



## THE LAW LIBRARY OF VICTORIA

Library  
Bulletin  
9 December  
2016

## Library News

### Tour for legal professionals

13 December 2016, 1.15PM - 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.

More information and RSVP: <https://lawlibrary.vic.gov.au/tours>.

### Save the date - Ronald Ryan anniversary

3 February 2017, 4.30PM, for a 4.45PM commencement

The Supreme Court of Victoria will mark the 50th anniversary of Ronald Ryan's death with a re-enactment of parts of the trial in Court 4 - where Ryan's trial took place - followed by brief remarks in the Library with special guests Brian Bourke, Barry Jones AC and Mike Richards introduced by the Honourable Chief Justice Marilyn Warren.

Please RSVP via [libraryevents@supcourt.vic.gov.au](mailto:libraryevents@supcourt.vic.gov.au).

### Events for 2017

The Law Library of Victoria is creating a calendar of events for 2017, and we are keen to hear from you! Email us with suggestions for events or speakers for 2017 at [libraryevents@supcourt.vic.gov.au](mailto: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](mailto: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.

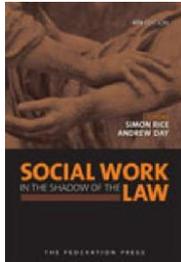
The book costs \$60 and there is a \$10 discount for members of the Royal Historical Society of Victoria (RHSV).

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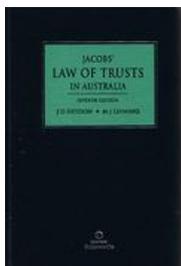
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## New Books

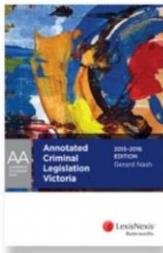
Following is a selection of new books in the Library collection. For details of more new books, see the Library Catalogue: [https://courts.sdp.sirsidynix.net.au/client/en\\_AU/llv/](https://courts.sdp.sirsidynix.net.au/client/en_AU/llv/).



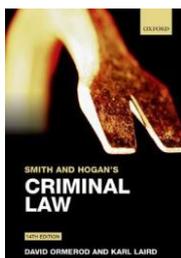
Day, Andrew (ed.), *Social work in the shadow of the law*, Annandale, N.S.W., Federation Press, 2014.  
Call number: 344.032 INT.4 (Supreme Court Library)



Heydon, J. D. (John Dyson), *Jacobs' law of trusts in Australia*, Chatswood, NSW, LexisNexis Butterworths, 2015.  
Call number: 346.059 JAC.7 (Supreme, County, Magistrates Court, VCAT libraries)



Nash, Gerard, *Bourke's criminal law Victoria*, Chatswood, NSW, LexisNexis Butterworths, 2016.  
Call number: 345.945 NAS.2015-2016 (Supreme and County Court libraries)



Ormerod, D. C. (David C.), *Smith and Hogan's Criminal Law*, Oxford, United Kingdom, Oxford University Press, 2015.  
Call number: 345 SMI.14 (Supreme Court Library)



Stickley, Amanda, *Australian torts law*, 4<sup>th</sup> ed., Chatswood, N.S.W., LexisNexis Butterworths, 2016.  
Call number: 346.03 STI.4 (County Court Library)

# Legislation

## Victorian Bills

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

- [Building Amendment \(Enforcement and Other Measures\) Bill 2016](#)
- [Children Legislation Amendment \(Reportable Conduct\) Bill 2016](#)
- [Children, Youth and Families Amendment \(Youth Offenders\) Bill 2016](#)
- [Corrections Amendment \(Parole\) Bill 2016](#)
- [Crimes \(Mental Impairment and Unfitness to be Tried\) Amendment Bill 2016](#)
- [Justice Legislation Amendment \(Parole Reform and Other Matters\) Bill 2016](#)
- [Summary Offences Amendment \(Begging or Gathering Alms\) Bill 2016](#)
- [Victorian Planning Authority Bill 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.

## Victorian Assents

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

- [Medical Treatment Planning and Decisions Act 2016 No. 69/2016](#)
- [Road Legislation Further Amendment Act 2016 No. 70/2016](#)
- [Transport \(Compliance and Miscellaneous\) Amendment \(Abolition of the Penalty Fares Scheme\) Act 2016 No. 71/2016](#)
- [Working with Children Amendment Act 2016 No. 72/2016](#)

## Proclamations

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

- *Crimes Amendment (Carjacking and Home Invasion) Act 2016* No. 50/2016
  - Sections 1-9 of this Act came into operation on 7 December 2016 (VGG S375 6.12.2016)
- *Integrity and Accountability Legislation Amendment (A Stronger System) Act 2016* No. 30/2016
  - Sections 3(c), 19, 20, 51(1), 63(1), 78(1), 79, 80(1), 86, 87(1), 89(1) of this Act came into operation on 1 December 2016 (VGG S194 21.6.2016)
- *Police and Justice Legislation Amendment (Miscellaneous) Act 2016* No. 54/2016
  - Sections 3-22, 24-26 of this Act came into operation on 1 December 2016 (VGG S368 29.11.2016)
- *Primary Industries Legislation Amendment Act 2016* No. 48/2016
  - Part 4, (sections 8-12), sections 20, 21, 23, 25-27 of this Act came into operation on 1 December 2016 (VGG S368 29.11.2016)

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

- *Crown Land Legislation Amendment (Canadian Regional Park and Other Matters) Act 2016* No. 12/2016
  - Part 3 (sections 14-37) of this Act came in by forced commencement on 1 December 2016 s.2(2)
- *Road Legislation Further Amendment Act 2016* No. 70/2016
  - Part 1 (sections 1, 2), Part 6 (section 53) of this Act came in by forced commencement on 30 November 2016 s. 2(1)

## High Court Cases

CONTRACT - Construction of terms - Performance bonds - Where unconditional undertakings by financial institution to pay on demand ("Undertakings") required as security under construction contract - Where Undertakings and underlying finance applications erroneously referred to non-existent entity as payee because incorrect information provided by applicant for security - Principle of autonomy - Principle of strict compliance - Whether possible to construe references to non-existent entity in Undertakings and applications as references to counterparty to construction contract.

CONTRACT - Rectification - Actual or true common intention of parties - Where references to non-existent entity in Undertakings and applications result of common mistake - Whether rectification available to correct references to non-existent entity.

WORDS AND PHRASES - "actual or true common intention", "bank guarantee", "common mistake", "letter of credit", "performance bond", "principle of autonomy", "principle of strict compliance", "rectification", "subjective intention of the parties".

***Simic, Daniel Matthew & Ors v New South Wales Land and Housing Corporation & Ors***

[\[2016\] HCA 47](#)

07/12/2016

CRIMINAL LAW - Sentencing - Intentionally causing serious injury - Where respondent and victim in domestic relationship - Where victim 12 weeks pregnant with respondent's child - Where respondent caused serious injury to victim by dousing her with petrol and setting her alight - Where instant offence at upper end of range of seriousness for offence of intentionally causing serious injury - Whether Court of Appeal erred in use of expression "worst category" of offence - Whether Court of Appeal erred in consideration of current sentencing practices - Whether sentence imposed by sentencing judge manifestly excessive.

WORDS AND PHRASES - "comparable case", "current sentencing practices", "maximum prescribed penalty", "spectrum of seriousness", "upper end of the range of seriousness", "worst category", "yardstick". Crimes Act 1958 (Vic), s16. Sentencing Act 1991 (Vic), s1(a), s5(2)(b).

***The Queen v Kilic, Yavaz***

[\[2016\] HCA 48](#)

07/12/2016

# Victorian Supreme Court Cases

## Court of Appeal

ADMINISTRATIVE LAW - Ombudsman - Jurisdiction - Jurisdiction and functions of Ombudsman - Investigation - Investigation of matter referred by Legislative Council - Whether matter referred within Ombudsman's jurisdiction - Ombudsman Act 1973 s16.

STATUTES - Statutory interpretation - Construction of s16 of the Ombudsman Act 1973 - Meaning - Meaning of 'any matter' in s16 of the Ombudsman Act 1973 - Whether 'any matter' in s16 means 'any matter otherwise within the functions and jurisdiction of the Ombudsman' - Statutory text - Context and purpose of enactment - Statutory scheme - Ombudsman Act 1973 s13, s13AAA, s13AA, s14, s15, s15A, s15B, s16A, s16B, s16C, s16D, s17, s18, s19, s19A, s19B, s19C, s21 and s25AB - Freedom of Information Act 1982 - Independent Broad-based Anti-corruption Commission Act 2011 - Protected Disclosure Act 2012.

