



## THE LAW LIBRARY OF VICTORIA

Library  
Bulletin  
3 February  
2017

### Library News

#### Capital Punishment and the Ronald Ryan 50<sup>th</sup> Anniversary Exhibition in the Supreme Court Library

The Supreme Court Library's new exhibition has been created to mark the 50<sup>th</sup> anniversary of the death of Ronald Ryan, the last man executed in Australia, in February 1967. In addition the exhibition looks at capital punishment in Victoria over nearly 130 years, including Jean Lee, the last woman to be executed.

Items on display include contemporary newspaper accounts and the certificate that verifies Ryan's death.

#### Switch on... Legislation - Victorian Parliamentary Procedure 21 February 2017, 1:15pm to 1:45pm

The Law Library of Victoria invites you to participate in our Switch on... information sessions. This session, presented by the staff of the Chief Parliamentary Counsel Office, will inform you about the Victorian legislative process. Find out the facts behind the process; from setting the legislative program, drafting of Bills, and the passage of Bills from Parliament through to the commencement of legislation.

#### 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.

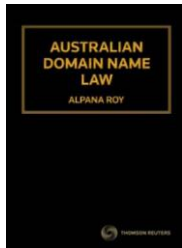
The book costs \$60 and there is a \$10 discount for members of the Royal Historical Society of Victoria (RHSV).

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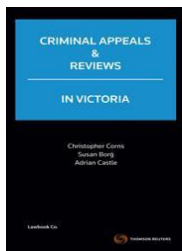
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# New Books

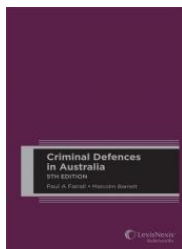
Following is a selection of new books in the Library collection. For details of more new books, see the Library Catalogue: [https://courts.sdp.sirsidynix.net.au/client/en\\_AU/llv/](https://courts.sdp.sirsidynix.net.au/client/en_AU/llv/).



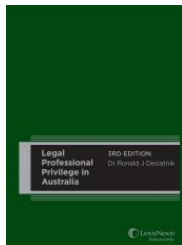
Roy, Alpana, *Australian domain name law*  
Pymont, NSW, Thomson Reuters, 2016  
Call number: 346.048 ROY (Supreme Court Library)



Corns, Christopher, *Criminal appeals and reviews in Victoria*  
Pymont, NSW, Thomson Reuters, 2017  
Call number: 345.01 COR (Supreme Court Library)



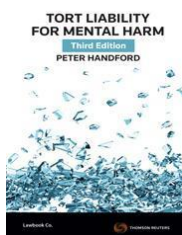
Fairall, Paul A., *Criminal defences in Australia*  
5th ed., Chatswood, NSW, LexisNexis, 2017  
Call number: 345.05044 OCO.5 (Supreme Court Library)



Desiatnik, Ronald Jules, *Legal professional privilege in Australia*  
3rd ed., Chatswood, NSW, LexisNexis, 2017  
Call number: 347.066 DES.3 (Supreme Court Library)



Mills, Simon, *Salinger on factoring*  
5th ed., London, Sweet & Maxwell, 2017  
Call number: 346.077 SAL.5 (Supreme Court Library)



Handford, Peter R., *Tort liability for mental harm cover*  
3rd ed., Pymont, NSW, Thomson Reuters, 2017  
Call number: 346.0323 MUL.3 (Supreme Court Library)



# Legislation

## Victorian Bills

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

## Victorian Assents

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

## Proclamations

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

- *Road Legislation Further Amendment Act 2016* No. 70/2016
  - Part 2 (sections 3-5), Part 3 Division 3 (sections 23-31), Division 5 (sections 35-41), sections 42-48, 50, 51, Part 5 (section 52) of this Act came into operation on 1 January 2017 (SG389 20.12.2016)
- *Transport (Compliance and Miscellaneous) Amendment (Abolition of the Penalty Fares Scheme) Act 2016* No. 71/2016
  - Sections 1-10 of this Act came into operation on 1 January 2017 (SG389 20.12.2016)
- *Family Violence Reform Implementation Monitor Act 2016* No.74/2016
  - Sections 1-24 of this Act came into operation on 1 January 2017 (SG389 20.12.2016)
- *Primary Industries Legislation Amendment Act 2016* No.48/2016
  - Part 8 (Sections 28-30) of this Act came into operation 1 January 2017 (SG368 29.11.2016)
- *Livestock Disease Control Amendment Act 2016* No.49/2016
  - Sections 1-3, 5, 11, 12 of this Act came into operation on 1 January 2017 (SG368 29.11.2016)
- *Victorian Funds Management Corporation Amendment Act 2016* No.56/2016
  - Sections 1-16 of this Act came into operation on 1 January 2017 (SG346 15.11.2016)

## EXHIBITIONS IN THE LIBRARY

### Argus from 100 years ago

The Supreme Court Library has the Argus newspaper from 1916 on display.

The page is turned daily and provides an insight into what was happening 100 years ago to the day.

