



## THE LAW LIBRARY OF VICTORIA

Library  
Bulletin  
23 December  
2016

### Library News

#### General tour of the Library

**10 January 1.15pm-1.45pm**

This 30 minute tour is recommended for those who want a brief introduction to the Library and its heritage.

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

#### Tour for legal professionals

**24 January 1.15pm-2.15pm**

This 60 minute tour is targeted at the legal profession and those with a keen interest in libraries and the 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).

#### New Website and Christmas/New Year's closing

The Library closes on 23 December & reopens on 3 January 2017 at 9.00am.

Reduced opening hours from 3 - 23 January 2017, 9.00am to 5.00pm.

Explore our new & improved website over the New Year break.

#### 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.

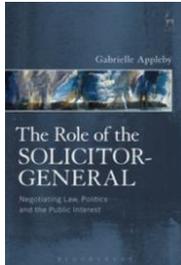
The book costs \$60 and there is a \$10 discount for members of the Royal Historical Society of Victoria (RHSV).

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# New Books

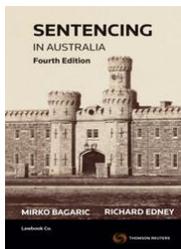
Following is a selection of new books in the Library collection. For details of more new books, see the Library Catalogue: [https://courts.sdp.sirsidynix.net.au/client/en\\_AU/llv/](https://courts.sdp.sirsidynix.net.au/client/en_AU/llv/).



Appleby, Gabrielle, *The role of the solicitor-general : negotiating law, politics and the public interest*

Oxford, Hart Publishing, 2016

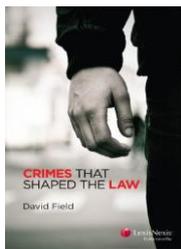
Call number: 353.4 APP (Supreme Court Library)



Bagaric, Mirko, *Sentencing in Australia*

4th ed., Pyrmont, NSW, Thomson Reuter, 2017

Call number: 345.0772 BAG.4 (Supreme, County, and Magistrates' Court Libraries)



Field, David, *Crimes that shaped the law*

Chatswood, NSW, LexisNexis Butterworths, 2015

Call number: 345 FIE (County Court Library)



Goode, Royston Miles, *Goode on payment obligations in commercial and financial transactions,*

3rd ed., London, Sweet & Maxwell, 2016

Call number: 346.077 GOO.3 (Supreme Court Library)



Ong, Denis S. K., *Ong on contribution*

Annandale, NSW, Federation Press, 2016

Call number: 340.57 ONG (Supreme Court Library)

# Legislation

## Victorian Bills

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

## Victorian Assents

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

- [Compensation Legislation Amendment Act 2016 No. 73/2016](#)
- [Family Violence Reform Implementation Monitor Act 2016 No. 74/2016](#)
- [Housing Amendment \(Victorian Housing Register and Other Matters\) Act 2016 No. 75/2016](#)
- [Justice Legislation Amendment \(Parole Reform and Other Matters\) Act 2016 No. 76/2016](#)

## Proclamations

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

- [Melbourne and Olympic Parks Amendment Act 2016 No. 52/2016](#)
  - Sections 1-5 of this Act came into operation on 12 December 2016 (VGG S375 6.12.2016)

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

- [Compensation Legislation Amendment Act 2016 No. 73/2016](#)
  - Part 1 (sections 1, 2), sections 3, 6, 7, 9, 10, 12, 16-18, Part 6 (section 23) of this Act came in by forced commencement on 14 December 2016 s. 2(1)
- [Justice Legislation Amendment \(Parole Reform and Other Matters\) Act 2016 No. 76/2016](#)
  - Sections 1-8, 11 of this Act came in by forced commencement on 14 December 2016 s. 2(1)



## 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.

# High Court Cases

ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES - Land rights - Claimable Crown lands - Crown land dedicated for public purposes - Where State recorded as registered proprietor - Where Crown land dedicated for gaol purposes - Where Crown land proclaimed as correctional complex and correctional centre - Where gaol closed but dedications continued in force - Where proclamations revoked - Where Crown land held pending decision as to future use - Where activities on Crown land not inconsistent with dedications - Whether land "lawfully used or occupied" under s36(1)(b) of Aboriginal Land Rights Act 1983 (NSW). CONSTITUTIONAL LAW (NSW) - Executive power - Power over Crown lands - Whether executive power abrogated by s2 of New South Wales Constitution Act 1855 (Imp) - Whether statutory authorisation required for lawful occupation of Crown lands.

WORDS AND PHRASES - "actual occupation", "beneficial and remedial legislation", "beneficial construction", "claimable Crown lands", "Crown lands", "dedication", "lawfully used or occupied", "lawful occupation", "the Crown". Aboriginal Land Rights Act 1983 (NSW), s36. New South Wales Constitution Act 1855 (Imp) (18 & 19 Vict c 54), s2. Real Property Act 1900 (NSW), s13D, s13J.

***New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act***  
[\[2016\] HCA 50](#)  
14/12/2016

CRIMINAL LAW - Criminal liability and capacity - Doli incapax - Where appellant convicted of two counts of sexual intercourse with child under 10 years - Where appellant approximately 11 years and six months at time of offending - Where appellant found to be of very low intelligence - Whether presumption of doli incapax rebutted.

WORDS AND PHRASES - "doli incapax", "knowledge of the moral wrongness of the act", "merely naughty or mischievous", "morally wrong", "seriously wrong". Children (Criminal Proceedings) Act 1987 (NSW), s5. Crimes Act 1900 (NSW), s66A(1).

***RP v The Queen***

[\[2016\] HCA 53](#)

21/12/2016

STATUTORY CONSTRUCTION - Building and Construction Industry Security of Payment Act 1999 (NSW), s13(1) - Whether existence of reference date under construction contract precondition to making of valid payment claim.

CONTRACT - Construction of terms - Where construction contract made provision for contractor to "claim payment progressively" by making a "progress claim" - Whether it was the parties' intention that the contractor's right to make a progress claim under construction contract was to survive termination.

WORDS AND PHRASES - "payment claim", "progress claim", "progress payment", "reference date". Building and Construction Industry Security of Payment Act 1999 (NSW), s8, s13.

***Southern Han Breakfast Point P/L (in Liquidation) v Lewence Construction P/L***

[\[2016\] HCA 52](#)

21/12/2016

TAXATION - Unit trusts - Public trading trust - Where trust settled by deed - Where employers become members of industry severance scheme created by trust - Where members of scheme obliged to make payments to trustee - Where trustee credits payments to accounts in name of individual employees - Where trustee makes payment to employee upon termination of employment - Whether unit trust within meaning of Div 6C of Pt III of the Income Tax Assessment Act 1936 (Cth).

WORDS AND PHRASES - "beneficial interest", "ordinary acceptance", "prescribed trust estate", "public trading trust", "unit", "unit trust". Income Tax Assessment Act 1936 (Cth), s102M, s102P, s102R, s102S, s102T.

***ElecNet (Aust) P/L v Commissioner of Taxation***

[\[2016\] HCA 51](#)

21/12/2016

TRADE PRACTICES - Restrictive trade practices - Substantially lessening competition - Price fixing - Where travel agent sold international airline tickets on behalf of airlines - Where travel agent attempted to induce airlines to agree not to discount price at which international airline tickets offered directly to customers - Whether travel agent acting as agent for airlines - Whether travel agent and airlines "in competition" notwithstanding travel agent supplied as agent for airlines - Trade Practices Act 1974 (Cth), s45(2)(a)(ii), s45(3), s45A.

TRADE PRACTICES - Restrictive trade practices - Market definition - Relevance of "functional approach" to market definition.

WORDS AND PHRASES - "agency agreement", "agent", "competition", "functional approach to market definition", "international air carriage", "market", "price fixing", "substantially lessening competition". Trade Practices Act 1974 (Cth), s4E, s45, s45A.

***Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd***

[\[2016\] HCA 49](#)

14/12/2016

# Victorian Supreme Court Cases

## Court of Appeal

ADMINISTRATIVE LAW - Judicial review - Prison administration - Application for review of administrative decisions - Applicant prisoner sought access to CD containing legal materials - Access refused - Interlocutory application for mandatory order - Whether order available - Whether applicant's access to court impeded - Leave to appeal refused.

***Rich, Hugo v Ryan, Brett (acting in his capacity as General Manager of H M Prison Barwon and for Corrections Victoria)***

Maxwell P, Santamaria and Ferguson JJA

[\[2016\] VSCA 337](#)

20/12/2016

BUILDING AND CONSTRUCTION - Protection work - Requirement for owner to ensure contract of insurance in force - Building Act 1993 s 93(1).

STATUTORY INTERPRETATION - Section 93(1)(a) of the Building Act 1993 - Meaning of 'insurance - against damage by the proposed protection work to the adjoining property' - Whether insurance on which adjoining owners can themselves claim is required.

INSURANCE - Insurance contracts - Construction - Whether contract of insurance with endorsement satisfied Building Act 1993 s 93(1).

INSURANCE - General indemnity insurance - Distinction between property damage insurance and liability insurance.

PRACTICE AND PROCEDURE - Arguments raised for first time on appeal - Whether party should be permitted to rely on argument.

***Colonial Range P/L (ACN 070 855 220) v CES-Queen (Vic) P/L (ACN 153 232 663) and Delta P/L (ACN 007 069 794)***

Warren CJ, Whelan JA, and Riordan AJA

[\[2016\] VSCA 328](#)

16/12/2016

CONTEMPT - Coercive powers under Major Crime (Investigative Powers) Act 2004 s36, s49(1)(b) - Refusing or failing to answer questions of Chief Examiner - Reasonable excuse - Burden of proof - Examinee carries evidential burden - Prosecution carries legal burden - Chugg v Pacific Dunlop Ltd (1990) 170 CLR 249; R v QX [2015] VSC 784, considered; R v Debono [2013] VSC 408, distinguished.

HUMAN RIGHTS - Presumption of innocence - Evidential burden does not limit presumption of innocence - Charter of Human Rights and Responsibilities Act 2006 s25(1) - R v Holmes [1988] 1 SCR 914; R v Whyte [1988] 2 SCR 3, discussed.

