



THE LAW LIBRARY OF VICTORIA

Library
Bulletin
14 October
2016

Library News

Upcoming Switch on... sessions

Unreported Judgments 18 October 1.15-1.40pm

This session provides guidance for locating unreported judgments of the Supreme Court of Victoria, County Court, Magistrates' Court and VCAT.

Victorian Reports Quick Guide 15 November 1.15-1.40pm

This session will introduce you to the guide developed for the Library and will provide tips on using the Victorian Reports website.

More information on these and other upcoming events can be found on the Law Library of Victoria website:

<https://www.lawlibrary.vic.gov.au/events>

Lyrical Lunchtimes: 20 October 2016, 1.15pm

This is the sixth and final in this year's series of lunchtime classical concerts presented by the Law Library of Victoria and Bottled Snail Productions.

Featuring performances by pianist Arthur Athan, oboist Naomi Tian-Min Kwong and a return appearance from the wind trio Winded!

This concert is held in the Supreme Court Library. There is no need to book. All welcome.

SUBSCRIBE TO THE LIBRARY BULLETIN

If you would like to receive the Library Bulletin by email, please contact us at lv@courts.vic.gov.au

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



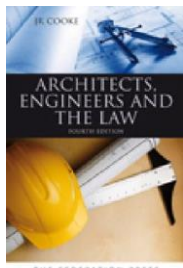
Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016 has just been published. Copies of the book can be ordered from the Supreme Court Library, please phone 03 9603 6282 for details.

Contents

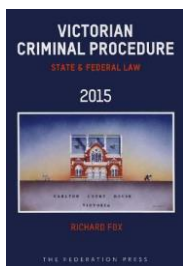
New Books	3
Legislation	4
Victorian Bills	4
Victorian Assents	4
Proclamations	4
Legislation	5
High Court Cases	6
Victorian Supreme Court Cases	8
Court of Appeal	8
Commercial Court	13
Common Law Division	15
Costs Court	19
Criminal Division	19
County Court of Victoria Cases	20
Articles	21
Administrative Law	21
Contract law	21
Courts	21
Evidence	21
Human Rights	21
Intellectual Property	21

New Books

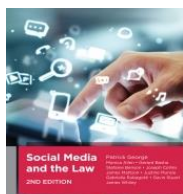
Following is a selection of new books in the Library collection. For details of more new books, see the Library Catalogue: https://courts.sdp.sirsidynix.net.au/client/en_AU/llv/



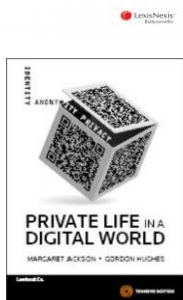
Cooke, JR, *Architects, Engineers and the Law*
4th ed, Federation Press, NSW, 2010
Call number: 343.078624 COO.4 (Supreme Court and VCAT libraries)



Fox, Richard and Deltondo, Nadia M, *Victorian Criminal Procedure: State and Federal Law*
14th ed, Federation Press, NSW, 2015
Call number: 345.05 FOX.14 (Supreme Court, County Court, Magistrates' Court libraries)



George, Patrick et al, *Social Media and the Law*
2nd ed, LexisNexis, NSW, 2016
Call number: 343.94099 GEO.2 (Supreme Court and VCAT libraries)



Jackson, Margaret and Huges, Gordon, *Private Life in a Digital World*
Thomson Reuters, NSW, 2015
Call number: 342.0858 JAC (Supreme Court and VCAT libraries)



Paterson, Moira, *Freedom of Information and Privacy in Australia: Information Access 2.0*
2nd ed, LexisNexis, NSW, 2015
Call number: 342.0858 PAT.2 (Supreme Court, Magistrates' Court and VCAT libraries)

Legislation

Victorian Bills

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

- [Compensation Legislation Amendment Bill 2016](#)
- [Domestic Animals Amendment \(Puppy Farms and Pet Shops\) Bill 2016](#)
- [Sentencing \(Community Correction Order\) and Other Acts Amendment Bill 2016](#)
- [State Taxation Acts Further Amendment Bill 2016](#)
- [Transport \(Compliance and Miscellaneous\) Amendment \(Abolition of the Penalty Fares Scheme\) Bill 2016](#)
- [Transport Integration Amendment \(Head, Transport for Victoria and Other Governance Reforms\) Bill 2016](#)

Victorian Assents

There were no Victorian Acts assented to since the last Library Bulletin.

Proclamations

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

- *Crimes Legislation Amendment Act 2016* No. 28/2016
 - Parts 2, 3 of this Act came into operation on 3 October 2016 (VGG S296 27.09.2016)
- *Justice Legislation (Evidence and Other Acts) Amendment Act 2016* No. 38/2016
 - Sections 12-14 of this Act came into operation on 3 October 2016 (VGG S296 27.09.2016)
- *Land (Revocation of Reservations - Metropolitan Land) Act 2016* No. 31/2016
 - Sections 1, 2, 11-14 of this Act came into operation on 5 October 2016 (VGG S300 4.10.2016)
- *Witness Protection Amendment Act 2016* No. 34/2016
 - Parts 1 and 4 of this Act came into operation on 5 October 2016 (VGG S289 20.09.2016)



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

The following Victorian Acts have come into operation by forced commencement:

- *Relationships Amendment Act No. 4/2016*
 - Section 6 of this Act came into operation on 1 October 2016 (s. 2(2))

High Court Cases

CONSTITUTIONAL LAW (CTH) - Legislative power - Acquisition of property on just terms - Where amendments to Parliamentary Contributory Superannuation Act 1948 (Cth) and Remuneration Tribunal Act 1973 (Cth) and Determinations by Remuneration Tribunal modified method by which allowances paid to retired members of Parliament calculated - Where enactment of and subsequent amendment to Members of Parliament (Life Gold Pass) Act 2002 (Cth) modified entitlement conferred on retired members of Parliament to payment of travel expenses - Whether amendments and Determinations constitute or authorise acquisition of property otherwise than on just terms within meaning of s51(xxxi) of Constitution.

