



## THE LAW LIBRARY OF VICTORIA

Library  
Bulletin  
28 October  
2016

### Library News and Events

#### Tour of the Supreme Court Library for legal professionals

Tuesday 8 November, 1.15-2.15pm

This 60 minute tour of the Library facilities and history is targeted at the legal profession and those with a keen interest in libraries and law, exploring all four levels of the Library.

#### “Switch on...” in the Library: Victorian Reports Quick Guide

Tuesday 15 November, 1.15-1.40pm

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

#### General tour of the Supreme Court Library

Tuesday 22 November, 1.15-1.40pm

This 30 minute tour of the Library is recommended for those who want a brief introduction to the Library and its history, exploring the magnificent Main Reading Room and the First Floor.

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>

#### SUBSCRIBE TO THE LIBRARY BULLETIN

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

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



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

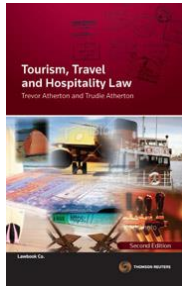
The book costs \$60 and there is a \$10 discount for members of the Royal Historical Society of Victoria (RHSV).

# Contents

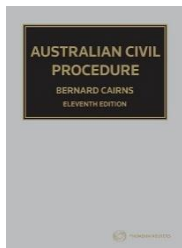
<b>New Books</b>	<b>3</b>
<b>Legislation</b>	<b>4</b>
Victorian Bills	4
Victorian Assents	4
Proclamations	5
<b>High Court Cases</b>	<b>6</b>
<b>Victorian Supreme Court Cases</b>	<b>7</b>
Court of Appeal	7
Commercial Court	10
Common Law Division	11
Criminal Law	15
<b>County Court of Victoria Cases</b>	<b>16</b>
<b>Articles</b>	<b>17</b>
Contract Law	17
Corporations Law	17
Courts	17
Criminal Law & Procedure	17
Evidence	17
Human Rights	17
Insurance Law	18
International Law	18
Legal Profession	18
Legal Systems	18
Practice & Procedure	18
Torts	18
Trade Practices	18
Trusts	18

# New Books

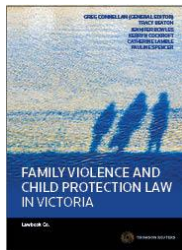
Following is a selection of new books in the Library collection. For details of more new books, see the Library Catalogue: [https://courts.sdp.sirsidynix.net.au/client/en\\_AU/llv/](https://courts.sdp.sirsidynix.net.au/client/en_AU/llv/)



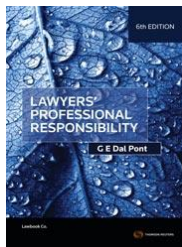
Atherton, Trevor and Atherton Trudie, *Tourism, Travel and Hospitality Law*  
2<sup>nd</sup> ed, Lawbook Co, NSW, 2011  
Call number: 343.07891 ATH.2 (Supreme Court Library)



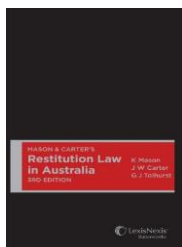
Cairns, Bernard, *Australian Civil Procedure*  
11<sup>th</sup> ed, Thomson Reuters, NSW, 2016  
Call number: 347.94 CAI.11 (Supreme Court, County Court, Magistrates' Court and VCAT libraries)



Connellan, Greg (ed) *Family Violence and Child Protection Law in Victoria*  
Thomson Reuters, NSW, 2016  
Call number: 345.5025554 FAM (Magistrates' Court Library)



Dal Pont, Gino, *Lawyers' Professional Responsibility*  
6<sup>th</sup> ed, Thomson Reuters, NSW, 2016  
Call number: 174.3 DAL.6 (Supreme Court, Magistrates' Court, VCAT libraries)



Mason, Keith, Carter JW and Tolhurst, G, *Carter's Restitution Law in Australia*  
3<sup>rd</sup> ed, LexisNexis, NSW, 2016  
Call number: 346.029 MAS.3 (Supreme Court Library)

# Legislation

## Victorian Bills

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

- [Crimes Legislation Further Amendment Bill 2016](#)
- [Energy Legislation Amendment \(Feed-in Tariffs and Improving Safety and Markets\) Bill 2016](#)
- [Family Violence Reform Implementation Monitor Bill 2016](#)
- [Housing Amendment \(Victorian Housing Register and Other Matters\) Bill 2016](#)
- [Road Legislation Further Amendment Bill 2016](#)
- [Working with Children Amendment Bill 2016](#)

## Victorian Assents

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

- [Crimes Amendment \(Carjacking and Home Invasion\) Act 2016](#) No. 50/2016
- [Crown Land Legislation Amendment Act 2016](#) No. 51/2016
- [Melbourne and Olympic Parks Amendment Act 2016](#) No. 52/2016
- [National Domestic Violence Order Scheme Act 2016](#) No. 53/2016
- [Police and Justice Legislation Amendment \(Miscellaneous\) Act 2016](#) No. 54/2016
- [Tobacco Amendment Act 2016](#) No. 55/2016
- [Victorian Funds Management Corporation Amendment Act 2016](#) No. 56/2016



## EXHIBITIONS IN THE LIBRARY

### The Supreme Court & the 1990s

The 1990s was an era of dynamic change at the Supreme Court. Technological developments saw the creation of the Supreme Court website and databases to manage court records. The Court of Appeal was established and the Library was radically renovated.