A snapshot is provided via the Law Library of Victoria Twitter account. You can follow these tweets via @lawlibraryvic #argus1916

## Proclamations (continued)

- *Melbourne College of Divinity Amendment Act 2016* No.61/2016
  - Sections 1-40 of this Act came into operation on 1 January 2017 (SG381 13.12.2016)
- *Alpine Resorts Legislation Amendment Act 2016* No.62/2016
  - Sections 1-12 of this Act came into operation on 1 January 2017 (SG381 13.12.2016)
- *Child Wellbeing and Safety Amendment (Oversight and Enforcement of Child Safe Standards) Act 2016* No.63/2016
  - Sections 1-19 of this Act came into operation on 1 January 2017 (SG381 13.12.2016)

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

- *Fire Services Property Levy Act 2012* No.58/2012
  - Sections 133-136 of this Act came in by forced commencement on 31 December 2016 s. 2(8)
- *State Taxation and Other Acts Amendment Act 2016* No.40/2016
  - Section 20 of this Act came in by forced commencement on 1 January 2017 s. 2(3)
- *Mineral Resources (Sustainable Development) Amendment Act 2014* No. 10/2014
  - Section 7 of this Act came in by forced commencement on 31 December 2016 s. 2(3)
- *State Taxation Acts Further Amendment Act 2016* No. 66/2016
  - Part 2 (Sections 3-5) of this Act came in by forced commencement on 1 January 2017 s. 2(2)

# High Court Cases

CONSTITUTIONAL LAW (CTH) - Judicial power - Election of Senator - Validity - Court of Disputed Returns - Power to hear petition - Whether non-judicial - Constitution, Ch III - *Commonwealth Electoral Act 1918 (Cth)*, Pt XXII, Div II.

PRACTICE AND PROCEDURE - High Court of Australia - Failure to raise argument at hearing - Principles applicable - Validity - *Commonwealth Electoral Act 1918 (Cth)*, Pt XXII, Div II.

**In the matter of Questions Referred to the Court of Disputed Returns Pursuant to section 376 of the Commonwealth Electoral Act 1918 (Cth) Concerning Senator Rodney Norman Culleton: Re Culleton**

[\[2017\] HCA 3](#)

27/01/2017

No catchwords

***In the matter of questions referred to the Court of Disputed Returns pursuant to section 376 of the Commonwealth Electoral Act 1918 (Cth) concerning Mr Robert John Day AO: Re Day***

[\[2017\] HCA 2](#)

27/01/2017

PARLIAMENTARY ELECTIONS (CTH) - Senate - Reference to Court of Disputed Returns - Where at date of nomination person convicted of offence punishable by term of imprisonment for one year or longer - Where person liable to be sentenced - Where person elected as Senator - Where conviction subsequently annulled - Whether annulment of conviction of retrospective effect - Whether person incapable of being chosen as Senator under s 44(ii) of Constitution - Whether vacancy should be filled by special count of ballot papers.

WORDS AND PHRASES - "annulment", "convicted and is under sentence, or subject to be sentenced", "incapable of being chosen", "retrospective effect", "special count", "void ab initio".

**In the matter of Questions Referred to the Court of Disputed Returns Pursuant to section 376 of the Commonwealth Electoral Act 1918 (Cth) Concerning Senator Rodney Norman Culleton: Re Culleton [No 2]**

[\[2017\] HCA 4](#)

03/02/2017

PRACTICE AND PROCEDURE - High Court - Application for interlocutory injunctions - Where injunctions in force since August 2013 - Where application for special leave to appeal pending - Where extension of injunctions sought until determination of application for special leave to appeal and any appeal should special leave be granted - Whether injunctive relief be granted.

WORDS AND PHRASES - "injunction", "stay", "substantial prospect that special leave to appeal will be granted".

***Mercanti, Jason Dean v Mercanti, Tyrone Kane & Ors***

[\[2017\] HCA 1](#)

05/01/2017

# Victorian Supreme Court Cases

## Court of Appeal

ADMINISTRATIVE LAW - Judicial review - Jurisdictional error - Relevant considerations - Power to establish centres for detention of young persons - Decisions of Governor-in-Council - Whether decision-maker failed to take into account relevant considerations - Whether power exercised for improper purpose - Appeal dismissed - Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 applied - Children, Youth and Families Act 2005 s362, s478, s482.

***Minister for Families and Children and Secretary to the Department of Health and Human Services and State of Victoria v Certain children by their litigation guardian Sister Marie Brigid Arthur and Victorian Equal Opportunity and Human Rights Commission***

Warren CJ, Maxwell P, and Weinberg JA

[\[2016\] VSCA 343](#)

29/12/2016

CRIMINAL LAW - Application for leave to appeal against sentence - Theft - Applicant sentenced to 20 months' imprisonment with 12 month community correction order - Co-offender with significant criminal history sentenced to 3 years' imprisonment with non-parole period of 2 years for same offence - Whether parity principle misapplied - Whether sentence manifestly excessive - Appeal allowed on parity ground - Applicant resentenced to 16 months' imprisonment and 12 month community correction order - Sentencing Act 1991 s5(2AA)(a) considered.

