



## THE LAW LIBRARY OF VICTORIA

Library  
Bulletin  
17 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 current 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.

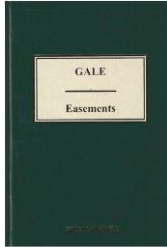
The book costs \$60 and there is a \$10 discount for members of the Royal Historical Society of Victoria (RHSV).

# Contents

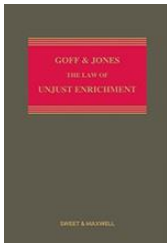
<b>New Books</b>	<b>3</b>
<b>Legislation</b>	<b>4</b>
Victorian Bills	4
Victorian Assents	4
Proclamations	4
<b>High Court Cases</b>	<b>5</b>
<b>Victorian Supreme Court Cases</b>	<b>6</b>
Court of Appeal	6
Commercial Court	9
Common Law Division	12
Criminal Division	16
<b>County Court of Victoria Cases</b>	<b>18</b>
<b>Articles</b>	<b>19</b>
Arbitration	19
Bankruptcy	19
Contract Law	19
Corporations Law	19
Courts	19
Criminal Law & Procedure	19
Environmental Law	19
Evidence	20
Human Rights	20
Insurance Law	20
Legal Aid	20
Practice & Procedure	20
Torts	20

# New Books

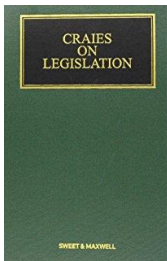
Following is a selection of new books in the Library collection. For details of more new books, see the Library Catalogue: [https://courts.sdp.sirsidynix.net.au/client/en\\_AU/llv/](https://courts.sdp.sirsidynix.net.au/client/en_AU/llv/).



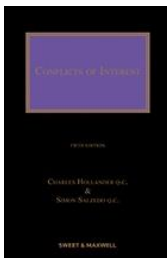
Gaunt, Jonathan, *Gale on easements*  
20th ed., London, Sweet & Maxwell, 2017  
Call number: 346.0435 GAL.20 (Supreme Court Library)



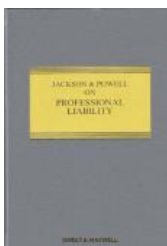
Goff of Chieveley, Robert, *Goff & Jones the law of unjust enrichment*  
9th ed., London, Sweet & Maxwell, 2016  
Call number: 346.029 GOF.9 (Supreme Court Library)



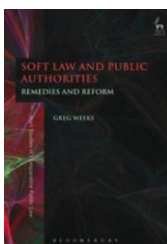
Greenberg, Daniel (editor), *Craies on legislation : a practitioners' guide to the nature, process, effect and interpretation of legislation*  
11th ed., London, Sweet & Maxwell, 2017  
Call number: 348.022 CRA.11 (Supreme Court Library)



Hollander, Charles, *Conflicts of interest*  
5th ed., London, Sweet & Maxwell, 2016  
Call number: 342.410684 HOL.5 (Supreme Court Library)



Jackson, Rupert M., *Jackson & Powell on Professional Liability*  
8th ed., London, Sweet & Maxwell, 2017  
Call number: 346.032 JAC.8 (Supreme Court Library)



Weeks, Greg, *Soft law and public authorities : remedies and reform*  
Oxford, Hart Publishing, 2016  
Call number: 342.9406 WEE (Supreme Court Library)

# Legislation

## Victorian Bills

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

- [\*Electricity Safety Amendment \(Bushfire Mitigation Civil Penalties Scheme\) Bill\*](#)
- [\*Fair Work \(Commonwealth Powers\) Amendment Bill 2017\*](#)
- [\*Statute Law Revision Bill 2017.\*](#)

## Victorian Assents

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

- [\*Energy Legislation Amendment \(Feed-in Tariffs and Improving Safety and Markets\) Act 2017 No. 1/2017\*](#)
- [\*Food Amendment \(Kilojoule Labelling Scheme and Other Matters\) Act 2017 No. 2/2017\*](#)
- [\*Transport Integration Amendment \(Head, Transport for Victoria and Other Governance Reforms\) Act 2017 No. 3/2017.\*](#)

## Proclamations

No Victorian Act proclamations have been made since the last Library Bulletin.