This exhibition includes photos and information about significant cases and developments in the 1990s that effected the Court.

# Legislation

## Proclamations

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

- *Access to Medicinal Cannabis Act 2016 No. 20/2016*
  - Sections 121, 122, 124, 127, 128, 132 of this Act came into operation on 21 October 2016 (VGG S284 13.09.2016)

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

- *Drugs, Poisons and Controlled Substances Amendment Act No. 2/2016*
  - Sections 1-19 of this Act came into operation by forced commencement on 20 October 2016 s.2(2)
- *Crown Land Legislation Amendment Act 2016 No. 51/2016*
  - Sections 1-34 of this Act came into operation by forced commencement on 19 October 2016 s.2
- *Police and Justice Legislation Amendment (Miscellaneous) Act 2016 No. 54/2016*
  - Sections 1, 2, 27-40 of this Act came into operation by forced commencement on 19 October 2016 s.2(1)

# High Court Cases

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

# Victorian Supreme Court Cases

## Court of Appeal

CRIMINAL LAW - Appeal - Conviction - Trafficking not less than a commercial quantity of a drug of dependence (heroin) - Whether verdict unsafe and unsatisfactory - Verdict open to jury - Application for leave to appeal refused.

CRIMINAL LAW - Appeal - Sentence - Trafficking not less than a commercial quantity of a drug of dependence (heroin) - Claim that factual findings of judge not open - No error - Application for leave to appeal refused.

### ***Nguyen, Quoc v The Queen***

Weinberg, Whelan and Priest JJA

[\[2016\] VSCA 253](#)

20/10/2016

CRIMINAL LAW - Appeal - Conviction - Two charges of intentionally cause serious injury - Charges tried together - Whether charges properly joined on indictment - Whether rational forensic decision to have charges heard together - Whether directions to jury on separate consideration of charges adequate - Whether miscarriage of justice - Appeal dismissed (by majority).

CRIMINAL LAW - Appeal - Sentence - Intentionally cause serious injury - Two offences - Each victim shot in leg - Sentence of 8 years' imprisonment on each charge - Total effective sentence 11 years' imprisonment, non-parole period of 8 years - Whether manifestly excessive - No evidence of remorse - Serious violent offender on second charge - Nash v The Queen (2013) 40 VR 134 - Appeal dismissed (unanimously).

### ***Nicholls, William Lindsay v The Queen***

Maxwell P, Osborn and Santamaria JJA

[\[2016\] VSCA 250](#)

17/10/2016

CRIMINAL LAW - Appeal - Sentence - Intentionally causing serious injury - Sentence of 4 years 9 months, non-parole period 3 years 3 months - Whether manifestly excessive - Whether judge erred in considering subsequent offending - Indicators of offence seriousness - Persistent, violent attack - Victim seriously injured - Offender's disadvantaged background - Delay - Offending on parole - Community protection - Leave to appeal refused - Nash v The Queen (2013) 40 VR 134 applied.

### ***Chol, Dieu v The Queen***

Maxwell P, Redlich and Weinberg JJA

[\[2016\] VSCA 252](#)

19/10/2016

CRIMINAL LAW - Appeal - Sentence - Remitted by High Court for redetermination - Drug offences - Importation of marketable quantity of border controlled drug - Appellant was courier - Plea of guilty - Prior convictions but limited relevance - Medical issues - Sentence of 8 years 6 months, non-parole period of 6 years - Whether manifestly excessive - Use of comparable cases - Sentence not outside available range - Appeal dismissed - Pham v The Queen (2015) 325 ALR 400, followed - Nguyen v The Queen [2016] VSCA 198; DPP v Thomas [2016] VSCA 237, discussed - Criminal Code Act 1995 (Cth) s 307.2(1).

### ***Pham, Vu Lang v The Queen***

Redlich, Beach and Kaye JJA

[\[2016\] VSCA 259](#)

28/10/2016

CRIMINAL LAW - Appeal - Sentence - Trafficking in drug of dependence (2), dealing with proceeds of crime - Possession for sale - Quantities of two drugs found in offender's possession - Whether sentences on lesser charges (18 months, 4 months) manifestly excessive - Whether cumulation manifestly excessive - Quantity trafficked - Offender's role - Possession of second drug represented additional criminality - Current sentencing practice - Median sentence of no assistance - Sentences reasonably open - Appeal dismissed.

