



## THE LAW LIBRARY OF VICTORIA

Library  
Bulletin  
15 April  
2016

## Library News

### Lyrical Lunchtimes at the Law Library

BottledSnail Productions and the Law Library of Victoria invite you to attend Lyrical Lunchtimes at the Law Library.

BottledSnail Productions presents lunchtime classical concerts, performed by James Barber and Susan de Weger on horn, Andrew Robertson on cello, Paul Glass, Sarah Gilkes and Kylie Weston-Scheuber on piano, and vocal performances by Jessica Heyes, Alice McNab and Bilal Rafiq.

The first performance of 2016 will be held on Thursday 21 April at 1.15pm in the Supreme Court Library.

All are welcome, entry is free and there is no need to register.

### Illumination of the Supreme Court Building

From Tuesday 12 April 2016 and ending Sunday 22 May 2016, the main Supreme Court building will be illuminated each evening, from 6.30pm until 11pm.

The lighting is to mark 175 years of the Supreme Court in Victoria.

We hope you can view this spectacular event.

### SUBSCRIBE TO THE LIBRARY BULLETIN

If you would like to receive the Library Bulletin by email, please contact us at [lv@courts.vic.gov.au](mailto:lv@courts.vic.gov.au)

### Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016



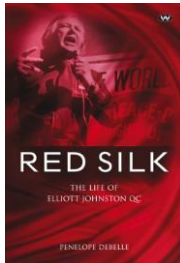
*Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016* has just been published. Copies of the book can be ordered from the Supreme Court Library, please phone 03 9603 6282 for details.

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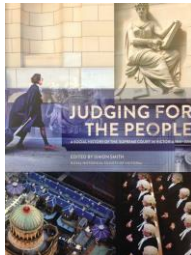
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# New Books

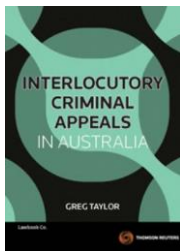
Following is a selection of new books in the Library collection. For details of more new books, see the Library Catalogue: [https://courts.sdp.sirsidynix.net.au/client/en\\_AU/llv/](https://courts.sdp.sirsidynix.net.au/client/en_AU/llv/)



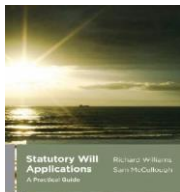
Debelle, Penelope, *Red Silk: The Life of Elliott Johnston, QC*  
Wakefield Press, South Australia, 2011  
Call number: 340.092 JOH (Supreme Court Library)



Smith, Simon (ed), *Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016*  
Allen and Unwin, Sydney, 2016  
Call number: 347.945035 JUD (Supreme Court Library Reference and Lending sections); 347.035 JUD (County Court, Magistrates' Court and VCAT)



Taylor, Greg, *Interlocutory Criminal Appeals in Australia*  
Thomson Reuters, NSW, 2016  
Call number: 345.05 TAY (Supreme Court Library)



Williams, Richard and McCullough, Sam, *Statutory Will Applications: A Practical Guide*  
Lexis Nexis Butterworths, NSW, 2014  
Call number: 346.054 WILL (Supreme Court Library)

# Legislation

## Victorian Bills

The following Victorian Bills received a second reading since the last Library Bulletin:

- [Infant Viability Bill 2015](#)
- [Justice Legislation \(Evidence and Other Acts\) Amendment Bill 2016](#)
- [Land \(Revocation of Reservations – Metropolitan Land\) Bill 2016](#)
- [Local Government \(Greater Geelong City Council\) Bill 2016](#)
- [Public Administration Amendment \(Public Sector Communication Standards\) Bill 2016](#)
- [Road Management Amendment \(Bus Stop Delivery Powers\) Bill 2016](#)
- [Victorian Funds Management Corporation Amendment Bill 2016](#)

## Victorian Assents

The following Victorian Acts were assented to since the last Library Bulletin:

- [Aboriginal Heritage Amendment Act 2016](#) No. 11/2016
- [Crown Land Legislation Amendment \(Canadian Regional Park and Other Matters\) Act 2016](#) No. 12/2016
- [Land \(Revocation of Reservations\) Act 2016](#) No. 13/2016



## EXHIBITIONS IN THE LIBRARY

### Argus from 100 years ago

The Supreme Court Library has the Argus newspaper from 1916 on display.

The page is turned daily and provides an insight into what was happening 100 years ago to the day.

A snapshot is provided via the Law Library of Victoria Twitter account. You can follow these tweets via @lawlibraryvic #argus1916

# Legislation

## Proclamations

There have been no Commonwealth Act proclamations since the last Library Bulletin.

The following Victorian Act proclamations have been made since the last Library Bulletin:

- *Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016* No. 10/2016
  - Parts 1 to 7 of this Act came into operation on 5 April 2016 (VGG S86 05.04.2016)
- *Justice Legislation Amendment Act 2015* No. 20/2015
  - Part 7 of this Act came into operation on 6 April 2016 (VGG S86 05.04.2016)
- *Road Legislation Amendment Act 2016* No. 5/2016
  - The remaining provision (all provisions except Part 1, sections 13, 27 and 38 and Part 5) came into operation on 15 April 2016 (VGG S92 12.04.2016)

The following Victorian Acts have come into operation by forced commencement since the last Library Bulletin:

- *Land (Revocation of Reservations) Act 2016* No. 13/2016
  - This Act, except Part 2, Part 6 and items 1 and 5 of Schedule 1, came into operation on 6 April 2016: s 2(1)

Following is a selection of Victorian Statutory Rules that were proclaimed to commence since the last Library Bulletin:

- *Children, Youth and Families (Children's Court Family Division) (Amendment No. 6) Rules 2016* No. 19/2016 (VGG S90 11.04.2016)

## High Court Cases

CRIMINAL LAW - Criminal liability - Criminal Code (Q), s317(b) - Intent to cause specific result - Where appellant HIV positive - Where appellant lied to complainant about his HIV status - Where complainant diagnosed with HIV after frequent unprotected sex with appellant - Whether element of intent to cause specific result satisfied - Whether intent could be inferred from frequency of conduct giving rise to risk of specific result - Whether intent proved by evidence of awareness of risk.

WORDS AND PHRASES - "awareness of risk", "intent", "motive", "proof of intention", "recklessness", "serious disease", "specific intent".

