



THE LAW LIBRARY OF VICTORIA

Library Bulletin

24 May 2019

Library News

6 June 2019: Switch On... Lawlex

Thursday 6 June, 1.15pm - 1.45pm

The Law Library of Victoria invites you to attend our Switch On... information sessions. These thirty minute sessions are suited to judicial officers, court staff, legal professions, law students, and anyone with an interest in law.

Lawlex brings together legislation and parliamentary information in a one-stop location. Linking through to authorised versions of legislation from all jurisdictions, Lawlex also provides links to explanatory material and Hansard. Come along and see how you can search the freely accessible parts of Lawlex.

All are welcome and entry is free. To register please email libraryevents@supcourt.vic.gov.au

SUBSCRIBE TO THE LIBRARY BULLETIN

If you would like to receive the Library Bulletin by email, please contact us at llv@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.

The book costs \$60 and there is a \$10 discount for members of the Royal Historical Society of Victoria (RHSV).

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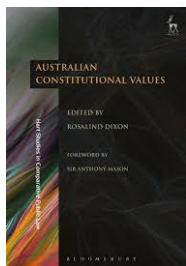
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New Books

Following is a selection of new books added to the Law Library of Victoria collection. For details of more new books, see the Library Catalogue: https://courts.sdp.sirsiidynix.net.au/client/en_AU/llv/.

Members of the legal profession and the public can request Supreme Court Library books to read on site.

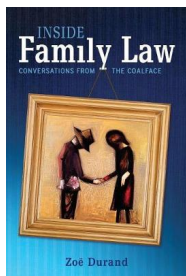
Judicial officers and court staff can borrow any of the books listed. Contact your jurisdictional librarian to request an item.



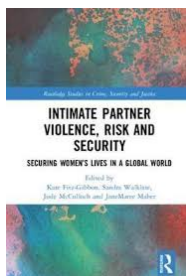
Australian constitutional values
edited by Rosalind Dixon.
Oxford : Hart Publishing, 2018.
342.02 AUS (Supreme Court Library)
[Link to the book in the catalogue](#)



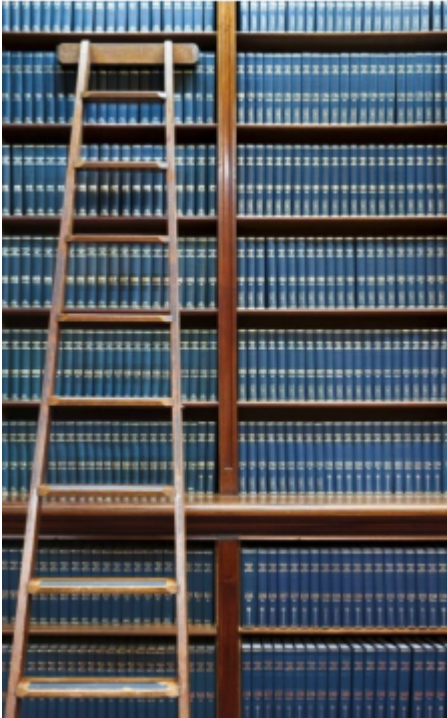
Criminal investigation and procedure in Victoria
Christopher Corns.
3rd ed., Pyrmont, N.S.W. : Thomson Reuters (Professional) Australia, 2019.
345.945 COR.3 (Supreme Court Library, Magistrates' Court Library)
[Link to the book in the catalogue](#)



Inside family law : conversations from the coalface
Zoe Durand
Haberfield, N.S.W. : Longueville Media, 2018.
346.015 DUR (County Court Library, Magistrates' Court Library)
[Link to the book in the catalogue](#)



Intimate partner violence, risk and security : securing women's lives in a global world
edited by Kate Fitz-Gibbon, Sandra Walklate, Jude McCulloch and JaneMaree Maher.
London ; New York : Routledge, Taylor & Francis Group, 2018.
362.8292 INT (Magistrates' Court Library)
[Link to the book in the catalogue](#)



Legislation

Victorian Bills

No Victorian Bills have received a second reading since the last Library Bulletin.

Victorian Assents

No Victorian Acts were assented to since the last Library Bulletin.

Proclamations

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

- *Major Transport Projects Facilitation Amendment Act 2019*
No. 10/2019

Sections 1 - 12 of this Act came in by forced commencement on 8 May 2019 s.2

EXHIBITIONS IN THE LIBRARY

Argus from 100 years ago

The Supreme Court Library has the Argus newspaper from 1919 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 #argus1919

High Court of Australia Cases

ADMINISTRATIVE LAW (CTH) - Administrative Appeals Tribunal - Nature and scope of review - Where appellant's convictions spent under Pt VIIC of *Crimes Act 1914* (Cth) - Where Div 3 of Pt VIIC of *Crimes Act* prohibited Australian Securities and Investments Commission ("ASIC") from taking into consideration spent convictions in deciding to make banning order - Where review of decision of ASIC by Administrative Appeals Tribunal - Where s 85ZZH(c) of *Crimes Act* provided that Div 3 of Pt VIIC does not apply to Commonwealth tribunal - Whether Administrative Appeals Tribunal entitled to take into consideration on review spent convictions which ASIC was prohibited from taking into consideration.

WORDS AND PHRASES - "banning order", "fit and proper person", "function of the original decision-maker", "review", "spent conviction", "stand in the shoes of the decision-maker".

Administrative Appeals Tribunal Act 1975 (Cth), ss 25, 43.

Crimes Act 1914 (Cth), Pt VIIC, ss 85ZM, 85ZV, 85ZW, 85ZZH(c).

National Consumer Credit Protection Act 2009 (Cth), ss 80, 327.