***Tiong, Chiong Teck v The Queen***

Maxwell P and Cavanough AJA

[\[2016\] VSCA 257](#)

25/10/2016

CRIMINAL LAW - Application for leave to appeal against sentence - Manifest excess - Murder - Applicants co-offenders - Applicant Ryan sentenced to 31 years imprisonment with 26 years non-parole period - Applicant Lindholm sentenced to 25 years imprisonment with 21 years non-parole period - Applicant Trabert sentenced to 28 years imprisonment with 23 years non-parole period - Sentences not manifestly excessive - Leave to appeal refused.

CRIMINAL LAW - Application for leave to appeal against sentence - Parity - Co-offender Lindholm pleaded guilty to murder - Applicants Ryan and Trabert pleaded not guilty - No arguable basis that principle infringed - Sentencing differential reasonably open - Disparity insufficiently marked or manifest - Leave granted - Appeal dismissed.

***Ryan, John v The Queen***

***Lindholm, Robyn Jane v The Queen***

***Trabert, Torsten v The Queen***

Weinberg, Whelan and Priest JJA

[\[2016\] VSCA 255](#)

20/10/2016

CRIMINAL LAW - Sentence - Crown appeal - Respondent sentenced to 23 months' imprisonment and two year Community Correction Order for intentionally causing serious injury in circumstances of gross violence - Common ground that trial judge erred in failing to declare 150 days' pre-sentence detention - Whether trial judge erred in application of s10(1) and s10A of the Sentencing Act 1991 - Whether parity amounted to 'a special reason' for not fixing mandatory four year non-parole period - Whether sentence manifestly inadequate - Crown appeal allowed - Respondent sentenced to five years' imprisonment with non-parole period of four years - Crimes Act 1958 s15A - Sentencing Act 1991 s10, s10A.

***Director of Public Prosecutions [DPP] v Hodgson, Graham Miles***

Weinberg, Whelan and Priest JJA

[\[2016\] VSCA 254](#)

20/10/2016



LEGAL PRACTITIONERS - Professional misconduct at common law - Primary judge dismissed appeal against VCAT orders suspending practising certificate and imposing penalty conditions - False statutory declaration by legal practitioner submitted to Legal Services Board - Finding that applicant knew facts were false - Whether finding constituted finding of dishonesty - Whether finding of dishonesty was open and procedurally fair - Jurisdiction to make such a determination notwithstanding the facts found constituted the commission of a criminal offence - Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd [2015] HCA 7 considered - Whether judge's reasons adequate - Adequacy of reasons depends upon issues and nature of proceedings - Whether judge erred in making findings - Whether conduct sufficiently connected to legal practice - Procedural fairness - Whether breach of procedural fairness to hear issues of liability and penalty together - Whether penalty imposed excessive.

***Pham, Quan v Legal Services Commissioner***

Redlich, Kaye JJA and Cavanough AJA

[\[2016\] VSCA 256](#)

25/10/2016

NEGLIGENCE - Medical practitioner - Duty of care - Plaintiff presenting with lump in parotid gland - Whether breach of duty by practitioner in diagnosis of lump and recommendation to undergo surgery - Assessment by practitioner of risks of adopting conservative 'wait and see' approach.

COURTS - Self-represented litigant - Duty of judge to ensure a fair hearing of trial - Whether judge gave adequate advice and assistance to litigant.

***Redzepovic, Damir v Western Health***

Ferguson, Kaye JJA, and Beale AJA

[\[2016\] VSCA 251](#)

19/10/2016

PRACTICE AND PROCEDURE - Appeal - Interlocutory appeal - Case management - Stay Commercial dispute - Claim for repayment of debt - Amount outstanding exceeded \$90 million - Counterclaim alleged sale of secured assets at undervalue - Judge stayed counterclaim - Overarching purpose - Objects of case management - Appeal from exercise of discretion - No error of principle - Conclusions well open - Leave to appeal refused - Civil Procedure Act 2010 ss 7-9, s49.

***Littore, Vincent, Littore David & Ors (according to the schedule) v Rabobank Australia Ltd (ACN 001 621 129) & Ors (according to the schedule)***

Maxwell P and Weinberg JA

[\[2016\] VSCA 258](#)

26/10/2016

## Commercial Court

CONTRACT - Mediated agreements and subsequent agreements to settle family disputes about father's will - Claim by younger brother against sister that he was misled about the effects of the agreements on his entitlements under the will - Claims in negligence, promissory estoppel, unilateral mistake and breach of fiduciary duty - Claims dismissed.

CONTRACT - Mediated agreement and subsequent agreement to settle family disputes about father's will - Meaning of obligation of the plaintiff to pay 'all proper estate liabilities' - Ambiguity - Evidence of objective background facts.

