



THE LAW LIBRARY OF VICTORIA

Library
Bulletin
29 April
2016

Library News

175th Anniversary of the Supreme Court in Victoria - Exhibition in the Library

This year marks the 175th anniversary of the Supreme Court in Victoria.

To commemorate this event, an exhibition showcasing historical items of significance is on display in the Supreme Court Library.

The exhibition includes items such as the Notebook of Sir Redmond Barry, Chief Justice Higinbotham's Notebook, a black execution cap, and sketches of Ned Kelly in court.

The exhibition is free, open to the public and viewable when the Supreme Court Library is open (8.30am-6pm Monday-Thursday, 8.30am-5pm Friday).

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



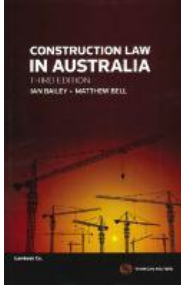
Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016 has just been published. Copies of the book can be ordered from the Supreme Court Library, please phone 03 9603 6282 for details.

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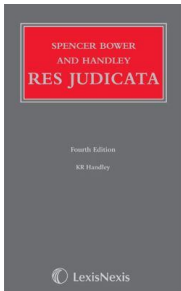
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New Books

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/



Bailey, Ian and Bell, Matthew, *Construction Law in Australia*
3rd ed, Thomson Reuters, 2011, NSW
Call number: 343.078624 BAI.3 (Supreme Court Library and VCAT)



Bower, George Spencer and Handley, K R, *Spencer Bower and Handley the Doctrine of Res Judicata*
4th ed, Lexis Nexis, 2009, London
Call number: 347.41077 BOW.4 (Supreme Court Library)

No image
available

Neave, Marcia, Royal Commission into Family Violence
Royal Commission into Family Violence: Report and Recommendations
Victorian Government Printer, 2016, Melbourne
Call number: q 362.829209945 (Supreme Court Library), 362.8292 (County Court, Magistrates' Court, VCAT Libraries)

Legislation

Victorian Bills

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

- [Appropriation \(2016-2017\) Bill 2016](#)
- [Appropriation \(Parliament 2016-2017\) Bill 2016](#)

Victorian Assents

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

- [Access to Medical Cannabis Act 2016](#) No. 20/2016
- [Building Legislation Amendment \(Consumer Protection\) Act 2016](#) No. 15/2016
- [Judicial Commission of Victoria Act 2016](#) No. 16/2016
- [Local Government \(Greater Geelong City Council\) Act 2016](#) No. 14/2016
- [Racing and Other Acts Amendment \(Greyhound Racing and Welfare Reform\) Act 2016](#) No. 17/2016
- [Sex Offenders Registration Amendment Act 2016](#) No. 21/2016
- [Transport Accident Amendment Act 2016](#) No. 18/2016
- [Victoria Police Amendment \(Merit-based Transfer\) Act 2016](#) No. 19/2016



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:

- *Bail Amendment Act 2016* No. 1/2016
 - The remaining provisions of this Act (sections 3-23) come into operation on 2 May 2016 (VGG S 103 19.04.2016)
- *Justice Legislation Further Amendment Act 2016* No. 3/2016
 - This Act (except sections 4, 5, 6 and 8 and Part 5) comes into operation on 1 May 2016 (VGG S 114 26.04.2016)
- *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* No. 66/2015
 - This Act comes into operation on 2 May 2016 (VGG S 114 26.04.2016)

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

- *Local Government (Greater Geelong City Council) Act 2016* No. 14/2016
 - This Act came into operation on 16 April 2016 (s. 2)
- *Transport Accident Amendment Act 2016* No. 18/2016
 - The remaining provisions of this Act (sections 1-3 and sections 7-8) came into operation on 20 April 2016 (s. 2(1))
- *Victoria Police Amendment (Merit-based Transfer) Act 2016* No. 19/2016
 - This Act came into operation on 20 April 2016 (s. 2)

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

- *Bail Amendment Regulations 2016* No. 26/2016
- *Children, Youth and Families Amendment (Bail) Regulations 2016* No. 27/2016

High Court Cases

There have been no High Court cases since the last Library Bulletin.

Victorian Supreme Court Cases

Court of Appeal

ACCIDENT COMPENSATION - WorkCover insurance - Premiums calculated by reference to WorkCover industry classification - Supply of labour in respect of security services - Whether labour hire - Whether supply of labour in connection with the performance of a task or the discharge of a specified function - Accident Compensation (WorkCover Insurance) Act 1993 - WorkCover Insurance Premiums Order (No 20) 2012/13 cl 4, sch1, sch4.

ACCIDENT COMPENSATION - WorkCover insurance - Appeal against determination of authority - Onus of proof - Accident Compensation (WorkCover Insurance) Act 1993 s36J.

COURTS AND JUDGES - Procedural fairness - Indication as to Judge's view on issues - Ruling that party could not cross-examine or lead evidence contrary to that view - Whether errors in rulings - Judge adopting a different view in judgment - Whether denial of procedural fairness.

Victorian WorkCover Authority v Divadeus P/L (in liquidation)

Ginnane AJA

[\[2016\] VSCA 81](#)

28/04/2016

COSTS - Whether any special circumstances relevant to discretion as to costs - Whether respondents ought to have settled proceeding - Application for leave to appeal wholly unsuccessful - Impecunious applicant - Relevance of personal difficulties - No point of principle.

Swindells, Andrew Hyde v State of Victoria & Batchelor, Peter (No 2)

Warren CJ, Tate JA, and Santamaria JA

[\[2016\] VSCA 77](#)

20/04/2016

CRIMINAL LAW - Appeal against sentence - Appellant pleaded guilty to a number of drug offences, including trafficking in steroids weighing 37.5 grams short of the commercial quantity threshold of 5 kilograms (charge 1) - Sentence of 3 years for charge 1, with a total effective sentence of 4 years and a non-parole period of 2 years and 9 months - Judge ordered that appellant be assessed for suitability for a community correction order (CCO) - Appellant assessed as suitable for CCO - Judge did not refer to a CCO as a sentencing option in his sentencing remarks - This omission did not constitute sentencing error - Sentencing Act 1991 s5(4C), Boulton v The Queen [2014] VSCA 342, Arthars v The Queen (2013) 39 VR 613 considered.