Frugniet, Rudy v Australian Securities and Investments Commission

Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ

[\[2019\] HCA 16](#)

15 May 2019

CONSTITUTIONAL LAW (CTH) - Powers of Commonwealth Parliament - Federal elections - Severance - Where s 51(xxxvi) in application to ss 10 and 31 of *Constitution* conferred legislative power on Commonwealth Parliament with respect to federal elections - Where Commonwealth Parliament enacted s 302CA within Div 3A of Pt XX of *Commonwealth Electoral Act 1918* (Cth) - Where s 302CA relevantly conferred authority on person to make, and on "political entity" to receive and retain, gift not prohibited by Div 3A provided that gift or part of it was "required to be, or may be" used for certain purposes relating to federal elections - Where s 302CA provided for displacement of such authority in circumstances including where State or Territory electoral law required gift or part of it to be kept or identified separately to be used only for purpose of State, Territory or local government election - Whether Commonwealth legislative power with respect to federal elections exclusive or concurrent - Whether s 302CA within scope of Commonwealth legislative power with respect to federal elections - Whether possible to sever s 302CA to preserve part of its operation within scope of Commonwealth legislative power.

CONSTITUTIONAL LAW (CTH) - Inconsistency between Commonwealth and State laws - Gifts to political parties - Where Queensland Parliament passed amendments to *Electoral Act 1992* (Qld) and *Local Government Electoral Act 2011* (Qld) prohibiting property developers from making gifts to political parties that endorse and promote candidates for election to Legislative Assembly and local government councils - Whether Queensland amendments inconsistent with s 302CA or framework of Pt XX of *Commonwealth Electoral Act* - Whether s 302CA invalid for infringing

principle in *University of Wollongong v Metwally* (1984) 158 CLR 447; [1984] HCA 74.

CONSTITUTIONAL LAW (CTH) - Implied freedom of communication about governmental and political matters - Where amendments to *Electoral Act 1992* (Qld) substantially replicated provisions in *Election Funding, Expenditure and Disclosures Act 1981* (NSW) upheld in *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34 - Whether amendments invalid for infringing implied freedom.

CONSTITUTIONAL LAW (CTH) - Relationship between Commonwealth and States - Doctrine of inter-governmental immunities - Whether implication expounded in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; [1947] HCA 26 operates reciprocally to protect States and Commonwealth from impermissible interference by law of one polity with operations of government in another - Whether s 302CA invalid for contravening *Melbourne Corporation* principle - Whether Queensland amendments invalid for contravening *Melbourne Corporation* principle.

WORDS AND PHRASES - "bare attempt to limit or exclude State power", "concurrent power", "electoral expenditure", "electoral matter", "exclusive power", "federal elections", "federalism", "immunity from State laws", "incidental", "inconsistency", "inter-governmental immunities", "political entity", "political party", "required to be, or may be, used for the purposes of incurring electoral expenditure, or creating or communicating electoral matter", "severance", "State elections", "structural implication", "sufficient connection".

Constitution, ss 7, 9, 10, 29, 31, 51(xxxvi), (xxxix), 109.

Acts Interpretation Act 1901 (Cth), ss 13, 15A, 15AD.

Commonwealth Electoral Act 1918 (Cth), ss 4AA, 302CA, Pt XX.

Election Funding, Expenditure and Disclosures Act 1981 (NSW), Pt 6, Div 4A.

Electoral Act 1992 (Qld), Pt 11, Div 8, Subdiv 4.

Local Government Electoral Act 2011 (Qld), Pt 6, Div 1A.

Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018 (Qld), Pts 3, 5.

Spence, Gary Douglas v State of Queensland

Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ

[\[2019\] HCA 15](#)

15 May 2019

Victorian Court of Appeal Cases

ACCIDENT COMPENSATION - Transport accident - Application for leave to appeal against refusal of trial judge to grant leave to commence proceedings for damages against respondent - Whether applicant has suffered serious long-term impairment or loss of a body function - Whether trial judge failed to properly apply evidence of orthopaedic surgeon - Whether trial judge failed to adequately assess the impairment consequences of the applicant's injuries - Whether trial judge failed to provide adequate reasons as to findings made in relation to the applicant's injuries - Whether trial judge erred in finding that fibromyalgia is not an 'orthodox medical diagnosis' - Whether injury primarily a consequence of organic or functional factors - Application for leave to appeal granted - Appeal dismissed - *Transport Accident Act 1986 s 93(17); Richards v Wiley (2000) 1 VR 79* considered.

Jovceva, Beti v Transport Accident Commission

Kaye, Niall and T Forrest JJA

[\[2019\] VSCA 105](#)

21 May 2019

CONTRACT - Agreement - Storage of outdoor furniture at commercial storage facility - Occupation agreement in name of company in liquidation - Identity of contracting party - Identity of owner of goods stored - Proof of ownership of goods stored - Evidence - Whether evidence sufficient to establish ownership - Claims of ownership rejected by judge - Detailed analysis by judge - No basis for overturning judge's conclusions that ownership claims not made out.

BAILMENT - Lien - Uncollected goods - Goods under bailment - Outstanding charges - Whether outstanding charges required to be paid prior to release of goods - Relevant charge - Amount payable entitling provider to take delivery of goods - *Australian Consumer Law and Fair Trading Act 2012*, ss 3, 54, 55, 59, 66, 68 and 70.

WORDS AND PHRASES - Bailment - Goods under bailment - Relevant charge - Provider - Receiver - *Australian Consumer Law and Fair Trading Act 2012*, Part 4.2.

Scandi International P/L (ACN 082 473 747); Casualife Furniture International Ltd (a Hong Kong Corporation); ACN 112 314 502 P/L (ACN 112 314 502) and Guss, Joseph v Larkfield Industrial Estate P/L (ACN 006 067 965)

Whelan and Beach JJA and Sifris AJA

[\[2019\] VSCA 109](#)

20 May 2019

CRIMINAL LAW - Appeal - Interlocutory appeal - Evidence - Admissibility - Record of interview - Applicant arrested and detained - Initial interview - Applicant exercised right to silence - Interview suspended - Investigations continuing - Whether investigators obliged to release applicant - Whether continued detention unlawful - Whether detention for improper purpose - No unlawfulness - Evidence admissible - Appeal allowed - *Crimes Act 1958 s 464A, Criminal Procedure Act 2009 s 295(3)(a)*.