EVIDENCE - Whether statement made at mediation was admissible - Evidence Act 2008 s131 (1), (2)(f)(g)(i)

***Humphreys, Peter v Humphreys, Linda***

Ginnane J

[\[2016\] VSC 637](#)

25/10/2016

COSTS - Application by defendant to set aside service of a writ where writ served without notice required by the Service and Execution of Process Act 1992 (Cth) - Application by the plaintiff to extend the validity of the writ in the event that service set aside - Service of the writ set aside and validity of the writ for service extended - Appropriate order for costs having regard to the defendant's deliberate strategy to rely upon the technical deficiency in service and the plaintiff's failure to include the SEPA notice with the service - No order as to costs of either application.

***Timbercorp Finance P/L (In Liquidation) (ACN 054 581 190) v Allan, Grant Robert***

Derham AsJ

[\[2016\] VSC 633](#)

26/10/2016

COSTS - Security for costs - Whether threshold test established by Defendants - Exercise of the discretion - Form of security - Quantum of security - Plaintiff proposed security in the form of a deed of indemnity from a supporting Australian company - Principles to be applied - Proposed deed of indemnity inappropriate to provide adequate security in the circumstances.

***Australian Institute (Vic & Tas) P/L (ACN 092 728 937) v Australian Institute of Fitness (NSW) P/L (ACN 082 557 346) & Ors (according to the schedule); Australian Institute of Fitness (NSW) P/L (ACN 082 557 346) & Ors (according to the schedule) (Plaintiffs by Counterclaim) v Australian Institute (Vic & Tas) P/L (ACN 092 728 937) (Defendant by Counterclaim) [No 2]***

Vickery J

[\[2016\] VSC 625](#)

19/10/2016

JUDGMENTS - Application to set aside a fraudulently obtained judgment - The elements of the cause of action - Whether there is a residual discretion.

PRACTICE - Application for Summary Dismissal - Principles to be applied - Application based on merits should be brought on the ground of no real prospect of success under s62 Civil Procedure Act 2010.

***Bodycorp Repairers P/L (ACN 068 589 408) v Maisano, Anunziato Enzo (also known as Michael Maisano and Michael Mason) & Ors (No 11)***

Riordan J

[\[2016\] VSC 645](#)

28/10/2016

PRACTICE & PROCEDURE - Pleadings - Application to amend statement of claim - Whether pleadings establish causes of action - Whether pleading of dishonesty sufficient to establish a cause of action - Particularity required when alleging dishonesty or fraud.

***Finance & Guarantee Company P/L (ACN 000 032 548) & Ors v Auswild, James & Ors***  
Sifris J

[\[2016\] VSC 559](#)

11/10/2016

PRACTICE AND PROCEDURE - Stay of proceedings - Exclusive jurisdiction clause - Where parties seek to enforce exclusive jurisdiction clause in agreement to which they are a non-signatory - Where signatory to agreement seeks to enforce exclusive jurisdiction clause even though not a party - Construction and interpretation of exclusive jurisdiction clause - No grant of stay - s30 Supreme Court Act 1986 - *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq) & Ors* [2010] NSWCA 196 distinguished - *Incitec Ltd v Alkimos Shipping Corporation & Anor* (2004) 138 FCR 496 considered - Application of foreign law - Content of foreign law not sufficiently proven - Victorian law applied - *Neilson v Overseas Projects Corporation of Victoria Ltd & Anor* (2005) 223 CLR 331 applied.

***Babcock & Brown DIF III Global Co-Investment Fund, LP and DIF III GP Ltd v Babcock & Brown International P/L (ACN 108 617 483) & Ors (According to the schedule annexed)***  
Hargrave J

[\[2016\] VSC 623](#)

21/10/2016

### Common Law Division

ADMINISTRATIVE LAW - Medical Panel - Whether reasons of panel inadequate - Whether panel failed to have regard to relevant considerations - Panel's reasons disclosed clear path of reasoning - No failure by panel to have regard to relevant considerations - Workplace Injury Rehabilitation and Compensation Act 2013 s284.

***Alcoa of Australia Ltd v Edwards, Dr William & Ors (in accordance with the attached Schedule)***

McDonald J

[\[2016\] VSC 630](#)

25/10/2016

APPEALS - Appeal from Associate Judge on questions of law - Whether Associate Judge erred in consideration of s75 of the Victorian Civil and Administrative Tribunal Act 1998 - Victorian Civil and Administrative Tribunal Act 1998, s148 - No error identified - Appeal dismissed.

APPEALS - Appeal from the Magistrates' Court on questions of law - Whether Magistrate erred in considering prior decision of Victorian Civil and Administrative Tribunal - Whether proceeding in the Magistrates' Court dismissed in error - No error established - Magistrates' Court Act 1989, s109 - Appeal dismissed.