CRIMINAL LAW - Appeal against sentence - Whether individual sentence on charge 1 and total effective sentence manifestly excessive - Strong mitigating circumstances, including exceptional efforts at rehabilitation - Appeal allowed - Appellant resentenced to 2 years' imprisonment with a 1 year non-parole period - Yacoub v The Queen [2006] VSCA 203 considered.

Gul, Huseyin v The Queen

Priest JA, Coghlan JA, and Kyrou JA

[\[2016\] VSCA 82](#)

28/04/2016

CRIMINAL LAW - Application for extension of time to file application for leave to appeal against conviction - Delay of approximately 18 months - Applicant not personally responsible for any part of delay - Affidavit in support sworn by solicitor in applicant's former law firm did not explain 9 months of this delay for which she was personally responsible, and was otherwise vague and inadequate - Solicitor's supervising partner requested to attend hearing to explain delay - Observations on the duties of lawyers in meeting statutory deadlines and in preparing affidavit in support of extension of time - *Kentwell v The Queen* (2014) 252 CLR 601 applied.

CRIMINAL LAW - Application for extension of time to file application for leave to appeal against conviction - Prospect of success - Cross-admissibility of coincidence evidence of 2 complainants - Whether judge properly assessed reliability of first complainant's evidence in determining that its probative value in relation to offences against second complainant substantially outweighed its prejudicial effect on applicant - Evidence Act 2008, s98, s101(2) - *IMM v The Queen* [2016] HCA 14 considered - Application refused.

Derwish, Noureldin v The Queen

Weinberg AP, Redlich JA, and Kyrou JA

[\[2016\] VSCA 72](#)

19/04/2016

CRIMINAL LAW - Child Pornography - Director's Appeal - 27 child pornography related charges under Criminal Code Act 1995 (Cth) and Crimes Act 1958 (Vic) - 11 State offences of causing minors to be concerned in the production of child pornography - Commonwealth offences of causing material to be transmitted from victims to himself, transmitting child pornography material, soliciting child pornography material, using a carriage service to engage in sexual activity with a person under 16, using a carriage service to menace, harass or cause offence - 71 victims - Child pornography procured from 43 victims, solicited from 10 victims, and 18 victims harassed in an effort to obtain child pornography.

CRIMINAL LAW - Child pornography - Use of false persona via internet to procure naked and sexually explicit photographs and videos from children aged 5 to 16 - Use of internet to exploit vulnerable children recognised by legislature as increasing objective gravity of offending - *R v Porte* [2015] NSWCCA 174; *Adamson v The Queen* (2015) 301 FLR 385, cited - Nature of the material relevant to determining objective gravity in child pornography matters - *R v De Leeuw* [2015] NSWCCA 183, *Heathcote (a pseudonym) v The Queen* [2014] VSCA 37, cited - Preponderance of material fell within category 1 and 2 on ANVIL scale - No diminution in objective gravity of offending - General deterrence paramount consideration in child pornography offending - *Fitzgerald v The Queen* [2015] NSWCCA 266, *Director of Public Prosecutions (Cth) v D'Alessandro* (2010) 26 VR 477, cited - Offender continued to offend while on bail - Inadequate weight given to specific deterrence - No reliance on principles espoused in *R v Verdins* (2007) 16 VR 269 - *DPP v O'Neill* [2015] VSCA 325, discussed - Sentence manifestly inadequate - Appeal granted - Respondent resentenced.

SENTENCING - Cumulation of sentences where both State and Commonwealth charges - Orders for cumulation must reflect the totality of respondent's offending on both State and Commonwealth charges - *Pearce v The Queen* (1998) 194 CLR 610; *DPP v Grabovac* [1994] VR 664, discussed - Failure to assign appropriate cumulation to each charge resulted in manifestly inadequate total effective sentence.

SENTENCING - Rolled up counts - Offending on rolled up counts involving numerous victims and additional victims to those covered by individual counts - Rolled up counts objectively more serious - Rolled up counts different order of criminality requiring discrete attention and higher sentence than charges relating to single victims - Sentences manifestly inadequate.

Director of Public Prosecutions (Cth) [DPP] & Director of Public Prosecutions [DPP] v Watson, Daniel

Redlich JA, Priest JA, and Beach JA

[\[2016\] VSCA 73](#)

20/04/2016

CRIMINAL LAW - Conviction - Application for extension of time to file application for leave to appeal against conviction - Over four and a half years' delay - Total of 47 charges comprising obtaining financial advantage by deception, obtaining property by deception, carrying on financial services business without licence, dishonest conduct in carrying on financial services business, dishonestly making improper use of position of director with intent to gain advantage - 'Ponzi scheme' - Nearly \$16m dishonestly procured from investors - Nearly \$6m dishonestly procured from financial institution - Guilty plea - Whether applicant overborne - Whether applicant appreciated nature of guilty plea - Whether applicant's alleged hope that investors would be repaid relevant - Application refused.

Hoy, Graeme Ronald v The Queen

Weinberg AP and Kyrou JA

[\[2016\] VSCA 75](#)

19/04/2016

CRIMINAL LAW - Conviction - Application for leave to appeal against conviction - Evidence - Admissibility - Identification evidence - Lay opinion - No error in judge admitting voice recognition evidence - No error in judge's charge on voice identification - Application refused - *Kheir v The Queen* (2014) 43 VR 308 applied - Evidence Act 2008 s78, s79, s135, s137.

CRIMINAL LAW - Sentence - Application for leave to appeal against sentence - Applicant Chang convicted of trafficking large commercial quantity of drug of dependence and dealing with proceeds of crime - 13,890.7 grams methylamphetamine - Total effective sentence of 15 years' imprisonment with 12 year non-parole period - No significant mitigating factors - Application refused.