***Mai, Peter v The Queen***

Weinberg and Kyrou JJA

[\[2017\] VSCA 1](#)

18/01/2017

CRIMINAL LAW - Sentence - Appeal - Arson and burglary - Appellant set fire to toilet rolls and a clipboard at Crown Casino - Sentenced as a serious arson offender to be imprisoned for 5 years with a non-parole period of 3 years and to a community correction order of 7 years' duration - Sentence manifestly excessive - Leave to appeal granted - Appeal allowed - Re-sentenced to be imprisoned for 3 years and 6 months with a non-parole period of 2 years.

***Lisle, Damian Paul v The Queen***

Priest and Santamaria JJA

[\[2017\] VSCA 4](#)

25/01/2017



CRIMINAL LAW - Sentence - Appeal - Attempted armed robbery and recklessly causing injury - Sentenced to be imprisoned for 4 years with non-parole period of 2 years and 6 months - Youth - Cognitive deficits - Appeal allowed - Re-sentenced to be imprisoned for 3 years with non-parole period of 18 months.

***Pitone, Liah v The Queen***

Priest and Santamaria JJA

[\[2017\] VSCA 3](#)

25/01/2017

CRIMINAL LAW - Sentence - Appeal - Obtaining property by deception and attempting to pervert the course of justice - Sentence of 9 months' imprisonment - Denial of procedural fairness - Leave to appeal granted - Appeal allowed - Appellant re-sentenced.

***Strangio, Bruno v The Queen***

Priest and Santamaria JJA

[\[2017\] VSCA 6](#)

25/01/2017

CRIMINAL LAW - Sentence - Appeal - Trafficking in a commercial quantity of a priority species (abalone) and associated offences - Sentenced to 2 years and 8 months' imprisonment with non-parole period 16 months - Whether sentence manifestly excessive - Appeal dismissed.

***Nguyen, Van Yen v The Queen***

Priest and Santamaria JJA

[\[2017\] VSCA 5](#)

25/01/2017

CRIMINAL LAW - Sentence - Charges of trafficking in drug of dependence and various other related offences - Applicant sentenced to total effective sentence of two years and nine months' imprisonment with non-parole period of 18 months - Applicant not informed that Adult Parole Board previously cancelled his parole for earlier offending - Sentence imposed without judge, prosecutor or defence counsel aware of fact of parole cancellation - Principle of totality - Whether fact of cancellation 'fresh evidence' - Sentencing discretion vitiated - Whether lesser sentence warranted - Appeal allowed - Resentenced to total effective sentence of 23 months' imprisonment being effectively time served.

***Redenbach, Carl Gordan v The Queen***

Weinberg and Kyrrou JJA

[\[2017\] VSCA 2](#)

19/01/2017

PRACTICE AND PROCEDURE - Orders - Appeal allowed - Submissions on orders - Whether appropriate to set aside particular orders made by trial judge - Effect of interlocutory orders made in separate proceeding between the parties on appropriate relief to be granted in this appeal.

***Bisognin v Hera Project Pty Ltd (No 2)***

Santamaria and Ferguson JJA, Riordan AJA

[\[2017\] VSCA 7](#)

31/01/2017



## Commercial Court

CORPORATIONS - Company under external administration under Part 5.3A of the Corporations Act 2001 (Cth) - Application for extension of convening period of second meeting of creditors pursuant to s439A(6) and s447A - Application granted.

***In the matter of an application under s439A(6) and s447A of the Corporations Act 2001 (Cth) and In the matter of Southern Riverina Dairy Group P/L (administrators appointed) (ACN 603 101 042): Franklin, Glenn Jeffrey; Stone, Jason Glenn and Vrsecky, Petr (in their capacity as joint and several administrators of Southern Riverina Dairy Group P/L) (administrators appointed) ACN 603 101 042)***

Gardiner AsJ

[\[2017\] VSC 4](#)

18/01/2017

CORPORATIONS - Managed Investment Scheme - Recovery of Scheme loans - Defences - Test cases - Application Money - Management Fees - Responsible entity as trustee - Duties of responsible entity - Authority to pay Management Fees - Scheme Constitutions - Construction of loan agreement - Whether a loan made - Loan evidenced by journal entries - Corporations Act 2001 (Cth) s601FC(1).

***Timbercorp Finance P/L (in liquidation) (ACN 054 581 190) v Collins, Douglas James & Ors; Timbercorp Finance P/L (in liquidation) (ACN 054 581 190) v White, Peter John & Anor; Timbercorp Finance P/L (in liquidation) (ACN 054 581 190) v Gruyters, Peter Jeffrey; Timbercorp Finance P/L (in liquidation) (ACN 054 581 190) v Lowe, Morag***

Judd J

[\[2016\] VSC 776](#)

15/12/2016

PRACTICE AND PROCEDURE - Application to rescind opt out notice pursuant to s 33J(6) of the Supreme Court Act 1986 - Settlement of a group proceeding alleging breach of continuous disclosure obligations under ss 674, 674(2) and 1041H of the Corporations Act 2001 (Cth) - Settlement approved - Subsequent application to be reinstated as a group member - Bases for reinstatement insufficient - Application refused.