WORDS AND PHRASES - 'Any matter'.

***The Attorney-General for the State of Victoria v Glass, Deborah (in her capacity as Ombudsman for the State of Victoria) and The President of the Legislative Council***

Warren CJ, Beach and Ferguson JJA

[\[2016\] VSCA 306](#)

09/12/2016

CLUBS AND ASSOCIATIONS - Democratic Labor Party ('DLP') - Appeal from grant of summary judgment - Whether Federal and State Conferences of DLP validly convened - Whether election of office-bearers and resolutions passed at conferences were void - Whether judge erred in having regard to findings in matters in other jurisdictions - Whether judge adopted a prejudicial approach or failed to give adequate attention to the evidence - Absence of proper contradictor - Leave to appeal refused.

***Mulholland, John v Funnell, Paul***

Warren CJ, Tate and Whelan JJA

[\[2016\] VSCA 290](#)

28/11/2016

CONTRACT - Employment - Dispute over applicant's entitlements upon leaving employ of respondent - Judge found parties did not reach oral agreement - Appellate review of primary judge's findings of fact - Whether payment made by respondent to applicant for failed or no consideration - Whether payment made due to mistake of fact or law - Fox v Percy (2003) 214 CLR 118; Robinson Helicopter Co Inc v McDermott (2016) 90 ALJR 679, applied - Appeal allowed.

***Stevens, Anthony v Spotless Management Services P/L***

Kyrou and McLeish JJA, and Elliott AJA

[\[2016\] VSCA 299](#)

30/11/2016

CRIMINAL LAW - Appeal - Conviction - Applicants convicted by jury of trafficking by manufacture not less than a large commercial quantity methylamphetamine and possession of equipment and precursor chemicals for trafficking - Whether verdicts unsafe and unsatisfactory - Whether open to jury to find applicants parties to joint criminal enterprise to manufacture not less than a large commercial quantity methylamphetamine or aided and abetted principal offender - Whether open to jury to find applicants possessed equipment and precursor chemicals for trafficking - Whether open to jury to find applicants had intention to traffick in not less than a large commercial quantity methylamphetamine - Verdicts not unsafe and unsatisfactory - Leave to appeal refused.

CRIMINAL LAW - Appeal - Sentence - Applicant Cavanagh convicted by jury of trafficking by manufacture not less than a large commercial quantity methylamphetamine and possession of equipment and precursor chemicals for trafficking - Sentenced to a total effective sentence of 7 years' imprisonment with non-parole period of 3 years - New evidence that applicant suffering undiagnosed bowel cancer at the date of sentence - Applicant terminally ill - Sentencing discretion reopened - Appeal allowed - Total effective sentence confirmed - Non-parole period of 12 months' imprisonment substituted.

***Cavanagh, William v The Queen; Rekhviashvili, Reyn v The Queen***

Osborn, Whelan, and Priest JJA

[\[2016\] VSCA 305](#)

08/12/2016

CRIMINAL LAW - Appeal - Conviction - Rape, incest, indecent act with child under 16 - Complainant was younger sister of accused - Whether verdicts unreasonable - Whether jury bound to have doubt about complainant's credibility - Complainant contacted witnesses before trial - Dispute between complainant and accused over mother's will - Whether complainant financially motivated - Inconsistencies in complaint evidence - Whether complainant's behaviour inconsistent with allegations - Appeal allowed - Convictions quashed - Verdicts of acquittal entered - Criminal Procedure Act 2009 s276(1)(a).

***Mejia, Albert (a pseudonym) v The Queen***

Maxwell P, Kyrou and Kaye JJA

[\[2016\] VSCA 296](#)

28/11/2016

CRIMINAL LAW - Appeal - Conviction - Sexual penetration of a child under the age of 16 (5 counts) - Complainants were step-granddaughters of applicant - Separate trials in respect of each complainant - Admissibility of text messages between complainants containing allegations of sexual assault - Evidence revealed mutual support and context in which complainants decided to complain to father and to police - Prejudicial effect minimised by directions to jury not to use evidence for tendency or coincidence purpose and editing of text messages - Evidence Act 2008 s136, s137 - Applications for leave to appeal granted, appeals dismissed.

***Daniels, Roger (a pseudonym) v The Queen***

Beach, Kaye and McLeish JJA

[\[2016\] VSCA 291](#)

28/11/2016

CRIMINAL LAW - Appeal - Sentence - Dishonest use of position as director with intention of gaining advantage (3 counts) - Guilty plea - Sentenced to total effective sentence of 4 years and 6 months, release ordered under Crimes Act 1914 (Cth) s20(1)(b) after serving 3 years, by recognizance of \$2000, to be of good behaviour for 18 months - Manifest excess - Sentence manifestly excessive in light of guilty plea, applicant's age, good prospects of rehabilitation and delay in sentencing - R v Donald [2013] NSWCCA 238; DPP (Cth) v Northcote (2014) 99 ACSR 1, considered - Appeal allowed - Resentenced to total effective sentence of 3 years and 6 months with non-parole period of 2 years and 6 months.

CRIMINAL LAW - Appeal - Sentence - Whether judge provided discount for utilitarian benefit of guilty plea - Discount provided in circumstances - DPP (Cth) v Thomas [2016] VSCA 237, applied.

***Nicholls, Anthony John v The Queen***

Redlich and McLeish JJA, and Beale AJA

[\[2016\] VSCA 300](#)

30/11/2016

CRIMINAL LAW - Application for leave to appeal against sentence - Aggravated burglary (3y 9m) - Common law assault (x2) (6m (x2)) - Making threats to kill (x2) (8m (x2)) - Contravention of a family violence order (x2) (2m and 6m) - Attempt to pervert the course of justice (10m) - Total effective sentence 5y - Non-parole period 3y - Leave to appeal granted on proposed ground 4 concerning 'double punishment' otherwise leave refused.

***Woods, Timothy v The Queen***

Whelan JA

[\[2016\] VSCA 293](#)

25/11/2016

CRIMINAL LAW - Application for leave to appeal against sentence - Culpable driving causing death (7y 6m) - Negligently causing serious injury (2y 6m) - Serious example of culpable driving - Total effective sentence 8y 6m - Non-parole period 6y - Leave refused.

CRIMINAL LAW - Application for leave to appeal against conviction - Culpable driving causing death - Whether evidence regarding the wearing of seatbelts by the victims' was relevant - Whether reference to 'merited criminal punishment' in charge to jury on culpable driving causing death remains appropriate - R v De'Zilwa (2002) 5 VR 408 cf King v The Queen (2012) 245 CLR 588 - Leave granted.

***Bouch, Ian v The Queen***

Whelan JA

[\[2016\] VSCA 298](#)

28/11/2016

CRIMINAL LAW - Application for leave to appeal against sentence - Import a commercial quantity of a border controlled drug (methamphetamine) - Sentence 10y - Non-parole period 7y - Leave refused.

***Wang, Chun Chieh v The Queen***

Whelan JA

[\[2016\] VSCA 292](#)

25/11/2016

CRIMINAL LAW - Application for leave to appeal against sentence - Intentionally causing serious injury in circumstances of gross violence (8y) - Aggravated burglary (6y) - Theft (1y) - Total effective sentence 9y - Non-parole period 6y - Leave refused.

***Ferrer, Ismael v The Queen***

Whelan JA

[\[2016\] VSCA 295](#)

25/11/2016

CRIMINAL LAW - Application for leave to appeal against sentence - Proposed ground on parity with co-accused - Trafficking in a drug of dependence - Sentence 3y 6m - Co-accused sentence 4y - Leave refused.

***Daniel Noel Dislakis v The Queen***

Whelan JA

[\[2016\] VSCA 297](#)

25/11/2016

CRIMINAL LAW - Application for leave to appeal against sentence - Reckless conduct endangering life - Sentence 4y 6m (charge 1) - Negligently causing serious injury (by driving) - Sentence 4y 6m (charge 2) - Total effective sentence 6y 6m - Non-parole period 4y - Leave refused.