CRIMINAL LAW - Sentence - Application for leave to appeal against sentence - Applicant Tran convicted of trafficking large commercial quantity of drug of dependence and possessing unregistered Category D firearm (non-prohibited person) - 13,890.7 grams methylamphetamine - Total effective sentence of 12 years and 3 months' imprisonment with 8 year non-parole period - Role in trafficking significant and above that of mere 'mule' - Parity - Lesser role compared with co-offender Chang adequately reflected in sentence - Application refused

Tran, Giang Truong v The Queen: Chang, Tony v The Queen

Weinberg JA, Santamaria JA, and McLeish JA

[\[2016\] VSCA 79](#)

26/04/2016

CRIMINAL LAW - Joint State/Commonwealth Director's appeal against sentence - One charge of use of carriage service to access child pornography - One charge of knowingly possess child pornography - Total effective sentence of 4 years Community Corrections Order with 300 hours of community work and \$5,000 fine - Whether imposition of CCO manifestly inadequate - Seriousness of accessing and possessing child pornography - Immediate term of imprisonment ordinarily expected for offending of this nature - Importance of general deterrence in child pornography offending - DPP (Cth) v Zarb [2014] VSCA 347, DPP v Smith [2010] VSCA 215; DPP (Cth) v D'Alessandro (2010) 26 VR 477, applied - DPP (Cth) v Guest [2014] VSCA 29; R v De Leeuw [2015] NSWCCA 183; R v Porte [2015] NSWCCA 174, discussed.

CRIMINAL LAW - Accessing child pornography - Classification of images and videos according to ANVIL scale - Lower classification of images and videos does not reduce objective gravity of offending - Category 1 material covers wide range of activity - Categorisation of material to be considered within context of offending as a whole in order to determine objective gravity - DPP (Cth) v Zarb [2014] VSCA 347; Porte v The Queen [2015] NSWCCA 174; Director of Public Prosecutions (Cth) v Watson [2016] VSCA 73, discussed.

PRACTICE AND PROCEDURE - Cumulation on counts where Commonwealth and State offending occurs - Boulton v The Queen [2014] VSCA 342, Atanackovic v The Queen (2015) 326 ALR 159, Porte v The Queen [2015] NSWCCA 174 discussed - Cumulation between State and Commonwealth child pornography offences generally expected.

CRIMINAL LAW - Director's appeal against sentence - Residual discretion not to intervene - CMB v Attorney-General (NSW) (2015) 89 ALJR 407 ('CMB'); DPP v Karazisis (2010) 31 VR 634; DPP v Zhuang [2015] VSCA 96 [49], applied - Compliance with CCO for over 7 months - No public interest in removing respondent from civil society and imposing term of imprisonment - Good prospects of rehabilitation - Residual discretion not exercised adversely to respondent - Appeal dismissed.

Director of Public Prosecutions (Cth) [DPP] & Director of Public Prosecutions [DPP] v Garside, Lesly Albert

Redlich JA, Priest JA, and Beach JA

[\[2016\] VSCA 74](#)

20/04/2016

CRIMINAL LAW - Sentence - Appeal - Conspiracy to cheat and defraud - Mitigating factors - Risk of deportation - Whether judge failed to take into account changes to Migration Act 1958 (Cth) - Whether judge failed properly to take into account risk of deportation - Whether sentencing judge mistook nature of prior conviction - Whether sentence manifestly excessive - Appeal dismissed - DPP v Zhuang [2015] VSCA 96, Konamala v The Queen [2016] VSCA 48, Da Costa v The Queen [2016] VSCA 49 - Migration Act 1958 (Cth), s501(3A), s501CA.
Schneider, Dan v The Queen
Priest JA, Coghlan JA, and Kyrou JA
[\[2016\] VSCA 76](#)
19/04/2016

ESTOPPEL - Issue estoppel - Whether finding in application made pursuant to s134AB(16)(b) of Accident Compensation Act 1985 gave rise to issue estoppel in subsequent proceedings claiming statutory benefits - Whether decision said to create estoppel was final - Whether Court hearing s134AB application has jurisdiction to determine finally questions of causation - Accident Compensation Act 1985, s134AB(1), s (16)(b), s(19)(c) and s(19A) and s134AC.
ACCIDENT COMPENSATION - Finding in application under s134AB(16)(b) of Accident Compensation Act 1985 that injury was employment related - Whether respondent estopped from contesting causation finding in subsequent proceedings claiming statutory benefits - Trial judge held no issue estoppel - No error in trial judge's conclusion - Application for leave to appeal refused.
Laratae, Kassandra v Dean's P/L (t/a Bellbird Kid-Z Educational Resources)
Warren CJ, Tate JA, and Beach JA
[\[2016\] VSCA 71](#)
18/04/2016

PRACTICE AND PROCEDURE - Application for extension of time - Non-party seeking extension of time to appeal - Whether applicant has standing - Substantial delay in bringing application - Unsuccessful party not appealing - No satisfactory reason for delay - Prospects of success of appeal - No error of law identified - Application dismissed.
PRACTICE AND PROCEDURE - Application for stay - Special or exceptional circumstances - No special or exceptional circumstances raised - Supreme Court (General Civil Procedure) Rules 2015 r64.39 - Application dismissed.
Giza, Richard v Waybecca P/L
Santamaria JA and McLeish JA
[\[2016\] VSCA 78](#)
22/04/2016

SOLICITORS - Receivers appointed to law practice of the defendant under the Legal Profession Act 2004 - Proceeding by receivers to recover moneys paid from clients' trust accounts to the solicitor's office account under s5.5.14 of the Act - Whether payments made 'in breach of trust, improperly or unlawfully' - Whether solicitor 'knew or believed' that payments made 'in breach of trust, improperly or unlawfully' - Whether by reason of payments, solicitor 'became indebted or otherwise liable' to a client - Legal Profession Act 2004 s5.5.14(1).