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

- *Crimes Legislation Amendment Act 2016 No. 28/2016*
  - Part 4 Division 2 (section 12) of this Act came in by forced commencement on 6 February 2017 s. 2(3)
- *Health Complaints Act 2016 No. 22/2016*
  - Sections 1-254, Schedules 1, 2 came in by forced commencement on 1 February 2017 s. 2(2)
- *Sex Offenders Registration Amendment Act 2016 No. 21/2016*
  - Sections 1-24 of this Act came in by forced commencement on 1 February 2017 s. 2(2).



## 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

## High Court Cases

CONSTITUTIONAL LAW (CTH) - Judicial power - Mandatory examination of persons about corporation's examinable affairs - Where plaintiffs former directors of corporation in voluntary liquidation - Where liquidators applied for and obtained order for issue of summons under s596A of Corporations Act 2001 (Cth) requiring plaintiffs to attend for examination about corporation's examinable affairs - Whether s596A invalid as contrary to Ch III of Constitution - Whether s596A gives rise to "matter" that engages judicial power of Commonwealth - Whether power conferred by s596A incompatible with or outside judicial power of Commonwealth.

WORDS AND PHRASES - "examinable affairs", "federal jurisdiction", "judicial power", "matter". Constitution, Ch III. Corporations Act 2001 (Cth), s596A, s597.

*Palmer, Clive Frederick v Ayres, Marcus William; Parbery, Stephen James and Owen, Michael Andrew in their capacities as liquidators of Queensland Nickel P/L (in liq) & Ors; Ferguson, Ian Maurice v Ayres, Marcus William; Parbery, Stephen James and Owen, Michael Andrew in their capacities as liquidators of Queensland Nickel P/L (in liq)*

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

08/02/2017

TAXATION - Land tax - Where land tax assessments were paid - Where Commissioner did not amend assessments after error detected - Whether Commissioner under duty compellable by mandamus to amend and refund excess land tax - Whether Commissioner's refusal to amend amounted to conscious maladministration - Whether amended assessment had effect that excess tax was never land tax - Whether proceedings were barred under Land Tax Act 1958 (Vic).

WORDS AND PHRASES - "amended assessment", "charged, levied and collected", "completeness and accuracy", "conscious maladministration", "land tax", "tax paid under, or purportedly paid under".

*Commissioner of State Revenue v ACN 005 057 349 P/L*

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

08/02/2017

TOWN PLANNING (WA) - Compensation - Where land reserved for public purpose under planning scheme - Where s173 of Planning and Development Act 2005 (WA) makes provision for landowner to be compensated where land injuriously affected by making or amendment of planning scheme - Where, under s177, compensation not payable until land first sold after reservation or responsible authority refuses development application or grants application on unacceptable conditions - Where landowners purchased land affected by planning scheme after date of reservation - Where purchasers applied to develop land and were refused - Whether purchasers entitled to compensation.

WORDS AND PHRASES - "compensation", "injuriously affection", "planning scheme", "reservation".

*Western Australian Planning Commission v Southregal P/L & Anor; Western Australian Planning Commission v Leith, Trevor Neil*

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

08/02/2017

# Victorian Supreme Court Cases

## Court of Appeal

ACCIDENT COMPENSATION - Appeal - Application for leave to appeal - Industrial accident - Damages - Assessment of pecuniary loss damages - Loss of earning capacity - Assessment of loss of earning capacity - Bases of assessment of damages for loss of earning capacity - Whether judge erred in assessment of pecuniary loss damages - No error in judge's assessment - Accident Compensation Act 1985, s134AB. INTEREST - Interest on past pecuniary loss damages - Interest from date of commencement of proceeding until date of judgment - Supreme Court Act 1986, s60 - Accident Compensation Act 1985, s134AB(34).

***Sahin, Edliban v Victorian WorkCover Authority***

Warren CJ, Beach JA, and Cameron AJA

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

10/02/2017

ACCIDENT COMPENSATION - Appeal - Workplace injury - Serious injury - Serious injury application - Elbow injury - Epicondylitis - Whether worker's epicondylitis had recovered - Whether worker's injury continued to have a substantial organic basis - Disentangling physical consequences from psychological consequences - Whether judge was correct in concluding that there was ongoing epicondylitis or organic elbow injury - No error in judge's conclusion - Reasons for judgment - Whether reasons adequate - No inadequacy in judge's reasons - Appeal dismissed - Accident Compensation Act 1985 s134AB.