CRIMINAL LAW - Coercive powers under Major Crimes (Investigative Powers) Act 2004 s31 - Obligations of Chief Examiner prior to questioning witness - Chief Examiner must inform examinee of right to refuse if reasonable excuse - Procedural fairness - Chief Examiner not required to determine whether excuse is reasonable or give reasons - R v QX [2015] VSC 784, disapproved.

***The Queen (on the application of the Chief Examiner) v D A (a pseudonym); The Queen (on the application of the Chief Examiner) v G F K (a pseudonym)***

Ashley, Redlich and McLeish JJA

[\[2016\] VSCA 325](#)

16/12/2016

CONTRACT - Contract of employment - Restraint of trade - Enforceability of covenant in restraint of trade - Legitimate interest of employer in protecting its confidential information - Whether restraint unreasonable - Restraint unreasonable - Severance - Whether covenant or words in covenant should be severed - Covenant and words not severed - Application for leave to appeal granted - Appeal dismissed.

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

Beach and Ferguson JJA, and Riordan AJA

[\[2016\] VSCA 334](#)

20/12/2016

CONTRACTS - Contract for sale of land - Applicants received unsolicited approach from developer seeking to purchase a portion of their land - Special conditions included obligation that the purchaser at its own cost and expense prepare a plan of subdivision and use its best endeavours and do all things reasonably required to expedite and procure registration of plan - Further special condition added stating that if plan of subdivision not registered by 25 August 2015 either party may terminate contract - Pre-requisite for approval of plan was entry into agreements with service suppliers - Agreements included financial obligations - Dispute as to which party obliged to pay - Effect of special conditions to shift risk of registration and associated financial obligations from vendor to the purchaser - Sale of Land Act 1962 - Subdivision Act 1988 Part 2, Part 4 - Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104 - Royal Botanical Gardens and Domain Trust v South Sydney City Council (2002) 240 CLR 45.

PRACTICE AND PROCEDURE - Application to set aside Judicial Registrar's orders extending time to file application for leave to appeal - Court will not extend time if appeal so devoid of merit it would be futile to do so - Court will consider length of delay, reasons for delay and extent of any prejudice suffered by respondent if extension granted - Applicants had adequately explained reasons for delay - Appeal had substantive merits - Failure to extend time would lead to unjust outcome - Application dismissed.

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

Santamaria and Ferguson JJA, and Riordan AJA

[\[2016\] VSCA 322](#)

16/12/2016

CORPORATIONS - Application to set aside statutory demand pursuant to s459G of the Corporations Act 2001 (Cth) by reason of alleged genuine dispute - Respondent lent applicant substantial amount of money - Respondent put in liquidation - By statutory demand liquidator demanded repayment of loan and interest - Applicant sought to set aside statutory demand on the basis that there was a genuine dispute as the loan was payable only when applicant chose to pay it - Applicant sought to introduce further supplementary affidavits after expiration of 21-day period - Whether primary judge erred in finding that there was no genuine dispute - Whether primary judge erred in refusing to admit supplementary affidavits - Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in liq) [2015] VSCA 330 - Head v Kelk [1963] 63 SR (NSW) 340 - Universal Greening Pty Ltd v Sabine (1999) 17 ACLC 880 - Application for leave to appeal refused.

***GoConnect Ltd (ACN 089 240 353) v Sino Strategic International Ltd (in liquidation)***

Santamaria and Kyrou JJA, and Elliott AJA

[\[2016\] VSCA 315](#)

14/12/2016

COSTS - Appeal costs - Application for indemnity certificate by respondent police officer - Whether appeal against decision of Court 'in a civil proceeding' - Whether certificate would be 'in favour of the Crown or any person representing the Crown' - Application for indemnity certificate granted - Appeal Costs Act 1998, s3, s4, s5, s38.

***Siddique, Mohamed v Martin, Michael and Magistrates' Court of Victoria (No 2)***

Tate and Ferguson JJA, and Cavanough AJA

[\[2016\] VSCA 310](#)

09/12/2016

COSTS - Appeal - Indemnity costs - Calderbank offer - Whether refusal of offer unreasonable - Offer invited appellant to discontinue - Appeal was from an order granting leave to serve an amended statement of claim - Trial judge had provided detailed reasons - Offers open to be accepted after exchange of written cases - Sufficient time for offers to be considered - Sufficiency of compromise - Refusal unreasonable - Application for indemnity costs granted - Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) 13 VR 435 and Settlement Group Pty Ltd v Purcell Partners (a firm) (No 2) [2014] VSCA 68 applied - Sandri v O'Driscoll [2014] VSCA 109 distinguished - Supreme Court (General Civil Procedure) Rules 2015 r26.12.

***Swan Hill Chemicals P/L (ACN 144 706 258) v MA & J Tripodi P/L (ACN 083 150 136)***

Santamaria JA and Riordan AJA

[\[2016\] VSCA 316](#)

13/22/2016

CRIMINAL LAW - Appeal against sentence - Sentence of seven years' imprisonment with a non-parole period of five years and six months for one count of intentionally causing serious injury - Whether manifestly excessive - Appellant struck 70 year old victim to the head forcefully with a golf club - Physical injuries severe but not catastrophic - Victim profoundly affected emotionally by the assault - Appellant, aged 38, had numerous prior convictions including for violence - Sentencing judge 'guarded' about appellant's prospects of rehabilitation - Current sentencing practices for intentionally causing serious injury considered - Appeal dismissed - The Queen v Kilic [2016] HCA 48.

***Webster, Shane v The Queen***

Redlich JA and Beale AJA

[\[2016\] VSCA 329](#)

16/12/2016

CRIMINAL LAW - Appeal - Conviction - Incriminating conduct - Jury Directions Act 2015 pt 6 - Lie told in response to general allegation of misconduct - Whether lie capable of being seen as implied admission - Applicant's knowledge of offence provides foundation for inference of guilt - Jury Directions Act 2015 s20(1)(b), s32 - *Edwards v The Queen* (1993) 178 CLR 193, considered.

CRIMINAL LAW - Jury directions - Jury Directions Act 2015 s21 - Direction by judge that implied admission was as to inappropriate touching - Whether misdirection as to lesser serious offence than that charged - *Ciantar v The Queen* (2006) 16 VR 26, *Baini v The Queen* (2012) 246 CLR 46, *Hothnyang v The Queen* [2014] VSCA 64, *Crocker v The Queen* (2013) 39 VR 668, discussed - No substantial miscarriage of justice - Leave granted - Appeal dismissed.

CRIMINAL LAW - Sentence - Rape - Indecent Assault - Sentence of 7 years and 2 months' imprisonment, 4 years and 9 months' non-parole period - *DPP v Werry* [2012] VSCA 208, *Ali v The Queen* [2013] VSCA 294, *Singh v The Queen* [2014] VSCA 250, discussed - Sentence not beyond sound exercise of sentencing discretion - Appeal dismissed.

***Di Giorgio, Alex v The Queen***

Redlich and Tate JJA, and Beale AJA

[\[2016\] VSCA 335](#)

20/12/2016

CRIMINAL LAW - Appeal - Conviction - One charge of kidnapping, one charge of false imprisonment and one charge of intentionally cause serious injury - Unreliable evidence direction - Jury Directions Act 2015 s32 - Effect of smoking cannabis on memory and loss of consciousness during offending - Whether evidence was 'evidence of a kind that may be unreliable' - *Allen (A pseudonym) v The Queen* (2013) 39 VR 629, *Young v The Queen* [2015] VSCA 265, discussed - Unreliability arising from cannabis use fully exposed to jury through cross-examination and final address - Jury able to draw from own experiences - No warning required - Application for leave to appeal refused.

CRIMINAL LAW - Appeal - Conviction - Guilty verdict unreasonable or cannot be supported having regard to the evidence - Circumstantial case - Evidence of victim in conjunction with strong circumstantial case - Open to jury to be satisfied of applicant's guilt - Application for leave to appeal refused.

CRIMINAL LAW - Appeal - Sentence - Current sentencing practice - *Hills v The Queen* [2011] VSCA 364; *Cini v The Queen* [2013] VSCA 115; *Hanna v The Queen* [2014] VSCA 187; *Chol v The Queen* [2016] VSCA 252, considered - Objective gravity of offending - Non-parole period - *Kumova v The Queen* (2012) 37 VR 538, considered - Sentence not outside available range - No mitigating circumstances requiring lower non-parole period - Application for leave to appeal refused.

***Elmaghraby, Adam v The Queen***

Redlich and Santamaria JJA, and Beale AJA

[\[2016\] VSCA 326](#)

16/12/2016

CRIMINAL LAW - Appeal - Sentence - Indecent assault of person under 16 (6 charges) - Representative charges - Total effective sentence 6 years, non-parole period 4 years - Whether sentences manifestly excessive in whole or in part - Child victims - Appellant was victims' teacher - Abuse of power - Humiliation of victims - Culpability high - Severe impact on victims - Offending in 1970s - Offender's subsequent good character - Remorse - Sentences within range - Appeal dismissed.

***Morris, Robert Leonard v The Queen***

Maxwell P and Cavanough AJA

[\[2016\] VSCA 331](#)

19/12/2016

CRIMINAL LAW - Appeal - Sentence - Negligently causing serious injury by driving - Offence seriousness - Victim was passenger - Whether victim's knowledge of driver's intoxication affects driver's culpability - Driver's responsibility for negligent driving unaffected - Whether victim's failure to wear seatbelt contributed to injury - Not shown that failure to wear seatbelt made injuries more serious - Sentenced to three years' imprisonment, non-parole period 18 months - Appeal dismissed - R v Tran (2002) 4 VR 457; R v Howarth (2000) 1 VR 593; R v Cowden (2006) 47 MVR 128; DPP v Johnstone (2006) 16 VR 75; R v Franklin (2002) 36 MVR 190; DPP v Walden (2003) 39 MVR 451, considered.