SOLICITORS - Allegation that solicitor withdrew moneys from the trust accounts to meet invoices containing sums for disbursements incurred on behalf of the clients when disbursements had already been paid from the clients' trust accounts - Whether the payments from the trust accounts were made 'in breach of trust, improperly or unlawfully' - Solicitor estopped from denying that the payments were made in breach of trust - Whether because of the payments the solicitor became indebted or otherwise liable to the practice or the clients - Solicitor was liable to account to clients for breach of trust - Solicitor 'otherwise liable' to clients - Whether liability to account affected by clients being indebted to solicitor under other invoices - Appeal allowed.

SOLICITORS - Solicitor agreed to charge clients professional fees on scale - Whether obligation to calculate fees on scale or not to charge more than scale - Solicitor failed to calculate fees charged on scale - Whether withdrawal of moneys from the trust account to meet legal fees charged to the clients were made 'in breach of trust, improperly or unlawfully' - Payments made in breach of trust - Whether the solicitor 'knew or believed' that payments were made 'in breach of trust, improperly or unlawfully' - Whether the solicitor 'became indebted or otherwise liable' to clients - Appeal allowed.

SOLICITORS - Consideration of s3.3.20 of the Legal Profession Act 2004 and the circumstances in which a solicitor may withdraw trust moneys held on behalf of a client for legal costs owing by the client - Solicitor gave client estimates of professional fees before they accepted settlements - Relevance of solicitor's belief that he had not charged more than estimated fees.

SOLICITORS - Consideration of s3.3.20 of the Legal Profession Act 2004 and the circumstances in which a solicitor may withdraw trust moneys held on behalf of a client for legal costs owing by the client - Solicitor gave client estimates of professional fees before they accepted settlements - Relevance of solicitor's belief that he had not charged more than estimated fees.

STATUTORY CONSTRUCTION - Words and phrases - Meaning of 'instructions' in reg 3.3.34(3)(a)(ii) of the Legal Profession Regulations 2005 - Meaning of 'a bill' in reg 3.3.34(4)(a) of the Regulations.

Batrouney, Noel and Lyle, Andrew (in their capacity as receivers of the law practice known as Hollows Lawyers ABN 32 840 058 016) v Forster, David Brian

Santamaria JA, Beach JA, and McLeish JA

[\[2016\] VSCA 80](#)

27/04/2016

Commercial Court

APPLICATION FOR SECURITY FOR COSTS - Order 62 of the Supreme Court (General Civil Procedure) Rules 2015 (Vic) and section 1335 of Corporations Act 2001 (Cth) - Applicants demonstrated that jurisdictional threshold reached - Consideration of several discretionary factors - Order made that corporate plaintiffs provide security for defendants' costs up to completion of mediation.

In the matter of Muranna Park P/L

Muranna Park P/L (ACN 086 934 045) & Ors (according to the Schedule attached) v Southern Mortgages Limited & Ors (ACN 089 763 413) (according to the Schedule attached)

Gardiner AsJ

[\[2016\] VSC 84](#)

09/03/2016

CONTRACT - Loan between directors - Loan from company to director - Unconscionable conduct - Economic duress - Defences not established - Demands for repayment - Construction of the contract - Repayment of both loans due - Competition and Consumer Act 2010 (Cth), schedule 2, the Australian Consumer Law, s20, s21, s22.

DIRECTORS' DUTIES - Alleged breaches of fiduciary and statutory duties - Alleged misappropriation of company assets - Establishing competitive business - Knowing involvement - Constructive trust - Breaches not established - Constructive trust not established.

Suh, Jung Wha & Anor v Cho, Jeff W & Ors

Elliott J

[\[2016\] VSC 108](#)

21/03/2016

CORPORATIONS - Director engaged in conduct not in best interests of the company and not for proper corporate purposes - Breach of fiduciary duty - Breach of statutory duty - Compensation ordered - Corporations Act 2001 (Cth) s181, s182, s1317H

EVIDENCE - Lack of documentary evidence - Failure to produce any relevant books, records or documents of company - Consequences.

KQ International Trading P/L (ACN 120 547 971) v Yang, Jia Fu (aka Yang, Kerry Jia Fu)

Sifris J

[\[2016\] VSC 146](#)

15/04/2016

CORPORATIONS - Winding up - Relief under Corporations Act 2001 (Cth), s588FE and s 588FF - Unreasonable director-related transactions within s588FDA - Section 588FDA(1)(c) - Uncommercial transactions within s588FB - Whether it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction.

In the matter of Golden Heritage Golf P/L (in liquidation) (Receivers and Managers appointed) (ACN 147 372 101): Golden Heritage Golf P/L (in liquidation) (Receivers and Managers appointed) (ACN 147 372 101) & Ors v Guo Zhao Sun & Ors

Sifris J

[\[2016\] VSC 167](#)

22/04/2016

TAXATION - Acquisition of interests in certain land holders - Duties Act 2000 Ch 3, Pt 1 and 2, particularly ss77-86 - Whether "economic entitlement" was acquired - Whether "economic entitlement" amounted to an interest of less than 50 per cent in a "private landholder".

BPG Caulfield Village P/L (ACN 143 652 493) v Commissioner of State Revenue

Croft J

[\[2016\] VSC 172](#)

22/04/2016

Common Law Division

ACCIDENT COMPENSATION - Female worker fell when walking on man-made pathway through a garden bed, sustaining injury - Premises occupied by university - Claim for indemnity by VWA against university in respect of compensation payments made to the worker - Whether there was a breach of occupier's common law duty and/or statutory duty creating a liability in the university - Whether it was reasonable for the university to take no precautions against the risk of harm posed by the garden path - No breach of duty by university - Application dismissed - Accident Compensation Act 1985, s138; Occupational Health and Safety Act 2004, s26; Wrongs Act 1958, s14B, s48, s49.