***Victorian WorkCover Authority v Kalenjuk, Olga***

Santamaria and Beach JJA

[\[2017\] VSCA 17](#)

16/02/2017

ADMINISTRATIVE LAW - Application for leave to appeal against order of Trial Division judge dismissing application for judicial review of order of County Court judge - Conviction for offences involving use of land without planning permit - Whether charges valid - Whether Trial Division judge misconstrued Planning and Environment Act 1987 s6, s126(2) and Melton Planning Scheme cl 35.04-1 - Whether Trial Division judge failed to give effect to principle of legality - Criminal Procedure Act 2009 s6, sch 1 cls 1, 3 - Application for leave to appeal refused.

***Kitanovski, Mendo v Melton City Council and County Court of Victoria***

Kyrou and McLeish JJA

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

15/02/2017

ADMINISTRATIVE LAW - Respondent required accreditation and working with children check assessment notice to drive buses and taxis - Respondent previously convicted of inciting murder of ex-de facto wife - Accreditation refused and negative working with children notice issued - Victorian Civil and Administrative Tribunal ordered respondent be accredited and issued with working with children assessment - Applicants sought leave to appeal - Appeal could only be brought on questions of law - Proposed grounds of appeal in effect seeking merits review - Reformulated grounds - Whether Tribunal's findings open on the evidence - Findings open on the evidence - Leave to appeal refused - Victorian Civil and Administrative Tribunal Act 1998 s148(1) - Working with Children Act 2005 s13(2) - Transport Act s164, s169 - *Victoria v Bacon* [1998] 4 VR 269 referred to.

***Secretary, Department of Justice and Regulation v Zhong, Zhanyu; Taxi Services Commission v Zhong, Zhanyu***

Santamaria, Ferguson, and McLeish JJA

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

17/02/2017

COURTS - Anonymisation - Respondent sought to have name anonymised in published reasons and restriction of access to court file - Pseudonym used in previous proceedings - Applicants did not oppose order - Pseudonym order part of exercise of Court's inherent jurisdiction - Application did not fall naturally into established categories for which order commonly made - Primary question whether order necessary to avoid prejudicing interests of justice - Court not bound to make pseudonym order simply because of earlier orders - No proper basis for pseudonym order - Mere embarrassment, distress or invasion of privacy insufficient to warrant making of pseudonym order - *ABC v D1; Ex parte The Herald & Weekly Times Limited* [2007] VSC 480 referred to.

***Secretary, Department of Justice and Regulation v Zhong, Zhanyu; Taxi Services Commission v Zhong, Zhanyu (No 2)***

Santamaria, Ferguson, and McLeish JJA

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

17/02/2017

CRIMINAL LAW - Sentence - Crown appeal - One charge of rape, two charges of attempted rape and two charges of indecent act with child under 16 - Complainant was respondent's step-daughter - Offending occurred over 12 month period when complainant aged 11 or 12 - Respondent sentenced to 720 days' imprisonment combined with three year Community Correction Order - Whether sentence manifestly inadequate - Whether sentencing judge significantly understated objective gravity of offending - Whether excessive weight given to mitigating factors - Crown appeal allowed - Respondent resentenced to total effective sentence of six years' imprisonment with non-parole period of four years.

***Director of Public Prosecutions [DPP] v Cooper, Bryan (a pseudonym)***

Weinberg, Whelan, and Kyrrou JJA

[\[2017\] VSCA 8](#)