Director of Public Prosecutions [DPP] v Hollis, Karen (a Pseudonym) and Hull, Alex (a Pseudonym)

Maxwell P, T Forrest and Emerton JJA

[\[2019\] VSCA 110](#)

21 May 2019

CRIMINAL LAW - Appeal - Interlocutory appeal - Evidence - Admissibility - Circumstantial case - Motive - Evidence of prior animosity between accused and victim - Whether probative of state of mind - Whether probative of fact of offending - Evidence admissible - Appeal allowed - *Evidence Act 2008 ss 135, 137, Criminal Procedure Act 2009 s 295*.

Director of Public Prosecutions [DPP] v Mariona, Denis (a Pseudonym)

Maxwell P, Priest and Weinberg JJA

[\[2019\] VSCA 107](#)

17 May 2019

CRIMINAL LAW - Appeal - Sentence - New evidence - Risk of deportation - Robbery, common assault (2), indecent assault, sexual assault - Guilty plea - Sentence 3 years and 10 months' imprisonment, non-parole period 2 years and 5 months - Automatic cancellation of visa - Prospect of deportation not raised before sentencing judge - Imprisonment more burdensome because of fear of deportation - Whether lesser sentence should be imposed - Very serious offending - Significant criminal record - Sentences very moderate - No reasonable prospect of less severe sentence being imposed - Leave to appeal refused - *Guden v The Queen* (2010) 28 VR 288, *Allouch v The Queen* [2018] VSCA 244 considered - *Migration Act 1958* (Cth) s 501(3A), *Criminal Procedure Act 2009* s 280.

Magedi, Mohammad Ehsan v The Queen

Maxwell P and Weinberg JA

[\[2019\] VSCA 102](#)

13 May 2019

CRIMINAL LAW - Appeal - Sentence - Crown appeal - Importation of firearms (six charges) - Four completed importations - Two attempted importations - Fully automatic machine guns - Semi-automatic handguns - Highest end of range of seriousness - Sentence 10 years and 3 months' imprisonment, non-parole period of 6 years - Whether manifestly inadequate - Danger to community posed by firearms - Duration of offending - Awareness of use of weapons in connection with criminal activity - Persistent, planned and sophisticated offending - Discrete periods of offending - Offender's age, health and prospects of rehabilitation - Offender pleaded guilty - Totality - Cumulation - General deterrence - Residual discretion - Sentence manifestly inadequate - Resentenced (15 years' imprisonment, non-parole period of 11 years) - *Customs Act 1901* (Cth) s 233BAB(5), *Criminal Code 1995* (Cth) ss 11.1(1), 361.2.

Director of Public Prosecutions [DPP] (Cth) v Munro, Paul Robert

Maxwell P, Beach and McLeish JJA

[\[2019\] VSCA 89](#)

14 May 2019

CRIMINAL LAW - Appeal - Sentence - Importation of marketable quantity of border controlled drug (cocaine) - *Criminal Code Act 1995* (Cth) sch 1 s 307.2(1) - Guilty plea - Sentenced to eight years and three months imprisonment - Whether sentencing judge failed to make an allowance for the plea - Whether allowance for plea can be inferred - *R v Gillick* (2001) 125 A Crim R 395 - Whether term of imprisonment manifestly excessive - Appeal dismissed.

Cuthbertson, Jia v The Queen

Priest and Emerton JJA

[\[2019\] VSCA 104](#)

15 May 2019

CRIMINAL LAW - Director's appeal against inadequacy of sentence - Culpable driving causing death - Death of respondent's own child - Plea of guilty - Sentence 5 years' imprisonment, non-parole period 12 months - Disproportionality between head sentence and non-parole period - Whether non-parole period manifestly inadequate - Whether open to the Court to exercise residual discretion - Construction of ss 289 and 290 *Criminal Procedure Act 2009* considered - *R v VZ* (1998) 7 VR 693; *R v Leesley* (2001) 33 MVR 495; *R v De Montero* (2009) 25 VR 694; *DPP v Avci* (2008) 21 VR 310; *R v Tsiaras* [1996] 1 VR 398; *R v Bullen* [2005] VSCA 206; *R v Satalich* (2004) 41 MVR 435; *DPP v Miller* (2005) 42 MVR 411; *R v Campbell* [2005] VSCA 225; *DPP v King* (2008) 50 MVR 517; *Chaplin v The Queen* (2010) 55 MVR 591; *Leddin v The Queen* [2014] VSCA 155 considered - Lower level of culpability of offending - Non-parole period not manifestly inadequate when considered separate from issue of disproportionality - Appeal dismissed.

Director of Public Prosecutions [DPP] v Huby, Thomas Callum

Priest, McLeish and Weinberg JJA

[\[2019\] VSCA 106](#)

17 May 2019

CRIMINAL LAW - Sentence - Application for leave to appeal against sentence - Trafficking in a commercial quantity of a drug of dependence - Knowingly dealing with the proceeds of crime - Applicant sentenced to 6 years' imprisonment with non-parole period of 4 years - Co-offender sentenced to 7 years 6 months' imprisonment on charge of trafficking in a commercial quantity of a drug of dependence - Parity - Whether judge erred in application of parity principle - Application for leave to appeal refused.

Miller, Alexander v The Queen

Whelan JA

[\[2019\] VSCA 108](#)

17 May 2019

PRACTICE AND PROCEDURE - Stay - Applicant unsuccessful at VCAT - VCAT orders stayed pending application for leave to appeal to Trial Division - Appeal to Trial Division dismissed - Application to Court of Appeal for leave to appeal from Trial Division - Subsequent granting of ex parte order by VCAT staying VCAT's original order - Whether appropriate for VCAT to grant stay after appeal from VCAT to Trial Division dismissed - Whether applicant has arguable ground of appeal - Whether stay granted by VCAT should be continued - Stay terminated.

Quick, John Sebastian v Lam-Ly P/L

Beach JA

[\[2019\] VSCA 111](#)

22 May 2019

Supreme Court of Victoria Cases

Commercial Court

ADMINISTRATIVE LAW - Judicial review - Relief in the nature of certiorari - Injunctions - Declarations - Whether Adjudication Determination is vitiated by jurisdictional error - Error of law on the face of the record - Review of jurisdictional facts - *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 56.