WORDS AND PHRASES - "acquisition of property", "inherently defeasible", "inherently liable to variation", "just terms", "Life Gold Pass", "parliamentary allowance", "property", "retiring allowance", "subject to this Act", "until the Parliament otherwise provides". Constitution, s48, s51(xxxi), s51(xxxvi), s66.

Members of Parliament (Life Gold Pass) Act 2002 (Cth), s 11(2).

Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012 (Cth), s3.

Parliamentary Contributory Superannuation Act 1948 (Cth), s18, s22T.

Remuneration and Other

Legislation Amendment Act 2011 (Cth), s3.

Remuneration Tribunal Act 1973 (Cth), s7(1A), s7(1B), s7(1C), s7(2A).

Cunningham, Barry Thomas & Ors v Commonwealth of Australia & Anor

[\[2016\] HCA 39](#)

12/10/2016

DISCRIMINATION LAW - Disability discrimination - Where deaf person summoned for jury service - Where deaf person required assistance of Auslan interpreters to participate as juror - Where deaf person excluded from jury panel - Whether exclusion was unlawful discrimination. Juries - Persons constituting jury - Jury deliberations - Whether permissible for interpreter to be present in jury room during deliberations - Whether deaf person who requires assistance of interpreter in jury room eligible for jury service under Jury Act 1995 (Q). Words and phrases - "deaf person", "direct discrimination", "functions of a juror", "indirect discrimination", "jury deliberations", "jury service", "separation of the jury". Anti-Discrimination Act 1991 (Q), ss 10, 11, 101. Jury Act 1995 (Q), s4(3), s54, s70.

Lyons, Gaye Prudence v State of Queensland

[\[2016\] HCA 38](#)

05/10/2016

LIMITATION OF ACTIONS - Extension or postponement of limitation periods - Extension of time in personal injury matters - Principles upon which discretion exercised - Where extraordinary delay - Where deficiencies in evidence due to passage of time - Where absence or death of witnesses - Where loss of documentary evidence - Where earlier decision by claimant not to institute proceedings - Whether just in all the circumstances to grant extension of time. Tort - Vicarious liability - Course of employment - Where boarding school employed housemaster - Where housemaster sexually abused boarder - Consideration of correct approach to vicarious liability of employer for intentional criminal acts of employee - Whether employment gave "occasion" for wrongdoing - Whether employee placed in special position vis-à-vis victim - Whether features of special position warrant finding of liability. Procedure - Courts and judges generally - Determination of issues - Whether appropriate for trial judge to determine all litigated issues. Words and phrases - "authority", "close connection", "control", "course or scope of employment", "extension of time", "extraordinary delay", "fair and just", "intimacy", "occasion", "opportunity", "power", "special features", "special position", "trust", "vicarious liability". Limitation of Actions Act 1936 (SA), s48.

Prince Alfred College Incorporated v ADC

[\[2016\] HCA 37](#)

05/10/2016

REAL PROPERTY - Community titles scheme - Use of common property - Body Corporate and Community Management Act 1997 (Q) - Dispute between owners of lots in community titles scheme - Where one lot owner sought to use common property airspace to expand balconies - Where proposal put to body corporate for alteration of rights of lot owners to allow lot owner exclusive use of common property - Where proposal required resolution without dissent - Where motion defeated - Where proponent applied for dispute resolution - Where adjudicator concluded that opposition by other lot owners to proposal unreasonable - Whether adjudicator erred in approach to decision - Whether grounds for opposition to motion by individual lot owners unreasonable - Whether necessary to balance competing interests.

WORDS AND PHRASES - "adjudicator", "body corporate", "common property", "original design intent", "resolution without dissent", "unreasonable in the circumstances".

Body Corporate and Community Management Act 1997 (Q), s94(2), s276, Sched 5, Item 10.

Ainsworth, Kjerulf & Ors v Albrecht, Martin & Anor

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

12/10/2016

Victorian Supreme Court Cases

Court of Appeal

ACCIDENT COMPENSATION - Appeal from unsuccessful application under s134AB(16)(b) Accident Compensation Act 1985 - Serious injury - Prior injury - Disentanglement of injuries - Whether reasons of primary judge adequate - Reasons inadequate - Appeal allowed - Application re-determined on appeal.

Poholke, Andrew Nathan v Goldacres Trading P/L and Victorian WorkCover Authority

Hansen, Kaye and McLeish JJA

[\[2016\] VSCA 232](#)

06/10/2016

ADMINISTRATIVE LAW - Judicial review - Procedural fairness - Racing industry - Statutory power to exclude person from race-courses - Decision-maker obliged to accord procedural fairness to person affected - Content of procedural fairness - Police intelligence information - Whether required to be disclosed - Public interest in integrity of racing - Public interest in investigation of criminal activity - Importance of statutory context - Whether statutory purpose would be frustrated - Disclosure not required - Appeal allowed - *Kioa v West* (1985) 159 CLR 550, *SZBEL v Minister for Immigration and Ethnic Affairs* (2006) 228 CLR 152 applied - Racing Act 1958 pt I div 5.