***Sadiq, Shameer v The Queen***

Whelan JA

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

25/11/2016

CRIMINAL LAW - Director of Public Prosecutions' appeal against sentence - Multiple charges of incest, indecent act with child under 16 and knowingly possess child pornography - sentenced to eight years' imprisonment with a non-parole period of five years and nine months - Significant prior convictions - Need for specific deterrence - Sentenced as a serious sexual offender - Presumption of cumulation - Principal sentencing purpose is the protection of the community - Tension between s6E Sentencing Act 1991 and the principle of totality - Specific error in relation to degree of concurrency ordered by sentencing judge - Manifest inadequacy - Appeal allowed - Respondent re-sentenced to 11 years and six months' imprisonment with a non-parole period of eight years and six months - Reid (a Pseudonym) v The Queen (2014) 42 VR 295 - R H McL v R (2000) 203 CLR 452 - Gordon (a Pseudonym) v The Queen [2013] VSCA.

***Director of Public Prosecutions [DPP] v Hopson, Ivor (a pseudonym)***

Redlich and Whelan JJA, and Beale AJA

[\[2016\] VSCA 303](#)

08/12/2016

CRIMINAL LAW - Interlocutory appeal from refusal to permanently stay indictment and special hearing - Applicant suffering from advanced dementia - Applicant found unfit to be tried by jury - Finding that applicant would remain unfit to be tried for at least next 12 months, Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 s11(4) - Alleged offending occurred between 1982 and 1984 - Power to grant stay of special hearing based on mental infirmity, *Subramaniam v The Queen* (2004) 211 ALR 1, discussed - *R v Littler* (2001) 120 A Crim R 512, considered - Lengthy delay, loss of evidence and witnesses, and degree of cognitive impairment considered - No procedural measures appropriate - Diminished public interest in proceeding - Proceeding would involve incurable, oppressive and unacceptable unfairness - Abuse of process - Appeal allowed - Permanent stay of indictment ordered - *Barton v The Queen* (1980) 147 CLR 75; *Jago v District Court of New South Wales* (1989) 168 CLR 23; *R v Glennon* (1992) 173 CLR 592; *Walton v Gardiner* (1993) 177 CLR 378 - *R v ALP* [2002] VSCA 210; *Hermanus (a pseudonym) v The Queen* (2015) 44 VR 335; *R v FJL* (2014) 41 VR 572, discussed.

***McDonald, Dave (a pseudonym) v The Queen***

Redlich and Ferguson JJA, and Beale AJA

[\[2016\] VSCA 304](#)

08/12/2016

CRIMINAL LAW - Sentence - Obtain property by deception - Obtain financial advantage by deception - Manifest excess - Whether sentencing judge properly took into account principle of totality and delay - Leave to appeal granted - Applicant resentenced to one year and three months with a 9 month non-parole period.

***Mendoza-Cortez, Joanne v The Queen***

Santamaria and Beach JJA

[\[2016\] VSCA 302](#)

05/12/2016

CRIMINAL LAW - Sentence - Sexual offences - Sexual penetration of child under 16 - Combined sentence of 20 months' imprisonment and CCO of 2 years' duration - Offender's previous good character - Breach of trust an aggravating circumstance - Reduction in mitigatory weight of good character constituted double punishment - Extra-curial punishment - Sentence of imprisonment reduced to 18 months - CCO to NSW - Transfer of Community-Based Sentences (Transfer) Act 2012 - Unpaid community work unable to be transferred - Condition removed - *Ryan v The Queen* (2001) 206 CLR 267; *CMG v The Queen* (2013) 46 VR 728; *Bishop v The Queen* (2013) 39 VR 642; *SD v The Queen* (2013) 39 VR 487; *R v Gent* (2005) 162 A Crim R 29 considered.

***Wakim, Joseph v The Queen***

Redlich JA and Beale AJA

[\[2016\] VSCA 301](#)

30/11/2016

REAL PROPERTY - Respondent sought possession of land owned by applicant following default on loan pursuant to mortgage - Applicant contended signature on mortgage was forged - Trial judge held that applicant failed to prove that signature on mortgage procured by fraud - Whether applicant denied procedural fairness.

PRACTICE AND PROCEDURE - Appeal - Consent orders proposed allowing appeal and remitting matter to Trial Division - Whether court satisfied that orders made at trial were wrong or attended by sufficient doubt - *Newton v Geelong Ethnic Communities Council* [2011] VSCA 59; *Hennes v Hobsons Bay City Council* [2012] VSCA 215; *Kovacic v Transport Accident Commission* (2016) 76 MVR 82, applied.

COURTS - Judge's duty to assist self-represented litigant - Whether judge adequately explained law to applicant - *Trkulja v Markovic* [2015] VSCA 258, considered - Appeal allowed.

***Loftus, Michael David v Australia and New Zealand Banking Group Ltd (No 2)***

Redlich, Osborn and McLeish JJA

[\[2016\] VSCA 308](#)

08/12/2016

## Commercial Court

COMPANIES - Receivership - Contract - Construction of deeds - Is there a cap limiting the amount of remuneration that the Receivers can incur - Waiver - Whether by conduct of the appointor, it would be unconscionable for the appointor to rely on the cap - Adverse inference drawn for not calling key witness - *Jones v Dunkel*.

EQUITY - Receivers' lien - Whether Receivers entitled to an equitable lien in priority to the secured creditor over the proceeds of sale of the underlying property - Whether fees incurred for steps leading up to the realisation of the underlying property are subject to a lien.

***Ross, David Anthony & Albarran, Richard v Gippsreal Ltd (ACN 005 443 292)***

Cameron J

[\[2016\] VSC 753](#)

07/12/2016

CONSUMER LAW - Declarations made that defendant failed to comply with the Australian Consumer Law (Vic) (ACL)(Vic), as incorporated by the Australian Consumer Law and Fair Trading Act 2012 (Vic), applicable to unsolicited consumer agreements - Order to refund fees charged to consumers pursuant to s232(6)(a) of the (ACL)(Vic) - Order that defendant pay damages to consumer for anxiety and distress caused by actions of the defendant pursuant to s237 of the ACL(Vic) - Order that defendant pay a pecuniary penalty pursuant to s224 ACL (Vic) - Australian Consumer and Fair Trading Act 2012.

***Director of Consumer Affairs Victoria v Donald, David James***

Robson J

[\[2016\] VSC 754](#)

05/12/2016

CONTRACT - Joint venture - Ascertainment of the parties to a joint venture and the obligations of the joint venture parties - Failure of joint venture party to account for profits of the joint venture - Claims on loans - Interest claimed on loans - Transfer of assets to defraud creditors - Fiduciary duties owed between joint venturers.

*Caple, Nicholas John Edward & Ors (according to the attached Schedule) v Wilson, Anton Joseph & Ors (according to the attached Schedule) ; Anacott Steel P/L (In Liquidation) (ACN 135 155 234) (formerly Mider @ Franklin Street P/L) & Ors (according to the attached Schedule) v Choice Planning P/L (ACN 103 233 343) & Ors (according to the attached Schedule)*

Robson J

[\[2016\] VSC 704](#)

05/12/2016

CONTRACT - Preliminary question to be tried - Question of the liability of the first defendant for outstanding debt in relation to a farming property owned by the plaintiff - Whether a variation of the parties' agreement to the effect of extending its term can be implied from the conduct of the first defendant or her late husband - *Moratic Pty Ltd v Lawrence James Gordon & Anor* [2007] NSWSC 5 applied - Whether the parties' agreement was akin to a lease or otherwise such that principles of 'overholding' apply - Whether the first defendant has a legal obligation for the debt or is liable for the debt as joint promisee with her late husband - Finding that the conduct of the first defendant did not amount to an assumption of liability for the debt beyond the period of the written agreement - No representation that she continued to be bound by the agreement after its expiry in accordance with its express terms.

QUANTUM - Credibility of evidence as to the quantum of claim - Accounting for missing cattle - Number of stock sold and basis of the plaintiff's authority to sell cattle and apply outstanding commissions payable to meet outstanding debts - *Batrouney v Forster* [2015] VSC 230 followed - Creditor entitled to apply proceeds of debt in the manner it sought fit in the absence of instructions to the contrary.

*Frontlink Pty Ltd (ACN 074 034 496) v Feldman, Cynthia and Ramarim P/L (ACN 147 722 781)*

Daly AsJ

[\[2016\] VSC 691](#)

30/11/2016

CONTRACT - Share sale agreement - Dispute resolution clause - Expert accountant appointed by the parties to calculate an adjustment amount - Whether expert complied with the terms of the agreement - *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 applied - Scope of expert's broad discretion under agreement - Whether the expert made a 'manifest error' in determining the accounting treatment of two items - General principles regarding 'manifest error' - Consequences of a finding of 'manifest error' - Whether whole determination vitiated - One issue referred to expert for re-determination.