08/02/2017

**EQUITABLE REMEDIES - Rectification - Agents entered into written sales authorities with developers - Developers paid sales commissions to Agents who claimed owed further commissions - Developers alleged Agents not entitled to commission as sales authorities omitted information necessary to comply with Estate Agents Act 1980 - Developers seeking rectification to include that information to accord with common intention of parties - Availability where document does not reflect true agreement of parties due to mistake - Importance of common intention of parties - Whether rectification available in respect of collateral consequences of contract as written - Non-compliance with regulatory scheme not necessarily barrier to application for rectification - Nature and extent of contravention relevant - *Simic v NSW Land and Housing Corporation* (2016) 91 ALJR 108; *Nelson v Nelson* (1995) 184 CLR 538; *The Club Cape Schanck Resort Co Ltd v Cape Country Club Pty Ltd* (2001) 3 VR 526; *GE Capital Finance Australasia Pty Ltd v Federal Commissioner of Taxation* (2011) 219 FCR 420; *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329; *Mayo v W & K Holdings (NSW) Pty Ltd (in liq)* [2015] NSWCA 119; *Wills v Gibbs* [2007] EWHC 3361 - Estate Agents Act 1980 s49A, s50.**

**PRACTICE AND PROCEDURE - Pleadings - Whether leave to file amended pleading should be refused with no right to re-plead - High threshold to be overcome if leave to be denied with no right to re-plead - Relevant test 'no real prospect of success' - Courts should not strike out pleading if some factual matter could emerge at trial that might alter analysis - Proposed pleading not fanciful - Whether facts pleaded as to common intention could be established and whether those facts sufficient to support rectification sought are matters for trial - Appeal dismissed - *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62; *Mutton v Baker* [2014] VSCA 43 - Estate Agents Act 1980 s49A, s50.**

***CA & CA Ballan P/L (ACN 006 578 972) v Oliver Hume (Australia) P/L (ACN 068 318 712); Elysian Group P/L (ACN 114 025 204) v Oliver Hume (Australia) P/L (ACN 068 318 712); Land Source Australia P/L (ACN 132 726 151) v Oliver Hume (Australia) P/L (ACN 068 318 712)***

Redlich, Tate, and Ferguson JJA

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

10/02/2017

**LEGAL PRACTITIONERS - Costs - Application for leave to appeal against decision of Trial Division judge dismissing appeal from Costs Court - Application refused.**

***Awadallah, Hassan v Galbally & O'Bryan Lawyers***

Kyrou and McLeish JJA

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

15/02/2017



PRACTICE AND PROCEDURE - Application for interlocutory relief pending special leave to appeal to the High Court - Prospects of success - Balance of convenience - Whether irreparable loss - Undertakings given to the effect of some of the orders sought - No irreparable loss shown - Application dismissed.

***Apple and Pear Australia Ltd (ACN 101 551 348) v Pink Lady America LLC (No 2)***

Tate and McLeish JJA

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

08/02/2017

PROCEEDS OF CRIME - Applications for examination orders - Application for an order for the examination of a person about the affairs of specified individuals - Restraining orders - Applications for forfeiture orders - Applications for exclusion from forfeiture orders - Purpose of examination orders - Forensic purpose of examination - Exercise of discretion - Whether judge erred in exercise of his discretion by failing to properly identify forensic purpose to be served by the grant of an examination order - No error made by judge - Appeal dismissed - Proceeds of Crime Act 2002 (Cth), s180, s180A and s180B.

***Lam, Sak Cheung Duncan v The Commissioner of the Australian Federal Police***

Tate, Beach, and Ferguson JJA

[\[2017\] VSCA 9](#)

08/02/2017

### Commercial Court

CIVIL PROCEDURE - Supreme Court (General Civil Procedure) Rules 2015 (Vic) r11.01 and r11.06 - Application to add as a third party the secretary of the Department of Economic Development, Jobs, Transport and Resources (the Department) - Whether application is made against the Crown and is prohibited by the Crown Proceedings Act 1958 (Vic) - Alleged misrepresentation by officers of the Department - Whether such conduct alleged to be misleading and deceptive occurred in trade or commerce - Whether claims made in the proposed third party notice are unsubstantiated at law - Application granted.

***In the matter of Fleurie P/L (in liquidation) (ACN 060 643 156) Between: Fleurie P/L (in liquidation) (ACN 060 643 156) v Australian Construction and Mining Company P/L (ACN 162 509 391) & Ors and Department of Economic Development, Jobs, Transport And Resources***

Robson J

[\[2017\] VSC 30](#)

03/02/2017

CONTRACT - Principles for inferring a contract from conduct - Conduct relied upon not capable of giving rise to a contract - No intention to enter into any agreement enforceable at law as a binding contract.