***Weber, Mark Paul v Deakin University & Ors; Weber, Mark Paul v Deakin University & Ors***

McMillan J

[\[2016\] VSC 640](#)

26/10/2016

CONTRACT OF EMPLOYMENT - Enforceability of covenant in restraint of trade - Legitimate interest of plaintiff in protecting its confidential information - Restraint unreasonable - Single restraint preventing defendant from working for 50 brands/entities - Restraint not capable of being severed - Applications for injunctions and declarations dismissed - Supreme Court Act 1986 s36 - Restraints of Trade Act 1976 (NSW) s4.

***Just Group Ltd (ACN 096 911 410) v Peck, Nicole***

McDonald J

[\[2016\] VSC 614](#)

17/10/2016

COSTS - Actions in misfeasance in public office alleged against the first and second defendant - Actions of malicious prosecution alleged against all three defendants - Each and every cause of action alleged against each of the defendants dismissed - Defendants' application for indemnity costs - Whether or not indemnity costs should be awarded - Date from which indemnity costs should be awarded - Ugly Tribe Company Pty Ltd v Marios Sikola & Ors [2001] VSC 189 - Macedon Ranges Shire Council v Thompson & Ors [2009] VSCA 209 - Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd & Ors 81 ALR 397 - Calderbank offer - Hazeldene's Chicken Farm v Victorian Workcover Authority (No 2) (2005) 13 VR 435.

***Mullett, Paul v Nixon, Christine; Walshe, Keiran; Taylor, Wayne***

T Forrest J

[\[2016\] VSC 641](#)

26/10/2016

EVIDENCE - Discovery - Public interest immunity claimed over the production of documents characterised as Cabinet documents - Evidence Act 2008 (Vic) s130.

***Kamasae, Majid Karami v Commonwealth of Australia & Ors (in accordance with the schedule to the Writ)***

Macaulay J

[\[2016\] VSC 595](#)

07/10/2016

EVIDENCE - Discovery - Public interest immunity claimed over production of documents characterised as foreign relations documents - Evidence Act 2008 (Vic) s130, s131A.

EVIDENCE - Discovery - Immunity from disclosure of documents under International Organisations (Privileges & Immunities) (International Committee of the Red Cross) Regulation 2013 (Cth) - Construction of s6(13).

***Kamasae, Majid Karami v Commonwealth of Australia & Ors (in accordance with the schedule to the Writ)***

Macaulay J

[\[2016\] VSC 605](#)

07/10/2016

INJUNCTION - Representative Order - whether defendants had the same interest as individuals engaging in picketing activities - whether court should refrain from exercising discretion to make order on discretionary grounds - Representative Order made - Supreme Court (General Civil Procedure) Rules 2015 r18.03, r18.04.

***Viva Energy Refining P/L (ACN 004 303 842) v The Australian Workers' Union and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union***

McDonald J

[\[2016\] VSC 619](#)

06/10/2016

JUDICIAL REVIEW - Medical Panel - Adequacy of reasons - Whether path of reasoning disclosed - Reasons inadequate - Error of law on the face of the record - Jurisdictional error - Workplace Injury Rehabilitation and Compensation Act 2013 (Vic) s3, s313(2), Accident Compensation Act 1985 (Vic) s5; Supreme Court (General Civil Procedure) Rules 2015 (Vic) O56.

***Stankoski, Koste v Flickers Australia P/L (ACN 005 660 837) and Ors (according to the attached schedule)***

Ginnane J

[\[2016\] VSC 648](#)

28/10/2016

JURY - Discharge of jury - Juror had previous work experience as a plumber and currently manages tradespersons - Appearance of partiality in the context of the cause - Jury discharged.

***Page, Brian v Rheem Australia P/L (ACN 098 823 511)***

***BPG Access Pty Ltd (ACN 140 147 708); CSR Building Products Ltd (ACN 008 631 356)***

T Forrest J

[\[2016\] VSC 600](#)

04/10/2016

LEGAL PRACTITIONERS - Client determines solicitor's retainer - Client seeks return of documents - Solicitor's lien - Client's offer to provide security for solicitor's costs - Client seeking assessment of costs - Solicitor entitled to rely on lien - Supreme Court Act 1986 s76; Legal Profession Uniform Law Application Act 2014 s198(7); Supreme Court (General Civil Procedure) Rules 2015 O 37.05

***Jasmin Solar P/L (ACN 158 644 225) v Fitzpatrick Legal P/L (ABN 61 124 925 524)***

Ginnane J

[\[2016\] VSC 631](#)

21/10/2016

OFFENCES - Drink-driving - Breath analysis (Vic) - Whether a purported requirement to undertake preliminary breath test rendered ineffective by an earlier caution - Refusal to undertake preliminary breath test - Road Safety Act 1986 (Vic) s49(1)(e), s53(1).