*Funtastic Ltd (ACN 063 886 199) v Madman Film and Media P/L (ACN 600 441 549)*

Almond J

[\[2016\] VSC 708](#)

29/11/2016

CORPORATIONS - Proceedings seeking relief for alleged oppressive conduct under s232, 233 of Corporations Act 2001 (Cth) - Parties reach settlement at judicial mediation - Defendants bring application for summary judgment to enforce terms by reason of alleged breach - Application refused - *Roberts v Gippsland Agricultural and Earth Moving Contracting Co Pty Ltd* (1956) VLR 555 and *Seachange Management Pty Ltd & Anor v Pital Business Pty Ltd* (2009) 23 VLR 396 applied.

***Samarawickrama, Supun v Hoops*247 P/L (ACN 608 032 383) and *Dabb, Robb***

Gardiner AsJ

[\[2016\] VSC 729](#)

02/12/2016

COSTS - Plaintiff sought declaration that redacted invoices provided by the defendant did not constitute sufficient information for the purposes of s3.4.38(7) of the Legal Profession Act 2004 - Application dismissed - 18 entries in invoices redacted on grounds of legal professional privilege - Court inspected unredacted invoices - Claims for legal professional privilege in respect of 13 entries rejected - Plaintiff and defendant ordered to bear their own costs of proceeding.

***Reardon, Rosemary v Hall & Wilcox***

McDonald J

[\[2016\] VSC 719](#)

02/12/2016

COURTS AND JUDGES - Summary judgment application - Multiple banking facilities and securities - Substantial claims - Litigants in person as defendants - Unclear defence - Some objective facts arousing matters to investigate or explain dealing - Court's unavoidable inquisitorial task in assessing prospects of success or desirability of matter proceeding to trial - Summary judgment allowed partially

***National Australia Bank Ltd v Ganesh, Anandavakku ; Radhakrishnan, Ganesh; Gsquare Group P/L***

Mukhtar AsJ

[\[2016\] VSC 738](#)

06/12/2016

POSSESSION OF LAND - Application by mortgagee for summary judgment - Proposed defence that loan unconscionable - Asset based lending - No financial information supplied to the lenders - Alleged misrepresentation by intermediary as to surplus funds - Large procurement and consultancy fees insufficiently explained - Alleged fraud in attempt at refinance after default - Whether fault of intermediaries should be attributed to the lenders - Summary judgment refused - Only a full hearing on the merits is appropriate - Leave to defend granted on condition of security - Civil Procedure Act 2010 (Vic) s64(b).

***Jams 2 P/L (ACN 600 173 1117) ; Conterra P/L (ACN 078 900 017); Janaco P/L (ACN 006 209 105) v Stubbings, Jeffrey William***

Lansdowne AsJ

[\[2016\] VSC 711](#)

28/11/2016

PRACTICE AND PROCEDURE - Application by Commissioner to amend Statement of Claim to reduce RBA deficit debt to exclude PAYG penalties-whether power to grant amendment - whether amendment otherwise appropriate in the light of Federal Court proceeding in which PAYG penalty issue raised - Taxation Administration Act 1953 (Cth) Pt 11B.

PRACTICE AND PROCEDURE - Application to transfer proceeding to Federal Court of Australia - Whether it is more appropriate that Federal Court determine proceeding - Application dismissed - Jurisdiction of Courts (Cross-vesting) Act 1987 (Vic) s5(1).

***Between Deputy Commissioner of Taxation and Sunraysia Harvesting Contractors P/L***  
Kennedy J

[\[2016\] VSC 736](#)

05/12/2016

PRACTICE AND PROCEDURE - Application for adjournment of trial - Application to amend a freezing order - Use of moneys frozen for legal fees - Use of moneys frozen for living expenses - Defendant trustee of discretionary trust - Use of trust assets for living expenses of a beneficiary.

SOLICITOR'S LIEN - Whether solicitor may be compelled to produce documents subject to a lien to the party in default of paying fees in the litigation - Whether Civil Procedure Act may be used to compel production of documents.

***Distinctive FX P/L & Ors v Wright, Kylie and Vince, Peter (as trustees of the estate of Jason Andrew Van Der Slot pursuant to Part XI of the Bankruptcy Act 1996 (Cth)) NKT Holdings P/L & Ors***

Robson J

[\[2016\] VSC 727](#)

25/11/2016

PRACTICE AND PROCEDURE - Application for substituted service - Application by mortgagee for possession and payment of moneys lent from estate of deceased mortgagor and borrower - Where proceeding commenced against the estate of a deceased person pursuant to r9.08(1) and (2) of the Supreme Court (General Civil Procedure) Rules 2015 ('Rules') - Where the deceased died intestate and his estate vests in State Trustees Limited pursuant to s19 of the Administration and Probate Act 1958 ('A&P Act') - Where person claiming to be daughter of the deceased applied for the grant of Letters of Administration of the estate of the deceased - Plaintiff applied for order for substituted service on the daughter and State Trustees - Substituted service not available - Proper course to apply pursuant to r9.08(5)(a)(i) of the Rules for the appointment of a person to represent the estate or await a grant of representation to a person and apply to make that person a party to the proceeding under r9.08(5)(a)(ii) of the Rules - Alternatively, to apply under r16.03 of the Rules - *Andrews v Hogan* (1952) 86 CLR 223 and *GEL Custodians Pty Ltd v The Estate of the Late Geoffrey Francis Wells* [2013] NSWSC 973.

PRACTICE AND PROCEDURE - Application by mortgagee for possession and payment of moneys lent from estate of deceased mortgagor and borrower - Proceeding commenced against the estate of the deceased person pursuant to r9.08(1) & (2) of the Rules - Where the deceased died intestate and his estate vests in State Trustees Limited pursuant to s19 of the A&P Act - Where person claiming to be daughter of the deceased applied for the grant of Letters of Administration of the estate of the deceased - Application for appointment of personal representative of the estate pursuant to r9.08(5)(a)(i) or alternatively r16.03(1)(b) of the Rules - Person with the greatest interest in the estate is the applicant for the grant of Letters of Administration whose solicitor was given notice of the application - The applicant for the grant of Letters of Administration and the State Trustees given notice of the application - Appropriate procedure to apply by summons for the appointment of the appropriate person/(s) and failing that person/(s) consenting to be appointed to apply to proceed pursuant to r16.03(1)(a) of the Rules in the absence of a person to represent the estate of the deceased.

***Australia and New Zealand Banking Group Ltd (ACN 005 357 522) v The Estate of Balding, Michael Charles***

Derham AsJ

[\[2016\] VSC 728](#)

01/12/2016

PRACTICE AND PROCEDURE - Appointment of Special Referee - Questions as to discovery of documents and inspection of documents in a large document case referred to Special Referee - Reference conducted as a facilitation process rather than an adversarial process - Adoption of Special Referees' Report - Supreme Court (General Civil Procedure) Rules 2015 (Vic) O 50.

PRACTICE & PROCEDURE - Discovery in a large document case - Use of predictive coding technology (TAR or Technology Assisted Review) - Orders for TAR made in accordance with the recommendations of the Special Referee following a facilitation process conducted with the parties in a reference conducted under O 50 Supreme Court (General Civil Procedure) Rules 2015 (Vic).

***McConnell Dowell Constructors (Aust) P/L (ACN: 002 929 017) v Santam Ltd (Registration Number 1918/001680/06) and Ors (according to the schedule)***

Vickery J

[\[2016\] VSC 734](#)

02/12/2016

PRACTICE AND PROCEDURE - Costs follow the event - Indemnity costs - Without prejudice offers - *Calderbank v Calderbank* [1975] 3 WLR 586; 3 All ER 333.

***TrinityP3 P/L as Trustee for TrinityP3 Trust (ABN 83 091 197 287) v WIP Consulting P/L (ABN 95 094 355 094) & Anor***

Croft J

[\[2016\] VSC 735](#)

02/12/2016

PRACTICE AND PROCEDURE - Permanent stay - Abuse of process - Group proceeding - Plaintiff company initiated proceeding - Proceeding commenced for predominant purpose of generating income for lead plaintiff and/or related party funder - Whether proper purpose - Whether proper use of processes of court - Permanent stay granted - Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd (2014) 45 VR 585 applied.