BUILDING CONTRACTS - Whether settlement agreement was a genuine resolution of matters in dispute and whether such agreement amounted to contracting out of the *Building and Construction Industry Security of Payment Act 2002* (Vic), ss 9, 14, 21(2B), 23(2), 48.

Valeo Construction P/L (ACN 139 755 801) as Trustee for Valeo Construction Trust v Tiling Expert (Vic) P/L (ACN 602 396 609) and Martin, Philip

Digby J

[\[2019\] VSC 291](#)

9 May 2019

ADMIRALTY - Application that the Australian General Shipping Register be rectified to record Coco Saba Pty Ltd as the owner of the vessel 'Capella III' - Entitlement to enter and register a vessel on the Australian General Shipping Register - *Shipping Registration Act 1981* (Cth), s 59(1).

Coco Saba P/L (ACN 159 520 411) CI- Prior & Co P/L, Level 16, 379 Collins Street, Melbourne VIC 3000

Digby J

[\[2019\] VSC 305](#)

6 May 2019

CORPORATIONS - External administration - Application by former liquidators for remuneration - Prima facie case for remuneration established - Quantum of remuneration - *IMO Traditional Values Management Limited (in liq)* [2012] VSC 650 (14 December 2012) - *Thackray v Gunns Plantations* (2011) 85 ACSR 144 - *Deputy Commissioner of Taxation v Starpicket Pty Ltd (No 2)* [2013] FCA 699 - *Corporations Act 2001* (Vic), s 473.

Yeo, Andrew Reginald and Vasudevan, David Raj in their capacity as the former liquidators of Nissand P/L (In Liquidation) (ACN 119 909 705) v Nissand P/L (In Liquidation) (ACN 119 909 705)

Matthews JR

[\[2019\] VSC 280](#)

10 May 2019

CORPORATIONS - External administration - Application by liquidators of responsible entity of managed investment scheme for remuneration - Further application - Remuneration approved.

Re Traditional Values Management Ltd (In Liq) (No 5)

Matthews JR

[\[2019\] VSC 281](#)

10 May 2019

CORPORATIONS - Statutory derivative action - Application for leave to bring proceedings - Sections 236 and 237 of the *Corporations Act 2001* (Cth) - Good faith - Whether proceeding in the best interests of the company - Whether there is a serious question to be tried - Deadlocked company - Undertaking to pay company costs - Undertaking to indemnify company for adverse costs orders - Leave granted.

Zhu, Liping v Orico Australia P/L (ACN 169 219 612)

Connock J

[\[2019\] VSC 313](#)

30 April 2019

COSTS - Winding up application - Failure to set aside statutory demand - Deemed insolvency - Large proportion of amount claimed in statutory demand admitted as owed - Amount becoming payable after service of statutory demand also admitted - Wind up order resisted on the basis of solvency of the defendant - Proceeding for wind up and pursuant to s 459S dismissed upon payment of admitted amounts - No final determination on the merits of either application - Open offer concerning an amount owing.

Nanche P/L (ACN 161 388 932) v New Homes Shop (Vic) P/L (ACN 163 790 663)

Randall AsJ

[\[2019\] VSC 317](#)

17 May 2019

ESTOPPEL - Principles of promissory estoppel discussed - Detriment - Relevant detriment is not that which flows from the non-fulfilment of the promise - Necessary for a plaintiff to establish that, but for the assumption or expectation, it would not have acted as it did - Whether fulfilment of the promise is the appropriate relief - Whether departure from promise was justified.

EQUITY - Unclean hands - Requirements for availability of the defence discussed - Plaintiffs engaged in disentitling conduct.

DECLARATIONS - Whether equitable defences are available to a claim for declaratory relief.

FIDUCIARY DUTIES - Scope of the duty to exercise director's powers in good faith in the best interests of the corporation considered - Scope of the duty not to place oneself in a position of conflict in which a personal interest or duty conflicts with the duty to the company considered.

CONTRACT - Whether implied duty to co-operate extends to non-parties to the contract.

CONTRACT - Breach of duty of good faith - Repudiation - Whether Childcare Centre was trading profitably.

CC Growth P/L (ACN 619 193 921) & Ors v Amiga Growth No. 2 P/L (ACN 619 070 227) as trustee for the Amiga Growth Trust No 2 & Ors

Riordan J

[\[2019\] VSC 340](#)

22 May 2019

EVIDENCE - Whether communication in connection with negotiating a settlement - No relevant connection - Objective facts only - Section 131(1)(a) of the *Evidence Act 2008* (Vic).

PRACTICE AND PROCEDURE - Defendants' application to strike out statement of claim - claims to be properly re-pleaded/particularised as part of consolidation.

PRACTICE AND PROCEDURE - Defendants' application to stay or dismiss proceedings as abuse of process - Concurrent proceedings based on similar factual matrix - Delay as abuse of process - Whether second proceeding is abuse of process by invoking claims that should have been litigated in earlier proceeding - Application refused.

Euromark Ltd v Smash Enterprises P/L (ACN 091 134 708); Harbinson, William Jason aka Harbinson, Jason; Harbinson, Joseph Dale aka Harbinson, Dale and Malone, David

Kennedy J

[\[2019\] VSC 299](#)

17 May 2019

PRACTICE AND PROCEDURE - Application for summary judgment - Where the plaintiff seeks summary judgment on claims for breach of a distribution agreement - Distribution agreement to be construed according to the laws of Israel - Defendant alleges surrounding circumstances inform the proper construction of the distribution agreement - Whether ambiguity as to construction of the distribution agreement - Whether defendant has real prospect of success on its defence - Whether in the interests of justice to grant summary judgment - Whether a full hearing on the merits is appropriate - *Civil Procedure Act 2010* (Vic), ss 61, 63 and 64 - *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27 - *Hausman v Abigroup Contractors Pty Ltd* (2009) 29 VR 213.