***Camping Warehouse Australia P/L (ACN 097 355 578) (formerly Mountain Buggy Australia Pty Limited) v Downer EDI LTD (ACN 003 872 848)***

Digby J

[\[2016\] VSC 785](#)

22/12/2016

PRACTICE AND PROCEDURE - E-trial - Public access to court book and documents on monitors in courtroom - Confidentiality - Whether necessary for the administration of justice that public access to the documents be restricted during the course of the trial - Principles of transparency, open justice and facilitating the fair reporting of proceedings considered - Confidentiality regime for documents admitted into evidence referred to the trial judge - Confidentiality of discovered documents not yet tendered into evidence to be maintained - Hogan v Australian Crime Commission (2010) 240 CLR 658 referred to.

EVIDENCE - Privilege - Legal Professional privilege - Whether a party in its pleadings has put in issue its state of mind such that it is inconsistent with the maintenance of confidentiality in documents relevant to the formation of that state of mind - Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd (2015) 321 ALR 191 and DSE (Holdings) Pty Ltd v InterTan (2003) 135 FCR 151 applied - Privilege holder's conduct - Look beyond pleadings to evidence and conduct - Mullett v Nixon (Subpoena Application) [2016] VSC 129 considered and applied - Assertion of the privilege holder's state of mind repeatedly deployed to obtain a forensic advantage in the proceeding - Legal professional privilege waived.

PRACTICE AND PROCEDURE - Discovery - Delay - Subsequent application after earlier application dismissed by consent after extensive argument and numerous rulings - Applicable principles - Tenth Vandy Pty Ltd v Natwest Markets Australia Pty Ltd [2006] VSC 170 considered - No estoppel or abuse of process - Case management principles - Civil Procedure Act 2010 (Vic) - Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175 considered - Liu v The Age Company Limited [2016] NSWCA 115 distinguished - Inappropriate to put a time limit upon when parties can challenge claims to legal professional privilege - Application allowed to proceed.

**Oswal, Radhika Pankaj and AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522) & OTHERS (according to the attached schedule); Oswal, Pankaj and CARSON, IAN MENZIES & OTHERS**

Daly AsJ

[\[2017\] VSC 19](#)

01/02/2017

PRACTICE AND PROCEDURE - Settlement of a group proceeding alleging breach of continuous disclosure obligations under s 674 and s 1041H of the Corporations Act 2001 (Cth) - Application for approval of settlement of group proceeding - Supreme Court Act 1986 (Vic) Part 4A, s 33V and s 33ZF - Whether terms of settlement fair, proper, reasonable and appropriate and likely to be in the interests of the group members as a whole - Whether settlement distribution scheme fair and reasonable - Whether provision for payment to the litigation funder and to the plaintiff are fair, proper, reasonable and appropriate - Settlement approved.

**Camping Warehouse Australia P/L (ACN 097 355 578) (formerly Mountain Buggy Australia Pty Limited) v Downer EDI LTD (ACN 003 872 848)**

Digby J

[\[2016\] VSC 784](#)

21/12/2016

## Common Law Division

APPEAL - Appeal from order of Associate Judge summarily dismissing proceeding - Whether appellant had real prospect of establishing that its predecessor as trustee of unit trust entered into the contract of employment in the administration of the trust - Whether chose in action vested in appellant upon its appointment as trustee - Whether vesting order pursuant to s 51 of the Trustee Act 1958 a pre-condition to appellant having standing to sue - Application to admit further evidence on appeal - Appellant failed to establish any error in decision of Associate Judge - Appeal dismissed - Civil Procedure Act 2010 ss 62, 63 - Property Law Act 1958 s 134 - Trustee Act 1958 ss 3, 45, 51, 58 - Supreme Court (General Civil Procedure) Rules 2015 r 77.06.

***Innovateq Australia Pty Ltd (ACN 609 748 674) ATF The Innovateq Unit Trust v Barnes, Ross & Ors***

McDonald J

[\[2017\] VSC 16](#)

03/02/2017

JURIES - Juries Act 2000 s71, s81 - Failure of prospective juror to attend in accordance with summons - Whether prospective juror had reasonable excuse - Significance of jury duty - Determined juror did not have reasonable excuse for failure to attend in accordance with summons.

SENTENCING - Sentencing Act 1991 - Whether fine and/or imprisonment appropriate - Role of general deterrence - Community corrections order imposed.