Victorian WorkCover Authority v Monash University

McDonald J

[\[2016\] VSC 178](#)

22/04/2016

CONTEMPT OF COURT - Costs of contempt of court proceeding - Principles - Indemnity costs - Payment of costs where charges withdrawn or dismissed.

The Queen v Witt, Michael Geoffrey (Costs Ruling)

J Forrest J

[\[2016\] VSC 169](#)

19/04/2016

COSTS - Solicitor's bills of costs - Review by Costs Court - Determination by Costs Judge of preliminary questions - Appeal to Trial Division - Right of appeal - Nature of appeal - Legal Profession Act 2004, s3.4.47 - Supreme Court Act 1986, s171 - Supreme Court (General Civil Procedure) Rules 2005, rr77.06-77.06.9.

CONTRACT - Costs agreement - Formation - Identification of parties - Acceptance by conduct of offer to enter into costs agreement - Construction of agreement - Whether applicable to particular legal work - Whether costs agreement unenforceable for want of consideration - Discretion of Costs Court to reduce taxed costs for failure to provide adequate costs disclosures - Legal Profession Act 2004, Part 3.4, Divisions 3, 5 and 7

Kliger Partners (a firm) v Lotzof, Anthony Hilton

Cavanough J

[\[2016\] VSC 185](#) First Revision: 28 April 2016

27/04/2016

COSTS – Supreme Court (General Civil Procedure) Rules 2015 r26.08(3) – Offer of compromise made – The Court's discretion to 'otherwise order'.

Transport Accident Act 1986 s46A, s47, s49, s93(3), s93(11)(b)(i) – Impairment – Whether plaintiff required to pay back the impairment benefit.

Nakos, Gregory (by way of Litigation Guardian Nakos, Anastasia) v Serdaris, George

Zammit J

[\[2016\] VSC 179](#)

27/04/2016

COSTS - Where plaintiffs' application to propound informal document refused - Where the Court requested parties to provide particulars of costs - Whether costs are reasonable and proportionate to the issues in dispute - Civil Procedure Act 2010, s24

Robinson, James William (in his Capacity as Executor of the Will and Estate of Andrews, Bruce Desmond, Deceased) & Raleigh, Simon John (in his Capacity as Executor of the Will and Estate of Andrews, Bruce Desmond, Deceased) v Jones, Jennifer & Victorian Animal Aid Trust (No 4)

McMillan J

[\[2016\] VSC 160](#)

15/04/2016

JUDICIAL REVIEW AND APPEALS - Application to appeal Associate Judge's order refusing leave to appeal from the Victorian Civil and Administrative Tribunal - Victorian Civil and Administrative Tribunal Act 1998 (Vic) s148 - Supreme Court Act 1986 (Vic) s17(3).

NATURE OF THE APPEAL - Appeal from an Associate Judge under Supreme Court (General Civil Procedure) Rules 2015 r77.06 - Whether such an appeal is a rehearing, hearing de novo or appeal stricto sensu - The type of error that must be demonstrated in such an appeal - Whether an appeal can be heard if there is no error - Whether a court order has 'worked an injustice'.

Weber, Mark v Deakin University & Ors (according to the schedule)

Zammit J

[\[2016\] VSC 147](#)

14/04/2016

JUDICIAL REVIEW AND APPEALS - Order 56 - Application for orders in the nature of mandamus and prohibition by solicitor being investigated by the defendant under Part 4.4 of the Legal Profession Act 2004 - Whether application for orders in the nature of mandamus and prohibition available against the defendant on the facts - Orders not available.

PRACTICE AND PROCEDURE - Application by defendant for summary judgment under r23.01 of the Supreme Court (General Civil Procedure) Rules 2015, s63 of the Civil Procedure Act 2010 or pursuant to the inherent jurisdiction of the Court - Application Granted.

PRACTICE AND PROCEDURE - Application by plaintiff for leave to discontinue the proceeding under r25.03 on the basis that the defendant's actions have rendered the proceeding useless - Application for the defendant to pay plaintiff's costs on discontinuance - Operation of r63.15 of the Rules - Application refused.

Beling, Joel Lorensz v Legal Services Commissioner

Derham AsJ

[\[2016\] VSC 180](#)

22/04/2016

JUDICIAL REVIEW - Variation of an interim family violence intervention order for the protection of an adult on the Magistrates' Court's own initiative - held to be without power - Application or consent required - Family Violence Protection Act 2008 (Vic) s1, s11, s42, ss53-55, s59, s60, s61, s65, s100-102, s108-111, s170 - Magistrates' Court (Family Violence Protection) Rules 2008 (Vic) r4.05, r15.03.

PRACTICE AND PROCEDURE - Whether transcript of lower court must be prepared by an authorised transcription service for purposes of judicial review - No statutory requirement - Transcript prepared in a solicitor's office and checked by the solicitor accepted - Evidence (Miscellaneous Provisions) Act 1958 (Vic) s130, ss134-135, s137 - Courts Security Act 1980 (Vic) ss4A-4C.

PRACTICE AND PROCEDURE - Costs on successful judicial review where no appearance by defendants - Application for certificate under Appeal Costs Act 1998 (Vic) s7 - Certificate granted.

L v L & Magistrates' Court of Victoria

Lansdowne AsJ

[\[2016\] VSC 182](#)

14/04/2016

LAND VALUATION AND COMPENSATION - Separate questions - Whether Respondent had an 'interest' in land under the Land Acquisition and Compensation Act 1986 as a party to an agreement purportedly made under s173 of the Planning and Environment Act 1987 - Land compulsorily acquired belonged to other parties, but Respondent's land formed part of land that was to be developed by the other parties upon its transfer to them - Agreement provided for the other parties to make development contributions prior to certification of plans of subdivision - Agreement to be recorded on titles to Respondent's land within the development area - Whether Respondent's agreement to recording created a charge over Respondent's land - Whether power to enforce certain terms of the Agreement created a right, power or privilege in, under, over, affecting or in connexion with land owned by other parties to the Agreement - Planning and Environment Act 1987 s173, s174, s175, s177, s181, s182, s183; Land Acquisition and Compensation Act 1986 s3(1), s24(1)(b), s37(1).