Israfoods (2006) Ltd v J & D Consortium P/L (ACN 138 871 726)

Sloss J

[\[2019\] VSC 323](#)

17 May 2019

PRACTICE AND PROCEDURE - Execution - Garnishee summons - Garnishee summons issued in respect of a debt that will or is likely to become due or accrue to the judgment debtor between the day an order for the filing and service of a garnishee summons is made and the day for hearing named in the summons - Whether at the date of the hearing the debt had become due or was accruing to the judgment debtor from the garnishee - No debt due or accruing to the judgment debtor as no sum certain due or accruing - *Roberts v Death* (1881) 8 QBD 319; *Webb v Stenton*; *Australian National Airways Pty Ltd (Garnishee)* (1883) 11 QBD 518; *Cairns v Walsh*; *The Victorian Railways Commissioners (Garnishees)* (1891) 17 VLR 44; *Vinall v De Pass* [1892] AC 90; *Re Australia and New Zealand Savings Bank Ltd*; *Mellas v Evriniadis* [1972] VR 690; *The Tile Centre v Symons*; *Ex Parte Krytsis* [1972] VR 965; *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 considered - Construction of Order 71 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

Jafari, Kourosch (on his own behalf and as trustee of The Essence Unit Trust) v 23 Developments P/L (ACN 112 616 976) and Alderuccio, John and Alderuccio, Bruno trading as 'Alderuccio Solicitors'

Derham AsJ

[\[2019\] VSC 333](#)

21 May 2019

PRACTICE AND PROCEDURE - Subpoenas - Application for leave to issue subpoenas to attend to give evidence - Interlocutory application - Where leave opposed - Whether evidence relevant or sufficiently relevant to interlocutory application - Rules 40.02(a) and 42.02(2)(a) of the *Supreme Court (General Civil Procedure Rules) 2015* (Vic) - Sections 8 and 9 of the *Civil Procedure Act 2010* (Vic) - Leave refused.

PharmX P/L (in its capacity as trustee of the PharmX Unit Trust) v Fred IT Group P/L (ACN 109 546 901); Mountaintop Systems P/L (ACN 002 897 234); Daleflag P/L (ACN 092 950 822) and Corum Systems P/L (ACN 091 519 603)

Lyons J

[\[2019\] VSC 321](#)

16 May 2019

REAL PROPERTY - Purchaser executed binding nominations that nominated a third party as purchaser under land contracts - Whether there was an oral agreement to terminate the nominations.

CONTRACT - Whether agreement to terminate a joint venture was in writing; or partly in writing and partly oral.

EVIDENCE - Whether oral evidence admissible to determine whether agreement to terminate a joint venture was in writing; or partly in writing and partly oral.

Bi, Ran and Sortop P/L (ACN 615 282 883) v Yingde Investments P/L (ACN 620 151 126) and Ors

Riordan J

[\[2019\] VSC 324](#)

17 May 2019

TRADE PRACTICES - Misleading or deceptive conduct - Plaintiff transferred shares as consideration for second defendant providing security for a loan - First defendant proposed and arranged the share transfer - First defendant failed to disclose that second defendant was entitled to retain the shares if he did not provide security - First defendant engaged in misleading or deceptive conduct - Second defendant was not involved in first defendant's contravention - *Australian Consumer Law s 18*.

TRADE PRACTICES - Unconscionable conduct - Plaintiff was not under a special disadvantage or disability - First and second defendants did not engage in unconscionable conduct within the meaning of the unwritten law - First and second defendants engaged in unconscionable conduct by expropriating or retaining the plaintiff's shares for no consideration - *Australian Consumer Law ss 20 and 21 - Commercial Bank of Australia v Amadio (1983) 46 ALR 402; Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (2000) 169 ALR 324*.

RESTITUTION - Transfer of property - Plaintiff transferred shares under a mistake of fact - Total failure of consideration - Retention of shares by second defendant unjust in all of the circumstances.

REMEDIES - Damages - Shares retained by second defendant worthless - Company wound up - Nominal damages awarded.

EQUITY - Breach of fiduciary duty - Plaintiff and first defendant were shareholders and directors in a company - First defendant wound up that company and incorporated a new company - Plaintiff alleged that he had been improperly excluded from new company - Whether first defendant owed fiduciary obligations to plaintiff - Where parties alleged to be in 'quasi-partnership' - First defendant did not assume responsibility for interests of plaintiff - Contractual arrangements and company and trust structures inconsistent with fiduciary obligations - Plaintiff was not vulnerable to and did not rely on first defendant - First defendant did not owe fiduciary obligations to plaintiff - *Ebrahimi v Westbourne Galleries Ltd [1973] AC 360; Brunninghausen v Glavanics (1999) 32 ACSR 294*.

CONTRACT - Breach of contract - Parties entered into a series of agreements to govern the operation, management and structure of a company's business - Breach of the terms of an earlier agreement alleged - Subsequent agreement superseded the earlier agreements - No breach of contract - *Hillam v Iacullo [2015] NSWCA 196*.

Rozenblit, Boris v Vainer, Michael and Vainer, Alexander

Sifris J

[\[2019\] VSC 316](#)

20 May 2019

Common Law Division

ADMINISTRATION AND PROBATE - Application by administrator pursuant to *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 54.02 - Intestacy - Application for declaration of paternity - *Anderson v Teboneras* [1990] VR 527 - *Re XY; Ex parte Trustees Limited* [2001] VSC 89 - *Farnell v Penhalluriack (No 2)* [2008] VSC 214 - *Helebrant v Perdic* [2010] VSC 580 - *Re AC, MM and Anor* [2017] VSC 576, referred to - *Status of Children Act 1974* (Vic) ss 7, 10.

State Trustees Limited v Valentin Jeklar & Ors: IMO the estate of Franc Jeklar, deceased

Daly AsJ

[\[2019\] VSC 267](#)

3 May 2019

CHILDREN - Children's Court - Interim accommodation order - Appeal - Whether different order should have been made - Contested questions of fact - Exercise of discretion as to witnesses permitted to be called - *Children, Youth and Families Act 2005* ss 10, 262, 271.