Chief Commissioner of Police v Nikolic, Daniel

Maxwell P, Osborn and Kaye JJA

[\[2016\] VSCA 248](#)

14/10/2016

BUILDING AND CONSTRUCTION - Right to progress payments in Building and Construction Industry Security of Payment Act 2002 ('BCISP Act') s9(1) - Reference to person who has undertaken 'to carry out construction work' or 'supply related goods and services' - Whether provisions available to companies in liquidation.

STATUTORY INTERPRETATION - Scope of BCISP Act - Consideration of text, context and purpose of Act - Provisions of BCISP Act pt 3 not available to companies in liquidation.

CONSTITUTIONAL LAW - Whether s109 inconsistency arises between BCISP Act s16(2)(a)(i) and s16(4)(b) and Corporations Act 2001 (Cth) ('Corporations Act') s553C - Where s 553C provides for set-off of mutual dealings with insolvent company - Where BCISP Act provides for summary judgment proceeding that precludes reliance upon cross-claims or defences - If s16(2)(a)(i) and s16(4)(b) available to companies in liquidation, they would 'alter, impair or detract from' operation of s553C.

CORPORATIONS LAW - Where Corporations Act s553C(2) precludes set-off where person had notice of company's insolvency at time of giving credit to or receiving credit from company - Mutual dealings pursuant to contract entered into prior to company's insolvency - Whether date for assessing notice of insolvency is date of entry into contract or date of conduct pursuant to or in breach of contract.

BUILDING AND CONSTRUCTION - Requirements for payment schedules under BCISP Act s15 - Adequacy of reasons for withholding payment.

Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd

Warren CJ, Tate and McLeish JJA

[\[2016\] VSCA 247](#)

14/10/2016

CONTRACT - Collateral contract based on alleged representation - Dispute over repayment of debt settled on basis that applicant would pay respondent \$250,000 plus costs assessed on standard basis - Respondent's costs assessed at approximately \$39,500 - Applicant claimed that during negotiations to settle dispute respondent's counsel represented that respondent's solicitor/client costs were approximately \$25,000 - Difference between estimates about \$14,500 - Whether representation made and, if made, whether amounted to collateral contract or misleading and deceptive conduct - No basis to disturb trial judge's finding that representation not made - Leave to appeal refused.

EVIDENCE - Privilege - Applicant sought to rely on email from counsel to instructing solicitor recording communication between counsel - Trial judge satisfied that communication between counsel was for purpose of resolving dispute - Email excluded on basis protected under s131(1)(a) Evidence Act 2008 - Exception in s131(2)(f) did not apply - Evidence Act 2008 s131.

LEGAL PROFESSION - Obligation to ensure costs proportionate to issues and amount in dispute - Civil Procedure Act 2010 s24.

McCarthy, Jane Catherine v Camil Holdings P/L

Tate and Ferguson JJA

[\[2016\] VSCA 235](#)

06/10/2016

CONTRACT - Deed of settlement - Payment obligation under deed of settlement dependent on practical completion under construction contract - Certificate issued but validity challenged - Whether payment under deed of settlement dependent on valid certificate - Construction contract providing for date of practical completion by reference to date in certificate or other date determined in arbitration or litigation - No other date determined - Whether judge relied on post-contractual conduct in construing deed of settlement - Whether trial judge required to determine validity of certificate - Whether applicants elected to accept validity of certificate - Leave to appeal refused.

Enwerd P/L and SHL Nominees (1965) P/L v Metier 3 P/L

Whelan, McLeish JJA and Cavanough AJA

[\[2016\] VSCA 234](#)

06/10/2016

COSTS - Appeal - Appellant substantially successful but first respondent resisted some grounds and defended part of judgment - Apportionment of costs - First respondent to pay 80 per cent of appellant's costs of appeal.

COSTS - Trial - First respondent successful on part of claim and in defending appellant's counterclaim - Apportionment of costs - Appellant to pay 40 per cent of first respondent's costs of trial.

PRACTICE AND PROCEDURE - Interest - Calculation - Supreme Court Act 1986 s60.

Nom De Plume Nominees P/L v Fingal Developments P/L and Ascot Vale Self Storage Centre Pty Ltd (Receivers and Managers Appointed) (In Liquidation) [No 2]

Tate, McLeish JJA, and Ginnane AJA

[\[2016\] VSCA 233](#)

06/10/2016

CRIMINAL LAW - Appeal - Sentence - Crown appeal - Negligently causing serious injury - Baby shaking - Infant victim - Fractured skull, haemorrhages, fractured ribs and femur - Plea of guilty - Sentenced to two years' imprisonment - Whether manifestly inadequate - High level negligence - High culpability - Offender warned previously - Victim's condition - Risk of future seizures, cognitive decline - Loss of enjoyment of life - Appeal allowed - Resentenced to four years' imprisonment.

Director of Public Prosecutions v Weston, Darren

Maxwell P, Tate and Osborn JJA

[\[2016\] VSCA 243](#)

10/10/2016

CRIMINAL LAW - Appeal - Sentence - Guilty plea - Whether person who pleads guilty to Commonwealth offence entitled to discount for utilitarian benefit of plea - Cameron v The Queen (2002) 209 CLR 339, considered - Common law and State provisions concerning discount to be allowed for a plea of guilty considered - R v Tyler (2007) 173 A Crim R 458, not followed - Crimes Act 1914 (Cth) s16A(2)(g).