Secretary to the Department of Economic Development, Jobs, Transport and Resources v MG Pastoral Company P/L

Emerton J

[\[2016\] VSC 187](#)

29/04/2016

LEGAL PRACTITIONERS - Application for removal of practitioner's name from the local roll of practitioners - Recommendation by the Victorian Civil and Administrative Tribunal - Practitioner overseas - Not served with originating motion - Application that the Court dispense with the requirement of service - Application refused - Proceeding adjourned for one year - Legal Profession Act 2004 s4.4.17, Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 r14.13(4) and Supreme Court (General Civil Proceedings) Rules 2015 r2.04, r6.02.

Victorian Legal Services Commissioner v Spaulding, Lewis James

Ginnane J

[\[2016\] VSC 162](#)

18/04/2016

PRACTICE AND PROCEDURE - Case management conference - Supervisory power of the Court - Orders made for the payment of the Scheme Administrator - Appointment of counsel to monitor progress of the Settlement Distribution Scheme - Appointment of additional assessors.

Matthews, Carol Ann v Ausnet Electricity Services P/L (formerly SPI Electricity P/L) (ACN 064 651 118) and others according to the Schedule & Ausnet Electricity Services P/L (formerly SPI Electricity P/L) (ACN 064 651 118) v ACN 060 674 580 P/L and others according to the Schedule & ACN 060 674 580 P/L & Ausnet Electricity Services P/L (formerly SPI Electricity P/L) (ACN 064 651 118) and others according to the Schedule annexed to other rulings of the Court (Ruling No. 41)

J Forrest J

[\[2016\] VSC 171](#)

19/04/2016

PRACTICE AND PROCEDURE - Cross vesting - Claim for damages and personal injuries - Application to transfer proceedings to Supreme Court of South Australia - Whether South Australia is more appropriate - Section 5(2)(iii) Jurisdiction of Courts (Cross-Vesting) Act 1987 (Vic) - Case involving a seriously ill plaintiff - Application dismissed.

Wittern, Wolfgang v Amaca P/L (formerly James Hardie and Coy Ltd) (ACN 000 035 512) & Ors

Zammit J

[\[2016\] VSC 40](#)

10/02/2016

PRACTICE AND PROCEDURE - Group proceedings - Administration of approved settlement scheme - Amendment of settlement deed - Approval of administration costs - s33ZF, Supreme Court Act 1986.

Rowe, Katherine v Ausnet Electricity Services P/L (ACN 064 651 118) (formerly SPI Electricity P/L & Ors

John Dixon J

[\[2016\] VSC 166](#)

19/04/2016

PRACTICE AND PROCEDURE - Security for costs - Planning - Permit associated with water extraction in rural areas - VCAT granting permit - Community group objector seeking leave to appeal - Respondent seeking security for costs - Relevant factors in the exercise of the discretion - Security ordered - Amount of security - Victorian Civil and Administrative Tribunal Act 1998 s148; Supreme Court (General Civil Procedure) Rules 2015 r62.02(b).

Stanley Rural Community Inc v Stanley Pastoral P/L

Ginnane J

[\[2016\] VSC 173](#)

20/04/2016

PRACTICE AND PROCEDURE - Whether challenge to standing must be determined at the commencement of the proceeding - Whether challenge to standing can be determined at the conclusion of the proceeding - Relevance of Civil Procedure Act 2010 (Vic) - Resolution of objection to standing deferred to the conclusion of the proceeding.

In the Matter of Akron Roads P/L (in liquidation)

Blakeley, Ross; Ryan, Michael & Olde, Quentin (as joint and several liquidators of Akron Roads P/L (in liquidation) and Akron Roads P/L (in liquidation) v Crewe, Trevor Paul & Ors (Ruling No 2)

Robson J

[\[2016\] VSC 199](#)

29/04/2016

PRACTICE AND PROCEDURE - Vexatious litigant - Application for leave to commence legal proceeding - Application granted - Supreme Court Act 1986 s21; Vexatious Proceedings Act s54, s55, s56, s60, s62, s63, s64, s91, s102.

ACCIDENT COMPENSATION - Reduction and discontinuance of weekly payments - Issue as to work capacity - Accident Compensation Act 1985 s114; Workplace Injury Rehabilitation and Compensation Act 2013.

The Attorney General for the State of Victoria v Lindsay, David James

McDonald J

[\[2016\] VSC 136](#)

28/04/2016

Criminal Division

CRIMINAL LAW - Attempting to pervert the course of justice - Complicity based on agreement - Statutory complicity - Whether liability under s323(1)(c) and s324 of the Crimes Act 1958 requires proof of participation in the joint venture - Significance of abolition of requirement of presence by s323(3) of the Crimes Act 1958.

The Queen v Semaan, Alexander; The Queen v Semaan, Hanna; The Queen v Beljulji, Megan

Beale J

[\[2016\] VSC 170](#)

15/04/2016

CRIMINAL LAW - Fitness to stand trial - Accused found by jury to be unfit to stand trial - Accused unlikely to become fit within the next 12 months - Special hearing to be held - Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 s6(1), s11(4)(a), s12(5)

Director of Public Prosecutions [DPP] v Woodruff, John

Hollingworth J

[\[2016\] VSC 157](#)

15/04/2016

CRIMINAL LAW - Pre-trial ruling - Indictment charging accused with recklessly causing injury and manslaughter - Infant victim - Severance application by Crown - Section 193(1) of the Criminal Procedure Act - Severance of indictment both desirable and practicable to ensure a fair trial - Danger of prejudice - Evidence on one charge used impermissibly to corroborate latter charge - Severance ordered.