PR and SV v Department of Health and Human Services

Ginnane J

[\[2019\] VSC 326](#)

7 May 2019

CONTRACT - Whether an 'agreement in principle' to settle a proceeding is a concluded agreement that is final and binding - *Masters v Cameron* (1954) 91 CLR 353, considered and applied - Correspondence between counsel purporting to settle the proceeding - Where client had no direct involvement in the negotiations - *Cook v Taing* [2014] VSC 428, considered and applied - Whether counsel had the actual or ostensible authority to bind his client - *Harvey v Phillips* [1956] 95 CLR 235 and *Donellan v Watson* (1990) NSWLR 335, referred to - Declaration that the settlement agreement is valid and enforceable, subject to approval of the Court.

Young, Daniel v The GEO Group Australia P/L (ACN 051 120 600)

Daly AsJ

[\[2019\] VSC 320](#)

17 May 2019

COSTS - Review of taxation of costs by Costs Court under former r 63.57, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) - No error established - Review dismissed.

Waybecca P/L (ACN 143 303 511) v Vella, Joseph and Giza, Richard

Richards J

[\[2019\] VSC 306](#)

10 May 2019

INJUNCTION - Defendants previously engaged by plaintiff - Application to restrain defendants from utilising confidential information of the plaintiff - Plaintiff established an arguable case - Balance of convenience strongly in favour of dismissing application.

One Dream Enterprises P/L (ACN 145 089 005) t/as YPA Estate Agents Werribee v Simmonds, Melanie; Vercher, Tony and Risos, James

McDonald J

[\[2019\] VSC 304](#)

8 May 2019

JUDICIAL REVIEW - Application for leave to appeal decision of VCAT - Whether identified error of law - Whether real or significant argument that error exists - Whether grant of leave just in all the circumstances - *Supreme Court (Miscellaneous Civil Procedure) Rules 2018* r 4.08(8) considered - *Secretary of the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331 referred to.

RES JUDICATA - Cause of action estoppel - Issue estoppel - Anshun estoppel - Previous proceedings before VCAT issued under incorrect legislative provisions - Previous proceedings dismissed as being issued under incorrect provisions - Whether final determination on the merits - Whether unreasonable not to raise correct cause of action - *Residential Tenancies Act 1997* ss 259, 322, 325, 344 considered - *Henderson v Henderson* (1843) 3 Hare 115; 67 ER 319; *Jackson v Goldsmith* (1950) 81 CLR 446; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; *Re AWB Limited (No 10)*; *ASIC v Lindberg* (2009) 76 ACSR 181; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; *LPD Holdings (Aust) Pty Ltd v Russells (a firm)* [2017] QSC 45 referred to.

CIVIL PROCEDURE - Application for leave to amend notice of appeal - Application made at hearing of appeal - Whether prejudice to respondent - *AON Risk Services v Australian National University* (2009) 239 CLR 175 referred to.

Herrington, Samuel v Lawrence, Christopher

Cameron J

[\[2019\] VSC 319](#)

14 May 2019

NEGLIGENCE - Occupier's liability - Self-employed brick cleaner fell from scaffolding - Deficiencies in scaffolding - Where pre-existing injuries - Whether pre-existing injuries aggravated by fall - Whether contributory negligence - Damages - *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 applied - *Wrongs Act 1958* Pts IIA and X - *Occupational Health and Safety Regulations 2007* Part 3.5.

Bucic, Marin v Arnej P/L

Zammit J

[\[2019\] VSC 330](#)

20 May 2019

PRACTICE AND PROCEDURE - Application to dismiss or strike out defendant's proportionate liability defence - Trespass - Whether 'failure to take reasonable care' has to be an element of the cause of action for the claim to be apportionable - Unsettled point of law - Inappropriate to summarily dismiss or strike out - Rules 23.01 and 23.02 of the *Supreme Court (General Civil Procedure) Rules 2015* - *Wrongs Act 1958* (Vic), Part IVAA - *Corporations Act 2001* (Cth), s 1041L - *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 - *ABN AMRO Bank NV v Bathurst Council* (2014) 309 ALR 445 - *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58 - *Reinhold v New South Wales Lotteries Corp (No 2)* (2008) 82 NSWLR 762 - *Dartberg Pty Ltd v Wealthcare Financial Planning Ltd* (2007) 164 FCR 450.

Demetrios, Andrew and Demetrios, Dolly v Lehmann, Sonya Kay; Geocore P/L and E-Struct P/L

Matthews JR

[\[2019\] VSC 301](#)

10 May 2019

PRACTICE AND PROCEDURE - Application to transfer proceeding to Tasmania - *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic), s 5 - Whether in the interests of justice to transfer - *Irwin v State of Queensland* [2011] VSC 291 referred to - Relevant connecting factors - Weight to be given to financial hardship of the plaintiff as a result of a transfer - *Kellow v Irish Murphy's Pty Ltd* [2010] VSC 239, referred to - *Williams v TT-Line Pty Ltd* [2019] VSC 55 referred to - Liability likely to be the most significant issue - *Farrelly v Maratanka Tourist Resort Pty Ltd* [1999] VSC 13 referred to.

Hackett, Betty Lorraine v State of South Australia

Daly AsJ

[\[2019\] VSC 311](#)

10 May 2019

PRACTICE AND PROCEDURE - Summary judgment/strike out application - Whether defence of qualified privilege has a real, and not fanciful prospect of success - *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* [2013] VSCA 158, referred to.

DEFAMATION - Defences - Qualified privilege at common law - Publication to the world at large - Public interest in food safety and regulation - Whether defendant had an interest in making the defamatory statements and the recipients had a reciprocal interest in receiving them - Voluntary disclosure of information to a broad audience about the conduct of the chief executive officer of a private business - Public interest and concern insufficient to establish reciprocity - *Marshall v Megna; Megan v Tory; Tory v Megna* [2013] NSWCA 30, referred to and applied - *Gutnick v Dow Jones (No 4)* [2004] VSC 138, referred to - *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366, distinguished - Whether the publications could attract the defence of qualified privilege by reason of the implied freedom of communication with respect to government and political matters - *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, referred to - Summary judgment granted.