PRECEDENT - Comity - Decision of intermediate appellate court explaining reasoning of High Court - Whether other courts obliged to follow unless plainly wrong - Hasler v Singtel Optus Pty Ltd (2014) 87 NSWLR 609, approved.

CRIMINAL LAW - Sentence - Comparable cases - Utility of schedule of comparable cases - Schedule must be accompanied by articulation of unifying principles revealed by cases referred to - Prosecution must make plain purpose for which each case is relied on - Use of contrasting cases permissible - Sentencing judge not restricted to consideration of sentences in cases referred to by parties when fixing sentence.

CRIMINAL LAW - Appeal - Sentence - Manifest inadequacy - Attempted possession of commercial quantity of border controlled drug - 4.8 times commercial quantity threshold - Respondent Thomas sentenced to 5 years' imprisonment with 3 years non-parole period - Sentence manifestly inadequate - Appeal allowed - Misapplication of principle - Re-sentenced to 9 years' imprisonment with 6 years and 3 months non-parole period.

CRIMINAL LAW - Appeal - Sentence - Manifest inadequacy - Importation of commercial quantity of border controlled drug - 5.29 times commercial quantity threshold - Respondent Wu sentenced to 6 years and 6 months' imprisonment with 3 years and 6 months non-parole period - Sentence manifestly inadequate - Appeal allowed - Re-sentenced to 10 years and 6 months' imprisonment with 7 years and 6 months non-parole period.

PRIMARY CASES CONSIDERED - Cameron v The Queen (2002) 209 CLR 339 - R v Tyler (2007) 173 A Crim R 458 - R v Winchester (1992) 58 A Crim R 345 - R v Gray [1977] VR 225 - R v Shannon (1979) 21 SASR 442 - Phillips v The Queen (2012) 37 VR 594 - R v Place (2002) 81 SASR 395 - R v Morton [1986] VR 863 - R v Thomson and Houlton (2000) 49 NSWLR 383 - R v Sharma (2002) 54 NSWLR 300 - Siganto v The Queen (1998) 194 CLR 656 - R v Bugeja [2001] NSWCCA 196 - Director of Public Prosecutions (Cth) v Gow (2015) 298 FLR 397 - R v Harrington (2016) 11 ACTLR 215 - R v RND [2002] VSCA 192 - Moody v French [2008] WASCA 67.

Director of Public Prosecutions (Cth) v Thomas, Vinod; Director of Public Prosecutions (Cth) v Wu, Leung Hang

Redlich, Santamaria and McLeish JJA

[\[2016\] VSCA 237](#)

10/10/2016

CRIMINAL LAW - Appeal - Sentence - Guilty plea - Whether person who pleads guilty to Commonwealth offence entitled to discount for utilitarian benefit of plea - DPP (Cth) v Thomas [2016] VSCA 237, followed.

CRIMINAL LAW - Appeal - Sentence - Manifest excess - Aiding and abetting dealing in proceeds of crime worth \$50,000 or more - Applicants part of syndicate involved in managing licensed brothels without approval under Sex Work Act 1994 - Applicant Kim sentenced to 3 years and 2 months' imprisonment with 2 years non parole period - Applicant Fang sentenced to 3 years and 8 months' imprisonment with 2 years and 3 months non-parole period - Sentences not manifestly excessive - Criminal Code (Cth) s400.5(1) - Appeals dismissed.

CRIMINAL LAW - Appeal - Sentence - Money laundering - Sentencing principles - Criminal Code (Cth) div 400.

Moon Ja Kim v The Queen; Zhe Fang v The Queen

Redlich, Santamaria and McLeish JJA

[\[2016\] VSCA 238](#)

10/10/2016

CRIMINAL LAW - Application for leave to appeal against sentence - Armed robbery - Obtaining property by deception - Total effective sentence of 12 months' imprisonment and Community Correction Order of 18 months - Whether judge erred in imposing a CCO for all charges and term of imprisonment on one charge - Whether judge erred in finding applicant's offending involved disguise - Whether judge erred in assessment of applicant's prospects of rehabilitation - Whether judge erred in failing to moderate general or specific deterrence on account of the applicant's intellectual deficits - No reasonable prospect of sentence being reduced - Leave to appeal refused.

Sankey, Andrew v The Queen

Weinberg JA

[\[2016\] VSCA 244](#)

07/10/2016

CRIMINAL LAW - Application for leave to appeal against sentence - Indecent assault of a female under 16 - Carnal knowledge of a girl under 10 - Total effective sentence of three years and six months' imprisonment with a non-parole period of 18 months - Whether failure to take appropriate account of applicant's age at time of offending - Whether manifest excess - No reasonable prospect of sentence imposed being reduced - Leave to appeal refused.

Fleming, William John v The Queen

Weinberg JA

[\[2016\] VSCA 242](#)

07/10/2016

CRIMINAL LAW - Application to reinstate application for leave to appeal against sentence - Applicant convicted of attempted murder in 2006 and sentenced to 11 years' imprisonment with non-parole period of 8 years - Application for leave to appeal against sentence dismissed by Acting Registrar of Criminal Appeals in 2007 due to failure to file a full statement of grounds of appeal by due date - Nine year delay in seeking reinstatement of application - Proposed grounds directed at decision of Adult Parole Board to refuse parole rather than decision of sentencing judge - Application for reinstatement refused.

Defrutos, Manuel v The Queen

Weinberg, Kyrou JJA and Elliott AJA

[\[2016\] VSCA 241](#)

07/10/2016

CRIMINAL LAW - Bail pending hearing - Exceptional circumstances - Bail granted.