Criminal Code (Q), ss 23, 317(b).

***Zaburoni, Godfrey v The Queen***

[\[2016\] HCA 12](#)

06/04/2016

EVIDENCE - Admissibility and relevance - Evidence (National Uniform Legislation) Act (NT), s97(1)(b), s137 - Where appellant charged with indecent dealing with child and sexual intercourse with child - Where tendency evidence given by complainant that appellant ran his hand up complainant's leg - Where evidence tendered of complaints made by complainant concerning appellant - Whether probative value of evidence assessed on assumption that jury would accept evidence - Whether trial judge should have regard to credibility of witness or reliability of evidence in assessing probative value of evidence - Whether evidence from complainant adduced to show accused's sexual interest can have significant probative value.

WORDS AND PHRASES - "complaint evidence", "credibility", "danger of unfair prejudice", "probative value", "relevance", "reliability", "significant probative value", "tendency evidence".

EVIDENCE (NATIONAL UNIFORM LEGISLATION) ACT (NT), s55, s56, s65, s66, s97(1)(b), s101, s137.

***IMM v The Queen***

[\[2016\] HCA 14](#)

14/04/2016

FEDERAL JURISDICTION - Application of State laws - Service and Execution of Process Act 1992 (Cth) ("SEPA"), s89(4) - Where appellant arrested in Victoria pursuant to warrant issued in New South Wales - Where order made under s83(8)(b) of SEPA to return appellant in custody to New South Wales - Where appellant charged with attempting to escape lawful custody under s310D of Crimes Act 1900 (NSW) ("Crimes Act") - Whether s89(4) of SEPA applied s 310D of Crimes Act as surrogate federal law - Whether content of applied State law altered - Whether prosecution required to prove all elements of offence under State law."

WORDS AND PHRASES - "competent authority", "correctional centre", "court", "escape lawful custody", "inmate", "law of a State", "surrogate federal law".

CONSTITUTION, s51(xxiv), s52(i).

COMMONWEALTH PLACES (APPLICATION OF LAWS) ACT 1970 (Cth), s4.

JUDICIARY ACT 1903 (CTH), s68, s79.

SERVICES AND EXECUTION OF PROCESS ACT 1992 (CTH), s8(4), s81A, s82, s83, s89.

CHILDREN (DETENTION CENTRES) ACT 1987 (NSW), s33(1).

CRIMES ACT 1900 (NSW), Pt 1A, s310A, s310D.

CRIMES (ADMINISTRATION OF SENTENCES) ACT 1999 (NSW), s3(1), s4.

INTERPRETATION ACT 1987 (NSW), s5, s12.

***Mok, Yau Ming Matthew v Director of Public Prosecutions (NSW)***

6 April 2016

[\[2016\] HCA 13](#)

06/04/2016

PRACTICE AND PROCEDURE - High Court of Australia - Appeal - Stay of proceeding - Application to stay criminal proceeding in Supreme Court of New South Wales pending determination of application for special leave to appeal - Applicant made interlocutory application before empanelment of jury in proceeding on indictment in Supreme Court to quash indictment or permanently stay proceeding - Application refused by single judge - Appeal dismissed by Court of Criminal Appeal - Application made for special leave to appeal - Whether criminal proceeding should be stayed pending determination of special leave application.

HIGH COURT RULES 2004 (Cth), r8.07.

***Obeid, Edward Moses v The Queen***

[\[2016\] HCA 9](#)

04/04/2016

PRACTICE AND PROCEDURE - High Court of Australia - Non-publication order - Application for non-publication order under s77RE of Judiciary Act 1903 (Cth) - Application for special leave to appeal from orders of Court of Criminal Appeal of Supreme Court of New South Wales dismissing appeal from refusal of single judge to quash indictment or permanently stay criminal proceeding - Application in High Court for stay of criminal proceeding pending determination of special leave application - Respondent applies for non-publication order concerning information tending to reveal identity of applicant - Whether non-publication order should be made.

JUDICIARY ACT 1903 (Cth), s77RE, s77RG.

***Obeid, Edward Moses v The Queen (No 2)***

[\[2016\] HCA 10](#)

04/04/2016

STATUTES - Interpretation - Meaning of "land" - Meaning of "Crown lands" - Whether "Crown lands" in s11(1) of Valuation of Land Act 2001 (Tas) includes seabed and waters above it - Whether s11(1) of Valuation of Land Act and s2 of Crown Lands Act 1976 (Tas) in pari materia.

WORDS AND PHRASES - "Crown lands", "in pari materia", "including", "land".

ACTS INTERPRETATION ACT 1931 (Tas) - s46.

CROWN LANDS ACT 1976 (Tas) - s2, s29.

LOCAL GOVERNMENT ACT 1993 (Tas) - Pt 9, s87(1).

VALUATION OF LAND ACT 2001 (Tas) - s3, s11.

***Warrick Coverdale, Valuer-General of the State of Tasmania v West Coast Council***

[\[2016\] HCA 15](#)

14/04/2016

TRUSTS - Trustees' powers - Power of advancement - Where trust property included shares in a company - Where value of shares recorded in "asset revaluation reserve" - Where trustee made resolution to distribute entire asset revaluation reserve to specified beneficiaries - Where trustee covenanted to pay specified beneficiaries on demand - Whether valid exercise of power to "advance" and "apply" trust capital or income - Whether trustee indebted to specified beneficiaries - Whether action for money had and received maintainable.

WORDS AND PHRASES - "advance", "apply", "pay", "pay or apply", "raise".

TRUSTEE ACT 1925 (NSW), s44.

TRUSTEE ACT 1925 (UK), s32.

***Fischer, Robert William & Ors v Nemeske P/L & Ors***

[\[2016\] HCA 11](#)

06/04/2016



# Victorian Supreme Court Cases

## Court of Appeal

APPEALS - Court of Appeal - Application for leave to appeal against decision of Victorian Civil and Administrative Tribunal - Whether Supreme Court Act 1986 s14A-s14D apply - Whether 'real prospect of success' test in Supreme Court Act 1986 s14C applies - Comparison of 'real prospect of success' test with test in Secretary to the Department of Premier and Cabinet v Hulls [1999] 3 VR 331 - Victorian Civil and Administrative Tribunal Act 1998 s148 - *Ikosidekas v Karkanis* [2015] VSCA 121 considered.