DEFAMATION - Defences - Qualified privilege - Reply to attack - Whether reply by defendant privileged - *Kennett v Farmer* [1998] VR 991, referred to - Properly the subject of full evidence and argument at trial.

Hive & Wellness Australia P/L (formerly Capilano Honey Ltd) and McKee, Ben v Mulvany, Simon

Daly AsJ

[\[2019\] VSC 273](#)

16 May 2019

PROCEEDS OF CRIME - Application for restraining order - Application for variation of a restraining order - Whether property proposed to be restrained sufficiently particularised - *Proceeds of Crime Act 2002* (Cth), ss 18, 19, 25, 38, 39, 42 and 338.

Commissioner of the Australian Federal Police v Jiang, Hai

Moore J

[\[2019\] VSC 334](#)

22 May 2019

PROPERTY LAW - Order for modification of a restrictive covenant made and authenticated - Court subsequently alerted by a third party to an earlier failed application in respect of the same land - Whether order for modification can be re-opened of the Court's own motion - Held: no. *Bailey v Marinoff* (1971) 125 CLR 529 and *Burrell v R* (2008) 238 CLR 218 applied.

PRACTICE AND PROCEDURE - Obligation of full and fair disclosure at an ex parte hearing - Whether this obligation applies at the initial hearing of an application for modification of a restrictive covenant - *Garrard and ors v Email Furniture Pty Ltd* (1993) 32 NSWLR 662; *Redwin Industries Pty Ltd v Feetsafe Pty Ltd* [2002] VSC 427; *Savcor Pty Ltd v Cathodic Protection International APS* (2005) 12 VR 639 considered and observations made.

PRACTICE AND PROCEDURE - Overarching obligation not to engage in conduct that is misleading or deceptive or likely to mislead or deceive - Whether Court has jurisdiction to enquire of its own motion into potential breach of the obligation after proceeding concluded - Held: no - *Civil Procedure Act 2010* (Vic) ss 21, 29, 30, 31.

LEGAL PRACTITIONERS - Obligations to the Court - Earlier application not disclosed by practitioners for the plaintiff - Inherent jurisdiction of the Court to enquire into breach of an obligation to the Court - Whether that jurisdiction enlivened - Held: no.

In the matter of an application by Castlereas Carpenters P/L

Lansdowne AsJ

[\[2019\] VSC 303](#)

7 May 2019

TOWN PLANNING - Application for leave to appeal pursuant to s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* - Effect of transitional exemption in planning scheme related to mandatory height control - No implication of words going beyond literal meaning - No exclusion of purpose of zone as a consideration relevant to the grant of a permit - Application refused.

Andrews and Morrissy Developments P/L v Port Phillip City Council; Freeman, Michael; Thibault, Donna; Freeman, Mark; Aziz, Ays; Grieve, Brian; Everett, Robert; Everett, Sally; McShanag, Andy and Kilpikoski, Antti

Osborn JA

[\[2019\] VSC 337](#)

22 May 2019

TOWN PLANNING - Application for leave to appeal pursuant to section 148 of the *Victorian Civil and Administrative Tribunal Act 1998* - No real prospect of success - Application refused

Gray, James v McCrae, Jeanette; Yarra Ranges Shire Council; Melbourne Water; Country Fire Authority and Minister for Energy, Environment & Climate Change

Osborn JA

[\[2019\] VSC 329](#)

20 May 2019

WILLS AND ESTATES - Application to admit informal will to probate as a codicil - Where deceased had executed formal will - Whether deceased intended the informal will to be his final will - Whether the deceased had testamentary capacity - *Wills Act 1997 s 9* - *Banks v Goodfellow* (1870) LR 5 QB 549.

In the matter of the will of Williams, John, deceased. Duryea, Garry Alfred v Drew, Lynette and Drew, Terence

Moore J

[\[2019\] VSC 314](#)

13 May 2019

Costs Court

COSTS COURT - Review of taxation of costs by a costs registrar - Application of Rule 63.56.2(2) to review where Summons for Taxation issued before amendment of Order 63 commencing on 1 October 2019 - Costs of obtaining advice on advisability of appeal - Application of Rule 63.85.

ASA Nominees P/L (ACN 084 232 306) (controllers appointed) & Anor v Adamopoulos, Irene

Gourlay JR

[\[2019\] VSC 296](#)

10 May 2019

Criminal Division

CRIMINAL LAW - Bail - Aggravated carjacking, armed robbery and other offence - Applicant an 18 year old Aboriginal with low IQ - Whether exceptional circumstances justifying bail - Whether relevantly an unacceptable risk - Bail granted on strict conditions - *Bail Act 1977*, ss 1B, 3AAA, 3A, 3B, 4A, 4E.

In the matter of the Bail Act 1977 and In the matter of an Application for Bail by Moore, Martyn

Priest JA

[\[2019\] VSC 344](#)

22 May 2019

CRIMINAL LAW - Sentence - Intentionally causing serious injury - Prohibited person carrying firearms - Accused shot victim multiple times with sawn off .22 calibre rifle - Guilty plea - Prior convictions - Diagnosed with Post-Traumatic Stress Disorder and Major Depressive Disorder - Guarded prospects of rehabilitation - Total effective sentence of seven years and six months' imprisonment, with a non-parole period of five years.

Director of Public Prosecutions [DPP] v Pham, Thanh Huu

Coghlan JA

[\[2019\] VSC 245](#)

12 April 2019

CRIMINAL LAW - Sentence - Murder - Victim attacked in home with various objects - Suffered numerous head injuries - DNA evidence - Accused diagnosed with Post-Traumatic-Stress Disorder and Major Depressive Disorder - Good prospects of rehabilitation - Sentenced to 19 years' imprisonment, with a non-parole period of 15 years and six months.