Application for Bail by Lennon, James Brian

Weinberg JA

[\[2016\] VSCA 239](#)

06/10/2016

CRIMINAL LAW - Conviction - Applicant convicted of nine charges of sexual penetration of a child under 16 - Verdicts of guilty said to be inconsistent with verdicts of not guilty - Admissibility of uncharged criminal acts - Trial judge said to have erred in refusing application for direction regarding failure of Crown to call witness - Verdicts said to be unreasonable and/or not supported by evidence - No legal or logical inconsistency between verdicts - Uncharged acts admissible as relevant to context - No miscarriage of justice - Verdicts reasonably open - Jury Directions Act s12, s43 - Leave to appeal refused

CRIMINAL LAW - Sentence - Applicant sentenced to nine years' imprisonment with non-parole period of six years - Whether sentence manifestly excessive - Sentence within range - Leave to appeal refused.

Ashley, John v The Queen

Redlich, Weinberg and Hansen JJA

[\[2016\] VSCA 246](#)

14/10/2016

CRIMINAL LAW - Indecent act with a 16 year old child - Two charges - Conviction on one, acquittal on other - Whether verdicts inconsistent - Unsafe and unsatisfactory - Error in statement of offence in indictment - Whether indictment valid - Crimes Act 1958, s49(1), Criminal Procedure Act 2009, s159 and s166, Schedule 1, cll 1, 2 and 3.

Ashley, John v The Queen

Redlich, Weinberg and Hansen JJA

[\[2016\] VSCA 245](#)

14/10/2016

PROBATE - Where caveat lodged with Registrar of Probates - Caveator objected to grant of probate - Caveator filed grounds of objection - Caveator required to file particulars of grounds of objection - Whether particulars of grounds of objection adequate for assertion of undue influence - Particulars of undue influence struck out - Whether primary judge erred in striking out particulars of undue influence - Particulars of undue influence not sufficient - Application for leave to appeal dismissed

Montalto, Antonino v Sala, Giuseppe and Montalto, Giuseppe

Warren CJ, Whelan and Santamaria JJA

[\[2016\] VSCA 240](#)

07/10/2016

PROCEDURE - Costs - Discretion to make non-party costs order - Applicants were sole director and sole shareholder of litigation funder - Litigation funder had only \$100 in paid-up capital - Litigation funder provided funds for plaintiff to continue proceeding below - Plaintiff failed in its claim - Orders for security for costs made during proceedings but were insufficient to cover costs - Defendants sought non-party costs order against applicants and various other persons associated with plaintiff - Trial judge ordered that applicants be jointly and severally liable for payment of defendants' costs - Discretion to order costs to be exercised judicially - Costs awarded dependent on the justice of the case - Costs order against non-parties exceptional in sense that usual costs orders made against party to proceeding - Factors to be taken into account include financial position of party against whom order would be made, whether security for costs orders made, whether non-party has 'real interest' in litigation, amount of funding contributed and whether non-party agreed to provide indemnity - Whether the trial judge erred by 'piercing the corporate veil' - Plaintiff and litigation funder impecunious - Making a non-party costs order against company director is not piercing the corporate veil - Plaintiff maintained ultimate control of litigation but applicants had direct interest beyond mere recovery of funds - Litigation funder could be properly characterised as a party to proceedings - Judge's exercise of discretion did not miscarry - Leave to appeal refused - Supreme Court Act 1986 s24(1) - Knight v FP Special Assets Ltd (1992) 174 CLR 178 - Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 336 - Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd (2009) 239 CLR 75 - Deutsche Bank AG v Sebastian Holdings Inc & Anor [2016] 4 WLR 17

Carter, Ryan and Esplanade Holdings P/L v Caason Investments Pty Ltd & Ors

Weinberg, Ferguson and Kaye JJA

[\[2016\] VSCA 236](#)

07/10/2016

Commercial Court

CONTRACT - Restraint of trade - Share buy-back agreement - Former employee - Certainty - Reasonableness - Mistake - Rectification - Common intention.

Popham Holdings P/L (ACN 166 571 286) and Anor v Franklin, Xavier Daniel

Elliott J

[\[2016\] VSC 597](#)

06/10/2016

CORPORATIONS - Scheme of Arrangement - Scheme proposed may constitute oppressive conduct towards a minority shareholder if implemented by a certain date - Application for an injunction to delay implementation of Scheme to avoid loss to minority shareholder - Held, Scheme should be delayed to avoid Court processes being used to enable possible oppressive conduct.

McMahon, Paul Anthony and Silver Street Investments P/L (ACN 602 023 834) and McMahon Properties Nominees P/L (ACN 156 275 115); Silver Street Investments P/L (ACN 602 023 834); McMahon Properties Nominees P/L (ACN 156 275 115) v Simonds Group Limited and SR Residential P/L

Robson J

[\[2016\] VSC 609](#)

20/09/2016

ESTATE AGENTS - Franchise agreement - Whether franchise agreement within statutory definition - Whether franchisee authorised to carry on business under name franchisor entitled to carry on business under - Legislative history of franchising regulation - Estate Agents Act 1980 s43.

ESTATE AGENTS - Compensation Fund for victims of estate agent's defalcation - Payments out of Fund by Secretary to victims of defalcation - Joint and several liability of franchisor - Subrogation - Secretary's right of subrogation against the franchisor - Whether claims under Pt VII of the Act - Estate Agents Act 1980 s73, s79, s80, s81, s82, s83, s85.