***Melbourne City Investments P/L (ACN 161 046 304) v Myer Holdings Ltd (ACN 119 085 602)***

Sifris J

[\[2016\] VSC 655](#)

09/12/2016

PRACTICE AND PROCEDURE - Undertaking to manage company in the ordinary course of its business - Variation of undertaking sought to permit company to protect its interests - Changed circumstances - Variation granted - P Dawson Nominees Pty Ltd v ASIC (2009) 255 ALR 466 applied.

***Daiwa Can Company v Barokes P/L (ACN 079 714 579) & Ors***

Sifris J

[\[2016\] VSC 737](#)

09/12/2016

## Common Law Division

ADMINISTRATIVE LAW - Judicial review of an opinion of a medical panel - Denial of procedural fairness - New facts and circumstances - Whether medical questions should be remitted to original medical panel or differently constituted medical panel - Remitter to Convenor of Medical Panels - Civil Procedure Act 2010, s9 - Accident Compensation Act 1985, s45 - Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480 - Barrett Burston Malting Co Pty Ltd v Kotzman [2013] VSC 248.

***Toyota Motor Corporation Australia Ltd v Bendrups, Dr Andrea and Kirszenblat, Dr Jack and Downes-Brydon, Dr Jenny and Siu, Mr Kevin and Landy, Jenelle***

J Forrest J

[\[2016\] VSC 718](#)

02/12/2016

ADMINISTRATIVE LAW - Judicial review - Procedural fairness - Relevant considerations - Workers' Compensation - Medical panel - Application to quash opinion of medical panel - Proceeding dismissed.

***Humphries, Bartholamew (by way of his Administrator State Trustees Limited) v Allianz Australia Workers Compensation (Victoria) Ltd & Ors***

Cavanough J

[\[2016\] VSC 761](#)

09/12/2016

ADMINISTRATIVE LAW - Judicial review - Procedural fairness - Workers' compensation - Medical Panel - New information relevant, credible and significant to the Panel's decision - Procedural fairness - Adequacy of reasons - Failure to take into account relevant considerations - Accident Compensation Act 1958 (Vic) s98, s98E.

***YG-1 Australia P/L v Brann, Dr Susan & Ors***

Zammit J

[\[2016\] VSC 713](#)

01/12/2016

APPEAL - Appeal from Magistrates' Court - Procedural fairness - Natural justice - Self-represented litigant - Adequacy of reasons - Appeal allowed - Matter remitted for retrial

***Yusof, Basam v AAI Ltd t/as AAMI***

Hollingworth J

[\[2016\] VSC 518](#)

09/12/2016

CHOICE OF LAW - Worker employed in Victoria injured in accident in Western Australia - Worker's Victorian proceeding against Western Australian contractors statute barred - Claim continuing against Victorian employer - Contribution claims by employer against Western Australian contractors - Applicable law - State with closest connection - Contractors' application for summary dismissal of contribution notices - Discretion to refuse summary judgment - Employer's application for particular discovery against one contractor - Possible subsequent application to amend contribution notice to include contract claim - Relevance of separate Victorian proceeding by employer against contractor claiming indemnity - Wrongs Act 1958 s23B; Civil Procedure Act 2010 s63 and s64, Supreme Court (General Civil Procedure) Rules 2015 Order 11.01.

PRACTICE AND PROCEDURE - Contribution notice - Summary judgment application - Possible application to amend contribution notice after discovery obtained - Whether no reasonable prospect of success - Whether summary judgment should be granted - Civil Procedure Act 2010 s63 and s64; Supreme Court (General Civil Procedure) Rules 2015 Order 11.01, 11.15, 36.01.

***Di Paolo, Massimo v Salta Constructions P/L and Safe Labour Hire P/L and GCS Rapid Access P/L***

Ginnane J

[\[2016\] VSC 741](#)

06/12/2016

CONTRACT - Asset Sale Deed - Business sold as a going concern - Deed contained reciprocal supply / purchase obligations - Purchaser was obliged to obtain all supplies of raw materials from Vendor (cl 12.1) - Vendor was obliged to obtain 'all its' supplies of finished products from Purchaser (cl 12.2) - Construction of cl 12.1 (supply) and cl 12.2 (purchase) obligations - Whether Vendor breached cl 12.2 obligation to obtain 'all its' supplies of finished products from Purchaser - Whether subject work was encompassed within cl 12.2 - If breach is made out on what basis are damages to be assessed - Expert evidence - Which methodology is to be applied.

CONTRACT - Asset Sale Deed - Business sold as a going concern - Deed contained reciprocal supply / purchase obligations - Purchaser was obliged to obtain all raw materials from Vendor (cl 12.1) - Vendor was obliged to obtain 'all its' supplies of finished products from Purchaser (cl 12.2) - Parent company of Vendor not bound by Deed - Whether the Deed as executed makes commercial sense - Whether additional supply agreement is to be implied between Purchaser and the parent company of Vendor containing terms equivalent to cl 12.1 and cl 12.2 of the Deed - Construction of cl 12.2 obligation under the implied supply agreement - What purchase requirements (and of whom) were captured by cl 12.2 obligation.

ESTOPPEL BY CONVENTION - Alternatively to implied supply agreement - Whether during negotiations for Asset Sale Deed, Purchaser and parent company of Vendor adopted the assumption that the effect of the Deed would be that parent company of Vendor would be bound by cl 12.2 obligation - Whether Purchaser and parent company of Vendor conducted their relationship on the basis of such mutual assumption - Whether parent company of Vendor is estopped from denying it was bound by terms equivalent to those alleged in the implied supply agreement.

CONTRACT - Deed of Accession - Novation of Vendor's rights and obligations under Asset Sale Deed to parent company of Vendor - Whether parent company of Vendor breached cl 12.2 obligation to obtain 'all its' supplies of finished products from Purchaser.

CONTRACT - Asset Sale Deed - Deed contained clause that Purchaser may not permit, allow or suffer a change in its control or the control of another party without first obtaining written consent of Vendor (cl 16.4) - Relevant concept of 'change of control' - Whether Purchaser breached cl 16.4 - Rights available to Vendor in the event that the Purchaser is found to have breached cl 16.4 - s50AA Corporations Act 2001 (Cth).

ANSHUN ESTOPPEL - Asset Sale Deed - Whether Anshun estoppel operates to preclude Vendor and parent company of Vendor from claiming that the Purchaser breached cl 16.4.

CONTRACT - Asset Sale Deed - Deed contained indemnity clause (cl 11.3) whereby the indemnifier agreed to indemnify the Vendor in respect of all 'Claims' - Construction of 'Claims' - Whether 'Claims' means third party claims.

CONTRACT - Fixed and floating charge - Chargor granted fixed and floating charge to secure payment of the 'Secured Money' - What amounts and liabilities are captured by 'Secured Money' - Whether Chargor made a valid and effective tender under the charge - In what circumstances is the Chargor entitled to a discharge of the charge - Whether interest is payable.

***Amcor Ltd (ACN 000 017 372) & Ors (according to the schedule attached) v Trevor Mark Barnes & Ors (according to the schedule attached) ; Australian Corrugated Box Co P/L (formerly Achilla P/L) (ACN 104 489 581) & Anor (according to the schedule attached) v (ACN 002693843) Box P/L (ACN 002 693 843) & Anor (according to the schedule attached) ; Orora Ltd (formerly Amcor Packaging (Australia) P/L) (ACN 004 275 165) v Australian Corrugated Box Co P/L (formerly Achilla P/L) (ACN 104 489 581) & Ors (according to the schedule attached)***

Sloss J

[\[2016\] VSC 707](#)

28/11/2016

COSTS - Cross applications for costs in the proceeding following settlement at mediation - Court's discretion as to costs - Mistaken factual basis for plaintiffs' claim - Defendants substantially successful in relation to the key questions - Repeated attempts to negotiate a settlement - Alleged improper purpose - Conduct of the litigation unreasonable - Supreme Court Act 1986 s24.