STATUTORY INTERPRETATION - Legislative intention - Interpretation of two State Acts - Whether inconsistency arises - Victorian Civil and Administrative Tribunal Act 1998 s148 - Supreme Court Act 1986 s14A-s14D.

JUDICIAL REVIEW - Application for leave to appeal against decision of Victorian Civil and Administrative Tribunal - Building contract - Applicant's breach of contract resulted in slab heave and structural distress in respondents' house - Whether Tribunal erred in assessing damages as cost of demolishing and rebuilding house - Whether Tribunal failed to provide adequate reasons - *Bellgrove v Eldridge* (1954) 90 CLR 613, *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 and *Kirkby v Coote* [2006] QCA 61 applied - Leave to appeal granted - Appeal dismissed.

WORDS AND PHRASES - 'civil appeal'.

***Metricon Homes P/L (ACN 005 108 752) v Softley, Earl & Softley, Shelley***

Warren CJ, Tate JA, and Robson AJA

[\[2016\] VSCA 60](#)

06/04/2016

CRIMINAL LAW - Appeal - Conviction - Murder - Intent - Intent must accompany act(s) which caused death - Whether directions adequate - Whether unanimity direction required - Standard of proof - Whether judge erred in explaining 'beyond reasonable doubt' - Appeal allowed - Retrial ordered - Jury Directions Act 2013 s20-s21.

WORDS AND PHRASES - 'Beyond reasonable doubt'.

***Dookheea, Kritsingh v The Queen***

Maxwell P, Redlich JA, and Croucher AJA

[\[2016\] VSCA 67](#)

12/04/2016

CRIMINAL LAW - Appeal - Conviction - Murder - Joint criminal enterprise - Participation - Whether trial judge misdirected the jury on participation and presence - Whether verdict is unsafe and unsatisfactory - Leave to appeal refused.

***Henderson, Joel Parker v The Queen***

Weinberg AP, Priest JA, and Beach JA

[\[2016\] VSCA 61](#)

06/04/2016

CRIMINAL LAW - Appeal - Conviction - Rape - Jury directions - Forensic disadvantage warning - Propensity warning - Separate consideration direction - Whether directions adequate - Whether verdicts unsafe - Leave to appeal refused.

CRIMINAL LAW - Appeal - Sentence - Crown appeal - Rape - Multiple rapes by co-offenders - Child victim (14 y.o.) - Prolonged and repeated conduct - Victim degraded and humiliated - Youthful offenders - Delay - Rehabilitation - Residual discretion - Sentences manifestly inadequate - Appeals allowed - Respondents resentenced.

Jurj, Ross Stefan v The Queen: Director of Public Prosecutions [DPP] v Jurj, Ross Stefan: **Director of Public Prosecutions [DPP] v Miftode, Daniel: Miftode, Daniel v The Queen**  
Maxwell P, Redlich JA, and Beach JA

[\[2016\] VSCA 57](#)

04/04/2016

CRIMINAL LAW - Conviction - Application for leave to appeal against conviction - Murder - Crown case put on two bases - Whether jury required to be unanimous in respect of basis for conviction - Jury directions - Whether judge required to charge jury that they must be unanimous as to the basis for conviction before finding accused guilty - R v Clarke and Johnstone [1986] VR 643 applied - Application for leave to appeal refused.

CRIMINAL LAW - Sentence - Application for leave to appeal against sentence - Murder - Applicant sentenced to term of imprisonment of 27 years - Co-offender sentenced to term of imprisonment of 24 years - Parity - Justification for different sentences - Parity complaint not reasonably arguable - Application for leave to appeal refused.

**Wilson, Darren v The Queen**

Weinberg AP, Priest JA, and Beach JA

[\[2016\] VSCA 62](#)

06/04/2016

CRIMINAL LAW - Sentence - Appeal - Multiple counts of rape committed by 17 year old appellant - Appellant sentenced in Children's Court to 12 month youth supervision order, with conditions - Appellant resentenced in County Court, on DPP's appeal from Children's Court, to 2 years detention in a youth justice centre - Inapplicability of general deterrence - Error in taking into account general deterrence in resentencing of appellant - Whether different sentence should now be imposed - Child offender - No prior criminal history - Rehabilitation - Primacy of rehabilitation - Children, Youth and Families Act 2005, s362 - Application for leave to appeal granted - Appeal allowed - Appellant resentenced to youth attendance order for 12 months, with conditions.

**Webster, Bradley (a pseudonym) v The Queen**

Maxwell P, Redlich JA, and Beach JA

[\[2016\] VSCA 66](#)

11/04/2016 (date of orders 31 July 2015)

CRIMINAL LAW - Sentence - Persistent contravention of intervention order, common assault, threat to kill, theft (two charges), criminal damage, unlicensed driving - Aggregate sentence of 4 years and 9 months' imprisonment with 2 years and 9 months non-parole period - Leave to appeal previously granted on ground of manifest excess - Serious example of persistent contravention of intervention order - Common assault against former domestic partner involving partial strangulation - Objective gravity of offending warranted severe punishment - Aggregate sentence for multiple offences can exceed maximum sentence for one of the offences - Sentence not manifestly excessive - Appeal dismissed

***Fitzpatrick, Lyndon v The Queen***

Weinberg AP, Priest JA, and Beach JA

[\[2016\] VSCA 63](#)

06/04/2016

CRIMINAL LAW - Trial judge's charge to jury - Whether charge had the effect of reversing onus of proof - Whether comments by trial judge led to charge being unbalanced - Whether unreliable evidence warning in respect of witness whose evidence was exculpatory led to miscarriage of justice - Charge to be read as a whole - Appeal dismissed.

***Ramlagan, Aman v The Queen***

Weinberg JA, Whelan JA, and Coghlan JA

[\[2016\] VSCA 68](#)

14/04/2016

PRACTICE AND PROCEDURE - Application for a stay of appeal - First respondent declared bankrupt - Pending applications for leave under s58(3) of the Bankruptcy Act 1966 (Cth) - Effect of proposed appeal against decision of the Magistrates' Court dismissing the claim for monies alleged to be owed by the first respondent - Application for stay granted.