CONSTRUCTIVE TRUST - *Muschinski v Dodds* (1985) 160 CLR 583 constructive trust considered - Common intention constructive trust considered - Onus of proof - Onus not discharged by party asserting constructive trust.

CORPORATIONS - Duties of directors to company - Content of conflict of interest rule and the profit rule - Application to a corporate trustee holding trust property - Evidentiary value of company financial statements - Corporations Act 2001 (Cth) s295, s296, s297, s1308 and s1309 - *ASIC v Hellicar* 247 CLR 345, 381 discussed and applied.

EQUITY - Fiduciaries - Director of corporate trustee arranged for sale of assets of the trust - Motivated in significant part by personal advantage to himself - No loss or damage sustained to trust - Whether breach of fiduciary duties - Content of fiduciary duties of conflict of interest and acting for personal interest considered - Liability of recipient company for knowing receipt of property in breach of trust - First limb of *Barnes v Addy* (1874) LR 9 Ch App 244, 251-252 considered and applied - Persons considered to be the 'mind' of the recipient company.

EVIDENCE - Evidentiary Value of the Financial Statements - Assessed in context of Corporations Act 2001 (Cth) - Requirements on companies and their directors in relation to the accuracy of financial reports and statements - *ASIC v Hellicar* 247 CLR 345, 381 applied.

PRACTICE AND PROCEDURE - Very large number of issues to be determined - Trial of first tranche questions determined in a sequential trial - *Ying Mui & Ors v Frank Kiang Ngan Hoh & Ors* (Ruling No 1) ('Ruling No 1') [2016] VSC 519 applied.

RESULTING TRUST - Whether resulting trust arose in favour of family company - Principles applicable to formation of a resulting trust when real estate purchased - Purchase money in part supplied, not as capital for the purchases, but as loan funds - No resulting trust found.

***Ying Mui P/L (ACN 009 992 449) & Ors; Amore Corporation P/L (ACN 097 964 175); Hoh, Kiang Po (also known as George Hoh); Hoh, Han Keyet; and Sharikat Ying Mui SDN BHD v Hoh, Frank Kiang Ngan; Hoh, Pooi Yoke Lim; Hoh, Lynn Yook Lien; Hoh, Ian Han Lok; Lokit Investments P/L (ACN 006 855 741); Lumarkye P/L (ACN 131 575 785); Frosthollow P/L (ACN 151 816 401); Olrey P/L (ACN 140 494 319)***

Vickery J

[\[2017\] VSC 29](#)

08/02/2017

CORPORATIONS - Oppression - Whether conduct contrary to the interest of members as a whole - Whether conduct unfairly prejudicial to or unfairly discriminatory against member; s233 and s232(d) and (e) of Corporations Act 2001 (Cth) (Act).

CORPORATIONS - Oppression - Whether oppression must exist at the time of trial; s233 of the Act; *Campbell v BackOffice Investments Pty Ltd* [2009] HCA 25.

CORPORATIONS - Deadlock - Whether winding up on just and equitable ground justified - Whether other remedy available - Whether other remedy must be a legal remedy - Discretionary considerations; s461(1)k and s467(4) of Act; *Host-Plus Pty Ltd v Australian Hotels Association* [2003] VSC 145.

***Exton, Peter Allan Roy and P & K Exton P/L (ACN 146 822 899) as trustee of the Peter Exton trust v Extons P/L (ACN 005 916 192) & Ors***

Sifris J

[\[2017\] VSC 14](#)

10/02/2017

COSTS - Indemnity principle - Unsuccessful party seeking to challenge party/party costs judgment following taxation and unsuccessful review - Contention that possibility solicitor/client costs of successful party may be less than the party/party costs judgment, thus meaning costs judgment offended the indemnity principle - Point not taken at party/party costs taxation or on review - No sufficient likelihood of indemnity principle being breached - *Shaw v Yarranova Pty Ltd & Anor* [2011] VSCA 55 applied.