***Stoneman, Ronald James and Stoneman, Kevin Brian v Bourne, Anthony Allan and Bourne, Nicole Fiedler***

Emerton J

[\[2016\] VSC 726](#)

02/12/2016

COSTS - Where application for removal of executors and trustees successful - Whether costs claimed by plaintiff are reasonable and proportionate - Whether executors' costs expended in administering the estate reasonable and proportionate

***Denby, Lynne Maree v Power, Damien James (who are sued both personally and in their capacity as executors of the will and estate of Peter Gerard Power, deceased)***

McMillan J

[\[2016\] VSC 739](#)

05/12/2016

CRIMES MENTAL IMPAIRMENT - Application for variation of custodial supervision order to non-custodial supervision order - Whether release of applicant on non-custodial supervision order would seriously endanger safety of applicant or members of the public - Whether applicant has completed a period of 12 months extended leave and complied with the conditions of that leave - Whether it was too soon to place applicant on a non-custodial supervision order - Whether a further period of extended leave under a custodial supervision order was preferable - Whether granting application would be consistent with principle that applicant's freedom and personal autonomy should be kept to minimum consistent with safety of community - Whether applicant would be likely to endanger himself or any other person or people generally - Whether court has obtained and considered reports of medical practitioner and person having supervision of the applicant - Crimes (Mental Impairment and Unfitness to be Tried) Act 1977 (Vic) s32(2)-(3), s39(1), s40(1), (2)(a) and (ab).

***In the matter of an application for variation of a custodial supervision order to a non-custodial supervision order pursuant to section 31 of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) and In the matter of an application by H P***

Bell J

[\[2016\] VSC 701](#)

01/12/2016

JUDICIAL REVIEW - Review of sentence imposed by Magistrates' Court - Offender sentenced to 6 months detention in youth justice centre and 15-month CCO - Sentencing Magistrate erred in imposing combined youth justice centre order and CCO on single charge - Sentencing Magistrate erred in having regard to date of parole - Requirement that CCO must commence within 3 months unable to be given effect - Offender turned 21 while serving sentence - Sentence substituted - CCO re-instated to commence immediately - No order as to costs - Sentencing Act 1991 (Vic) s5(2AA)(a), s7, s32(1), s38(2), s44(1), s104(1).

APPEAL - Question of law - Appeal dismissed - Criminal Procedure Act 2009 (Vic) s272(1).

**Director of Public Prosecutions [DPP] (on behalf of Helen Bell, Travis Mark Forrest, Kevin Alexander Hall, Donald Patrick Trice, Gavin Mark Rhodes & Ben Pardo) and Jordan, Blair Lincoln ; IN THE MATTER of an application pursuant to s 104 of the Sentencing Act 1991 Director of Public Prosecutions [DPP] (on behalf of Helen Bell, Travis Mark Forrest, Kevin Alexander Hall, Donald Patrick Trice, Gavin Mark Rhodes & Ben Pardo) v Jordan, Blair Lincoln and The Magistrates' Court of Victoria**

Jane Dixon J

[\[2016\] VSC 55](#)

23/02/2016

LIMITATION OF ACTIONS - Negligence - Personal injury - Limitation of Actions Act 1958 (Vic) - Whether limitation period should be extended under s23A - Plaintiff seriously injured - Prejudice resulting from delay - Limitation period extended.

**Batten, Wayne David v Victorian WorkCover Authority (in substitution of Ginevra Nominees P/L (deregistered))**

T Forrest J

[\[2016\] VSC 751](#)

24/11/2016

PRACTICE AND PROCEDURE - Application for an extension of time pursuant to the Limitation of Actions Act 1958 section 27K - Referral to an Associate Judge under Supreme Court (General Civil Procedure) Rules 2015 Rule 77.05 - Whether matter was 'before a Judge of the Court' - Whether referral order validly made - Extent of authority of an Associate Judge - Amendments contained within Courts Legislation Amendment (Associate Judges) Act 2008 - Constitution Act 1975 section 75A - Supreme Court Act 1986 sections 17(1A), 25(1)(b) - Supreme Court (General Civil Procedure) Rules 2015 Rules 77.01, 77.02 - Whether referral order should be set aside - Supreme Court (General Civil Procedure) Rules 2015 Rule 2.01(2)(b).

**Goodenough, Clive Belmont v State of Victoria**

Keogh J

[\[2016\] VSC 733](#)

05/12/2016

PRACTICE AND PROCEDURE - Application for approval of settlement of group proceeding - Supreme Court Act 1986 Part 4A - Whether terms of settlement fair and reasonable - Whether settlement distribution scheme fair and reasonable - Whether claim for legal fees and disbursements reasonable - Whether unregistered group member should have leave to participate in the settlement - Settlement approved.

**Ramsay, Irwin James v AusNet Electricity Services P/L (ACN 064 651 118) & Ors**

Emerton J

[\[2016\] VSC 725](#)

21/11/2016

PRACTICE AND PROCEDURE - Group proceedings - Progress of the Settlement Distribution Scheme - Concerns of group members regarding the administration of the Scheme - Reports of Special Referee adopted.

***Matthews, Carol Ann v AusNet Electricity Services P/L (formerly SPI Electricity P/L) (ACN 064 651 118) and others according to the Schedule; AusNet Electricity Services P/L (formerly SPI Electricity P/L) (ACN 064 651 118) v ACN 060 674 580 P/L and others according to the Schedule; ACN 060 674 580 P/L v AusNet Electricity Services P/L (formerly SPI Electricity P/L) (ACN 064 651 118) and others according to the Schedule annexed to other rulings of the Court***

J Forrest J

[\[2016\] VSC 732](#)

07/12/2016

PRACTICE AND PROCEDURE - Group proceedings - Supervision of Settlement Distribution Scheme - Report of special referee - Costs - Adoption of report - Supreme Court (General Civil Procedure) Rules 2015, r50.04.

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

John Dixon J

[\[2016\] VSC 731](#)

07/12/2016

PRACTICE AND PROCEDURE - Group proceedings - Whether leave should be granted to the plaintiff to amend her statement of claim - New cause of action - Whether there should be class closure - Whether leave should be granted to the plaintiff to discontinue proceeding as against the third defendant - Whether notice to group members should be dispensed with - Northern Health v Kuipers [2015] VSCA 172; Fabfloor (Vic) Pty Ltd v BNY Trust Company of Australia Ltd [2016] VSC 99; Laine v Thiess Pty Ltd [2016] VSC 689 - Civil Procedure Act 2010 (Vic), s9 and s42; Supreme Court Act 1986 (Vic), s33V and s33X.

***Jackson, Valerie Ellen v GP & JM Bruty Pty Ltd (ACN 108 581 111) and Bruty, Darren and Bruty, Jennifer Mary; Bruty, Jason Matthew and Kehoe, Tania Marie (as executors of Geoffrey Philip Bruty)***

J Forrest J

[\[2016\] VSC 717](#)

02/12/2016

PRACTICE AND PROCEDURE - Interlocutory injunction - Road project causing environmental damage - Alleged deficiencies in Environment Effects Statement and Minister's assessment - Whether serious question to be tried - Whether balance of convenience favours granting injunction - Compliance with precautionary principle - Procedural fairness - No viable undertaking as to damages - Environment Effects Act 1978 - Environment Protection and Biodiversity Conservation Act 1999 (Cth) - Planning and Environment Act 1987 - Transport Integration Act 2010 - Charter of Human Rights and Responsibilities Act 2006.

***Mackenzie, Mairianne & Ors v VicRoads & Ors***

Emerton J

[\[2016\] VSC 698](#)

22/11/2016

REAL PROPERTY - Restrictive covenant - Application for modification - Covenant restricting the erection of more than one dwelling on the land - Proposed development involving subdivision and construction of 6 dwellings on the land - Whether precedent already set by previous developments - Whether modification will not substantially injure the persons entitled to the benefit - Application granted - Applicable legal principles - Property Law Act 1958 (Vic), s84(1)(c).

***In the matter of an application pursuant to s 84 of the Property Law Act 1958 for the modification of a restrictive covenant by: Jonson, Peter Andrew***

Ierodiaconou AsJ

[\[2016\] VSC 721](#)

30/11/2016

TORTS - Negligence - Breach of duty of care - Plaintiff tripped on exposed and protruding metal plate in floor of workplace and suffered injury - Metal plate had been secured by screw which had worked loose, causing one end of plate to raise - First defendant's failure to remove metal plate during refurbishment process - No system of regular inspection and maintenance of floor of premises - Risk arising from changes to features of the premises over time.

TORTS - Negligence - Breach of duty of care - Employer's failure to respond to risk - Causation - Strong v Woolworths Ltd (2012) 246 CLR 182 distinguished.

***Maryanne Kalos v Goodyear & Dunlop Tyres (Aust) P/L and Victorian Automobile Chamber of Commerce***

Keogh J

[\[2016\] VSC 715](#)

29/11/2016

TRUSTS - Terms of trust deed - Where trustee company deregistered and appointor bankrupt - Application by appointor's trustee in bankruptcy for appointment of new trustee by the Court - Welfare of the beneficiaries - Effect of deregistration of trustee company - Where Commonwealth acts as trustee - Trustee Act 1958, s 48 - Corporations Act 2001 (Cth), s601AD and s601AE.