STATUTES - Principles of interpretation - Legislative regulation of estate agency franchising - Relevance of legislative history - Beneficial and penal legislation - Estate Agents Act 1980 Parts IV and VII.

Secretary to the Department of Justice & Regulation & Ors (according to the attached schedule) v Century 21 Australia P/L (ACN 159 923 743)

Ginnane J

[\[2016\] VSC 590](#)

29/09/2016

PRACTICE - Constitution of court - Judges - Disqualification for bias - Test of bias - Objective standard applied - Professional relationship between judge and a legal practitioner defendant in the proceeding - Relevance of party's preference for another judge.

Bodycorp Repairers P/L (ACN 068 589 408) v Maisno, Anunziato Enzo (also known as Michael Maisano and Michal Mason) & Ors

Riordan J

[\[2016\] VSC 599](#)

29/09/2016

PRACTICE AND PROCEDURE - Application for leave to file amended statement of claim - Application for leave to proceed on behalf of a trustee - Application for leave to join a party.

BANKRUPTCY - Whether bankrupt defendant should participate in trial - Access to frozen funds to defend the claim - Trust property - Discretion - Requirement for a legally represented contradictor.

Ambridge Investments P/L v Baker, Theodore & Ors

Judd J

[\[2016\] VSC 616](#)

13/10/2016

PRACTICE AND PROCEDURE - Discovery - Legal professional privilege - Litigation privilege - Internal documents prepared by lawyers - Communications with potential witness - Invoices created by witness and related communications - Evidence Act 2008 (Vic), s119.

PRACTICE AND PROCEDURE - Discovery - Confidentiality - Nature of information and prior disclosures - Communications between solicitors and funder - Confidential business processes - Balancing exercise.

IOOF Holdings Ltd (ACN 100 103 722) & Anor v Maurice Blackburn P/L (ABN 21 105 657 949) (trading as Maurice Blackburn Lawyers) & Anor

Elliott J

[\[2016\] VSC 594](#)

13/10/2016

Common Law Division

ACCIDENT COMPENSATION ACT - Section 138 indemnity proceeding - costs - personal injury claim - Sanderson order/Bullock order sought against unsuccessful defendants for indemnity costs payable by VWA to successful third defendant - whether claims against defendants interdependent or alternatives - substantial connection between claims sufficient - nature of section 138 Accident Compensation Act 1985 claims permits Sanderson/Bullock order - conduct of unsuccessful defendants.

Victorian WorkCover Authority v Probuild Constructions (Australia) P/L (ACN 095 250 945) & Ors

Zammit J

[\[2016\] VSC 615](#)

13/10/2016

ADMINISTRATIVE LAW - Appeal pursuant to s82 of the Coroners Act 2008 (Vic) - Coroners Act 2008 (Vic), s52, s67, s82, s87, s87A - Inquest - Request to coroner for inquest - Refusal by coroner to hold inquest - Application to Supreme Court to order inquest - Discretion of coroner to hold an inquest - question of law - interests of justice.

Chol, Ayeel v White, Peter (Coroner)

J Forrest J

[\[2016\] VSC 561](#)

29/09/2016

APPEAL - Appeal under s109 Magistrates Court Act 1989 - Whether error of law by applicant being denied procedural fairness - Whether the magistrate erred in law by giving judgment without hearing all the evidence in the case - Whether the self-represented applicant was given appropriate assistance and guidance by the magistrate - No error of law - Abuse of process - Lack of any defence with a real prospect of success - Appeal dismissed.

Tomasevic, Milan v Somers MRH P/L

Macaulay J

[\[2016\] VSC 574](#)

03/10/2016

APPEAL - Application for leave to appeal and appeal if leave is granted against order of VCAT - Neighbourhood dispute concerning parking on residual land - Company Titles (Home Units) Act 2013 (Vic) s8, s10 - Whether VCAT in determining what is a 'fair' order pursuant to s 8 is limited to the determination of legal rights - Held: not so limited - Whether there was evidence to support a finding that there would be considerable inconvenience to persons currently using the car spaces if the respondent was ordered to ensure they did not do so - Held: there was such evidence - Whether in taking into account that inconvenience given that those persons had no legal right to park there the Tribunal took into account an irrelevant consideration - Held: no - principles of legal unreasonableness discussed - Minister for Immigration and Citizenship v Li (2013) 249 CLR 332 and Minister for Immigration and Border Protection v Stretton [2016] FCAFC 11 discussed and applied - Leave to appeal granted on one question of law but appeal dismissed.

Tilley, Peter Graham v No 352 Toorak Road Pty Ltd (ACN 004 569 475)

Lansdowne AsJ

[\[2016\] VSC 608](#)

07/10/2016

APPEAL - Protection of personal privacy - Decision of Victorian Civil and Administrative Tribunal - Whether error of law - Respondent collected information from appellant's Facebook without her knowledge - Information used during employment misconduct investigation and disciplinary process - Whether information was personal information covered by Information Privacy Principles - Whether collection necessary for respondent's functions or activities and carried out in lawful, fair and not unreasonably intrusive way - Whether respondent ensured appellant was made aware of collection as soon as practicable - Whether it was reasonably practicable to obtain information from appellant directly - Whether information exempt from Principles by reason of being contained in document that was generally available publication - Interaction between privacy protection and human rights - Interpretation of statutory provisions expressed as general principles - Limitations on jurisdiction of court to determine questions of law not fact - 'Personal information', 'necessary', 'fair', 'not unreasonably intrusive', 'practicable', 'reasonable steps', 'aware', 'reasonable and practicable', 'generally available publication' - Victorian Civil and Administrative Tribunal Act 1998 (Vic) s148(1), Information Privacy Act 2000 (Vic) s11(1), sch 1, Charter of Human Rights and Responsibilities Act 2006 (Vic) s13, International Covenant on Civil and Political Rights art 17