ADMINISTRATIVE LAW - Judicial review - Application in nature of certiorari - Where plaintiff convicted before a magistrate - Where plaintiff appealed unsuccessfully to the County Court - Where judicial review sought of the decision made by the County Court - Whether the conclusion of the primary judge was a question of fact or law? - Whether the conclusions of the primary judge were open on the evidence? - Application dismissed.

***Ball, Ronald v Chargelegue, Florent and The County Court of Victoria***

Riordan J

[\[2016\] VSC 294](#)

02/06/2016

PRACTICE AND PROCEDURE - Discovery - Reasonable search obligation - Whether backup within power - Text messages deleted from smart phone devices since lost or replaced - Backup of text messages stored in plaintiff's Apple iCloud account - Additional specialist software required to access Apple iCloud account for text message backup - No criticism of plaintiff's search effort - Plaintiff's discovery obligation expanded to include search using specialist software at defendant's expense for text message backup - No obligation to search for deleted messages on current device - Civil Procedure Act 2010 (Vic), s55; Supreme Court (General Civil Procedure) Rules 2015 (Vic), r29.08, r29.11.

PRACTICE AND PROCEDURE - Discovery - Legal professional privilege - Whether privilege lost by waiver - Where emails to a party's solicitor copied to third parties - Whether common interest established - Application of inconsistency test - Third party did not share sufficient common interest with plaintiff - Evidence Act 2008 (Vic), s122(5).

***Hanks, Paul v Johnston, Stuart Neile***

John Dixon J

[\[2016\] VSC 629](#)

21/10/2016

PRACTICE AND PROCEDURE - Discovery of documents - Privilege - Without prejudice privilege - Evidence Act 2008 (Vic) s131 - Fair Work Act 2009 (Cth) s240 - Whether Fair Work Commission is an 'Australian court' for the purposes of the Evidence Act 2008 (Vic) - Whether a dispute referred to the Fair Work Commission is one in respect of which relief can be given in an Australian proceeding - Whether Fair Work Commission processes are 'proceedings' - Whether internal documents are subject to without prejudice privilege - Whether emails are subject to without prejudice privilege

***Volunteer Fire Brigades Victoria Inc v Country Fire Authority [CFA]***

Ierodiaconou AsJ

[\[2016\] VSC 621](#)

18/10/2016

PRACTICE AND PROCEDURE - Harman obligations/undertaking - Documents obtained on subpoena served on VCAT - Whether parties to a defamation proceeding should be permitted to use documents generated for the investigation and prosecution of a complaint against a health professional in proceedings in VCAT under the Health Profession Regulation Act 2005 - Documents formed the basis for a proposed amendment to allege justification in defence of certain imputations pleaded by the health professional as plaintiff in a defamation proceeding - Whether special circumstances shown - Whether discretionary considerations favour release of documents - Victorian Civil and Administrative Tribunal Act 1998, s34, s36; Health Profession Regulation Act 2005, s77; Health Practitioner Regulation National Law (Victoria) Act 2009, s3, s31, s35, s214, s216, s231.

***Teo, Ah Choo v Pacific Media Group P/L; Chinese Medicine Board of Australia v Teo, Ah Choo***

John Dixon J

[\[2016\] VSC 626](#)

21/10/2016

WILLS AND ESTATES - Small estates provisions - Where deemed grant of representation made in 1995 - Later discovery that estate exceeded the maximum monetary value for small estate provisions - Where grant of probate required to distribute real property of estate - Whether revocation of deemed grant required before application for grant of representation - Administration and Probate Act 1958, s71, s79.

***In the matter of an application by State Trustees Ltd (as the executor of the estate of Francis John McQuillan, deceased) pursuant to r54.02 of the Supreme Court (General Civil Procedure) Rules 2015 for directions in relation to the administration of the estate of Francis John McQuillan, deceased***

McMillan J

[\[2016\] VSC 647](#)

28/10/2016

### Criminal Law

CRIMINAL LAW - Sentence following trial - Murder - Accused, aged 18, without warning, struck deceased to head with baseball bat at least twice, causing catastrophic brain injury and, ultimately, death - Accused floridly psychotic at time of attack - Defence of mental impairment rejected by jury - Verdict consistent with psychosis being drug-induced instead of as a result of schizophrenia - History of drug use and some mental instability but not of violent psychosis precipitated by drug use - Accused unaware that drug use would make him violently psychotic - Accused now diagnosed as suffering schizophrenia - Illness now largely controlled by antipsychotic medication - Youth - Limited prior criminal history - Some regret - Reasonable prospects of rehabilitation - Reduced weight to be accorded to moral culpability, deterrence, denunciation and just punishment because of psychosis - Protection of community and rehabilitation - Sentence of 15 years' imprisonment with non-parole period of 11 years - R v Martin (2007) 20 VR 14; R v Sebalj [2006] VSCA 106.