***Oakley Thompson & Co P/L (ACN 092 053 239) v Maisano, Anuniziato Enzo (also known as Michael Maisano and Michael Mason) and Bodycorp Repairers P/L (ACN 068 589 408); Maisano, Anuniziato Enzo (also known as Michael Maisano and Michael Mason) v Bodycorp Repairers P/L (ACN 068 589 408) and Oakley Thompson & Co P/L (ACN 092 053 239)***

Hargrave J

[\[2017\] VSC 52](#)

13/02/2017

COSTS - Trustees - Where trustees sought orders approving adoption and signing of draft accounts of a deceased estate - Matter resolved by consent - Trustees' entitlement to costs on indemnity basis - Necessary and proper parties' entitlement to costs - Costs properly incurred.

***Equity Trustees Ltd (ACN 004 031 298) as executor and trustee of the estate of Pistorino, Agostino (deceased) v Pistorino, Antonio***

Elliott J

[\[2017\] VSC 17](#)

01/02/2017

PRACTICE AND PROCEDURE - Costs - Whether costs should be taxed immediately - Supreme Court (General Civil Procedure) Rules 2015 (Vic) r63.20.1 - Dale v Clayton Utz (No 3) [2013] VSC 593, Setka v Abbott MP (No 2) [2013] VSCA 376, Fanissa Pty Ltd v Tanya Versace [2016] VSC 416 considered and applied - Orders made taxing costs of interlocutory applications immediately.

***DC Payments P/L (ACN 009 582 781) and DC Payments Australasia P/L (ACN 097 550 519) v Next Payments Pty Ltd (ACN 160 185 106) & Ors (according to the Schedule): DC Payments Australasia P/L (ACN 097 550 519) v Vic Hotels P/L (ACN 82 131 914 282) & Ors (according to the Schedule)***

Vickery J

[\[2017\] VSC 22](#)

03/02/2017

### Common Law Division

ADMINISTRATIVE LAW - Judicial review of an opinion of a medical panel - Jurisdictional error - Inadequacy of reasons - Where medical panel found that plaintiff fit for pre-injury duties working in a commercial laundry - Where the medical panel concluded that the work duties were a significant contributing factor to injury which occurred against the background of a constitutional condition - Where aggravation to which work duties materially contributed remained symptomatic - Ryan v The Grange at Wodonga Pty Ltd & Ors [2015] VSCA 17 applied. ***Stojilkovic, Suncica v Romas, Associate Professor Evange; Cooney, Dr Laura; Leach, Dr Mary; Tagkalidis, Dr Matthew; Bourke, Mr John; Alsco P/L; QBE Workers Compensation (Vic) Ltd***

Keogh J

[\[2017\] VSC 49](#)

17/02/2017

APPEAL - Appeal on a question of law from an order of the Magistrates' Court that the appellants pay outstanding fire services property levy and interest - Appellants contend that the council had applied the wrong land use classification code to their land and that the magistrate erred by not applying the correct code - Held: this issue was not before the magistrate as challenge to a valuation, including the question of the correct code, must be made by the grievance route that is separate to debt recovery - Appeal dismissed - Fire Services Property Levy Act 2012 (Vic) - Valuation of Land Act 1960 (Vic) - Local Government Act 1989 (Vic) - s109 Magistrates' Court Act 1989 (Vic).

***Awad, Magdy and Awad, Suzy v Greater Bendigo City Council***

Lansdowne AsJ

[\[2017\] VSC 36](#)

15/02/2017

CONSTITUTIONAL LAW - Questions of law reserved by the Children's Court in the form of a special case stated under s533 of the Children, Youth and Families Act 2005 (Vic) - Whether inconsistency between detention provisions in the Commonwealth Migration Act 1958 and child protection provisions in the Victorian Children, Youth and Families Act 2005 - Whether 'covering the field inconsistency' or 'direct inconsistency' - Whether 'operational inconsistency' - No inconsistency - Victorian provisions not invalid - Commonwealth Constitution, s109 - Migration Act 1958 (Cth), s4, s4AA, s13, s14, s189, s196, s197AA, s197AB, s197AC, s197AD, s197AE, s197AF, s197AG - Children, Youth and Families Act 2005 (Vic), s1, s4, s5, s162, s240, s241, s242, s262, s263, s264, s266, s267, s268, s274, s275, s280, s281, s282, s533. COSTS - Special case stated - Indemnity certificates - Appeal Costs Act 1998, s19.