***The Juries Commissioner v Slattery, Sean Thomas Michael***

J Forrest J

[\[2017\] VSC 3](#)

16/01/2017

LIMITATION OF ACTIONS – Personal injury claim based on alleged breaches of duty while the plaintiff was imprisoned – Whether limitation period should be extended in circumstances where there is a delay of approximately 22 years – Limitation of Actions Act 1958 (Vic) ss 27K(2), 27L(1) and (2) – Consideration of the reasons for delay, the plaintiff’s circumstances, defendant’s conduct and prejudice to the defendant – Prejudice to the defendant not fatal to the plaintiff’s application – Application to extend limitation period allowed – Prince Alfred College Incorporated v ADC [2016] HCA 37 considered and distinguished.

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

Ierodiaconou AsJ

[\[2017\] VSC 12](#)

01/02/2017

PLANNING - Broiler farms - Classification of broiler farms - Separation distance - Time for assessing broiler farm classification and separation distance - Time for assessing facts relevant to planning schemes considerations and Code compliance - Significance of two pre-fabricated dwellings placed by plaintiffs within separation distance of proposed broiler farms prior to hearing by Victorian Civil and Administrative Tribunal - Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 148(1); Victorian Code for Broiler Farms 2009.

***Forbes, Maurice & Others (according to the attached schedule) v Vukadinovic, Michael & Others (according to the attached schedule)***

Garde J

[\[2017\] VSC 20](#)

03/02/2017

PRACTICE AND PROCEDURE - Appeal from Associate Justice dismissed after Appellant failed to appear on the hearing date - Application to reinstate appeal - Application for adjournment by email - Applicant/Appellant refused to appear to apply for adjournment prior to hearing date of application for reinstatement - No appearance by Applicant/Appellant on the hearing of the reinstatement application - Duty of the Court to self-represented litigants - Communications with the Court with respect to controversial matters by email - Application to reinstate dismissed

***Dirckze, Graham v Holmesglen Institute***

Riordan J

[\[2017\] VSC 18](#)

31/01/2017

PRACTICE AND PROCEDURE - Case management conference - Progress of the Settlement Distribution Scheme - Approval of costs of the administration of the Scheme.

***Downie, Erin v Spiral Foods Pty Ltd (ACN 006 292 780), Muso Co Ltd, Marusan-Ai Co Ltd***

J Forrest J

[\[2017\] VSC 7](#)

24/01/2017

PRACTICE AND PROCEDURE - Costs - Unsuccessful application by defendant for summary judgment pursuant to s62 of the Civil Procedure Act 2010 - Whether costs should follow the event or be costs in the proceeding - Whether defendant as Administrator of the estate of the deceased should be entitled to indemnity out of the estate in respect of his costs of the application - The plaintiffs' costs of the defendant's application ordered to be their costs in the proceeding and the question of the entitlement of the defendant to indemnity referred to the trial Judge - Justice Legislation Amendment (Succession and Surrogacy) Act 2014; Forsyth v Sinclair (No 2) [2010] VSCA 195; Briggs v Mantz (No 2) [2014] VSC 487; Towercom Pty Ltd v Fahour (No 4) [2013] VSC 585.

***In the matter of Part IV of the Administration and Probate Act 1958. In the matter of the Will and Estate of James Graeme Forrest, deceased: Innes-Irons, Kieren and Colliss, Emilie Harding v Forrest, Roger Cranfield (who is sued as the Administrator of the Estate of the late James Graeme Forrest)***

Derham AsJ

[\[2017\] VSC 10](#)

25/01/2017

STATUTORY INTERPRETATION - Crown immunity from suit in tort - Whether statutory removal of Crown immunity in tort under the Crown Proceedings Act 1958 (Vic) extends to personal liability, or is limited only to vicarious liability - Relevance of High Court's construction of the Judiciary Act 1903 (Cth) - Consideration of differing historical and statutory contexts - Crown Proceedings Act 1958 (Vic) s23, s25 - Judiciary Act 1903 (Cth) s64 - Hall v Whatmore [1961] VR 225, Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 applied - Maguire v Simpson (1977) 139 CLR 362, The Commonwealth v Evans Deakin Industries Ltd (1986) 161 CLR 254, Commonwealth v Mewett (1997) 191 CLR 471, Blunden v Commonwealth of Australia (2003) 218 CLR 330, Soil Conservation Authority v Read [1979] VR 557 considered.

PRACTICE AND PROCEDURE - Reservation of proceeding or question for the Court of Appeal - Plaintiff's application for reservation of certain questions - Supreme Court Act 1986 (Vic) s17B(2) - Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd & Ors (2014) 318 ALR 107, Collins v Black [1995] 1 VR 409 applied.

***Salt, Carolyn v State of Victoria***

Keogh J

[\[2017\] VSC 6](#)

23/01/2017

WILLS - Construction - Testator granted right to B to reside in a property for 'as long as she wishes' - Property to be sold and proceeds distributed when B 'ceases to use or reside permanently' in the property - B died while living in the property - Whether 'cease to use or reside' includes cesser by way of death - Whether voluntary or involuntary cesser required.