The Queen v Penrose, Brett Noel (Ruling No 1)

Lasry J

[\[2015\] VSC 786](#)

09/11/2015

CRIMINAL LAW - Sentence - Common law assault - Good prospects of rehabilitation - Remorse - Guilty plea - Youthful offender - Community Correction Order imposed.

The Queen v Sua, Sam

Emerton J

[\[2016\] VSC 194](#)

28/04/2016

CRIMINAL LAW - Sentence - Manslaughter - Early plea of guilty - Domestic violence - Sentenced to 537 days' imprisonment considered time served, combined with a two-year Community Corrections Order - No parole period - Standard CCO conditions - Additional conditions including 100 hours unpaid community work, mental health assessment and treatment, drug and alcohol rehabilitation and treatment, supervision, offending behaviour programs.

The Queen v McLaughlin, Lisa

T Forrest J

[\[2016\] VSC 189](#)

29/04/2016

EVIDENCE - Character Evidence - Criminal Law - Manslaughter - Good character evidence introduced by defence - Prosecution entitled to rebut this evidence - Evidence Act 2008 s110 - Evidence allowed.

The Queen v Penrose, Brett Noel (Ruling No 3)

T Forrest J

[\[2016\] VSC 192](#)

29/02/2016

EVIDENCE - Coincidence evidence - Evidence Act 2008 s98, s101 - Accused charged with recklessly causing serious injury, and manslaughter - Identity of offender - Whether or not evidence relevant on Charge 1 relevant on Charge 2 - Similarity of circumstances of events surrounding the alleged offending on each Charge - Whether or not the evidence has significant probative value - Whether or not the probative value is outweighed by prejudice to the accused.

The Queen v Penrose, Brett Noel (Ruling No 2)

T Forrest J

[\[2016\] VSC 191](#)

16/02/2016

JURY DIRECTIONS - Criminal law - Manslaughter - Unreliability - Drug use - Prior inconsistent statements - Whether or not asserted unreliability is outside of juries' common understanding - Jury Directions Act 2015 s12, s14, s16, s32.

The Queen v Penrose, Brett Noel (Ruling No 4)

T Forrest J

[\[2016\] VSC 193](#)

02/03/2016

Practice Court

REAL PROPERTY - Application to remove caveat - Whether estate or interest in land - Whether equitable charge created - Landscaping work - Unpaid debt - Romalpa clause regarding materials used - No serious question to be tried - Caveat disproportionate - Balance of convenience favours removal of caveat - Transfer of Land Act 1958 s90(3).

Popescu, Helen Mary v A & B Castle P/L, The Registrar of Titles

Ginnane J

[\[2016\] VSC 175](#)

15/04/2016

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.

BUILDING CONTRACT - Payment claims - Conflicting evidence as to the identity of the parties to the “construction contract” to whom the claims related - Building and Construction Industry Security of Payment Act 2002 (Vic) - *Grave v Blazevic Holdings Pty Ltd* [2010] NSWCA 324 followed.

UBM Plastering Pty Ltd & Anor v Idevelopment Group Pty Ltd

Judge Anderson

[\[2016\] VCC 458](#)

22/04/2016

PRACTICE AND PROCEDURE - Application for a stay of the proceeding - Appropriate court to determine the dispute - Policy of insurance entered into in New Zealand - Claim made relating to events occurring primarily in Victoria - Litigation against the insurer pursued pursuant to rights of subrogation or an assignment of rights - Whether “exclusive choice of court agreement” in the insurance policy determinative - Proceeding stayed - Section 20 Trans-Tasman Proceeding Act 2010 (Vic).

Australian Gourmet Pastes Pty Ltd v Endeavour Packaging Pty Ltd & Anor

Judge Anderson

[\[2016\] VCC 455](#)

22/04/2016

PRACTICE AND PROCEDURE - Jurisdiction of the County Court - Claim by a trustee in bankruptcy for declaration that an interest in real property was held on trust by the defendant for the plaintiff and was therefore “divisible property” pursuant to section 58(1) of the Bankruptcy Act 1966 (Cth) - Whether the County Court had jurisdiction to determine the plaintiff’s claim - Whether the Court was exercising “jurisdiction in bankruptcy” - *Jahimowicz v Jacks* [2016] VSCA 42 and *Turner v Gorkowski* [2014] VSCA 248 applied.

Cant v Magallanes

Judge Anderson

[\[2016\] VCC 454](#)

22/04/2016

Articles

Administrative Law

Freedom of information - Access to justice - Government - Government Information (Public Access) Act 2009 (NSW) - NSW - Australia

Rolfe, D. "Access all areas: timely release of information is crucial for access to justice, says NSW Information Commissioner Elizabeth Tydd." (2016) (21) LIJ 36-38

Arbitration

Civil procedure - Mediation - Refusal - Unreasonable conduct - UK

De Girolamo, D. "Rhetoric and civil justice: a commentary on the promotion of mediation without conviction in England and Wales." (2016) 35(2) CJQ 162-185

Constitutional Law

Commonwealth Constitution s96 - High Court - Interpretation - Methodology - Broad shift in interpretation - Federal constraints on Commonwealth power - Cooperative federalism - Australia

Chordia, S. "Section 96 of the Constitution: developments in methodology and interpretation." (2015) 34(2) U Tas L R 54-91

Contract Law

Indemnify - Meaning - Hold harmless - Save harmless - Australia

Gomes, S. "Indemnify, hold harmless or save harmless?" (2016) 36(3) Proctor 21-23

Courts

Access to justice - Civil litigation - Disproportionate legal costs - Litigation without lawyers - Unbundling services - UK

Briggs, M. "The online court." (2016) (Apr) Counsel 24-25.

Case management - Delay - Privileged communications - Professional negligence - Solicitors' powers and duties - The State of Queensland v JL Holdings - Aon Risk Services Australia Ltd v Australian National University - ERA v Armstrong - Australia

Willis, S. "Courting incompetence: should the High Court of Australia more carefully consider its influence on legal culture." (2016) 35(2) CJQ 129-147

Civil courts - Online court - Civil claims - Court of Appeal - High Court - Workload - Procedures - Review - UK

McDonald, I. et.al. "New chapter ahead: breaks down the key proposals in the interim report on the structure of the civil courts." (2016) 166(7689) NLJ 17-19.