Jurecek, Lara v Director, Transport Safety Victoria

Bell J

[\[2016\] VSC 285](#)

11/10/2016

CONTRACT OF EMPLOYMENT - Enforceability of covenant in restraint of trade - Legitimate interest of plaintiff in protecting its client base - Defendant proposing to establish a business in direct competition with plaintiff - Injunction granted to restrain defendant until the trial of the proceeding from providing services to 89 of the plaintiff's clients with whom the defendant had direct dealings in the 12 months prior to termination of employment.

Crowe Horwath (Aust) P/L v Loone, Anthony

McDonald J

[\[2016\] VSC 582](#)

26/09/2016

INJUNCTIONS - Contract for sale of land - Purchaser sought interlocutory prohibitory injunction and specific performance, alternatively mandatory injunction - Prohibitory injunction sought to prevent termination of contract of sale for land - Mandatory injunction sought to compel the vendor to take steps to execute the contract of sale - Order for specific performance not appropriate at an interlocutory stage - Serious question to be tried - Defence of hardship considered - Balance of convenience did not favour mandatory injunction being granted - Continuance of prohibitory interlocutory injunction ordered - Consideration of sufficiency of the plaintiff's undertaking as to damages - *Boyarsky v Taylor* [2008] NSWSC 1415 considered.

Hera Project P/L (ACN 163 685 041) v Bisognin, Gino Andrew and Bisognin, Leah Joan

Macaulay J

[\[2016\] VSC 591](#)

03/10/2016

INSURANCE - Total and permanent disability policy - Construction of definition of total and permanent disability and other provisions of policy - Plaintiff injured in the course of employment whilst covered by first schedule of policy - Plaintiff's employment terminated prior to making a claim under policy - Insurer rejected claim on basis that plaintiff was transferred to the sixth schedule upon termination of employment and did not satisfy TPD definition under that schedule - Plaintiff entitled to have his TPD claim assessed under first schedule of policy - Plaintiff satisfied first schedule TPD definition - Insurance Contracts Act 1984 (Cth) s11, s48.

Daffy, Kevin Adrian v MLC Nominees P/L and MLC LLtd

McDonald J

[\[2016\] VSC 606](#)

13/10/2016

PRACTICE - Security for costs - Inherent jurisdiction of the Supreme Court to order security for costs - Nature of cause of action - Prospects of success - Plaintiff bankrupt - Unpaid costs orders - Numerous statements of claim filed - Security for costs ordered.

Trkulja, Milorad (aka Michael Trkulja) v Dobrijevic, Irinej

Garde J

[\[2016\] VSC 596](#)

04/10/2016

PRACTICE AND PROCEDURE - Discovery of documents - Production for inspection - Civil Procedure Act 2010 (Vic) s55 - Overarching purpose - Real issues in dispute - Power of Court to limit inspection - Discretion of Court - Cost of discovery and inspection - Applicability of previous judicial finding

Volunteer Fire Brigades Victoria Inc v Country Fire Authority

Ierodiaconou AsJ

[\[2016\] VSC 613](#)

10/10/2016

PRACTICE AND PROCEDURE - Group proceedings - Amendment of the Settlement Distribution Scheme - Appointment of an independent expert by the Scheme Administrator to audit the administration in particular respects - Supreme Court Act 1986 s33V, Civil Procedure Act 2010 s65M.

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

John Dixon J

[\[2016\] VSC 586](#)

29/09/2016

PRACTICE AND PROCEDURE - Summary dismissal granted - Employee obligations inherently personal in nature - No indication of company entering employment agreement with defendant in capacity of trustee - Plaintiff failed to provide sufficient particulars allowing for the case to be properly understood - Failure of plaintiff to identify the facts relied upon in support of the defence to summary dismissal application.

Innovateq Australia P/L (ACN 609 748 674) atf Innovateq Unit Trust; A&S Investment Holdings P/L (ACN 144 986 612) atf the Innovateq Unit Trust v Barnes, Ross; Barnes, Ross and Ross, Emma as trustee for the R & family trust; Innovateq (ACN 132 372 242); Innovateq Services P/L (ACN 144 988 590); Phillips, Daniel; Certeq P/L (ACN 608 962 910); Certeq NZ P/L (5860031)

Ierodionou AsJ

[\[2016\] VSC 618](#)

14/10/2016

PROCEDURE - Proceed of Crimes Act 2002 (Cth) s180, s182, s183 - Postal service of s180 examination notice - Acts Interpretation Act 1901 (Cth) s1A, s2, s15AA, s15AB, s28A - Whether Judiciary Act 1903 (Cth) s79(1) 'picks up' Supreme Court (Criminal Procedure) Rules 2008 r6.04(3).