***Lawrence & Hanson Group P/L (ACN 080 350 812) v Young, John Stanley & Young, Mary Anne***

Tate JA and Beach JA

[\[2016\] VSCA 69](#)

12/04/2016

PRACTICE AND PROCEDURE - Application for leave to appeal filed 29 days out of time - Delay in authentication of order - Mistaken view by applicant's lawyers that authenticated order required before leave to appeal could be sought - Delay not inordinate and not the fault of applicant - Application granted.

***Gippsreal P/L v Kenny, Caroline Majella and Symonds, Ian & Associates***

Kyrou JA

[\[2016\] VSCA 65](#)

08/04/2016

PRACTICE AND PROCEDURE - Application for leave to appeal out of time - Determination without oral hearing - Application filed five days out of time - Miscalculation of correct date by applicant and counsel - Contention raised by applicant arguable and of general importance - No prejudice shown by respondent - Leave granted to extend time in which to appeal.

***Champion, Michael John v Rohrt, Richard Trygve (Determined on the Papers)***

Santamaria JA

[\[2016\] VSCA 64](#)

06/04/2016

PRACTICE AND PROCEDURE - Jurisdiction of the Court to hear an application for leave to appeal from the County Court of Victoria - Source of the jurisdiction is to be found under s74 of the County Court Act 1958 and not under s10(1)(c) of the Supreme Court Act 1986 - Whether observations made by judge in exchange with counsel amounted to a 'judgment' or 'order' - *McKenzie v Findlay* [1966] VR 3 and *National Australia Bank Ltd v Russell* [1990] VR 929 applied - Leave to appeal refused for want of jurisdiction.

***Moorabbin Transit P/L v Bekhit, Wageeh***

Tate JA, Ferguson JA, and McLeish JA

[\[2016\] VSCA 70](#)

14/04/2016

## Commercial Court

CONTRACT - Expert determination - Valuation of land - Assumptions - Planning Scheme - Ministerial approval - Application of Valuation and Property Standards - Whether determination was a 'valuation' - Determination made pursuant to contract.

***Adnow P/L (ACN 006 684 395) (as Trustee for the Adnow Pension Fund) v Greenwells Wollert P/L (ACN 128 803 092)***

Judd J

[\[2016\] VSC 153](#)

14/04/2016

CORPORATIONS - Voluntary administration - Administrator - Where directors appointed administrator - Whether at time of resolution company insolvent or likely to become so - Whether directors held requisite genuine opinion as to solvency of company - Whether voluntary administrator appointed for improper purpose - Whether curative order should be made - Corporations Act 2001 (Cth) Pt 5.3A, s436A, s447A.

***Australian Securities & Investments Commission [ASIC] v Planet Platinum Ltd (Liquidator Appointed) & Rathner, Gideon Isaac***

Efthim AsJ

[\[2016\] VSC 120](#)

01/04/2016

PRACTICE AND PROCEDURE - Particular discovery in proceeding relating to administration of discretionary trust - Plaintiffs seek declaration that deed of variation of trust removing the plaintiffs as beneficiaries is beyond power and invalid - Allegations of a lack of good faith, improper purpose, lack of impartiality and not giving proper effect to the terms and purpose of the trust - Whether grounds for belief that a document of a class of document in possession of the defendant - Whether pleadings of lack of good faith, improper purpose, lack of impartiality and not giving effect to the terms and purpose of the trust should be struck out - Pleading struck out with liberty to re-plead.

PRACTICE AND PROCEDURE - Discovery of documents - Discretionary trust - Removal of primary beneficiaries pursuant to discretionary power to revoke, add to or vary the trust - Extent to which discovery of documents may be allowed where allegations of lack of good faith, improper purpose, lack of impartiality and not giving proper effect to the terms and purpose of the trust are raised - In the absence of a proper pleading no discovery ordered - *Karger v Paul* [1984] VR 161; *Mandie v Memart Nominees Pty Ltd* (2014) 42 VR 325.

***Cohen, Samantha Ainley & Ors v Amberley Corporation Australia P/L***

Derham AsJ

[\[2016\] VSC 140](#) First Revision: 11 April 2016

08/04/2016

PRACTICE AND PROCEDURE - Strike out application brought shortly before trial where pleading on foot for years - Applicant did not oppose amendments and was content to deal with case pleaded at trial - No change of circumstances - Application adjourned.  
PRACTICE AND PROCEDURE - Discovery - Appeal from Associate Justice - No grounds made out - Documents relevant and discoverable.

***Oswal, Radhika v Australia and New Zealand Banking Group & Ors (Strike Out Application)***

***Oswal, Pankaj v Carson, Ian Menzies & Ors***

Sifris J

[\[2016\] VSC 134](#)

13/04/2016

REAL PROPERTY - Torrens scheme of registration of land in Victoria under s40 to s43 of the Transfer of Land Act 1958 (the "TLA") - In personam exception to indefeasibility - Claim under Barnes v Addy - Knowing receipt (first limb) and knowing assistance (second limb) - Knowledge an essential requirement under both limbs - Knowledge under first limb - The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9) applied - Knowledge under second limb - Farah Constructions Pty Ltd v Say - Dee Pty Ltd applied - Tests as to knowledge under both limbs of Barnes v Addy the same - Barnes v Addy claims not established on the facts - No breach of any relevant fiduciary duty and no relevant knowledge of any such breach - Claim under Barnes v Addy not a personal equity which defeats the indefeasibility provisions of the TLA - Farah Constructions v Say-Dee settles the question - Observations of Tadgell JA in Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd on the law in Australia - No basis for maintaining any in personam exception to the indefeasibility of the title of the registered proprietor.

SALE OF LAND - Effect of nomination of party to take transfer - Whether a charge on the land enforceable against nominated party - Construction of nomination clause.

SECURITIES - Fixed and floating charge over company assets - Whether an equitable charge or an equitable mortgage - An equitable charge and an equitable mortgage both create a proprietary right in the charged property - Differences between an equitable mortgage and an equitable charge - Equitable mortgage created.

***Mathieson Nominees P/L (ACN 005 328 012) v Aero Developments P/L & Ors***

Vickery J

[\[2016\] VSC 131](#)

05/04/2016

SUMMARY JUDGMENT - No real prospect of success - Issues not suitable for summary determination.

BANKING AND FINANCE - Deed of forbearance - Scope of release.

