancy to jury — whether misdirection Criminal evidence — identification — visual identification circumstances of identification — direction to jury — whether adequate (Jamaica) R v Boxx [2003] 4 LRC 591 Court of Appeal 110 Extradition — bail pending appeal — bail pending Minister's decision on surrender — factors to be considered — s. 20 Extradition Act — s. 679 Criminal Code (Canada) Canada (Attorney General) v Raghoonanan [2003] 63 Ontario Reports 465 Court of Appeal 113 Criminal law — mens rea — uttering words with intent to wound religious feelings — ingredients of offence — public meeting appellant asserting that Christ was not the son of God — tried and convicted of offence - whether deliberate intent required whether proved — whether evidence required of person whose feelings were wounded — relevance of fundamental rights to freedom of religion and expression — Penal Code (Cap 16), s. 129 - Constitution of Tanzania 1978, Arts 18(1), 19, 30(1) Criminal procedure — High Court — revisional proceeding in respect of magistrate's court case — requirements — right of accused to be

heard before prejudicial order made — conviction affirmed in accused's absence — judge failing to evaluate evidence presented at

Commonwealth Law Bulletin

Volume 29

No. 1

2003

page

- v Contents
- Legislation
- 24 Judicial Decisions
- 168 Law Reform
- 215 Legal Profession
- 233 Commonwealth Developments
- 491 International Developments
- 552 Article
- Public Procurement Law Reform: Some design issues for small island States A perspective from Trinidad and Tobago
- **IBC** Secretariat Legal Publications



Commonwealth Secretariat

Legal profession — fees — bill of charges — lawyer billing client for legal services — bill including sum for "professional fees all stages" — statute requiring that "principal items" of bill be listed — whether bill itemising fees with sufficient particularity — client not objecting to validity of bill or seeking taxation thereof — whether relevant — whether bill properly prepared — guidelines for contents of bill of charges — Legal Practitioners Act 1975, s. 16 (Nigeria)

Oyekanmi v National Electric Power Authority [2003] 4 LRC 1 Supreme Court (Karibi-Whyte, Ogundare, Onu, Achike and Uwaifo JJSC)

Solicitor — costs — conditional fee agreement — statutory provision requiring "the legal representative" to provide client with certain information before making conditional fee agreement — whether "the legal representative" having to be individual who conducts the litigation — whether duty of "the legal representative" delegable — whether duty delegable only to person capable of being "the legal representative" if instructed as principal — Courts and Legal Services Act 1990, s.27(9) — Conditional Fee Agreements Regulations 2000, regs 1(3), 4 (United Kingdom)

Sharratt v London Central Bus Co Ltd and other cases (The Accident Group Test Cases) [2003] 1 All ER 353 Supreme Court Costs Office (Chief Master Hurst)

Practice — filing — filing of document at court — whether delivery of document to court office constituting "filing" if no one present to receive or authenticate it — CPR 2.3(1) (United Kingdom) Van Aken v Camden London Borough Council [2003] 1 All ER 552 Court of Appeal, Civil Division (Ward, Mummery and Jonathan Parker LJJ)

Costs — security for costs — past costs orders — judge ordering defendant companies to pay money into court in respect of past costs orders as condition for proceeding with application to set aside default judgment — order retrospectively improving claimants' position by increasing pools of assets from which to recoup past costs orders — whether judge erring (United Kingdom) CIBC Mellon Trust Co and Others v Mora Hotel Corp NV and Another [2003] 1 All ER 564 Court of Appeal, Civil Division (Peter Gibson, Mance and Hale LJJ)

Costs — assessment — proportionality — guidance (United Kingdom)

Giambrone and Others v JMC Holidays Ltd (formerly Sunworld

Holidays Ltd) Queen's Bench Division (Morland J sitting with

assessors)

Solicitor — costs — contentious business — action to recover costs — whether client's knowledge relevant in determining sufficiency of gross sum bill in contentious business — Solicitors Act 1974, s. 69(2) (United Kingdom)

220

222

222

224

225

xxiv

Secretariat Legal Publications	Inside Back Cover
Public Procurement Law Reform: Some design issues for small island States — A perspective from Trinidad and Tobago (Carla Herbert, Legal Drafter and Law Reform Adviser)	552
Public Procurement Law Deform Some design in the State of	
Articles	552
WHO Framework Convention on Tobacco Control	532
Promotion of Women's Human Rights and Gender Equality	531
OAS: Implementation of the Inter-American Program on the	
OAS: American Declaration on the Rights of Indigenous Peoples	529
OAS: Declaration of Bridgetown: The Multidimensional Approach to Hemispheric Security	. 527
on the Suppression of Terrorism	519
Council of Europe: Protocol amending the European Convention	510
Council of Europe: Convention on Contact concerning Children	496 510
Council of Europe: European Convention for the Protection of Animals during International Transport (Revised)	407
and xenophobic nature committed through computer systems	491
Cybercrime, concerning the criminalisation of acts of racist	
Council of Europe: Additional Protocol to the Convention on	
Conventions and Agreements	
International Developments	491
Activities of the Commonwealth Lawyers' Association (CLA)	485
Association (CMJA)	482
Activities of the Commonwealth Magistrates' and Judges'	479
Activities of the Commonwealth Legal Education Association (CLEA)	4=0
Activities of the Commonwealth in the Legal Field	468
Activities of the Commonwealth and its Partners in the Legal Field	

xxvii