***Spanjol, Josip v The Queen***

Maxwell P, Redlich and McLeish JJA

[\[2016\] VSCA 317](#)

14/12/2016

CRIMINAL LAW - Appeal - Sentence - Possession of drug of dependence (two charges: methylamphetamine and cocaine) - Combination sentence - Aggregate sentence 20 months' imprisonment, combined with Community Correction Order for two years - Whether custodial component manifestly excessive - Substantial quantities of drugs - Specific deterrence - General deterrence - Physical and mental health difficulties - Sentence reasonably open - Leave to appeal refused - Drugs, Poisons and Controlled Substances Act 1981 s73.

***Mitchell, Toby v The Queen***

Maxwell P, Redlich and Tate JJA

[\[2016\] VSCA 321](#)

16/12/2016

CRIMINAL LAW - Application for leave to appeal - Sentence appeal - Cultivating a narcotic plant (commercial quantity) contrary to s72A of the Drugs, Poisons and Controlled Substances Act 1981 - Theft contrary to s74 of the Crimes Act 1958 - Whether sentence manifestly excessive - Leave to appeal granted.

***Nguyen, Quy v The Queen***

Santamaria JA

[\[2016\] VSCA 332](#)

19/12/2016

CRIMINAL LAW - Bail pending appeal - Exceptional circumstances - Relevance of trial judge's strongly held view that convictions may be quashed as unsafe or unsatisfactory - Whether considerations of 'parity' relevant when one applicant faces relatively short term of imprisonment which will substantially have been served by the time any appeal is heard while the other faces a significantly longer term of imprisonment and may not, therefore, fall within principles laid down in *Re Zoudi* (2006) 14 VR 580.

***Gant, Peter Stanley v The Queen; Siddique, Mohammed Aman v The Queen***

Weinberg JA and Priest JA

[\[2016\] VSCA 340](#)

16/12/2016

CRIMINAL LAW - Coercive powers of Chief Examiner - Chief Examiner not required to assure witness answers not to be communicated to prosecuting authorities - R v QX [2015] VSC 784, disapproved.

***The Queen (on the application of the Chief Examiner) v D A (a pseudonym); The Queen (on the application of the Chief Examiner) v G F K (a pseudonym)***

Ashley, Redlich, and McLeish JJA

[\[2016\] VSCA 325](#)

16/12/2016

CRIMINAL LAW - Murder - Appeal - Whether evidence sufficient to infer murderous intent - Multiple stab wounds to abdomen - Self-defence rejected by jury - Leave to appeal refused - M v The Queen (1994) 181 CLR 487; Henderson v The Queen [2016] VSCA 61 applied.

***Christie, Paul v The Queen***

Redlich, Beach, and Kyrou JJA

[\[2016\] VSCA 313](#)

13/12/2016

CRIMINAL LAW - Sentence - Appeal by leave - Traffick large commercial quantity of drug of dependence (heroin) - Sentence of seven years and six months' imprisonment with five years and six months non-parole period - Appellant sourced heroin interstate, had it couriered to Victoria, arranged for it to be broken down and on-sold - Whether impermissible want of parity with sentence of seven years' imprisonment with five year non-parole period imposed upon co-offender who trafficked large commercial quantity of the broken down heroin over longer period than the offending by the appellant - Overall different circumstances of offending and offenders - Appeal dismissed.

CRIMINAL LAW - Sentence - Application for leave to appeal - Traffick commercial quantity of drug of dependence (heroin) - Sentence of five years' imprisonment with three years non-parole period - Applicant's role to courier heroin from Sydney to Melbourne for cutting down and on-sale - Short period of offending - Conceded error in facts upon which judge imposed sentence - Whether different sentence should be imposed - Leave to appeal granted but appeal dismissed.

CRIMINAL LAW - Sentence - Appeal by Director of Public Prosecutions - Traffick large commercial quantity of drug of dependence - Sentence of four years and four months' imprisonment with three years non-parole period - Respondent's role to cut down and package heroin for on-sale - Whether finding by judge of exceptional circumstances constituted by third party hardship reasonably open - Finding open - Appeal dismissed.

CRIMINAL LAW - Sentence - Application for leave to appeal - Traffick large commercial quantity of drug of dependence - Sentence of six years' imprisonment with four years non-parole period - Applicant's role, over short period, assisting co-offender to cut down and package heroin for on-sale - Conceded error in facts upon which judge imposed sentence - Whether different sentence should be imposed - Parity considerations - Leave to appeal granted and appeal allowed - Appellant re-sentenced to five years and six months' imprisonment with three years and six months non-parole period.

***Trinh, Linh Anh v The Queen; Trinh, Thuy Hoang v The Queen; Director of Public Prosecutions v Thai, Uyen Thi Phuong; Nguyen, Minh Triet v The Queen***

Ashley and Ferguson JJA, and Beale AJA

[\[2016\] VSCA 307](#)

09/12/2016

EQUITY - Equitable liens - Winding-up - Liquidator - Care, preservation and realisation of assets - Liquidator's costs and expenses - No fund created - Whether liquidator entitled to lien - Liquidator's claim upheld - *Re Universal Distributing Co Ltd (in liq) (1933) 48 CLR 171, Stewart v Atco Controls Pty Ltd (in liq) (2014) 252 CLR 307* applied.

***Primary Securities Ltd (ACN 089 812 635) v Willmott Forests Ltd (receivers and managers appointed) (in liquidation) (ACN 063 263 650) and Crosbie, Craig David in his capacity as liquidator of Willmott Forests Ltd (receivers and managers appointed) (in liquidation) (ACN 063 263 650) and Carson, Ian Menzies in his capacity as liquidator of Willmott Forests Ltd (receivers and managers appointed) (in liquidation) (ACN 063 263 650)***

Maxwell P, Whelan and Santamaria JJA

[\[2016\] VSCA 309](#)

12/12/2016

INSURANCE - Life insurance - Master policy - Certificates of insurance issued under master policy - Insurer accepted assumption of risk - Whether contract of insurance between insurer and applicant - Whether applicant an insured under the Insurance Contracts Act 1984 (Cth) - Whether applicant a third party beneficiary under a trust - Reconciliation of inconsistencies in documentation - Fraudulent misrepresentation - Insurance Contracts Act 1984, s21, s29, s48A - Leave to appeal granted - Appeal dismissed.

***Montclare, John v Metlife Insurance Ltd (formerly Citicorp Life Insurance Ltd) (ACN 004 274 882)***

Ashley, Tate, and Kyrou JJA

[\[2016\] VSCA 336](#)

20/12/2016

LEGAL PRACTITIONERS - Recovery of legal costs from client - Non-compliance with provisions of Legal Profession Act 2004 - Oral agreement compromising amount of costs payable for work performed over lengthy period during which no bills were rendered at client's request - Agreement was a 'costs agreement' which was void under the Act because it was not in writing - Even if agreement constituted an accord and satisfaction, it was not enforceable because of non-compliance with the Act - Appeal allowed - *Beba Enterprises Pty Ltd v Gadens Lawyers (2013) 41 VR 590* applied.

COSTS - Features of a 'costs agreement' as defined in Legal Profession Act 2004 s3.4.2.

CONTRACT - Principles relating to accord and satisfaction - Interrelationship between those principles and the provisions of the Legal Profession Act 2004.

***Able Demolitions and Excavations P/L v Barry Kenna & Co***

Tate and Kyrou JJA, and Riordan AJA

[\[2016\] VSCA 312](#)

13/12/2016

PRACTICE AND PROCEDURE - Application for costs against lawyers for opposing party under r63.23 of Supreme Court (General Civil Procedure) Rules 2005 alleging no proper basis for commencement of proceedings, in breach of s 18 of Civil Procedure Act 2010 - Application made more than 2 years after proceedings finalised - Factors relevant to exercise of discretion under r63.23 - Relevance of time limit in s30 of Act - Delay inordinate and not satisfactorily explained - Principle of finality.

PRACTICE AND PROCEDURE - Judge erred in treating respondents' application under s29 of Civil Procedure Act 2010 for order dismissing applicant's application under r63.23 of Rules as being 'akin' to an application for summary judgment under s63 of Act - Whether 'no real prospect of success' test in s63 applicable - Factors relevant to exercise of discretion under s29 - Civil Procedure Act 2010 s7, s8, s9, s10, s18, s25, s28, s29, s30, s31, s61, s62, s63.

PRACTICE AND PROCEDURE - Whether judge overlooked relevant evidence in exercising discretion to dismiss application under r63.23 of Rules against lawyers - Whether judge's reasons adequate - Judge erred - Court of Appeal exercised discretion under r63.23 for itself on basis of all evidence before judge - Application under r63.23 against lawyers dismissed - Leave to appeal granted but appeal dismissed.

***Gippsreal Ltd v Kenny, Caroline Majella and Ian Symonds & Associates***

Whelan, Priest, and Kyrou JJA

[\[2016\] VSCA 319](#)

15/12/2016

PRACTICE AND PROCEDURE - Interest - Whether debt payable 'by virtue of some written instrument' - Whether interest calculated on pre- or post-tax judgment sum - Hodgson v Amcor Ltd [No 9] [2012] VSC 205, followed - Supreme Court Act 1986 s58.

COSTS - Trial - Appellant made offers of compromise during course of proceeding - Whether offers 'of a genuine compromise' - Gamboni v Bendigo and Adelaide Bank Ltd [2013] VSCA 282, applied - Whether court should 'otherwise order' and order payment of costs on ordinarily applicable basis after date of offer - Whether reasonableness of rejection of offer is critical question as to whether court should 'otherwise order' - Nakos v Serdaris [2016] VSC 179, approved - Supreme Court (General Civil Procedure) Rules 2005 r26.08.

***Stevens, Anthony v Spotless Management Services P/L (No 2)***

Kyrou and McLeish JJA, and Elliott AJA

[\[2016\] VSCA 311](#)

12/12/2016

PRACTICE AND PROCEDURE - Unsuccessful defendant in defamation proceeding applied for relief under s29 of Civil Procedure Act 2010 for alleged breaches by successful plaintiffs of overarching obligations in that Act, including in their capacity as lay witnesses - Whether Act applies to a party in capacity as lay witness - Whether party can be liable for breaches of overarching obligations by party's lawyer - Circumstances in which relief may be refused in interests of justice without detailed consideration of merits of alleged breaches of overarching obligations - Application under s 29 sought to contest matters that were, or should have been, raised during hearing of defamation proceeding - Alleged breaches of overarching obligations not shown to have caused any loss - Application for leave to appeal refused.