***Commonwealth Bank of Australia T/as Bank of Western Australia (ABN 48 123 123 124) v Codovo Developments P/L (ACN 122 084 477) & Ors***

Almond J

[\[2016\] VSC 122](#)

01/04/2016

## Common Law Division

CONTEMPT - Does the compulsory examination of an accused person authorised by statute constitute a contempt?

CONSTITUTIONAL LAW - Does the effect of such a provision on the Court's contempt power, substantially impair the institutional integrity of a Supreme Court of a State, which is incompatible with the role of that court under Chapter III of the Constitution? - Does the effect of such a provision on the Court's contempt power, remove a defining characteristic of the Supreme Court of a State?

***XYN [X.Y.N] v Chief Examiner***

Riordan J

[\[2016\] VSC 137](#)

12/04/2016

CONTEMPT OF COURT - Civil contempt - Solicitor interfering with the due administration of justice - Duty of a legal practitioner - Relevant principles - Penalty - Reparation - Supreme Court (General Civil Procedure) Rules 2015 O66, O75.

***The Queen v Witt, Michael Geoffrey (No 2)***

J Forrest J

[\[2016\] VSC 142](#)

11/04/2016

CONTRACT - Terms - Rectification - Breach - Repudiation.

***De Oliveira, Manuel Jose Dias v Udayaratna, Alawattage Chaminda Sudharshana & Udayaratna, Sanduni Ranthra***

Judd J

[\[2016\] VSC 123](#)

05/04/2016

EVIDENCE - View proposed in advance of trial - Decay of subject tree - Likely failure of subject tree imminent - Discretion to conduct view - Forensic disadvantage to party who have not yet engaged an expert - Preservation order - Evidence Act 2008 s53(1), s53(3).

***Williams, Steven Elliott v Ausnet Electricity Services P/L (ACN 064 651 118) & Ors (According to the schedule attached) (No 2)***

T Forrest J

[\[2016\] VSC 145](#)

06/04/2016

HABEAS CORPUS - Powers of the Mental Health Tribunal - Unsuccessful application for revocation of an inpatient treatment order - Tribunal made new inpatient treatment order with an expiry date beyond the date of the extant order - Plaintiff contended that Tribunal acted ultra vires and that involuntary detention pursuant to new order was unlawful - Application dismissed - Mental Health Act 2014 s5, s36, s55, s57, s60 and s182; Mental Health Tribunal Rules 2014 r12 and r13; Charter of Human Rights and Responsibilities 2006 s32.

***Daniels, Garth Jason v Eastern Health***

McDonald J

[\[2016\] VSC 148](#) (Ex tempore) (Revised 11 April 2016)

22/03/2016



JUDICIAL REVIEW - Certiorari - Time limit for bringing application - Time running from date of order - Ascertaining when order made - Distinction between decision made and order - Whether order pronounced by court below - Significance of requesting draft formal orders - Supreme Court (General Civil Procedure) Rules 2015, rule 56.02(1), (2).

JUDICIAL REVIEW - Requirement to commence proceeding in 60 days - Extension only in 'special circumstances' - Strength of case for judicial review - Significance of applicant's concession concerning the exercise of power sought to be quashed - Supreme Court (General Civil Procedure) Rules 2015, rule 56.02(3).

MAGISTRATES' COURT - Judgments and orders - What constitutes an order - When order made - Announcement of outcome on application - Whether to be construed as pronouncement of order - Significance of commensurate entry of order on court register by Magistrate - Magistrates' Court Act 1989 s18(5) - Magistrates' Court General Civil Procedure Rules 2010, r59.02, r59.08, r60.04 and r60.05.

Inspector O'Grady, Michael (Victorian Workcover Authority) v Magistrates' Court of Victoria; Donaldson, Christopher; Ginn, Shannon; Stevens, Christopher  
Mukhtar AsJ

[\[2016\] VSC 156](#)

15/04/2016

JUDICIAL REVIEW - Racing - Jockey - Exclusion Order made by Chief Commissioner's delegate - Protected information relied on - Method of hearing and determining review - Natural justice - Open justice - Public interest - Protecting confidential information - Right to a fair hearing - Hearing with confidential affidavits or a closed hearing with a right to make submissions - Racing Act 1958 s33, s35E, s35F - Administrative Law Act 1978 s3 - Charter of Human Rights and Responsibilities Act 2006 s24 - Police Integrity Act 2008 s 106, s107.

DISCOVERY - Application for particular discovery - Whether reason to believe that some documents existed - Supreme Court (General Civil Procedure) Rules 2015 O 29.08

***Nikolic, Daniel Mario v Chief Commissioner of Police***

Ginnane J

[\[2016\] VSC 143](#)

08/04/2016

JURISDICTION - Plaintiff sought certiorari to quash orders of the Magistrates' Court of Victoria - Magistrate erred in concluding that Magistrates' Court had no jurisdiction to determine constitutional validity of s245 of the Commonwealth Electoral Act 1918 (Cth) - No conviction recorded but fine imposed - Error of Law - Commonwealth Electoral Act 1918 (Cth) s245; Crimes Act 1914 (Cth) s19B - Commonwealth of Australia Constitution Act 1900 (Cth) s39 and s76; Judiciary Act 1903 (Cth) s39(2).

PROCEDURAL FAIRNESS - Denial of procedural fairness - Sentencing Act 1991 s104.

***Toscano, Guiseppe Joseph v The Magistrates' Court of Victoria; Stubbs, Neil (Australian Electoral Commission)***

McDonald J

[\[2016\] VSC 144](#)

04/04/2016

LEGAL PRACTITIONERS - Whether defendant's counsel and instructing solicitors breached overarching obligations under Civil Procedure Act 2010 - Inference that counsel made submissions inconsistent with his instructions - No waiver of client legal privilege by defendant - Whether permissible for Court to inquire of its own motion whether counsel acted inconsistently with instructions - Whether permissible for Court conducting an inquiry under s29 of the Civil Procedure Act 2010 to admit into evidence affidavits filed but not previously tendered in evidence - Referral of counsel and instructing solicitors to the Legal Services Commissioner - Administration and Probate Act 1958 s3 and s51; Civil Procedure Act 2010 s16, s18, s21, s22, s23 and s29; Legal Profession Uniform Law Application Act 2014, Schedule 1, s296.