***The Queen v Gibson, James William Colin***

Croucher J

[\[2016\] VSC 634](#)

24/10/2016



# 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.

ADVANCE OF MONIES - Whether as loans or gifts - Onus of proof upon the plaintiff to establish the loans - *Heydon v Perpetual Executors Trustees and Agency Co (WA) Ltd* [1930] HCA 26; (1930) 45 CLR 111; *Joaquin v Hall* [1976] VicRp 84; [1976] VR 788 applied

***Magri v Jovanovic***

Judge Anderson

[\[2016\] VCC 1480](#)

16/10/2016

CONTRACT - Joint venture to redevelop residential property with two units - Terms for repayment of capital instalments - Determination of valid expenses in order to calculate any profit - Whether a constructive trust arose in relation to profits of the venture used by defendants to make mortgage payments over their own home - Whether a transfer of one defendant's interest as co-owner to his wife for "natural love and affection" should be set aside as an alienation made with intent to defraud creditors - Section 172(1) Property Law Act 1958 (Vic).

***Kusumanadi & Anor v Artemas & Anor***

Judge Anderson

[\[2016\] VCC 1234](#)

26/10/2016

GUARANTEE - Contribution by co-guarantors - Whether guarantor can raise the enforceability of the guarantee to defeat the claim for contribution - Whether the principal creditor needs to be a party to the proceeding - Guarantee alleged to be unenforceable on the grounds of unconscionability, married woman's equity or breach of the Code of Banking Practice.

***Zenith 500 Pty Ltd v Stavrakis and Alexopoulos***

[\[2016\] VCC 1146](#)

26/10/2016

SUBPOENAS - Issue of subpoena to former employer seeking employment records - whether documents "relevant" to the issues in the trial - whether subpoena issued for legitimate forensic purpose

***Bart v AIA Australia Limited (Ruling)***

[\[2016\] VCC 1364](#)

19/09/2016



# Articles

## Contract Law

---

Insurance - Defect exclusion - All risks policy - Contract works policy - LEG - London Insurance Group - Acciona Infrastructure Canada Inc v Allianz Global Risks US Insurance Company - UK

**Mead, P.** "Contract works insurance - judicial interpretation of LEG 2." (2016) 28(1) Insurance L J 38-47.

Negligence - Claims - Pure economic loss - Duty of care - Latent defects - Vulnerability - High Court - Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 - Australia

**Robertson, M.** "Pure economic loss claims: Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 and its lessons for owners, builders, developers, vendors, purchasers, professional advisors and their respective insurers." (2016) 28(1) Insurance L J 71-86.

## Corporations Law

---

Directors' duties - Proper purposes - Shares - Restrictions - Eclairs Group Ltd v JXK UK Oil & Gas plc - Australia - UK

**Boadle, R.** "UK Supreme Court reconsiders directors' duties." (2016) 90(7) ALJ 462-464.

Hedge funds - Derivative instruments - Financial regulation - Risk management - Regulation - US - UK - Australia

**Sappideen, R.** "The regulation of hedge funds." [2016] (7) JBL 537-564.

Incorporation - Corporate mobility - Jurisdiction - Emigration - Immigration - Globalisation - UK

**Ferran, E.** "Corporate mobility and company law." (2016) 79(5) Modern L R 813-839.

## Courts

---

International commercial court - Chief Justice Marilyn Warren - Australia

**An Australian international commercial court.** (2016) 90(7) ALJ 453

## Criminal Law & Procedure

---

Privacy - Image - Public riot - Criminal investigation - In re JR38 - European Convention on Human Rights (ECHR), Art 8(1) - UK

**Purshouse, J.** "The reasonable expectation of privacy and the criminal suspect." (2016) 79(5) Modern L R 871-884.

## Evidence

---

Illegally obtained - Improperly obtained - Admissibility - Exclusion - Discretionary approach - Public policy concerns - Deterrence rationale - Disciplinary rationale - Evidence Act 1995 (Cth), s138 - Australia

**Bathurst, T. and S. Schwartz.** "Illegally or improperly obtained evidence: in defence of Australia's discretionary approach." (2016) 13(1) Judicial Review 79-98.

## Human Rights

---

Citizenship - Nationality - Revocation - Deprivation - Statelessness - Terrorism - Statement of Compatibility with Human Rights - Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth) - Australian Citizenship Act 2007 (Cth) - UK - Australia

**Tully, S.** "Citizen deleted." Australian Year Book of International Law [2016] (33) 131-162.

Rights - Freedoms - Common law - Encroachment - Property rights - Freedom of speech - Freedoms Report - Freedoms Enquiry - Commonwealth Constitution - Law reform proposal - Australian Law Reform Commission (ALRC) - Australia

**Croucher, R.** "Getting to grips with encroachments on freedoms in Commonwealth laws: the ALRC Freedoms inquiry." (2016) 90(7) 478-497.