PRACTICE AND PROCEDURE - Conduct of parties to civil proceeding - Overarching obligations in s18, s21, s22, s23, s24 and s29 of Civil Procedure Act 2010 - Procedure for dealing with alleged breaches of overarching obligations informed by procedural fairness and nature and gravity of alleged breaches - Yara Australia Pty Ltd v Oswal (2013) 41 VR 302 considered.

COSTS - Indemnity costs - Rejection of offer of compromise in defamation proceeding - Defamation Act 2005 s40(2)(a).

COSTS - Indemnity costs - Conduct of hearing of application under s29 of Civil Procedure Act 2010 by self-represented applicant - Re-agitation of issues dealt with in defamation proceeding - Indemnity costs order warranted. EVIDENCE - Fresh evidence - Facts known to applicant at time of trial - Application for leave to adduce fresh evidence refused.

***Giles, Virginia v Jeffrey, David and Curnow, Thomas***

Santamaria and Kyrou JJA, and Elliott AJA

[\[2016\] VSCA 314](#)

14/12/2016

REAL PROPERTY - Applicants contracted to purchase land owned by respondent - Applicants purported to exercise cooling-off right by sending notice of termination to respondent's estate agent - Whether notice of termination effective - Whether 'agent' in Sale of Land Act 1962 s 31 includes estate agent.

REAL PROPERTY - Contract of sale of land substantially conforming to standard form contract of sale of real estate contained in Estate Agents (Contracts) Regulations 2008 sch - Cooling-off right under Sale of Land Act 1962 s31 - Whether contract permitted service of notice of termination on respondent's estate agent - Appeal allowed.

CONTRACT - Interpretation of terms giving effect to statutory requirement - Whether contract may go further than statute requires - *Digby v General Accident Fire and Life Assurance Corporation Ltd* [1943] AC 121, 141; *Fawcett v BHP By-Products Pty Ltd* (1960) 104 CLR 80, 89-90, applied.

***Lo, Cheng and Tan, Eng Kiat v Russell, Thomas John***

Warren CJ, Tate and McLeish JJA

[\[2016\] VSCA 323](#)

16/12/2016

REAL PROPERTY - Urgent application to restrain sale of mortgaged property - Judgment for possession in favour of mortgagee - Purported residential tenancy - Granted without mortgagee's consent - Balance of convenience - Application dismissed.

***Bradley Galloway v National Australia Bank Ltd***

Osborn and Santamaria JJA

[\[2016\] VSCA 330](#)

09/12/2016

TAXATION - Duty - Group investors purchased property for redevelopment and subdivision - Property held on unit trust - Plan of subdivision registered, each subdivided lot subject of new certificate of title - Trustee transferred interest in one lot to unitholder - Exemption for duty in respect of transfer of property subject to 'fixed trust' - Whether duty payable on transfer to unitholder - Whether trust deed created initial unit trust existing before registration of plan of subdivision and subsequent 'fixed trusts' in favour of respective unitholders arising upon registration of plan of subdivision - Duties Act 2000 s36 - Appeal allowed.

JUDICIAL REVIEW - Appeal - Questions of law - Whether construction of statute and trust deed are questions of law - Whether application of Duties Act 2000 to facts is question of law - *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315; *Hope v Bathurst City Council* (1980) 144 CLR 1, applied.

***Commissioner of State Revenue v Arrigo, Antonino***

Ashley, Santamaria, and McLeish JJA

[\[2016\] VSCA 339](#)

20/12/2016

TAXATION - Land tax - Exemptions - Exemption for primary production - Whether land used primarily for primary production - Timing of ascertainment of use - Whether at assessment date or during tax year - Meaning of 'use' - Whether land lying fallow or not used - Saville v Commissioner of Land Tax (1980) 12 ATR 7, Longford Investments Pty Ltd v Commissioner of Land Tax (NSW) (1978) 8 ATR 656 considered - Land Tax Act 2005, s36, s59, s60 and s66. APPEAL - Appeal on question of law - Appeal from Victorian Civil and Administrative Tribunal - Whether question of fact or question of law - Leave to appeal refused - Victorian Civil and Administrative Tribunal Act 1998, s148(1).

WORDS AND PHRASES - 'Use', 'is used'.

***Rainn P/L v Commissioner of State Revenue***

Maxwell P, Santamaria JA, and Riordan AJA

[\[2016\] VSCA 338](#)

20/12/2016

TORTS - Contribution - Contribution claims between tortfeasors - Tortfeasors were manufacturers and suppliers of asbestos thermal insulation - Exposure - Whether exposure to asbestos thermal insulation established - Inferences - Findings of exposure dependent upon inferences drawn from facts of general application - Causation - Whether causation established - Findings of causation dependent upon inference drawn from facts of general application - Whether trial judge erred in finding causation established.

EVIDENCE - Hearsay - Exceptions to hearsay - Whether statements made to doctors by unavailable witnesses were admissible to prove a person's exposure to asbestos - Revival of memory - Reading aloud parts of a document - Evidence Act 2008, s32(3), s63(2), s136 and s192(2).

LIMITATION OF ACTIONS - Statutory construction of s24(4) of the Wrongs Act 1958 as it applied to torts committed on or before 31 December 1971 - Statutory construction of s 24(4) of the Wrongs Act 1958 as it applied to torts committed after 31 December 1971 - Wrongs Act 1958, s24 - Limitation of Actions Act 1958, s5(1)(d) - Wrongs Act 1972, s3.

EQUITY - Contribution - Partners - Coordinate liabilities - Whether action for equitable contribution subsumed by statutory provisions providing for contribution between tortfeasors - Whether action for equitable contribution only available in cases where no statutory right of contribution available - Defences - Laches - Statutory time limit applied by analogy - Whether defence of laches available notwithstanding that action within time prescribed by a statutory time limit applied by analogy.

***CSR Ltd (ACN 000 001 276) and Bradford Insulation Industries P/L (ACN 000 078 357) v Amaca P/L (ACN 000 035 512) (under NSW Administered Winding Up); Amaca P/L (ACN 000 035 512) (under NSW Administered Winding Up) v CSR Ltd (ACN 000 001 276) and Bradford Insulation Industries P/L (ACN 000 078 357)***

Maxwell P, Beach and Kaye JJA

[\[2016\] VSCA 320](#)

16/12/2016

TORTS - Defamation - Provider of internet search engine - Search results - Images - Text - Autocomplete predictions - Plaintiff's case that defendant published search results that were defamatory of him - Whether defendant published matter relied on by plaintiff - Metropolitan International Schools Ltd v Designtechnica Corporation [2011] 1 WLR 1743; Trkulja v Google Inc (No 5) [2012] VSC 533; Bleyer v Google Inc (2014) 88 NSWLR 670; Yeung v Google Inc [2014] 4 HKLRD 493; Duffy v Google Inc (2015) 125 SASR 437; Crookes v Newton [2011] 3 SCR 269; Niemela v Malamas [2015] BCSC 1024, discussed.

TORTS - Defamation - Defamatory meaning - Matter pleaded as composite publication - Whether matter relied on capable of conveying defamatory meaning.

PRACTICE AND PROCEDURE - Service of writ outside jurisdiction - Reliance on Supreme Court (General Civil Procedure) Rules 2015 r7.01(1)(i) and (j) - Application to set aside writ and its service pursuant to Supreme Court (General Civil Procedure) Rules 2015 r8.09(a) - Whether proceeding had no real prospect of success - Agar v Hyde (2000) 201 CLR 552 - Civil Procedure Act 2010 s62 and s63 - Application for leave to appeal granted and appeal allowed - Amended writ, amended statement of claim and service on defendant outside jurisdiction set aside.

***Google Inc v Milorad Trkulja (AKA Michael Trkulja)***

Ashley, Ferguson, and McLeish JJA

[\[2016\] VSCA 333](#)

20/12/2016

TORTS - Statutory construction - Significant injury threshold - Threshold level - Psychiatric injury - Amendment to definition of 'threshold level' - Psychiatric injury impairment of 10 per cent or more - Applicability of new definition of 'threshold level' to proceedings on foot at time of amendment - Wrongs Act 1958 pt VBA.

STATUTES - Statutory construction - Amendment - Amendment of statute - Transitional provision - Whether amendment had retrospective operation - Whether any right acquired or accrued under an earlier version of the statute - Whether amendment had any affect upon previous operation of the statute or anything duly done under earlier statutory provision - Whether contrary intention expressly appeared - Wrongs Act 1958 s28LB, s28LF, s28LZH and s28LZS - Interpretation of Legislation Act 1984 s14(2).

WORDS AND PHRASES - Meaning of 'unless the contrary intention expressly appears' - Meaning of 'expressly' - Interpretation of Legislation Act 1984 s14(2).

***Mitchell, Gary v Latrobe Regional Hospital***

Osborn and Beach JA, and J Forrest AJA

[\[2016\] VSCA 342](#)

21/12/2016

TRUSTS AND TRUSTEES - Trustee's remuneration - Trust deed provided for company to issue debenture stock - Trustee appointed receivers and managers to company pursuant to trust deed - Trustee performed work after appointment of receivers - Whether trustee entitled to remuneration for work undertaken after appointment of receivers in preference to debenture holders' claims for principal, premium and interest.

EQUITY - Trusts - Interpretation - Presumption that specific provisions prevail over general provisions in event of inconsistency - Analysis of which clause is more specific by reference to object or intention of contract - *Margetson v Glynn* [1892] 1 QB 337; *Glynn v Margetson & Co* [1893] AC 351; *William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016, considered - Appeal allowed.

***The Trust Company (Nominees) Ltd v Banksia Securities Ltd (receivers and managers appointed) (in liquidation)***

Ashley, Beach, and McLeish JJA

[\[2016\] VSCA 324](#)

16/12/2016

No catchwords supplied.