WILLS - Construction - Pecuniary legacies of specified amount to be paid from one-third of the proceeds of sale of the property - Specified amounts different in value from value of one-third of the sale proceeds - How legatees are to be paid - Whether pro rata division of sale proceeds is appropriate - Specified amounts ordered to be paid, with remainder falling as residue.

WILLS - Evidence - Armchair principle - Extrinsic evidence - Whether uncertainty from surrounding circumstances or on the face of the will - Evidence of testator's intention unhelpful - Wills Act 1997 (Vic) s 36

WORDS AND PHRASES - 'Cease to use or reside permanently' - 'Cease'.

***Blockley, Michael Blair v Challis, Phillip and Hall, Jane***

Ierodiaconou AsJ

[\[2017\] VSC 15](#)

01/02/2017

## Criminal Division

BAIL - Drugs, Poisons and Controlled Substances Act 1981 (Vic) s71 and S71AA - Drug offences in large commercial quantity - Exceptional circumstances - Principles - Strength of prosecution case - Delay - Other considerations.

***In the matter of the Bail Act 1977 and In the matter of an application for bail by Obian, Saer***

Lasry J

[\[2016\] VSC 607](#)

06/10/2016

CRIMINAL - Application for bail - Show cause situation - Charged with indictable offence while on bail - Whether an unacceptable risk - Intentionally or recklessly causing a bushfire - No direct evidence of the commission of the alleged offences - No prior related offences - No prior convictions in Victoria and limited convictions interstate - Relative youth of the accused - Availability of support and supervision from Community Mental Health Services - Availability of alternative stable accommodation - Availability of support and undertakings from Salvation Army - Bail Act 1977 (Vic), s4(1), (2) and (4)(a) - Bail granted.

***In the matter of the Bail Act 1977 (Vic) and In the matter of an application for bail by Chatters, Ashleigh-Sue***

Elliott J

[\[2017\] VSC 2](#)

04/01/2017

CRIMINAL LAW - Bail - Human rights - Application for bail by Aboriginal person with intellectual disability aged 17 years - Procedure to be followed when court hears applications for bail by children - Identifying suitable arrangements for child's detention when at court and procedures for conduct of bail hearing having regard to child's age - Segregating applicant as child in detention when at court - avoiding intimidation, humiliation and distress and ensuring child's effective participation in criminal process - assessing considerations applying to determination of applications for bail by Aboriginal persons - Assessing considerations applying to determination of applications for bail by children - Assessing possible conditions of bail when determining applications by Aboriginal persons and children - in such cases, adopting procedural accommodations to avoid multiple and intersectional discrimination - Whether applicant had shown cause why detention was not justified - Whether applicant represented unacceptable risk - Relationship between those criteria and considerations governing determination of applications by Aboriginal persons and children - Charter of Human Rights and Responsibilities Act 2006 (Vic) ss 6(2)(b), 8(3), 17(2), 19(1) and (2), 23(1) and 25(3), Bail Act 1977 (Vic) ss 3A, 3B, 4(2)(d)(i), 4(4), 5(1)-(8), International Covenant on 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 E***

Bell J

[\[2017\] VSC 13](#)

31/01/2017

CRIMINAL LAW - Sentence - Murder - Accused, aged 24, tried to kill former *de facto* wife, aged 20, by punching, kicking and choking - When attempt failed, accused took up knife and stabbed deceased to death - Accused sought to cover up crime until arrested - Full admissions to police - Early plea of guilty - Limited remorse - Relative youth - Accused's depression impaired judgment, but only moderately - Accused previously gaoled for assaulting deceased twice - Reasonable prospects of rehabilitation - Importance of general deterrence, denunciation, just punishment, specific deterrence, rehabilitation and parsimony - Relevance of current sentencing practices - Sentence of 23 years' imprisonment with non-parole period of 18 years - But for plea of guilty, sentence of 28 years' imprisonment with non-parole period of 24 years - *Sentencing Act 1991 (Vic)*, ss 5, 6AAA, 11 & 18.

***The Queen v Banek, Makeny***

Croucher J

[\[2017\] VSC 11](#)

01/02/2017

CRIMINAL LAW - Sentence - Murder - Plea of not guilty - Accused claimed self-defence - Accused stabbed deceased in the back with severe force - Killing not premeditated - Limited remorse - Low level intellectual impairment - Moderate prospects of rehabilitation - Sentenced to 20 years imprisonment with 16 years non-parole period.

***The Queen v Vikic, Rasim***

Coghlan JA

[\[2016\] VSC 818](#)

19/12/2016



CRIMINAL LAW - Sentence - Murder - Plea of guilty - Killing not premeditated - Limited remorse - Accused refusing treatment for HIV - Reduced life expectancy of six to 12 months from time of plea - Sentencing Act 1991 s 6AAA - Sentenced to 15 years imprisonment with non-parole period of 10 years.