## Insurance Law

---

Commercial contracts - Exclusion clauses - Contra proferentem - High Court - The Law of Liability Insurance - Canada - Australia  
**Thornton, J.** "Interpreting exclusion clauses in insurance policies: contra proferentem and the High Court." (2016) 28(1) Insurance L J 1-9.

Law Reform - Amendments - Insurance Contracts Act 1984 (Cth) - Consumer Insurance (Disclosure and Representations) Act 2012 (UK) - Insurance Act 2015 (UK) - UK - Australia  
**Tarr, J.** "Transforming insurance law: a comparative review of recent insurance law reform in the United Kingdom and Australia." (2016) 28(1) Insurance L J 10-22.

## International Law

---

Malaysian Airlines Flight MH17 - Investigation - Personnel deployment - Criminal jurisdiction - Consent - Host state - Ukraine - Netherlands - Operation Bring Them Home - Australia  
**Ierino, S. et.al.** "The international law framework underpinning the Australian Government's response to the downing of MH17." Australian Year Book of International Law [2016] (33) 45-54.

## Legal Profession

---

Barristers - Solicitors - Judiciary - Women - Newspapers - Reporting - Australia  
**The Chief Justices and "The Australian."** (2016) 90(7) 452-453.

## Legal Systems

---

Judges - Politics - House of Lords - Law Lords - Parliamentary debate - Policy - UK  
**O'Brien, P.** "Judges and politics: the Parliamentary contributions of the Law Lords 1876-2009." (2016) 79(5) Modern L R 786-812.

## Practice & Procedure

---

Prosecutors - Prosecutorial discretion - Judicial discretion - Nature of charges - Penalties - Department of Public Prosecutions (DPP) - Hong Kong - Australia  
**Justice M Weinberg.** "Judicial oversight of prosecutorial discretion: a line in the sand?" (2016) 13(1) Judicial Review 99-113.

## Torts

---

Duty of care - Vicarious liability - Non-delegable duty - Local authority - Foster parents - Sexual abuse - Child abuse - MA v Nottinghamshire County Council - Woodland v Swimming Teachers Association - UK  
**Tofaris, S.** "Vicarious liability and non-delegable duty for child abuse in foster care: a step too far?" (2016) 79(5) Modern L R 884-900.

## Trade Practices

---

Financial advice - Duty of care - Advice - Financial institutions - Financial products - Negligence - UK - New Zealand - Australia  
**Stace, V.** "Mis-selling financial products: when can the customer claim in negligence?" [2016] (6) JBL 517-535.

## Trusts

---

Knowing receipt - Remedies - Liability - Tracing claims - Quantum - UK  
**Whayman, D.** "Remodelling knowing receipt as a gains-based wrong." [2016] (7) JBL 565-588.

## INFORMATION SESSIONS

The Law Library of Victoria hosts regular information sessions on how to use specific legal research databases.

If you have suggestions for future information sessions, please send them to [llv@courts.vic.gov.au](mailto:llv@courts.vic.gov.au)

Visit our website for upcoming events [lawlibrary.vic.gov.au](http://lawlibrary.vic.gov.au)



## LIBRARY FACTS

- The first Supreme Court Library catalogue was published in 1861. It contained 4471 books.
- Some of the early books purchased included topics such as histories of wine, magic and “elegant recreations” for young ladies.
- The Argus newspaper from 100 years ago is on display in the Supreme Court Library. Each day we turn the page to show what was happening 100 years ago to the date.

## Law Library of Victoria

210 William Street  
Melbourne VIC 3000

## About the Law Library of Victoria

Since the 1850s, the legal profession in Victoria has funded a library to enhance the administration of justice.

The Law Library of Victoria builds upon this proud history and continues this role today. It provides access to authoritative legal information to ensure that the law is applied accurately, effectively and fairly.

The Library is an integral resource for the Victorian Courts and VCAT, as well as for the legal profession and the community.

The Library provides services that support the administration of justice in Victoria.

- We collate and curate the best range of legal information resources for our constituents.
- We assist with reference and research support, and improve skills in using legal resources across the community.
- We improve access to justice for all Victorians by providing access to legal resources for our members.

The Library Bulletin is a free fortnightly information service provided by the Law Library of Victoria for judicial officers, members of the legal profession and anyone with an interest in the law. It is compiled by Library staff and includes the following content:

- Library news and events
- New books and articles received by the Library
- Victorian legislative updates
- High Court, Supreme Court of Victoria Court of Appeal and Trial Division judgments.

The Library Bulletin is prepared within a quick turnaround time. All attempts are made to ensure accuracy, however readers are advised to verify information contained in the Library Bulletin against information from original sources. If you do see an error or omission, please contact us at [llv@courts.vic.gov.au](mailto:llv@courts.vic.gov.au).

The Library Bulletin is provided on the basis that readers will assume full responsibility for making their own assessment of the information provided. This service does not provide legal advice. No liability will be accepted as a result of any reliance on this service.