TRUSTS - Standing - Whether the plaintiff is a 'person beneficially interested in the property' of the trust - Gartside v Inland Revenue Commissioners [1968] AC 553 - Australian Securities and Investments Commissioner v Carey (No 6) (2006) 153 FCR 509 - Public Trustee v Smith [2008] NSWSC 397 - Trustee Act 1958, s64

***In the matter of the Cooper Street Property Trust and In the matter of an application pursuant to s48 and s51 of the Trustee Act 1958 Woods, Robert Scott (as trustee of the bankrupt estate of Ergun Omer)***

McMillan J

[\[2016\] VSC 756](#)

09/12/2016

TRUSTS - Where plaintiff appointed manager to defendant's legal practice - Where shortfall in funds held in legal practice's trust accounts - Where manager seeks directions to distribute remaining funds to clients - Which method of distribution most appropriate in the circumstances - Pari passu method of distribution applied - Re Magarey Farlam Lawyers Trust Accounts (No 3) (2007) 96 SASR 337 - Australian Securities and Investments Commission v Letten (No 7) (2010) 190 FCR 59 - Legal Profession Uniform Law (Victoria), s334.

***Hannan, Neil Francis (as manager of Zindilis Lawyers) v Zindilis, George***

McMillan J

[\[2016\] VSC 723](#)

30/11/2016

WILLS AND ESTATES - Administration proceeding - Where beneficiaries of estate sought financial information from executor - Where executor failed to provide timely and adequate financial information - Beneficiaries seek administration account for estate - Beneficiaries seek costs against the executor personally - Executor seeks costs against plaintiffs - Supreme Court (General Civil Procedure) Rules 2015, r63.07 - Supreme Court Act 1986, s24 - Colgate-Palmolive Co v Cussons Pty Ltd (1993) 118 ALR 248 (1993) 118 ALR 248.

WILLS AND ESTATES - Executor's commission - Executor seeks commission at 2 per cent on gross value of estate - Administration and Probate Act 1958, s65 - Supreme Court (Administration and Probate) Rules 2004, Order 10 - In the Estate of Stone (deceased); Patterson v Halliday [2003] VSC 298 - Hawkins v Barkley Brown [2010] NSWSC 48.

***Buckingham, Stephen Laurie (in his capacity as the Executor of the estate of the abovenamed deceased) v Buckingham, Peter and Buckingham, Anne; Peter Buckingham and Buckingham, Anne v Buckingham, Stephen Laurie (who is sued as the Executor of the estate of the abovenamed deceased)***

McMillan J

[\[2016\] VSC 757](#)

09/12/2016

WILLS AND ESTATES - Application by plaintiff to admit two page document to probate - Whether testator intended the document to be his final will - Where deceased prepared document during hospital admission - Where deceased failed to prepare a formal will for eight years after creation of two page document - Standard of proof - Briginshaw v Briginshaw (1938) 60 CLR 336 - Fast v Rockman [2013] VSC 18 - Wills Act 1997, s7 and s9.

***Credson, Robert Arthur (in the will called Robert Credson) v Lynch, Andrew William***

McMillan J

[\[2016\] VSC 758](#)

09/12/2016

WILLS AND ESTATES - Application for grant of probate - Informal codicil - Testamentary capacity - Onus of proving testamentary capacity - Burden of proof - Banks v Goodfellow (1870) LR 5 QB 549 - Briginshaw v Briginshaw (1938) 60 CLR 336 - Timbury v Coffee (1941) 66 CLR 277 - Wills Act 1997, s9.

***Kelsall, John Christopher and Kelsall, Merran Horne v Evans, Robert John (as administrator of the estate of Margaret Anne Kelsall)***

McMillan J

[\[2016\] VSC 724](#)

30/11/2016

## Criminal Division

CRIMINAL LAW - Application for bail - Charges of attempted murder, affray and other offences against the person - Applicant alleged to be part of group of men who attended business premises to remonstrate with another - While there, a co-accused fired a handgun, grazing the head of complainant - Whether applicant has shown cause why detention in custody not justified - Whether applicant, if granted bail, would present an unacceptable risk of offending, failing to answer bail or of interfering with witnesses - Applicant on bail on other charges - Weak case against applicant on attempted murder - Significant risk that he may spend more time in custody than any sentence likely to be imposed if convicted of a lesser alternative offence - Prior convictions, including several for failing to appear on bail - Bail granted with two sureties, daily reporting to police and other conditions.

***Tomas, Riko v Director of Public Prosecutions [DPP] (VIC)***

Croucher J

[\[2016\] VSC 476](#)

15/03/2016

CRIMINAL LAW - Application for bail - Charges of grooming for sexual conduct with a child under 16 and failing to comply with reporting conditions as a registered sex offender - Applicant in custody since October 2015 - Applicant's trial in County Court recently adjourned to commence in February 2017 - New charges of grooming also laid recently - Whether applicant, if granted bail, would present an unacceptable risk of offending or failing to answer bail - Applicant alleges dental health not being adequately addressed in custody - Strength or otherwise of prosecution cases - Applicant only 22 but has prior convictions for child sexual offences - Delay between arrest and trial - Bail refused.

***K W L D v Director of Public Prosecutions [DPP] (VIC)***

Croucher J

[\[2016\] VSC 709](#)

28/11/2016

CRIMINAL LAW - Bail - Applicant required to 'show cause' why detention not justified - Whether unacceptable risk - Bail refused - Bail Act 1977 s4(2)(d)(i), s4(4)(c).

***In the matter of the Bail Act 1977 and In the matter of an Application for Bail by Abdullah, Mohammed***

Priest JA

[\[2016\] VSC 745](#)

06/11/2016

CRIMINAL LAW - Bail - Multiple charges - Whether exceptional circumstances - Whether unacceptable risk - Delay - Availability of residential rehabilitation facility - Bail granted with strict conditions - Bail Act 1977 (Vic), s4(1) and (2).

***In the matter of the Bail Act 1977 (Vic) and In the matter of an Application for Bail by Reynolds, Jaydon***

Elliott J

[\[2016\] VSC 730](#)

06/12/2016

CRIMINAL LAW - Bail - Show cause situation - Whether risk unacceptable - Bail granted with strict conditions.

***In the matter of the Bail Act 1977 and In the matter of an Application for Bail by Ibrahim El-Sayah***

Jane Dixon J

[\[2016\] VSC 716](#)

09/11/2016

CRIMINAL LAW - Bail - Terrorism offence - Rebuttable presumption against bail - Whether exceptional circumstances - Accused on remand - Crimes Act 1914 (Cth), s15AA - Bail Act 1977 (Vic), s4.

***In the matter of the Bail Act 1977 (Vic) and In the matter of an Application for Bail by Murat Kaya***

Elliott J

[\[2016\] VSC 712](#)

30/11/2016

CRIMINAL LAW - Manslaughter - Attempting to pervert the course of justice - Pleas of guilty - Remorse not evident - Utilitarian benefit - Disposal of body by burning - Concealment.

***The Queen v Butorac, John***

Lasry J

[\[2016\] VSC 371](#)

18/11/2016

CRIMINAL LAW - Sentence - Aggravated burglary - Intentionally causing injury - Home invasion by 3 offenders (H, L & P) - Victim assaulted in his bed with a baseball bat by P - H and L played supporting roles - No antecedents for H and limited antecedents for L - Pleas of guilty entered at the earliest reasonable opportunity - Good prospects of rehabilitation - Youthful offenders, aged 21 and 22, at time of offending - Combined sentence of imprisonment and Community Correction Order imposed on both H and L - R v Parry [2016] VSC 685.