***The Queen v Kepenci, Simon***

Coghlan JA

[\[2016\] VSC 817](#)

19/12/2016

CRIMINAL PROCEDURE - Human rights of child defendant charged with serious crimes in superior court - Attempted murder and other charges brought against child aged 15 years in Supreme Court of Victoria - Plea of guilty - Defendant in detention on remand - Identifying suitable arrangements for child's detention when at court and procedures for conduct of directions and sentencing hearings having regard to child's age - Segregating defendant as child in detention from adult prisoners when at court - Avoiding intimidation, humiliation and distress and ensuring child's 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 on 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

# 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.

CONTRACT - Contract of sale of business - Whether defendant entitled to rescind contract - Whether vendor could deliver the business as contracted including its goodwill - Whether the plaintiffs' claim amounted to double recovery - Whether specific performance should be ordered - calculation of damages.

***Body in Balance Chiropractic Pty Ltd & Anor v Jambere Pty Ltd & Ors***

[\[2016\] VCC 1835](#)

Judge Smith

16/12/2016

CONTRACT - Whether real estate agent entitled to commissions under exclusive agency agreement - When contract becomes "unconditional" - When commission is earned - when commission is payable - Where original contracts of sale rescinded - Whether developer engaged in unconscionable conduct.

***Mandy Lee Real Estate Pty Ltd v Coastal Properties Pty Ltd & Anor***

[\[2017\] VCC 7](#)

Judge Cosgrave

25/01/2017

PRACTICE AND PROCEDURE - Conditional appearance - Jurisdiction of the Court - Whether in any event the proceeding be stayed - Whether the County Court has jurisdiction to hear the proceeding, that is, is the proceeding a simple common law claim or an application for a prerogative writ or an order in the nature of a prerogative writ - If the proceeding is wholly or partly beyond the jurisdiction of the Court - Whether the proceeding should be amended, stayed pending the making of an application under Part 3 of the Courts (Case Transfer) Act 1991 or be struck out - Whether, in any event, the proceeding should be stayed to allow other proceedings to be determined.

***Healey v Royal Society for Prevention of Cruelty to Animals Victoria (Ruling)***

Judge Parrish

[\[2016\] VCC 2000](#)

21/12/2016

TESTATOR'S FAMILY MAINTENANCE - Application under Pt IV of the Administration and Probate Act 1958 - Deceased mother and father survived by two adult sons and two adult daughters - Claim by the plaintiff son of the deceased for further provision out of the estates for his proper maintenance and support.

***Woollard v Woollard***

Judge Kings

[\[2016\] VCC 1999](#)

22/12/2016

TRADE PRACTICES - Misleading and deceptive conduct - Whether representations concerning suitability of a particular variety of broccoli seeds for transplanting at a particular time of year in a particular region were misleading and deceptive - Whether there was a breach of warranty of fitness - Whether there was a breach of agreement - Apportionable claim - reasons for the failure of the plaintiff's broccoli crop - Calculation of the plaintiff's loss and damage arising from misleading and deceptive conduct - Whether the plaintiff failed to mitigate its loss - Whether the plaintiff was guilty of contributory negligence - Whether the defendant could rely upon alleged terms and conditions of agreement limiting its liability for loss and damage.

***Amar Produce Pty Ltd v Fairbank's Selected Seed Co Pty Ltd & Anor***

Judge Smith

[\[2016\] VCC 1908](#)

14/12/2016

# Articles

## Aboriginals

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Definitions - Constitutional - Constitutionalism - Gunditjmara Peoples Constitution - Ngarrindjeri Nation Constitution - Indigenous legal systems - Self-governance - Settler state influences - Australia

**Dziedzic, A. and McMillan, M. Australian indigenous constitutions: recognition and renewal. (2016) 44(3) Fed L Rev 337-361.**

Indigenous - Customary law - Sentencing - Federal government exclusion - Racial Discrimination Act 1975 (Cth), Pt. III - Australia

**Maxwell, J. Two systems of law side by side: the role of indigenous customary law in sentencing. (2016) 19(2) AILR 97-112.**

Magistrates - New South Wales Children's Court - National study - Perception - Issues - Indigenous young people - NSW

**Bartels, L. et al. Indigenous young people and the NSW Children's Court: Magistrates perceptions of the Court's criminal jurisdiction. (2016) 19(2) AILR 34-44.**

## Administrative Law

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Confidential information - Statutory powers - Disclosure - Government - UK

**Dobson, N. Confidence in the taxman? (2017) 167 (7728) NLJ 14-15.**

Judicial review - Legal history - Private law constitutionalism - Juristic consensus - Private interest - Policy - Administration - Law commission - UK

**Arvind, T. and Stirton, L. The curious origins of judicial review. (2017) 133 LQR 14-20.**

Ombudsman - Uniform model - Dispute resolution - Historical development - Ombudsman Act 1976 (Cth) - Australia

**Stuhmcke, A. Australian ombudsmen: a call to take care. (2016) 44(3) Fed L Rev 531-556.**

Supreme Court - Empirical - Standard of review - Judicial review - Quantitative - Deference - *Dunsmuir v New Brunswick* - Canada