***In the matter of the Estate of Romano Peter Manlio, deceased (No 2)***

***In the matter of an Application for Letters of Administration ad colligendum bona Stagliano, Lisa Nicole (as the Administrator of the Estate of Romano Peter Manlio, deceased) v Scerri, Maria***

McDonald J

[\[2016\] VSC 130](#)

08/04/2016

NEGLIGENCE - Application for approval of compromise under the Supreme Court (General Civil Procedure) Rules 2015, Order 15 - Person under a disability - Relevant test to apply on application for approval - Compromise approved - Elderfield v Transport Accident Commission [2010] VSC 116.

***James, Mark (a person under a disability who sues by his Litigation Guardian Samantha Lee James) v Major Carpets P/L***

T Forrest J

[\[2016\] VSC 138](#)

07/04/2016

PRACTICE - Request by prisoners for provision of CD media outside the parameters of the Commissioner's requirements relating to prisoner computers - Advanced stage of strike out application - Lack of need for CD media in the interests of justice - Prisoner entitled to access and receipt of legal material by other means - Security risk and risk to IT system - Request for access to CD media refused.

***Rich, Alistair Hugo v Ryan, Brett (Acting in his Capacity as Acting General Manager of H.M Prison Barwon and for Corrections Victoria)***

Garde J

[\[2015\] VSC 785](#)

04/12/2015

PRACTICE AND PROCEDURE- Application for extension of time to commence proceeding- Supreme Court (General Civil Procedure) Rules 2015, r 56.02(3)- 'special circumstances'- Medical Panel determination - 'significant injury'- relevant threshold level - threshold as then defined by the Wrongs Act 1958- whether Wrongs Amendment Act 2015 retrospective in nature

***Williams, Melinda v Coles Supermarkets Australia P/L (and others according to the schedule attached)***

Ierodiaconou AsJ

[\[2016\] VSC 161](#)

15/04/2016



PRACTICE AND PROCEDURE - Pleadings - Defendant's application for leave to amend defence following earlier strike out of certain paragraphs - Paragraphs plead honest opinion defence - Whether particulars capable of establishing that an honest opinion was based on proper material - Defamation Act 2005 s31 - Supreme Court (General Civil Procedure) Rules 2005 r23.02.

***Hanks, Paul v Johnston, Stuart Neile (No 2)***

John Dixon J

[\[2016\] VSC 149](#)

11/04/2016

PRACTICE AND PROCEDURE - Subpoena - Production of documents - Claim for privilege - Disclosure waiver - Issue waiver - Associated document waiver - Derivative waiver - Tort of misfeasance in public office.

***Mullett, Paul Redmond v Nixon, Christine & Walshe, Kieran & Taylor, Wayne (Subpoena Application)***

J Forrest J

[\[2016\] VSC 129](#)

04/04/2016

PRACTICE AND PROCEDURE - Summary judgment application - Advocates' immunity - No real prospect of success - Merits of the case - Granted - Civil Procedure Act 2010 (Vic) s62, s63 and s64.

***Scargetta, Elliot Daniel v Hayes, Paul & Silver, Joel***

Macaulay J

[\[2016\] VSC 150](#)

13/04/2016

SUCCESSION - Where testator's copy will found amongst his papers after his death - Where original will last seen in the possession of the testator and not found - Deceased's children seek a grant of representation on intestacy - Beneficiary under copy will objects to a grant on intestacy on basis that presumption of revocation 'animo revocandi' is rebutted - Onus on beneficiary to rebut presumption - Welch v Phillips (1836) 12 ER 828 - Whiteley v Clune (Unreported, Supreme Court of New South Wales, Powell J, 13 May 1993) - Cahill v Rhodes [2002] NSWSC 561.

PRACTICE AND PROCEDURE - Where plaintiffs seek summary judgment - Whether caveator has no real prospect of success - Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd (2013) 42 VR 27 - Mandie v Memart Nominees Pty Ltd [2016] VSCA 4 - Civil Procedure Act 2010 (Vic), s63(1).

***Moschoudis, George Jason & Wesley-Smith, Paul Anthony v Soutlanakis, Constantine***

McMillan J

[\[2016\] VSC 139](#)

08/04/2016

SUCCESSION LAW - Where deceased made no provision for adult daughter - Where moral duty to the applicant conceded - Where quantum in dispute - Justice Legislation Amendment (Succession and Surrogacy) Act 2014 - Administration and Probate Act 1958, Part IV.

***Brimelow, Tessa v Alampi, Salvatore***

McMillan J

[\[2016\] VSC 135](#)

08/04/2016

## Costs Court

PRACTICE AND PROCEDURE - Relevant considerations on an application for a stay of execution of a warrant. APPEAL - Nature of appeal from Associate Justice - Whether Associate Justice failed to take into account relevant consideration in refusing an application for a stay of execution of a warrant - Appeal dismissed.

***Slaveska, Stojanka v Elencevski, Dragan***

Riordan J

[\[2016\] VSC 127](#)

06/04/2016

## Criminal Division

Charge: Contempt of the Chief examiner s49(1)(b) without reasonable excuse refusal to answer questions. Section 49(1)(b) - Elements of the offence - Onus of proof - What constitutes reasonable excuse.

***The Queen (on the application of the Chief Examiner) v QX [Q.X.]***

King J

[\[2015\] VSC 784](#)

25/02/2015

CRIMINAL LAW - Evidence - Media Application for Police Interview - Exercise of discretion - Relevant principles - Privacy of individual - Public interest - Crimes Act 1958 s464JB.

***In the Matter of an s464JB of the Crimes Act 1958: In the Matter of an Application by Nine Network Australia P/L***

T Forrest J

[\[2016\] VSC 158](#)

18/03/2016

# County Court of Victoria Cases

Following is a selection of cases recently handed down in the County Court of Victoria. These cases have been selected for inclusion by the presiding judge. If you would like your judgment added to the Library Bulletin, please email the reference librarian in your jurisdiction.

LEGAL PROFESSIONAL NEGLIGENCE - Testamentary instructions to client

***Bedford (who sues as Executrix of the Will and Estate of Lorraine Maureen Whitehead (deceased)) v Stojakovic***

Judge Jordan

[\[2015\] VCC 1692](#)

26/11/2015

CONTRACT - Alleged agreement between developers of adjoining land - Contribution to be made by one developer towards the costs of the other constructing a sub-divisional road on the common boundary - Whether agreement established - If no agreement made out, whether the developer obtaining the benefit of the road should contribute to the cost of construction - Lumbers v. W Cook Builders Pty Ltd (in liq.)