***The Queen v Hewett, Edward Charles and Lacey, Andrew David***

Beale J

[\[2016\] VSC 749](#)

08/12/2016

CRIMINAL LAW - Sentence - Intentionally causing serious injury, aggravated burglary and theft - Accused, without warning, stabbed former relative repeatedly to face, head and limbs, all but severing her nose - Victim suffers debilitating psychological and physical scarring - Accused ran to another house, entered while persons present and stole car keys and then car - Objectively very grave assault but very low moral culpability because of accused's psychotic state - Accused's behaviour caused by psychosis, precipitated by schizophrenia - Corresponding reduction in weight to general deterrence, specific deterrence, curial denunciation and just punishment - Pleas of guilty despite prosecution preparedness to consent to verdict of not guilty by reason of mental impairment - Remorse - Limited criminal history - Impact of schizophrenia on hardship of imprisonment - Illness now controlled by antipsychotic medication - Good prospects of rehabilitation - Total effective sentence of seven years and six months' imprisonment with non-parole period of four years - But for pleas of guilty, total effective sentence of ten years and six months' imprisonment with non-parole period of seven years - But for mental illness and pleas of guilty, total effective sentence in order of 13 or 14 years imprisonment.

***The Queen v Papathanasiou, Christos***

Croucher J

[\[2016\] VSC 722](#)

02/12/2016

CRIMINAL LAW - Sentence - Manslaughter by unlawful and dangerous act - Accused aged 20, whilst under the influence of drugs, accidentally shot friend in face with sawn-off shotgun, killing him instantly - Unclear as to how discharge occurred - Accused fled scene without rendering assistance - Accused sought to flee Australia the next day - Early plea of guilty - Remorse - Youth - Limited criminal history - Good prospects of rehabilitation - Sentence of eight years' imprisonment with non-parole period of five years - But for plea of guilty, sentence of 11 years' imprisonment with non-parole period of eight years.

***The Queen v Rapovski, Albert***

Croucher J

[\[2016\] VSC 706](#)

01/12/2016

CRIMINAL LAW - Sentence - Murder - Plea of guilty - Prior convictions - Serious violent offender - Sentencing Act 1991 (Vic), s6B, s6D - 21 years imprisonment - Non-parole period of 18 years.

***Director of Public Prosecutions [DPP] v Bennison, Timothy Michael***

Elliott J

[\[2016\] VSC 686](#)

29/11/2016

CRIMINAL PROCEDURE - Human rights of child defendants charged with serious crimes in superior courts - Attempted murder and other charges brought against child aged 15 years in Supreme Court of Victoria - Pleas of guilty - Defendant in detention on remand - identifying suitable arrangements for his detention at court and procedures for conduct of directions and sentencing hearings having regard to his age - Segregating defendant as child in detention from adult prisoners when at court - Avoiding his intimidation, humiliation and distress and ensuring his effective participation in criminal process - Charter of Human Rights and Responsibilities Act 2006 (Vic) s8(3), s17(2), s23(1),(2) and (3), s25(3), International Covenant in Civil and Political Rights arts 10(2)(b), 14(4) and 24(1), Convention on the Rights of the Child arts 37(c), 40(1) and (2).

***Director of Public Prosecutions [DPP] v S L***

Bell J

[\[2016\] VSC 714](#)

29/11/2016

### Practice Court

INTERLOCUTORY INJUNCTION - Freezing order - Arguable case - Danger of unsatisfied judgment - Balance of convenience - Search order - Supreme Court (General Civil Procedure) Rules 2015 OO 37A, 37B.

***O'Brien & Ors (according to the attached Schedule) v Industry Skills Peninsula P/L & Ors (according to the attached Schedule)***

McDonald J

[\[2016\] VSC 744](#)

28/11/2016

# County Court of Victoria Cases

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

**BUILDING CONTRACT** - Payment claim under the Building and Construction Industry Security of Payments Act 2002 (Vic) - Project management services - Whether “building...advisory...services” - Dispute as to whether the arrangement was a joint venture agreement or a “construction contract” - Payment to be made at the end of project of 50% share of profits - Whether consideration for construction work to be “calculated otherwise than by reference to the value of the...services supplied” (section 7(2)(c)) - Sufficiency of the identification of the “services to which the progress payment relates”.

***Fulconstruction P/L v ABP Consultants P/L***

Judge Anderson  
[\[2016\] VCC 1732](#)  
25/11/2016

**PARTNERSHIP** - Distribution of contributions following dissolution, determination of capital contributions.

***Li & Anor v Tse & Ors***

Judicial Registrar Tran  
[\[2016\] VCC 1876](#)  
7/12/2016

**PRACTICE AND PROCEDURE** - Application for leave to withdraw admissions in defence and for summary dismissal of plaintiff’s claim.

***Sunowe Solar P/L v Inverter Solar P/L & Anor***

Judge Anderson  
[\[2016\] VCC 1818](#)  
30/11/2016

**PRACTICE AND PROCEDURE** - Application for security of costs - Complex litigation relating to misuse of “trade secrets” - Statement of claim contained imprecise allegations with limited particularisation - Discretionary factors otherwise favoured an order for limited security whilst permitting the plaintiff to pursue its claim - Offer by directors of the plaintiff to pay any costs order in favour of the defendant up to the sum of \$100,000 - Security ordered limited to \$100,000 to be either secured over the directors’ family home or provided by four instalments prior to trial.

***Maitre D Marketing P/L v Patties Food Ltd***

Judge Anderson  
[\[2016\] VCC 1782](#)  
28/11/2016

# Articles

## Administrative Law

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Judicial review - Procedural fairness - Natural justice - Legitimate expectation - Hearing rule - Rule against bias - *Kioa v West* - Offshore Processing Case - Plaintiff M61/2010E v Commonwealth - Australia  
**Sharp, N.** "Procedural fairness: the age of legitimate expectation is over." (2016) 90(11) ALJ 797-812.

Public officers - Disclosure - Official secrets - Duty to keep secret - Prosecutions - *Tasmania v Johnston* - Western Australia v Burke - Criminal Code Act 1899 (Qld) - Australia  
**Kinross, J. and P. Davis.** "His or her duty to keep secret." (2016) 90(11) 813-830.

## Admiralty Law

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Damage - Done by - Admiralty Act 1988 (Cth), s4(3)(a) - Australia  
**Cremean, D.** "Damage done by ship." (2016) 90(11) ALJ 789-791.

## Criminal Law & Procedure

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Criminal liability - Complicity - Extended joint criminal enterprise - Murder - *Miller v R* - *R v Jogee* - *McAuliffe v R* - UK - Australia  
**Higgings, R.** "Recent cases - *Miller v The Queen*." (2016) 90(10) ALJ 706-707.

## Equity

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Equitable interests - Bona fide purchase for value without notice - BFP - *Tabula in naufragio* - *Tabula doctrine* - *Phillips v Phillips* - *Pilcher v Rawlins* - UK  
**Reilly, A.** "Does 'equity's darling' need a legal title?" (2016) 10(2) J Eq 89-114.

Promissory estoppel - Proprietary estoppel - Certainty - Reliance - Taxonomy - *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* - Australia  
**Hudson, J.** "Certainty in equitable estoppel: questions of taxonomy, unification and coherence." (2016) 10(2) J Eq 137-153.

## Evidence

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Expert Evidence - Jurors - Information technology - UK  
**van der Luit-Drummond, J.** "Juries can't understand technical evidence." (2016) 160(42) Sol J 12.

## Human Rights

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Sentencing - Capital punishment - Death penalty - Abolition - Australia  
**McMahon, J.** "A snapshot of Australia and the death penalty in 2016." (2016) 90(11) ALJ 781-783.

## Legal Education

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Law schools - History - Graduates - Australia  
**Cooper, M.** "Does Australia have too many law schools?" (2016) 90(11) ALJ 777-780.

## Legal History

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Anniversary - Chief Judge in Equity - Supreme Court of New South Wales - UK - NSW - Australia  
**Justice Leeming.** "The Primary Judge in Equity." (2016) 90(11) ALJ 783-788.

## Legal Profession

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Judiciary - Ethnicity - Hellenic lawyers - Names - Heritage - Greece - Australia  
**Justice Kyrou. "What's in a name?" (2016) 90(10) ALJ 752-755.**

Personalia - Lord Atkin - Biography - Judicial philosophy - Donoghue v Stephenson - Liversidge v Anderson - UK  
**Applegarth, P. "Lord Atkin: Principle and progress." 2016 90(10) ALJ 711-751.**

Personalia - Sir Henry Brooke - Newspapers - Social media - Courts - Technology - Lord Justice of Appeal - UK  
**van der Luit-Drummond, J. "Sir Henry Brooke: visionary who kicked courts into IT age." (2016) 160 (42) Sol J 22-25.**

## Trusts

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Breach of trust - Commercial activities - Compensation - Express trusts - Intention - Quistclose trusts - Powers - Duties - UK  
**Yip, M. "The commercial context in trust law." [2016] (5) Conv. 347-365.**

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