**Danay, R. Quantifying *Dunsmuir*: an empirical analysis of the Supreme Court of Canada's jurisprudence on standard of review. (2016) 66(4) U Toronto L J 555-608.**

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Mediation - Power - Tool of influence - Parties - Process - Outcomes - Mediator's neutrality - Australia

**Sweify, M. The art of using power as a tool of influence in mediation. (2016) 27(4) ADRJ 236-243.**

Online dispute resolution technology - Access to justice - Design - Online courts - Constrained - Judicial function - Australia

**Legg, M. The future of dispute resolution: online ADR and online courts. (2016) 27(4) ADRJ 207-236.**

## Arbitration

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Alternative dispute resolution - Costs - Reasonableness - Refusal - Unreasonable conduct - UK

**Ahmed, M. The merits factor in assessing an unreasonable refusal of ADR: a critique and a proposal. (2016) (8) JBL 646-669.**

International investment agreements - Protection of foreign investments - Plain packaging legislation - Arbitration tribunal's decision - *Philip Morris Asia v Australia* - Australia

**Alvarez-Jimenez, A. The international law gaze: the plain victory in *Philip Morris Asia v Australia*. (2016) (December) NZLJ 419-421, 429.**

## Constitutional Law

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Commonwealth - Legislate - Religion - Meaning - For the purpose - Improper test - Australian Constitution 1901 (Cth), s116 - Australia

**Beck, L. The case against improper purpose as the touchstone for invalidity under section 116 of the Australian Constitution. (2016) 44(3) Fed L Rev 505-529.**

Elections - Voter equality - Malapportionment - Liability - Constitutional challenge - The Constitution 1901 (Cth), ss 7, 24 - Australia

**Gray, Anthony. The protection of voting equality in Australia. (2016) 44(3) Fed L Rev 557-585.**

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**Duxbury, N. Acquisitive prescription and fundamental rights. (2016) 66(4) U Toronto L J 472-512.**

## Contract Law

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Behavioural standards - Good faith - Loyalty - Trustworthiness - Commercial contracts - Response - Enforcement - Interpretation - Agreement - Relational contract settings - UK

**Mitchell, C. Behavioural standards in contracts and English contract law. (2016) 33(3) JCL 234-252.**

Business tenancies - Consideration - Licenses - Oral contracts - Variation clauses - *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* - UK

**Shaw-Mellors, A. Contractual variations and promises to accept less: pragmatism in the Court of Appeal. (2016) (8) JBL 696-706.**

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**Yihan, G. New distinctions within terms implied in fact. (2016) 33(3) JCL 183-209.**

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Corporate attribution - Framework - Separate corporate personality - Companies - Auditors - Liability - No hierarchy of rules - Boundary - Actual authority - Abuse - Ostensible authority - Remedies - *Stone & Rolls Ltd (In liquidation) v Moore Stephens (A Firm)* - UK

**Worthington, S. Corporate attribution and agency: back to basics. (2017) 133 LQR 119-143.**

Director's duties - Company law - Fiduciary duties - Best interests - Good faith - Corporate social responsibility - Loyalty - UK - Hong Kong - Australia

**Langford, R. Best interests: multifaceted but not unbounded. (2016) 75(3) Cambridge L J 505-527.**

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**McCloud, V. The online court: suing in cyberspace. (2017) 36(1) CJQ 34-50.**

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### Criminal Law & Procedure

Abuse of process - Delay - Loss of evidence - Destruction of evidence - Manipulation of court process - Entrapment - Bringing justice into disrepute - Misuse of executive power - Right to fair trial - UK  
**Hungerford-Welch, P. Abuse of process: does it really protect the suspect's rights. (2017) (1) Crim L R 3-17.**

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**Stark, F. The demise of "parasitic accessory liability": substantive judicial law reform not common law housekeeping. (2016) 75(3) Cambridge L J 550-579.**

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**Robson, J. A fair hearing? the use of voice identification parades in criminal investigations in England and Wales. (2017) (1) Crim L R 36-50.**

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**Grant, A. An examination of New Zealand criminal appeals to the Judicial Committee of the Privy Council 1841-2015. (2016) 27(2) NZULR 438-462.**

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**Mackay, R. and Mitchell, B. The new diminished responsibility plea in operation: some initial findings. (2017) (1) Crim L R 18-35.**

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State parliaments - Parliamentary committees - Scrutiny of bills - Rights implications - Anti-bikie bills - Law and order bills - Victoria - SA - NSW - QLD

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**Goudkamp, J. The end of an era? illegality in private law in the Supreme Court. (2017) 133 LQR 14-20.**

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Agricultural land - Compensation - Crops - Emergencies - Flood control - Local authorities - Liabilities - Powers - Duties - Robert Lindley Ltd v East Riding of Yorkshire Council - UK

**Evans, S. Water, water everywhere ... but what to do with it, (and who pays?). [2016] (6) Conv. 496-502.**

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**Drone danger: remedies for damage by civilian remotely piloted aircraft to persons or property on the ground in Australia. (2016) 23(3) Torts L J 290-319.**

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