***Kassab, Mohammed v The Queen***

Santamaria JA

[\[2016\] VSCA 327](#)

16/12/2016

## Commercial Court

CAVEATS - Lodgement of caveats and issue of proceedings without proper basis.

COSTS - Whether solicitors should be jointly liable with caveator for costs ordered in favour of the registered proprietor of the property upon which a caveat had been lodged - Whether solicitor should indemnify caveator for costs for which it is liable by reason of issuing proceeding without instructions - Unnecessary to resolve factual disputes prior to resolving cost matters - Solicitor not liable for costs not caused by his conduct - Ordered that solicitor jointly liable with caveator for part of the costs.

***Gatto Corporate Solutions P/L (ACN 151 599 825) v Mountney, Lorraine Joan***

Daly AsJ

[\[2016\] VSC 752](#)

12/12/2016

CONTRACT - Guarantee - Performance - Beneficiary - Proof of loss - Causation.

***Network Ten P/L (ABN 91 052 515 250) v Centriq Insurance Company Ltd ; Centriq Insurance Company Ltd v Network Ten P/L (Abn 91 052 515 250) and Li'l Larikkins Productions P/L (Abn 82 101 280 497)***

Judd J

[\[2016\] VSC 768](#)

14/12/2016

CORPORATIONS - Civil penalty proceedings - Alleged breach of s180 and s181 of the Corporations Act 2001 (Cth) (the Act) - Flugge chairman of AWB Limited (AWB) - Geary an officer of AWB - Whether Flugge and Geary breached these duties in failing to inquire into and stop conduct by AWB that was contrary to United Nations Resolutions - United Nations had called on Australia, and all other member nations of the United Nations, to prevent its nationals from engaging in certain conduct with Iraq - United Nations resolutions prohibited the provision of hard currencies to Iraq - ASIC alleged that AWB had, contrary to the United Nations resolutions, supplied hard currencies to Iraq as part of its sale of wheat to Iraq - United Nations Oil-for-Food Programme permitted proceeds from the sale of Iraqi oil that was held by the United Nations in an escrow account to be used to pay for humanitarian goods and services provided to Iraq - ASIC alleged that AWB used proceeds to pay for non-humanitarian goods and services supplied to Iraq - ASIC alleged such conduct caused considerable damage to reputation and assets of AWB - ASIC alleged that Flugge and Geary knew of or ought to have known of the improper conduct by AWB and failed to stop the conduct in breach of their duties under ss 180 and 181 of the Act.

CORPORATIONS - Duty of directors and officers to inquire into possible wrongful conduct being engaged in by the company.

CORPORATIONS - Six-year limitation period - Whether a breach of duty to inquire into possible improper conduct by officers of AWB imposed on the chairman Flugge continued whilst he continued to serve as a director such that his conduct fell within six year limitation period imposed under the Act.

EVIDENCE - Application of *Jones v Dunkel* in a civil penalty proceeding.

EVIDENCE - Use of inferences to establish breach of the Act.

***In the matter of AWB Ltd (ACN 081 890 459) between: Australian Securities and Investments Commission v Flugge, Trevor James - and In the matter of AWB Ltd (ACN 081 890 459) between: Australian Securities and Investments Commission v Geary, Peter Anthony***

Robson J

[\[2016\] VSC 779](#)

15/12/2016

CORPORATIONS - External administration under Part 5.3A of the Corporations Act 2001 (Cth) of a group of companies - Application for extension of convening period - Corporations Act 2001 (Cth), s439A and s447A - Circumstances favour granting of extension sought - Application granted.

***Ex Parte: Horne, Stirling Lindley, Vrsecky, Petr and Stone, Jason Glenn (in their capacities as joint and several administrators of Wealth Within Holdings P/L ACN 124 628 020 (Administrators Appointed) and Ors (according to the Schedule attached) v Wealth Within Holdings P/L (ACN 124 628 020) (Administrators Appointed)***

Gardiner AsJ

[\[2016\] VSC 792](#)

19/12/2016

COSTS - Grounds for departing from a usual order that costs be taxed on a standard basis - Whether an award for indemnity costs are appropriate - Calderbank offer made - Principles for assessing relevance of Calderbank offer - Offer was merely an offer to capitulate - Relevance of parties' concessions to award of costs - Apportionment of costs where successful party lost several discrete questions.

***Blakeley, Ross (in his capacity as joint and several liquidator of Akron Roads P/L (in liquidation)) & Ors v CGU Insurance Ltd & Ors***

Robson J

[\[2016\] VSC 778](#)

07/12/2016

COSTS - Plaintiff largely, but not entirely successful at trial - Reliance upon indemnity clause in Deed of Offer in an application for indemnity costs - *Whild v GE Mortgage Solutions Pty Ltd* [2012] VSC 322 referred to - Reasons to deprive plaintiff of benefit of indemnity clause - Application of Rule 63.24 of the Supreme Court (General Civil Procedure) Rules 2015 - Judgment sum less than \$100,000 - Reason to 'otherwise order' - Whether unreasonable of the defendant to fail to accept Calderbank offers - *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435 applied.

INTEREST - Claim for interest on judgment sum at contractual rate from the date of demand refused - *Whild v GE Mortgage Solutions Ltd (No 2)* [2012] VSC 322 referred to - Claim for contractual interest based upon incorrect tax invoices - Section 60(1) of the Supreme Court Act 1986 (Vic) applied.

***Gippsreal Ltd (ACN 005 443 292) v Melbourne Linh Son Buddhist Society Inc (formerly Melbourne Linh Son Buddhist Congregation Inc)***

Daly AsJ

[\[2016\] VSC 696](#)

15/12/2016

LIQUIDATIONS - Court approval of litigation funding agreement pursuant to s477(2B) and s506(1A) of the Corporations Act 2001 (Cth) - Application by liquidators for orders under s30 of the Open Courts Act 2013 (Vic) and for confidentiality in the inherent jurisdiction of the court in respect of the evidence filed in the application, the written outline of submissions relied upon by the plaintiffs and the transcript of the hearing of the application.

***Bryant, Daniel Mathew, Crosbie, Craig David, and Carson, Ian Menzies as joint and several liquidators of Guns Ltd (in liquidation) (receivers and managers appointed) (ACN 009 478 148)***

Gardiner AsJ

[\[2016\] VSC 765](#)

07/12/2016

PRACTICE AND PROCEDURE - Application to set aside service on the basis of failure to comply with s16 of the Service and Execution of Process Act 1992 (Cth) - Rule 8.08 of the Supreme Court (General Civil Procedure Rules 2005) - Where conditional appearance filed - Where time for filing and serving application under r8.08(3) extended - Where party filing conditional appearance failed to file and serve an application under r8.08(3) within extended time - Application to further extend time to file and serve an application under r8.08(3) refused - Rule 8.08(3) operated to render conditional appearance a submission to the Court's jurisdiction.

***Babcock & Brown DIF III Global Co-Investment Fund, LP ; DIF III GP Ltd v The Royal Bank of Scotland PLC & Ors (According to the schedule annexed)***

Hargrave J

[\[2016\] VSC 769](#)

16/12/2016

### Common Law Division

ACCIDENT COMPENSATION ACT - Section 138 indemnity proceeding - Section 138(3)(b) formula - Assessment of Factor X - Determination of liability - Extent to which each defendant liable - Causation - Contributory negligence.

***Victorian WorkCover Authority v Downer Utilities Australia P/L (previously known as Tenix Alliance P/L)***

Zammit J

[\[2016\] VSC 775](#)

20/12/2016

ACCIDENT COMPENSATION - Workers compensation - Accident Compensation Act 1985 s138 - Indemnity - Whether injury was caused under circumstances creating a liability in the defendant to pay damages - Whether or not plaintiff able to prove the alleged incident occurred - Credibility of the worker witness.

***Victorian WorkCover Authority v Woolworths Ltd***

T Forrest J

[\[2016\] VSC 799](#)

09/12/2016

ADMINISTRATIVE LAW - Application for leave to appeal on question of law - Decision of Victorian Civil and Administrative Tribunal upholding an application for review of Indigo Shire Council refusal to grant planning permit for bulk extraction of groundwater - Respondent had previously been granted a licence under s51 of the Water Act 1989 to extract 19 megalitres of groundwater - Rights conferred upon respondent as holder of licence under Water Act were not expressly limited by any provision of the Planning and Environment Act 1987 or any planning scheme made thereunder - Application for leave to appeal dismissed - Water Act 1989 s1, s8, s40, s51, s53, s56, s64, s305B; Planning and Environment Act 1987 s1, s3, s4(1), s6(1)(b), s6(2)(b), s47(1)(a), s60(1), s77, s84B; Victorian Civil and Administrative Tribunal Act 1998 s148.

***Stanley Rural Community Inc v Stanley Pastoral P/L (ACN 163 142 363)***

McDonald J

[\[2016\] VSC 764](#)

12/12/2016

ADMINISTRATIVE LAW - Judicial review - Jurisdictional error - Inadequacy of reasons - Application for review of decision of medical panel - Where medical panel had determined whether first defendant had no current work capacity, with that situation likely to continue indefinitely - Meaning of 'no current work capacity' - Meaning of 'suitable employment' - Richter v Driscoll [2016] VSCA 142, Gruma v Oceania Pty Ltd v Bakar [2014] VSCA 252, Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480 applied.

***Combined Enterprises P/L v Brister, Craig; Murphy, Dr David; Littlejohn, Prof Geoffrey; Carr, Mr Ashley; Freidin, Dr Julian***

Keogh J

[\[2016\] VSC 807](#)

22/12/2016

ADMINISTRATIVE LAW - Judicial review - Order 56 Supreme Court (General Civil Procedure) Rules 2015 - Accident Compensation Act 1985 - Workplace Injury Rehabilitation and Compensation Act 2013 - Review of Medical Panel Opinion - Whether or not Panel failed to take into account a relevant consideration - Whether or not reasons inadequate - Whether or not the plaintiff was afforded procedural fairness.