Court closures - UK

Underwood, K. "Austerity ain't working." (2016) 160(10) Sol J 12.

Judiciary - Appointment process - India

Sengupta, A. "Appointment of judges and the basic structure doctrine in India." (2016) 132(April) LQR 201-206.

Judiciary - Recusals - Bias - Interventions - Appellate Court - Review court - Inappropriate recusal - Appeasement - Allegations - Personal attacks - Intellectual difficulty - Pragmatism - UK

Olowofoyeku, A. "Inappropriate recusals." (2016) 132(April) LQR 318-337.

Criminal Law & Procedure

Children - Vulnerable witnesses - Evidence - Family proceedings - Domestic violence - Victim confidentiality - Measures for evidence - UK

Burrows, D. "In safe hands? - Explores how courts strive to balance the search for justice with protecting vulnerable witnesses." (2016) 166(7689) NLJ 13-14

Criminal theory - Theories of violence - One punch fatalities - Male violence - Antisocial conduct - Australia

Flynn, A. et.al. "Emblematic violence and aetiological cul-de-sacs: on the discourse of 'one-punch' (non)fatalities." (2016) 56(1) *Brit. J Criminol.* 179-195

Criminology - Governance - Youth justice practice - Youth penalty - Punishment - UK
Phoenix, J. "Against youth justice and youth governance, for youth penalty." (2016) 56(1) *Brit. J Criminol.* 123-140

Doctrine of parasitic liability - Joint enterprise - Criminal liability - R v Jogee - UK
Kavanagh, D. "The world post-Jogee." (2016) (Apr) *Counsel* 29-31

Extradition - Integrated scheme - Reduction of complexity - Reduction in delay - Protection of rights - Mutual assistance - Reforms - Gateway functions - Gatekeeping functions - NZ
Comrie-Thomson, P. and K. Salmond. "Modernising New Zealand's extradition and mutual assistance laws." [2016] (March) *NZLJ* 81-83

Sentencing - Supreme Court of Tasmania - Reforms - Breaches - Suspended sentences - Outcomes for actioned breaches - Sentencing Act 1997 (Tas) - Australia
Bill, E. and L. Bartels. "Suspended sentences in Tasmania: an analysis of the impact of recent breach reforms." (2015) 34(2) *U Tas L R* 6-33

Young female offenders - Profile - Family dysfunction - Childhood maltreatment - Adolescent maltreatment - Mental health disorders - Substance abuse - Gang involvement - Recommendations - Children, Young Persons, and Their Families Act 1989 (NZ) - NZ
Best, C. et.al. "Who are young female offenders?: Implications for the New Zealand justice system." [2016] (March) *NZLJ* 69-74

Employment Law

Employees - Protection - Disclosure - Confidential communication - Corruption - Reforms - Australia
Black, S. "Saints or sinners - where to for whistleblowers?" (2016) (19) *LSJ* 24-25

Equity

Equitable remedies - Illegality - *Apotex v ParkingEye* - *Houga v Allen* - *Patel v Mirza* - Chief Land Registrar - Illegality principles - Comparative analysis - UK - Australia - NZ-Canada
Strauss, N. "Ex turpi causa oritur actio?" (2016) 132(April) *LQR* 236-265

Jurisprudence - Rule of law - Tolerance of indeterminacy - Unconscionable reliance - UK
Harding, M. "Equity and the rule of law." (2016) 132(April) *LQR* 278-302.

Human Rights

Possible repeal - Human Rights Act 1998 (UK) - Comparative analysis - Australia - UK
Williams, G. "The Human Rights Act debate." (2016) (21) *LSJ* 22-23

Intellectual Property

Copyright - Contemporary art - MONA art gallery - Buchell Installation - Moral rights protection - Moral rights schemes - Artistic work - *Perez v Fernandez* - Copyright Act 1968 (Cth) - Visual artists Act (US) - Comparative analysis - Australia - US
Chighine, L. "Damned if you do, damned if you don't: when can an art gallery make changes to an artwork?" (2015) 34(2) *U Tas L R* 34-53

Legal Aid

Community legal centres - Specialist youth legal services - Youth Advocacy Centre - Duty solicitors - Advocacy - NSW - Australia
Southward, J. "Behind the shopfront." (2016) (21) *LIJ* 30-35

Legal Profession

Solicitors Regulation Authority - Review - Misconduct - Professional's private lives - UK
Fox, M. and R. Behn. "Keep out!" (2016) 166(7689) NLJ 6

Women - Legal practitioners - Retention - Advancement - Long hours - Unconscious bias - Redefining success - NZ
Caldwell, J. "Gender and the legal profession." [2016] (March) NZLJ 51-56

Practice & Procedure

Class actions - Anti-competitive practices - Banks - Libor - FX price fixing - The Consumers Association v JJB Sports - Competition Appeals Tribunal - Consumer Rights Act 2015 (UK)- Comparative analysis - UK - USA
Duncan, S. "The hungry CAT fallacy." (2016) 166(7689) NLJ 15

Judgments - Reasons for decision - Written judgments - Principles - Justifications - Common approach - Jurisdictions - Quality of reasons - Consequences - Adequate reasons - Comparative analysis - Australia - Canada - NZ - UK
Harris, B. "The continuing struggle with the nuanced obligation on judges to provide reasons for their decisions." (2016) 132(April) LQR 216-235

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Campbell, D. "The absence of negligence in Hedley Byrne v Heller." (2016) 132(April) LQR 266-277

Trusts

Charities - Not-for-profit groups - Charitable status - Charitable purposes - Legacies - Public benefit - UK
Synge, M. "Charitable status: not a negligible matter." (2016) 132(April) LQR 303-317