The Commissioner of the Australian Federal Police [AFP] v Ying, Lang Tao

Zammit J

[\[2016\] VSC 556](#)

10/10/2016

STATUTORY INDEMNITY - Injured worker brought claim against plaintiff and another for injuries caused by or arising out of the use of a motor vehicle - Claim compromised on certain terms - Contribution and recovery proceedings as between plaintiff and another determined in this Court - Plaintiff now seeking statutory indemnity as against defendant pursuant to section 94(1) of the Transport Accident Act 1986 - Statutory construction - Whether plaintiff the 'owner' of the motor vehicle for purposes of section 94(1) of the Transport Accident Act 1986 - Vehicle registered in name of, and listed as asset by, another company within the same corporate group as the plaintiff - Plaintiff's payment of vehicle registration including transport accident charge, as well as maintenance and insurance costs, neutral as to the question of 'ownership' in the absence of evidence going to nature of interrelationship between companies in the corporate group.

Linfox Australia P/L (ACN 004 718 647) v Transport Accident Commission

Keogh J

[\[2016\] VSC 592](#)

05/10/2016

TESTATOR'S FAMILY MAINTENANCE - Application under Part IV of the Administration and Probate Act 1958 (Vic) - Application unsuccessful - Costs of successful defendant - Application not frivolous, vexatious, or with no real prospect of success - Section 97(7) of Administration and Probate Act 1958 (Vic) - Effect of rejection of Calderbank offer - Whether it was unreasonable to reject Calderbank offer.

Moleta Missen, Lucas Alexander Philip (a minor by his Litigation Guardian Angela Helen Moleta) v Missen, Leigh John and Missen, Karen Lorraine (who are sued in their capacity as Executors of the Will and Estate of Leonard Albert Missen)

Daly AsJ

[\[2016\] VSC 602](#)

10/10/2016

TORTS - Personal injury - Damages - Rate of interest payable on damages for gratuitous attendant care services - Rate of interest payable on past general damages - Whether interest payable on past medical expenses - Costs and certification of counsel's fees - *Grincelis v House* (2000) 201 CLR 321, *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657.

Clarke, Steven Graham v Greater Shepparton City Council

Keogh J

[\[2016\] VSC 593](#)

06/10/2016

WATER ACT 1989 - Whether owners of separate parcels of land constituting a 'serviced property' jointly liable for fees associated with delivery shares?

STATUTORY INTERPRETATION - Whether the imposition of a fee on the owner of one of several parcels of land constituting a 'serviced property' was invalid?

JOINT LIABILITY - Whether a liability under statute for owners of 'serviced property' to pay fees was joint?

Federation Estate P/L v Southern Rural Water Corporation

Riordan J

[\[2016\] VSC 610](#)

07/10/2016

Costs Court

COSTS - Indemnity principle - Pro bono - *Mainieri v Cirillo* applied.

Mourik, Pieter v Von Marburg, Roland

Wood AsJ

[\[2016\] VSC 601](#)

01/09/2016

Criminal Division

CRIMINAL LAW - Sentence - Crimes (Foreign Incursions and Recruitment) Act 1978, s7 (1)(a) - Three charges being preparatory to an incursion into a foreign state with the intention to engage in hostile activity - Relevance of terrorism offences - Rehabilitation - Remorse - Deportation.

The Queen v Mohamed, Amin

Lasry J

[\[2016\] VSC 581](#)

29/09/2016

CRIMINAL LAW - Sentence - Murder - Spontaneous unprovoked attack on stranger - Prolonged and violent attack - Guilty plea - No relevant prior convictions - Some remorse - Prospect of deportation - Sentenced to 21 years' imprisonment, with a non-parole period of 17 years

The Director of Public Prosecutions [DPP] v Laban, Dion Peletti

Hollingworth J

[\[2016\] VSC 612](#)

12/10/2016

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.

PRACTICE AND PROCEDURE - Interest - Whether “demand of payment” made - Section 58(1) Supreme Court Act 1986 (Vic).

Dumayne Property Group Pty Ltd v Balanced Securities Ltd

Judge Anderson

[\[2016\] VCC 1439](#)

06/10/2016

Articles

Administrative Law

Public law - Values - Principles - Reason - Commonwealth Constitution - Spigelman Public Law Oration - Australia
Chief Justice Allsop. "Values in public law." (2016) 13(1) Judicial Review 53-77.

Contract law

Good faith - Uniform Commercial Code - Australia - Canada - US - UK
Justice Kiefel. "Good faith in contractual performance." (2016) 13(1) Judicial Review 41-52.

Courts

Information technology - Digital technology - iPad - Jurors - Jury deliberation - Evidence - Engagement - Research study - County Court - Victoria - Australia
Gelb, K. "What is the impact of digital technology on juror deliberation?" (2016) 28(8) JOB 75-79.

Koori Court - County Court - Mildura - Victoria - Australia
Derkley, K. "No soft option." (2016) 90(1) LIJ 15-17.

Evidence

Expert evidence - Concurrent evidence - Hot-tubbing - Report - UK
Samuels, A. "Body of evidence." (2016) 166(7714) NLJ 21.

Expert evidence - Experts - Personal injury - Uniform Evidence Acts - Evidence Act 2008 (Vic), s79 - Australia
James, D. and J. Fitzpatrick. "Effective expert witnesses." (2016) 90(10) LIJ 27-31.

Human Rights

Discrimination - Race - History - Racial Discrimination Act 1975 (Cth) - Australia
Chief Justice French. "The Racial Discrimination Act: a 40-year perspective." (2016) 13(1) Judicial Review 1-20.

Intellectual Property

Hyperlinks - Publication - Copyright - Websites - GS Media (Case C-160/15) - European Court of Justice - Europe
"Chilling" hyperlink ruling. (2016) 166 (7714) NLJ 5.

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210 William Street
Melbourne VIC 3000