***Rodger Constructions Pty Ltd v. Woolcorp Pty Ltd***

Judge Anderson

[\[2016\] VCC 86](#)

18/03/2016

TRUSTS - Family home in the joint names of a husband and wife - Property sold as a result of a Family Court order - Purchased by a daughter and placed in joint names of the daughter and her mother - On the mother's death, the property passed to the daughter by survivorship - Son claiming an interest in the property on the basis of improvements he made to the property and the care of his mother over many years.

***Rossi v Rossi***

Judge Anderson

[\[2016\] VCC 353](#)

07/04/2016

# Articles

## Aboriginals

Indigenous female offenders - Young offenders - Youth justice system - Male youth offenders - Bias - NT - Australia  
**Ng, C.** "Invisible female indigenous offenders in the youth justice system: what's the problem? An illustration from the Northern Territory perspective." (2015) 18(2) AILR 19-28

New Zealand - Maori legal and political institutions - Indigenous recognition by the state - Indigenous constitutional recognition - Comparative analysis - New Zealand - Australia  
**Morris, S.** "Lessons from New Zealand: towards a better working relationship between indigenous peoples and the state." (2015) 18(2) AILR 67-87

## Administrative Law

Public law - Prerogative powers - Foreign affairs - Judicial review - Proportionality analysis v *Wednesbury* unreasonableness - *Youssef v Secretary of State for Foreign and Commonwealth Affairs* - UK  
**Dobson, N.** "Hands off: Nicholas Dobson examines the use of prerogative powers and review." (2016) 166 (7691) NLJ 13-15

## Admiralty Law

Vessels - Wrongful arrest - Detention - Damages - Economic loss - *Mala fides* - *Crassa negligentia* - The *Evangelismos* - Actions in remedies - Admiralty Act 1988 (Cth) s34 - Australia - UK  
**Cremean, D.** "Wrongful arrest of vessels." (2016) 90(2) ALJ 96-98

## Alternative Dispute Resolution

Advocacy - Legal Profession - Future impact  
**Maybury, S.** "The 'new advocacy': What does it mean for legal practice." (2016) 41(3) Aust Bar Rev 246-256

Commercial arbitration - Mandatory stay - *Re Mackie Group Pty Ltd - Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd No. 3 - Subway Systems Australia v Ireland - Lion-Dairy & Drinks Pty Ltd v Huhtamaki Australia - Commercial Arbitration Act 2011 (Vic) s8* - Victoria - Australia  
**Sharkey, J.** "Just no choice." (2016) 90(4) LIJ 28-32

Legal profession - Legal Professional Uniform Conduct (Barristers) Rules - State comparison - Australia  
**Cotman, N. and M. Walker.** "Conducting an ADR process and the Legal Profession Uniform Conduct (Barristers) Rules - recent developments." (2016) 41(3) Aust Bar Rev 252-256

Mediation - Benefits - Neutral location - Environment factors - Physical settings - Body language - on-site mediations - Victoria  
**McFarlane, T.** "A healthy environment: Practical factors including the choice of venue and seating arrangements, are often overlooked but can greatly assist in achieving a successful mediation." (2016) 90(4) LIJ 35-37

Mediation - Conversational style - Adversarial style - Preparation - Position paper - Victoria  
**Kaplan, J.** "Ready, set, go." (2016) 90(4) LIJ 32-34

Mediation - Legal Profession - Professional Conduct - First duty - Professional misconduct - Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015 - Victoria  
**Andreacchio, J.** "The paramount duty." (2016) 90(4) LIJ 24-27

Mediation - Telephone conference - Preliminary private meetings - Faster resolution - Victoria - Australia  
**White, S.** "Getting to yes sooner." (2016) 90(4) LIJ 45-47

Settlements - Net present value (NPV) - Discount factors - Costs recoverability - Civil Procedure Act 2010 (Vic) s19 - Victoria - Australia

**Fogarty, A.** "The merit of NPV." (2016) 90(4) LIJ 41-44

Technology - Mediation - Legal Profession - Online Dispute Resolution - ODR - Tools - Benefits - Risks - Considerations - Victoria - Australia

**Ainsworth, N. and M. Clark.** "Technology in mediation." (2016) 90(4) LIJ 38-40

## Computers

Cloud computing - Legal profession - Ethics - Confidentiality - Security - Reliability - WA Law Society - WA

**Edwards, J.** "Cloud computing services: professional obligations and ethics." (2016) 43(1) Brief 32-34

Legal profession - Technological change - Access to justice - Australia

**Susskind, R.** "How technology will transform the work of human experts." (2016) 43(3) Brief 22-23

## Constitutional Law

Free speech - Freedom of expression - War on terror - Federal counter terrorism laws - Cth Criminal Code 1995 (Cth) - Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014 (Cth) - Australian Security Intelligence Organisation Act 1979 (Cth) Australia - UK

**Greste, P. and G. Williams.** "A matter for democracy." (2016) (20) LSJ 28-32

## Contract Law

Breach of contract - Damages - Damages for non-pecuniary loss - Consumer surplus - Ruxley v Forsyth - Farley v Skinner - UK

**Mullen, S.** "Damages for breach of contract: quantifying the lost consumer surplus." (2016) 36(1) Oxford JLS 83-109

Mortgages - Mortgage broker - Arranger - Agent - Role of the intermediaries - Agency - Deception - Failure to follow guidelines - Public Interest - Unconscionable loans - Remedies - Damages - Compensation - Tonto Home Loans Australia Pty Ltd v Tavares - Contracts Review Act 1980 (NSW) - Australia

**Aitken, L.** "'Agency', mortgage 'originators', and loan enforcement." (2016) 41(3) Aust Bar Rev 220-235

## Criminal Law & Procedure

Barristers - Cross-examination - Witnesses - Legal history - Comparative analysis - Australia - UK

**Welsh, J.** "To put, or not to put." (2016) (4) Crim L R 245-265

Community sentences - Custodial Sentences - Suspended sentences - Electronic monitoring - Pre-Sentence Reports - Sentencing Council for England and Wales - UK