***Mattock, Kim Leanne v Handrinis, Dr Dennis; Downes-Brydon, Dr Jenny; Feletar, Dr Marie; Elsner, Mr Keith; Brimbank City Council***

T Forrest J

[\[2016\] VSC 798](#)

21/12/2016

ADMINISTRATIVE LAW - Judicial review - Procedural fairness - Adequacy of reasons - Jurisdictional error - Workers' Compensation - Medical panel - Application to quash opinion of medical panel - Opinion quashed

***Pearce, Rodney Allan v Lloyd, Dr John & Ors***

Cavanough J

[\[2016\] VSC 806](#)

21/12/2016

APPEAL FROM THE MAGISTRATES' COURT - Appeal to Supreme Court from conviction in Magistrate's Court - Where driver convicted in Magistrates' Court of exceeding the speed limit by 45 kph or more under the Road Safety Rules 2009 r20(1) - Whether there was evidence upon which the Magistrate could conclude that a 'prescribed speed detector' was used in the manner prescribed in the Road Safety Act 1986 s79 - Road Safety (General) Regulations 2009 reg 41, reg 45 - Road Safety Rules 2009 r20(1).

***Elezovic, Mario v Williams, Julia***

Keogh J

[\[2016\] VSC 763](#)

16/12/2016

CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES - Protection of children in their best interests - Protection from cruel, inhuman or degrading treatment - Humane treatment when deprived of liberty - Public authorities - Proper consideration - Effect of failure to give proper consideration - Declaration of failure to afford human rights - Charter of Human Rights and Responsibilities Act 2006 (Vic) s1, s10(b), s17(1), s17(2), s22(1), s38(1), s38(2).

CHILDREN - Detention of children in remand centres - Youth justice centres - Opening of Grevillea unit inside Barwon Prison - Validity of Orders in Council - Children Youth and Families Act 2005 (Vic) s1, s478 - s484.

ADMINISTRATIVE LAW - Habeas Corpus - Certiorari - Improper or extraneous purpose - Failure to take into account relevant considerations - Use of power to establish remand centre and youth justice centre for the purpose of 'emergency accommodation?' - Whether valid - Interpretation of Legislation Act 1984 (Vic) s35(1).

***Certain Children by their Litigation Guardian Arthur, Sister Marie Brigid v Minister for Families and Children & Ors (according to the schedule attached)***

Garde J

[\[2016\] VSC 796](#)

21/12/2016

CONTEMPT OF COURT - Sub judice contempt - Jury empanelled and trial underway - Publication on an internet news website of the suggestion that the accused in a murder trial had previously displayed a violent propensity towards the victim - Prosecution not intending to lead evidence of any such propensity - Single issue whether the accused, who pleaded guilty to manslaughter, had the requisite murderous intent - Whether publication had a real and definite tendency to prejudice the trial - Relevance of directions given by the trial judge to the jury - Relevance of circumstances of publication.

***The Queen (on the application of the Director of Public Prosecutions [DPP]) v Johnson, Krystal and Yahoo!7 P/L (ACN 089 187 100)***

John Dixon J

[\[2016\] VSC 699](#)

28/11/2016

COSTS - Choice of law - Contribution claims - Second and third defendants' summary judgment applications against first defendant's contribution claims - Third defendant's summary judgment application successful - Second defendant's summary judgment application unsuccessful - Appropriate costs order

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

Ginnane J

[\[2016\] VSC 810](#)

21/12/2016

COSTS - Negligence - Plaintiff successful at trial - Portion of award of damages to be paid into Prisoner Compensation Quarantine Fund, with medical and legal costs exempted pursuant to Part 9C of Corrections Act 1986 - Whether amount to be placed in fund should include deduction for contributory negligence - Whether 'medical costs' includes costs of future care - Whether 'legal costs' encompasses solicitor-client costs - Corrections Act 1986 s104S, s104T, s104U, s104V.

COSTS - Negligence - Plaintiff successful at trial - Defendant's application that plaintiff pay costs associated with late abandonment of certain aspects of claim - Whether departure from general rule that costs follow the event justified - *Mok v Minister for Immigration (No 2)* (1993) 47 FCR 81; *Ritter v Godfrey* [1920] 2 KB 47 considered.

***Khodr, Saleh v G4S Custodial Services P/L (ACN 050 069 255)***

Keogh J

[\[2016\] VSC 800](#)

19/12/2016

COSTS - Relationship between a gross costs order for interlocutory costs and an order for immediate taxation of interlocutory costs - Held: a gross costs order for interlocutory costs is not dependent on an order for immediate taxation of those costs also being appropriate - they are distinct discretions concerned with different subject matter - Further, the determining principle is the furtherance of the overarching purpose of the Civil Procedure Act 2010 (Vic) - In the alternative, in this instance an order for immediate taxation would also have been appropriate - Supreme Court Act 1986 (Vic) s24; Civil Procedure Act 2010 (Vic) s7, s8, s9, s65C, s65E; Supreme Court (General Civil Procedure) Rules 2015 r63.07(2)(c), r63.20.1.

***Angelevska, Snezana (known as Slaveska) v The State of Victoria and Others (according to the attached Schedule of Parties)***

Lansdowne AsJ

[\[2016\] VSC 720](#)

18/11/2016

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

***Kamasae, Majid Karami v The Commonwealth of Australia and Others (according to the attached schedule)***

Daly AsJ

[\[2016\] VSC 770](#)

16/12/2016

FUNDS IN COURT - Surplus proceeds from sale of land by mortgagee paid into court - Application for payment out - Plaintiff second mortgagee - Application opposed by mortgagor - Transfer of Land Act 1958, s77(3)(d) - Trustee Act 1958, s69 - Melbourne Property Group Pty Ltd v SC Australia Pty Ltd and Ors applied - Plaintiff failed to prove debt - Application refused - Defendant entitled to surplus funds.

***Secure Loan Solutions P/L (ACN 165 272 659) v Smith, Derick Aubrey***

Ierodionou AsJ

[\[2016\] VSC 794](#)

16/12/2016

JUDICIAL REVIEW - Planning - Amendment to planning scheme - Incorporated document - Removal of level crossings - Elevated rail design - Minister's decision to exempt himself from statutory exhibition and notice requirements - Whether decision unreasonable or irrational - Whether decision made for an improper purpose - Whether Minister's discretion fettered - Planning and Environment Act 1987 s17, s18, s19, s20(4).

***Lower Our Tracks Inc v Minister for Planning***

Ginnane J

[\[2016\] VSC 803](#)

20/12/2016

LANDLORD AND TENANT - Retail Leases - Renovation and refurbishment works carried out by tenant - Appropriate relief on refusal of further lease by landlord.

EQUITY - Estoppel - Relief for tenant on refusal of further lease having carried out renovation and refurbishment works - 'minimum equity' with respect to proprietary and promissory estoppel - *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 - *Donis v Donis* (2007) 19 VR 577 - *Crown Melbourne Ltd v Cosmopolitan Hotel (VIC) Pty Ltd* (2016) 90 ALJR 770.

JUDICIAL REVIEW - Non-applicability of Notice of Contention procedure - Victorian Civil and Administrative Tribunal Act 1998, s148 - Supreme Court (General Civil Procedure) Rules 2015.

***Pin Oak Holdings P/L (ACN 006 304 710) v RISI P/L (ACN 108 095 790)***

Croft J

[\[2016\] VSC 773](#)

16/12/2016

LEGAL PRACTITIONERS - Disciplinary proceedings - Roll of practitioners - Where plaintiff regulator brought charges against defendant lawyer in the Victorian Civil and Administrative Tribunal - Where Tribunal recommended defendant be removed from the roll - Whether defendant should be removed from the roll - Whether defendant a fit and proper person - Protection of the public and public confidence in the courts and the administration of justice - *Legal Services Board v McGrath* (2010) 29 VR 325 - *Legal Profession Uniform Law (Victoria)*, s23

***Victorian Legal Services Commissioner v Horak, Jan Antonin Alois***

McMillan J

[\[2016\] VSC 780](#)

15/12/2016

PLANNING & ENVIRONMENT - Application for leave to appeal and appeal from the Victorian Civil and Administrative Tribunal under s148(1)(a) of the Planning and Environment Act 1987 - Application for planning permit to develop former school site for residential purposes - Development Plan Overlay applicable - Requirement to submit landscaping plan as a component of the development plan - Whether landscaping plan must show the retention of trees identified in a reference document - Whether provision is authorised by the parent provision - Status of incorporated and reference documents - Leave to appeal granted - Appeal allowed - Interpretation of Legislation Act 1984 s32 - Planning and Environment Act 1997 s6(1)(j).

***Spire Group P/L v Monash City Council***

Emerton J

[\[2016\] VSC 801](#)

20/12/2016

PLANNING & ENVIRONMENT - Application for leave to appeal and appeal from the Victorian Civil and Administrative Tribunal under s148 of the Victorian Civil and Administrative Tribunal Act 1998 - Application for planning permit to develop land in Neighbourhood Residential Zone for three dwellings - Bayside Planning Scheme - Whether development exempt from permit requirement under Design and Development Overlay cl 43.02 - Purpose of Neighbourhood Residential Zone cl 32.09 - Application of transitional provision cl 32.09-3 - Whether the Tribunal failed to take relevant considerations into account - Statutory construction principles - Leave to appeal granted - Appeal allowed - Proceeding remitted to the Tribunal for determination according to law.

***Couttie, Anthony and Couttie, Dora v Bayside Council & Ors***

Emerton J

[\[2016\] VSC 772](#)

14/12/2016

PLANNING & ENVIRONMENT - Application for leave to appeal and appeal from the Victorian Civil and Administrative Tribunal under s148 of the Victorian Civil and Administrative Tribunal Act 1998 - Application for planning permit to develop land - Tribunal made interim order permitting the applicant to submit modified plans - Tribunal then decided the application 'on the papers' without further submissions - Whether the Tribunal failed to afford procedural fairness - Whether Tribunal had duty to inform parties of its opinion about the modified application - Leave granted - Appeal dismissed.