The Queen v Pylotis, Katia

Coghlan JA

[\[2019\] VSC 231](#)

11 April 2019

CRIMINAL LAW - Sentencing - Attempted murder - Intentionally causing serious injury - Home invasion - Stabbing - Offender in long-term incestuous relationship with his sister - Offender aggrieved by sister's new relationship with first victim - Offender, intoxicated, attended first victim's home finding him and the offender's sister asleep in bed together - Offender stabbed them both repeatedly and also stabbed first victim's mother who intervened - Offending against sister example of domestic violence - Upper end examples of offences - Relatively youthful offender - Limited non-violent antecedents - Plea of guilty - Remorse - Sentenced as a Serious Violent Offender on Charges 2 and 3 - Total effective sentence of 19 years' imprisonment - Non-parole period of 14 years.

The Director of Public Prosecutions [DPP] v Jensen, Hamish (a Pseudonym)

Beale J

[\[2019\] VSC 327](#)

17 May 2019

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.

Commercial Division

BUILDING AND CONSTRUCTION - Application for summary judgment under section 16(2) *Building and Construction Industry Security of Payment Act 2002* (Vic) - Defendant not 'in the business of building residences' at relevant time - Act does not apply - Application dismissed.

Bway v Pasiopoulos

Judge Marks

[\[2019\] VCC 691](#)

22 May 2019

LANDLORD AND TENANT - Refusal by landlord to allow tenant to recover chattels after termination of lease - No right to distress for rent - Conversion of chattels - Value of chattels converted - Calculation of interest on damages for conversion.

Katranis v Bahrou & D'Azzena

Judge Woodward

[\[2019\] VCC 602](#)

9 May 2019

PRACTICE AND PROCEDURE - Pleading summons - Applicable principles - Whether leave should be given to file proposed amended defence and counterclaim - Joinder of proposed defendant to counterclaim - Application of Harman implied undertaking not to use documents for collateral purpose.

32 Domain P/L v Hazell-Wright

Judge A Ryan

[\[2019\] VCC 629](#)

9 May 2019

WAREHOUSEMEN'S LEIN - When lien is claimed over goods stored - Possession of goods - Immediate possession - Storage costs.

SECURITY INTEREST - Registered security interests - Within meaning of *Personal Property Securities Act 2009* (Cth) - Whether a valid lien pursuant to legislation takes priority over a security interest.

NOTICE - Requirements of notice - Whether notice requirements complied with pursuant to statute.

CBA v MTC Diesel P/L & Ors

Judicial Registrar Burchell

[\[2019\] VCC 639](#)

15 May 2019

Articles

The team of Librarians from the Law Library of Victoria have included bibliographic information of selected articles from law journals which have recently been received digitally or in hard copy at the Supreme Court Library. The purpose of this information is to assist the Judiciary, Court staff, Barristers and other members of the legal profession to identify recently published articles of interest and relevance.

The Law Library provides digital access to many law journals for members of the Judiciary from their desktops, members of the VicBar from the Richard Griffith Library and members of the legal profession via the Public Access Computers in the Supreme Court Library.

Aboriginals

Sentencing Act 1995 (NT), s 91, s 104A - NT

Williams, M. Innervating colonialism: exploring the retraction of Indigenous rights through two sentencing provisions. (2019) 44(2) Australian Feminist Law Journal 203-220

Constitutional Law

R v Thoburn - R (Simms) v Secretary of State for the Home Department - Australian Constitution, s 51 - Charter of Human Rights and Responsibilities Act 2006 (Cth) - UK - Australia

Chen, B. The principle of legality: protecting statutory rights from statutory infringement? (2019) 41(1) Sydney Law Review 73-104

Courts

Research study - NZ

Brookbanks, W. The law as a healing agent. [2019] (April) New Zealand Law Journal 83-87

R v Gough - UK

Bindman, G. Life on the bench revisited. (2019) 169(7838) New Law Journal 21-22

Criminal Law & Procedure

Comparative analysis - NZ - Canada - UK

Keane, A. McKeown, P. Time to abandon "beyond reasonable doubt" and "sure": the case for a new direction on the criminal standard and how it should be used. [2019] (6) Criminal Law Review 505-527

Crime and Courts Act 2013 (UK) - UK

Laird, K. Deferred prosecution agreements and the interests of justice: a consistency of approach? [2019] (6) Criminal Law Review 486-504

Crime and Disorder Act 1998 (UK), ss 28-32 - Research study - UK

Owusu-Bempah, A. et al. Racially and religiously aggravated offences: "God's gift to defence?" [2019] (6) Criminal Law Review 463-485

Re A (Capacity: Social Media and Internet Use: Best Interests) - Re B (Capacity: Social Media: Care and Contact) - AH v West London Mental Health Trust - LBL v RYJ - CC v KK - LBX v K - Mental Capacity Act 2005 (UK) - UK

Davidson, L. Internet and social media use: a tangled capacity web. (2019) 169(7837) New Law Journal 13-14

Research study - Italy

Manzoni, S, et al. Discovering a double murder through skeletal remains: a case report. (2019) 59(1) Medicine, Science and the Law 9-16

Research study - Scotland

Curley, L. et al. The bastard verdict and its influence on jurors. (2019) 59(1) Medicine, Science and the Law 26-35

R v Harrison - R v Turner - R v Heihei - Sentencing Act 2002 (NZ), s103(2A), s104(1) - NZ

Midson, B. Sentencing for murder. [2019] (April) New Zealand Law Journal 75-76

Evidence

Lai v Chamberlains - Jones v Kaney - NZ

Morrison, R. The future of expert witness immunity. [2019] (April) New Zealand Law Journal 103-106

Practice & Procedure

Barts Health NHS Trust v Salmon - Civil Procedure Rules (UK), Rules 44.3(2)(a), 44.3(5) - (UK)

Gibbs, S. Re-counting the costs. (2019) 169(7838) New Law Journal 15-16

XYZ Limited (a pseudonym) - Strickland (a pseudonym) v Commonwealth DPP - Galloway (a pseudonym) v Commonwealth DPP - Hodges (a pseudonym) v Commonwealth DPP - Australia

Gans, J. The penultimate peril. (2019) 46(3) Brief: Law Society of WA 26-31

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