**Harris, L.** "The sentencing council's imposition of Community and Custodial sentences Draft Guidelines." (2016) (4) Crim L R 266-272

Criminal Procedure Rules - Efficiency - Guilty pleas - Leveson Review - Verdicts - UK

**Marsh, L.** "Leveson's narrow pursuit of justice: efficiency and outcomes in the criminal process." (2016) 45(1) CLWR 51-67

Practice and Procedure - Fitness to plead - Stand trial - Mental impairment - Law Commission - UK

**Padfield, N.** "'Prosecuting' Those who are unfit to be prosecuted." (2016) (4) Crim L R 227-228

Sexual Offences - Disclosure - Personal records - Privacy - Victims - Witnesses summonses - Comparative analysis - Canada - UK

**Leahy, S.** "Too much information? Regulating disclosure of complainants' personal records in sexual offence trials." (2016) (4) Crim L R 229-244

## Employment Law

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Employees - Protection - Harassment - Workplace bullying - Occupational Health and Safety Fair Work Commission - Fair Work Act (Cth) 2009 - Australia  
**O'Rourke, A. and S. Antioch. "Workplace bullying laws in Australia: Placebo or panacea?" (2016) 45 (1) CLWR 3-26**

## Environmental Law

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Environmental protection - Paris Climate Change Summit - International markets - REDD+ - Carbon Finance - Legal responsibility loss and damage - Legal status Treaty  
**Wilder, M. "Well below 2 C." (2016) (20) LSJ 34-38**

## Equity

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Equitable remedies - Fraud - Equitable proprietary relief - Investors money - Distribution of fund to investors - National Crime Agency v Robb - Proceeds of Crime Act 2002 (UK) s281 - Comparative analysis - Australia - UK  
**Proprietary relief and tracing in equity. (2016) 90 (2) ALJ 92-95**

Legal history - Equitable principles - Ancient Rome - Medieval Chancery - Court of Chancery - Sir Edward Coke - Lord Ellesmere - 17<sup>th</sup> century equitable principles - 18-19<sup>th</sup> Century Chancery - Bleak House - Judicature Acts - Australia - UK  
**Bathurst, T. "The history of equity from Ancient Rome to the Judicature Acts." (2016) 41(3) Aust Bar Rev 204-219**

## Judges

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Personalia - Chief Judge Peter Kidd - County Court of Victoria - Appointment - Victoria - Australia  
**Chief Judge Peter Kidd. (2016) 90(2) ALJ 90**

Personalia - Justice Jane Dixon - Supreme Court of Victoria - Appointment - Victoria - Australia  
**Justice Jane Dixon (2016) 90(2) ALJ 90**

## Legal History

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Legal Philosophy - Lord Denning - Let Justice be done - Freedom under the law - Put your trust in God - Comparative analysis - Australia - UK  
**Douglas, J. "Lord Denning: his judicial philosophy." (2016) 90(2) ALJ 107-119**

## Legal Profession

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First solicitor - William Meek - Supreme Court 175th Anniversary - Victoria - Australia  
**First among lawyers (2016) 90(4) LIJ 15-16**

Legal professional conduct - Competence - E-discovery - Confidentiality - WA - Australia  
**Dharmananda, J. "A duty to google? Ethical issues arising from technology." (2016) 43(3) Brief 18-21**

Personalia - Magistrate Megan Aumair - Magistrate Tim Gattuso - Appointment - Victoria - Victoria  
**Magistrates Megan Aumair and Tim Gattuso. (2016) 90(4) LIJ 23**

Red Mass - Opening new law year - Cultural diversity - Australia  
**Continuity and change. (2016) 90 (2) ALJ 80**

## Military Law

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International Military Tribunal - War Crimes - WWII - Tribunal - Sir William Webb - Sir Alan Mansfield - Claims of Bias - Tokyo - Japan  
**Cullity, F. "Australia's involvement in the International Military Tribunal for the Far East: the case of Sir William Webb and Sir Alan Mansfield." (2016) 41(3) Aust Bar Rev 236-245**

## Practice & Procedure

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Access to justice - Discovery - Civil procedure - Australia - USA  
**The many faces of access to justice: United States (2016) 90(2) ALJ 78**

## Property Law

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Equity - Nominal consideration - Volunteer - Consideration - Purchaser - Mountford v Scott - Costin v Costin - Corin v Patton - Schoppel v Royal trust Co - Schofield v Jones - Colon v Registrar of Titles - Australia

**Seddon, N.** "Is a provider of nominal consideration a "volunteer"?" (2016) 90(2) ALJ 81-83

GST ACT - Sale of Land - Going concern business - Protection of A New System (Goods and services Tax) 1999 (Cth) (GST Act) s38.325 - Attornment - GST Ruling 2002/5 - Example 16A - Contracts - Leasing - Australia.

**Raphael, D.** "The GST Act exemption and sales of real estate going concern businesses." (2016) 90(2) ALJ 83-86

Remedies - Unregistered Torrens title mortgagees - Forced sale of property - Vesting order - Appointment of person to convey - Asset Core Pty Ltd v Jarret Enterprises Pty Ltd - Yarrangah v National Australia Bank - Property Law Act 1974 (Qld) s99(2) - Conveyancing Act 1919 (NSW) s103 - Real Property Act 1900 (NSW) s 57(2)b

**Raphael, D.** "Remedies available to mortgagees under unregistered mortgages." (2016) 90(2) ALJ 86-88

## Restitution

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Unjust enrichment - Two restitution principles - Costs - Superior Courts - Appeal - Overpaid tax - Judicial review - Jurisdiction - New South Wales v Kable - Australia

**Mason, B.** "Australia is different: Restitution and the Australian Constitution." (2016) 90(2) ALJ 120-138

## Torts

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Corrective justice - Causal uncertainty - Market share liability - Loss of chance - Cook v Lewis - UK

**Weinrib, E.** "Causal uncertainty." (2016) 36(1) Oxford JLS 135-164

## Trade Practices

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Tobacco industry - Plain packaging requirements - Restrictions - JT International SA v Commonwealth - Tobacco Plain Packaging Act 2011 (Cth) - TRIPS Agreement - World Trade Organisation [WTO] - Australia

**Anything but plain.** (2016) 90(2) ALJ 77-78