***Woldeyes, Josef Asrat v Brimbank City Council***

Emerton J

[\[2016\] VSC 639](#)

14/12/2016

PRACTICE AND PROCEDURE - Application by plaintiff to re-open application for leave to appeal from Victorian Civil and Administrative Tribunal ('Tribunal') after reasons for decision pronounced but before final orders drawn up or entered - Discovery of fresh evidence since hearing of the Supreme Court application - Whether evidence is material and would affect the result of the application for leave to appeal - Whether with the exercise of reasonable diligence the evidence could have been discovered before the Tribunal hearing or the application in the Supreme Court - *Re Australian Meat Industry Employee's Union (WA Branch); ex parte Ferguson* (1986) 67 ALR 491; *Smith v New South Wales Bar Association (No 2)* (1992) 176 CLR 256; *Spotlight Pty Ltd v NCO Australia Ltd* [2012] VSCA 232; *Madden v Madden* [2014] NSWSC 1098; *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22.

ADMINISTRATIVE LAW - Application for leave to appeal from the Tribunal to the Supreme Court - Orders to be made in favour of successful appellant under the Victorian Civil and Administrative Tribunal Act 1998 (Vic), s148(7) ('the VCAT Act') - Whether appropriate to make orders under Subdivision Act 1988 ('Subdivision Act'), s34D - Whether only one conclusion is open on the correct application of the law to the facts found by the Tribunal - Whether factual matter has to be determined as a consequence of the appeal - Whether the outstanding issue involves a factual, evaluative or ministerial judgment within the Tribunal's jurisdiction - Whether Tribunal should consider again the exercise of the discretion under s34D of the Subdivision Act - Proceeding remitted to the Tribunal to be heard and decided again - *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* (2001) 207 CLR 72; *Osland v Secretary to the Department of Justice* [No 2] (2010) 241 CLR 320.

***Adamopoulos, Irene v ASA Nominees P/L (ACN 084 232 360) (controllers appointed) Owners Corporation PS513436B; ASA Nominees P/L (ACN 084 232 306) (Controllers Appointed) v Owners Corporation PS513436B and Adamopoulos, Irene***

Derham AsJ

[\[2016\] VSC 802](#)

20/12/2016

PRACTICE AND PROCEDURE - Group proceedings - Christmas Island Detention Centre - Application to interview potential witnesses without risk of civil sanction - Confidentiality obligations - Whether confidentiality clause in employment contract prevents witness from conferring with plaintiff's solicitors pre-trial - Whether maintaining party's right to confidentiality inimical to the public interest and the administration of justice - Civil Procedure Act 2010 s48.

***A S (by her litigation guardian Marie Theresa Arthur) v Minister for Immigration and Border Protection and Commonwealth of Australia and International Health and Medical Services P/L and Serco Australia P/L***

J Forrest J

[\[2016\] VSC 774](#)

15/12/2016

PRACTICE AND PROCEDURE - Pleadings - Application for summary judgment - Sections 62 and 63 of the Civil Procedure Act 2010 - Application for summary judgment allowed in part - Application to strike out amended statement of claim - Rule 23.02 of the Supreme Court (General Civil Procedure) Rules 2015 - Amended statement of claim struck out on grounds that it does not disclose a cause of action and may prejudice, embarrass or delay the fair trial of the proceeding - Leave granted to plaintiff to file another statement of claim.

***K G & B Flanders P/L v South Gippsland Shire Council***

Ierodionou AsJ

[\[2016\] VSC 786](#)

16/12/2016

PRACTICE AND PROCEDURE - Vexatious litigant - Application for leave to commence proceedings - Proposed proceeding a Victorian Civil and Administrative Tribunal review of decision made under Freedom of Information Act 1982 (Vic) - Whether proposed proceeding is vexatious - whether reasonable grounds for proposed proceeding - Vexatious Proceedings Act 2014 (Vic) s55, s56 - Freedom of Information Act 1982 (Vic) s13, s25, s38, s50(4) - Corrections Act 1986 (Vic) s104ZX, s104ZY, s104ZZA.

***Knight, Julian v The Secretary to the Department of Justice and Regulation***

Keogh J

[\[2016\] VSC 743](#)

16/12/2016

PROBATE - Where caveat objecting to grant of probate lodged with Registrar of Probates - Where caveator filed grounds of objection - Where caveator required to file particulars of grounds of objection - Whether caveator's further amended grounds of objection establish a prima facie case - Estate Kouvakas; Lucas v Konakas [2014] NSWSC 786 - In re Smith (dec'd) [1951] VLR 368 - Moran v Place [1896] P 214 - Supreme Court (Administration and Probate) Rules 2014, r8.08(a)(iii).

PRACTICE AND PROCEDURE - Summary judgment - Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd (2013) 42 VR 27 - Civil Procedure Act 2010, s63

***In the matter of the will of Przychodski, Anastazja deceased: Przychodski, Derek v Przychodski, Daniel***

McMillan J

[\[2016\] VSC 781](#)

15/12/2016

PROPERTY - Construction of a contract of sale conditional on best endeavours to obtain planning permit - Whether vendor can require settlement before fulfilment of condition.

VENDOR AND PURCHASER - Scope of jurisdiction and relief available under Property Law Act 1958 (Vic) s 9(1).

***Ten Boundary Street South Melbourne P/L (ACN 609 047 734) v Ivanhoe Project P/L (ACN 158 486 821)***

Riordan J

[\[2016\] VSC 755](#)

08/12/2016

RETAIL LEASES - Whether lease is a lease of retail premises for the purposes of Part 10 of the Retail Leases Act 2003 ('RLA') - Whether disputes in proceeding in the Supreme Court of Victoria are a 'retail tenancy dispute' within the meaning of s 81 of the RLA - Whether disputes are justiciable in the Supreme Court - Section 89(4) of the RLA - State of Victoria v Tymbook Pty Ltd [2005] VSC 267 distinguished - Plaintiff has a real prospect of establishing that the disputes the subject of the proceeding are not a retail tenancy dispute - Thus there is a real prospect of the plaintiff establishing that the Supreme Court has jurisdiction to adjudicate the disputes.

PRACTICE AND PROCEDURE - Application to dismiss proceeding under s62 of the Civil Procedure Act 2010 on basis that Part 10 of the RLA excludes the jurisdiction of the Court - Whether there is no real prospect of the plaintiff successfully claiming the Court has jurisdiction - Plaintiff has a real prospect of establishing that the disputes the subject of the proceeding are not a retail tenancy dispute - Thus there is a real prospect of the plaintiff establishing that the Supreme Court has jurisdiction to adjudicate the disputes - Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd [2013] VSCA 158; Mandie v Memart Nominees Pty Ltd [2016] VSCA 4.

***AMJE P/L (ACN 082 193 682) v Mobil Oil Australia P/L (ACN 004 52 984)***

Derham AsJ

[\[2016\] VSC 777](#)

13/12/2016

TESTATORS' FAMILY MAINTENANCE - Whether plaintiffs are eligible persons under Administration and Probate Act 1958, Part IV - Whether a child adopted out from their natural parent can be an eligible person within Administration and Probate Act 1958, Part IV, s90, definition of 'eligible person' paragraph (g) - Adoption Act 1984 (Vic) s53 - There is a real as opposed to a fanciful prospect that the plaintiffs are eligible persons under paragraph (g) of the definition of eligible person.

PRACTICE AND PROCEDURE - Summary judgment application - Whether plaintiffs have no real prospect of success - Civil Procedure Act 2010, Part 4.4.

***Innes-Irons, Kieren and Harding-Colliss, Emelia v Forrest, Roger Cranfield (who is sued as the Administrator of the Estate of the abovenamed deceased)***

Derham AsJ

[\[2016\] VSC 782](#)

15/12/2016

## Criminal Division

CRIMINAL LAW - Application for bail - Charges of trafficking in a commercial quantity of drugs of dependence, namely methylamphetamine (about 150 grams pure) and 1,4-butanediol ('BD') (3,852 litres) - BD valued at nearly \$4 million - Whether exceptional circumstances justifying bail - Whether applicant, if bailed, presents an unacceptable risk of offending and endangering public - Serious charges - Prior criminal history of using and trafficking drugs - Expected delay of up to two years between arrest and trial - Weaknesses in some aspects of prosecution case - Surety of \$180,000 offered - Some co-accused on bail, others not - Bail refused - Bail Act 1977 (Vic), s4(2)(aa)(i) and (d)(i); Drugs, Poisons and Controlled Substances Act 1981 (Vic), s4(1), s70(1), s73(2) and s71AA and Part 3 of Schedule 11.

***Omer, Munir v Director of Public Prosecutions [DPP] (Vic)***

Croucher J

[\[2016\] VSC 762](#)

09/12/2016

CRIMINAL LAW - Application for bail - Show cause situation - Charged with indictable offence while on bail - Whether an unacceptable risk - Multiple charges - Criminal damage - Unlawful assault - Contraventions of family violence intervention orders - Threats to kill - Stalking - Prior convictions - Previous commissions of indictable offences while on bail - Strong family support - Regular methylamphetamine use - Place at residential drug treatment program - Location of drug treatment centre proximate to complainant - Bail Act 1977 (Vic), s4(1), (2) and (4)(a) - Bail refused.

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

Elliott J

[\[2016\] VSC 710](#)

22/11/2016

CRIMINAL LAW - Application for bail by a child - Show cause situation - Indictable offence charge while on bail - Whether unacceptable risk - Multiple charges - Human rights - Conditions of remand - Bail Act 1977 (Vic), s3B, s4, s5 - Charter of Human Rights and Responsibilities Act 2006 (Vic), s7(2), s17(2), s22(1) and (3), s26(3), s32(1).

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

Elliott J

[\[2016\] VSC 750](#)

13/12/2016

CRIMINAL LAW - Bail - Show cause situation - Applicant diagnosed with borderline personality disorder - Applicant offered place at drug and alcohol rehabilitation facility - Where drug addiction not central to offending - Whether unacceptable risk - Bail refused.

***In the matter of the Bail Act 1977 and In the matter of an Application for Bail by De Waij, Casper***

Jane Dixon J

[\[2016\] VSC 805](#)

06/12/2016

CRIMINAL LAW - Bail application - Exceptional circumstances - Application for bail granted.  
*In the matter of the Bail Act 1977 and In the matter of an Application for bail by  
Debresay, Mussie*

Jane Dixon J

[\[2015\] VSC 756](#)

18/12/2016

CRIMINAL LAW - Sentence - Assist offender - Principal offence of manslaughter - Assisted in disposal of deceased's body - Pleas of guilty - Admissions - Presence of remorse - Undertaking to give evidence for prosecution against principal offender and fourth co-accused.

CRIMINAL LAW - Sentence - Parity - Where differences in objective gravity of offending and personal circumstances of co-offenders - Where differences in prospects of rehabilitation - Where community correction order not appropriate for one co-offender

*Director of Public Prosecutions [DPP] v Matthews, Mark and Burford, Anthony*

Jane Dixon J

[\[2016\] VSC 783](#)

14/12/2016

CRIMINAL LAW - Sentence - Commonwealth Criminal Code s 101.6(1) - Act in preparation for a terrorist act - Plea of guilty - Maximum penalty life imprisonment - Youth - Accused constructing improvised explosive device - Islamic State propaganda - Islamic State recruiter providing information - Intention to carry out terrorist attack - 'De-radicalisation' - Whether effective - Remorse incomplete - Contrition - Youth Justice order - Whether within sentencing range - Recommendation pursuant to s471 Children, Youth & Families Act 2005.

*The Queen v M H K*

Lasry J

[\[2016\] VSC 742](#)

07/12/2016

# 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 Payment Act 2002 (Vic) - Invoice comprising payment claim replaced by later "revised" invoice - Whether original payment claim withdrawn - Parties following established practice of progress claims being discussed between the contractor and a quantity surveyor appointed by the owner's financier, and revised invoices being issued by the contractor to reflect the result of those discussions - *Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602 applied.

***Promax Building Developments Pty Ltd v. 167 Lower Heidelberg Road Pty Ltd***

Judge Anderson  
[\[2016\] VCC 1960](#)  
16/12/2016

**CONTRACT** - Construction of special conditions - Whether unfettered right to terminate by purchaser - Whether implied term to act in good faith - Whether defendant's decision to terminate based on findings during due diligence - Measure of damages where promise retains subject of sale but it becomes unsaleable.

***B & B Group Investments Pty Ltd v Broughton***

Judge Cohen  
[\[2016\] VCC 1873](#)  
7/12/2016

**CONTRACTS** - Defendants' summary judgment applications - Misleading and deceptive conduct - unlawful interference with contract.

***Mahood v NAB & Ballagh***

Judge Marks  
[\[2016\] VCC 1957](#)  
16/12/2016

**PRACTICE AND PROCEDURE** - Costs - Application for indemnity costs based on defendants' conduct during the proceeding - Whether case sufficiently "special" or "unusual".

***Kusumanadi & Anor v. Artemas & Anor (No. 3)***

Judge Anderson  
[\[2016\] VCC 1904](#)  
14/12/2016

**PRACTICE AND PROCEDURE** - Interest on judgment - "Demand of payment" - Demand not made by the successful plaintiff - Section 58(1) Supreme Court Act 1986 (Vic) - *AJ Lucas Drilling Pty Ltd v McDonnell Dowell Constructions Pty Ltd* [2009] VSCA 310 applied.

***Laidlaw Holdings Pty Ltd & Anor v. Fieschi & Ors (No.2)***

Judge Anderson  
[\[2016\] VCC 1915](#)  
14/12/2016

# Articles

## Administrative Law

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Judiciary - Enforcement of limitations - Judicial review - Administrative decision making - Statutory discretion - *Marbury v Madison* - *Wotton v Queensland* - Commonwealth Constitution, s92 - Australia - USA

**Stellios, J.** "Marbury v Madison: Constitutional limitations and statutory discretions." (2016) 42(3) *Aust Bar Rev* 324-349.

## Alternative Dispute Resolution

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Civil justice systems - Civil justice reforms - Litigation - Comparative law - Culture shift - Mandatory ADR - Mandatory mediation - Canada - UK

**Billingsley, B. and M. Ahmed.** "Evolution, revolution and culture shift: A critical analysis of compulsory ADR in England and Canada." (2016) 45(3) *CWLR* 186-213.

Coercion - Mandatory mediation - Power imbalance - Pre-action protocol - Civil justice system - Australia

**Waye, V.** "Mandatory mediation in Australia's civil justice system." (2016) 45(3) *CWLR* 214-235.

Mediation - Mediator - Negligence - Professional misconduct - Quasi judicial immunity - Australia - NZ - USA - UK

**Koo, A.** "Exploring mediator liability in negligence." (2016) 45(3) *CWLR* 165 - 185.

## Contract Law

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Equity - Promissory estoppel - Development - Unconscionability - UK - NSW - Victoria - Australia

**Young, P.** "Unconscionability and promissory estoppel." (2016) 90(12) *ALJ* 878-888.

Extrinsic evidence - Ambiguity - Limits - Policy setting - Pleadings - Court intervention - Australia

**Bond, J.** "The use of extrinsic evidence in aid of construction: a plea for pragmatism." (2016) 42(3) *Aust Bar Rev* 281-309

## Courts

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Bias - Collegiate courts - Fair hearing - Judicial impartiality - Recusals - UK

**Olowofoyeku, A.** "Bias in collegiate courts." (2016) 65(4) *ICLQ* 895-926.

Judges - Apprehension of bias - Trial judges - Informed observer - Reasonable observer - Trial fairness - Justice Peter Smith - *Harb v HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz* - Australia - UK

**Robertson, A.** "Apprehended bias - the baggage." (2016) 42(3) *Aust Bar Rev* 249-280.

Judiciary - Criticism - Contempt - *R (Miller) v Secretary of State for Exiting the Union* - *R v Almon* - *R v Gray* - *Harris v Harris* - Crime and Court Act 2013 (UK), s33 - UK

**Aamodt, A.** "Judge & fury." (2016) 166(7724) *NLJ* 22.

Judiciary - Retirement - New appointment policy - Equal merit - Widest variety eligible applicants - UK

"New era for Supreme Court." (2016) 166(7724) *NLJ* 5.

## Employment law

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Restraints of trade - Ability to work - Chosen fields - NSW - Australia

**Ramsay, I. and H. Chia.** "Employment restraints of trade: an empirical study of Australian court judgments." (2016) 29(3) *AJLL* 283-304.

## Equity

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Absolute assignment - Facts - Terms of relevant agreement - Construing the charge - Hypothecation - Ambiguity in assignment - Express notice in writing - Notice by pleadings - Recognition of equitable charge - Stipulation to pay - Funds held by agent - Palette Shoes Pty Ltd (in liq) v Krohn - Lotteries Pty Ltd v Volteas - FTV Holdings Cairns Pty Ltd v Smith - Australia  
**'Absolute assignment', and the equitable 'charge' - further developments. (2016) 42(3) Aust Bar Rev 310-323.**

## Evidence

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Exclusion - Court of Appeal - Decisions - Opposing outcomes - R v A - Commissioner of Police v Marwood - Evidence Act (2006) (NZ), s30 - NZ

**Franks, A. and A. Brown. "Admissibility of excluded evidence in later proceedings." (2016) (November) NZLJ 386-389.**

Subpoenas - Production - Inspection - Documents - Interest of justice - Historical development - Privilege - Rules of Court - Australia

**Coles, B. "The confetti of the justice system - subpoenas, justice and third parties." (2016) 42(3) Aust Bar Rev 385-414.**

## Human Rights

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Commercial lawyers - Post 2011 - Human rights - Standards - Procedures - Advice to clients - Application to companies - UN Guiding Principles on Business and Human Rights - Australia

**Southalan, J. "Human rights and business lawyers: the 2011 watershed." (2016) 90(12) ALJ 889-907.**

## Practice & Procedure

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Class actions - Settlements - Appeals by class members - Appellate courts - British Columbia - Ontario - Canada  
**Morabito, V. "Can class members appeal class action settlements? A study from British Columbia." (2016) 45(2-3) CWLR 122-140.**

## Property Law

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Strata law - Short-term letting - By-law making power - Private citizens - Regulate - Neighbours' property - Owners Corporation PS 501391P v Balcombe - Subdivision Act 1988 (Vic), s27(2C) - Owners Corporation Act 2006 (Vic), s138(1) - Victoria - Australia  
**Butt, P. "Recent developments in strata law: by-law making power and short-term letting." (2016) 90(12) ALJ 853-859.**

Tenancy laws - Residential tenant - Subletting premises - Airbnb - Eviction of tenant - Commercial use of residential premises - Procedural protections regarding eviction - Swan v Uecker - Victoria - Australia  
**Swannie, B. "Trouble in paradise: are home sharing arrangements 'subletting' under residential tenancies legislation." (2016) 25(3) APLJ 183-198.**

## Torts

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Breach - Statutory duty - Duty of care - Omission - Pure economic loss - Hong Kong - UK

**Chan, S.** "Non-performance of statutory duty causing pure economic loss." (2016) 45(3) CWLR 242-247.

Challenges - Individual torts - Questionable principles - Principles that are wrong - Principles subject to exceptions - Policy masquerading as principle - Policy as basis for decision - UK

**Neuberger, L.D.** "Some thoughts on principles governing the law of torts." (2016) 23(2) Torts L J 89 - 104.

Consumer law - Protection - Statutory prohibition - Misleading conduct - Common law torts - Role - Australia

**Paterson, J. and E. Bant.** "In the age of statutes, why do we still turn to the common law torts? lessons from the statutory prohibitions on misleading conduct in Australia." (2016) 23(2) Torts L J 139-162.

Defamation - Common law - Declaration of falsity - Singapore - UK

**Yew, G.** "The right to a good (business) reputation and truth: re-examining the declaration of falsity." (2016) 23(2) Torts L J 163-191.

Negligence - Plaintiff vulnerability - Personal liability - Vicarious liability - Non-delegable duties - Australia - Canada - UK

**Todd, S.** "Personal liability, vicarious liability, non-delegable duties and protecting vulnerable people." (2016) 23(2) Torts L J 105-138.

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