***In the matter of questions of law reserved under s 533 of the Children, Youth and Families Act 2005 Between: The Secretary of the Department of Health and Human Services and A A and A B and The Attorney-General for the Commonwealth of Australia***

Cavanough J

[\[2017\] VSC 34](#)

08/02/2017

CONTEMPT OF COURT - Sub judice contempt - Contested hearing - Publication had a real and definite tendency to prejudice the trial - Penalty - Applicable principles for determination of penalty - Factors relevant to whether to convict.

***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

[\[2017\] VSC 45](#)

17/02/2017

DISCRIMINATION LAW - Appeals from Victorian Civil and Administrative Tribunal under s148 of the Victorian Civil and Administrative Tribunal Act 1998 - Refusal of service on the basis of a protected attribute - Meaning of 'direct discrimination' - Equal Opportunity Act 2010 s8, s9, s44 - Victorian Civil and Administrative Tribunal Act 1998 s75.

STATUTORY INTERPRETATION - Prohibition against discrimination - Economic and non-economic loss - Compensable loss - Meaning of 'in consequence of' - Equal Opportunity Act 2010 s44, s125 - Victorian Civil and Administrative Tribunal Act 1998 s124(1).

***Obudho, Antony Kwenda v Patty Malones Bar P/L (ACN 102 006 897) (trading as Inflation Nightclub)***

Emerton J

[\[2017\] VSC 28](#)

09/02/2017

JUDICIAL REVIEW AND APPEALS - Application for leave to appeal from Victorian Civil and Administrative Tribunal ('VCAT') under s150 of the Private Security Act 2004 (Vic) - Decision of delegate of the Chief Commissioner of Police to cancel a Private Security Individual Operator licence under s56 of the Private Security Act 2004 (Vic) - VCAT stands in the shoes of original decision-maker - Nature of applications for leave to appeal under s148 of VCAT Act.

STATUTORY CONSTRUCTION - Private Security Act 2004 (Vic) s25 - Public interest - The extent to which public confidence is relevant to the question of whether it is in the public interest that the defendant hold a licence - Breadth of test - Distinction between what is 'of public interest' and what is 'in the public interest' - Public confidence an outcome of a proper system of regulation, rather than a matter to be taken into account in determining what is in the public interest - The Tribunal has broad discretion to consider circumstances of individual cases within the purpose of the relevant Act - Secretary, Department of Justice v LMB; Secretary, Department of Justice v PMY [2012] VSCA 143; Director of Public Transport v XFJ [2011] VSCA 302 referred to and applied.

STATUTORY CONSTRUCTION - Whether Tribunal erred in finding that defendant a fit and proper person to hold a security licence - Director of Public Transport v XFJ [2011] VSCA 302 followed - Whether defendant convicted of an offence which renders him unsuitable to hold a licence.

APPEALS FROM VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL - Whether decision of Tribunal unreasonable - Whether to interfere with exercise of discretion - Reluctance of Court to conclude that a decision of Tribunal was so unreasonable as to be untenable - Bell Corp Victoria Pty Ltd v Stephenson (2003) 20 VAR 280, Pong Property Development Pty Ltd v Strangio (2005) VSC 217 referred to and applied.

PRACTICE AND PROCEDURE - Defendant's decision not to participate in the proceeding - Practical utility of proceeding - Improper to seek determination as a precedent for future applications - Determination of issues in this proceeding affects the defendant's personal record.

***Kahan, Brett as a delegate of the Chief Commissioner of Victoria Police exercising powers pursuant to the Private Security Act 2004 (Vic) v Stephen Strauss***

Daly AsJ

[\[2017\] VSC 8](#)

06/02/2017

LANDLORD AND TENANT - Whether retail premises leased - Lease of premises for cold and cool storage warehouse and transport facility - Whether the services provided at the premises are retail services for the purposes of the Retail Leases Act 2003 - 'Ultimate consumer' test applied with respect to services - Scope of retail leases legislation as remedial or ameliorating legislation - 536 Swanston Street Pty Ltd v Habrut Pty Ltd (1998) V ConvR ¶154-323 - Wellington v Norwich Union Life Insurance Society Limited [1991] 1 VR 333 - FP Shine (Vic) Pty Ltd v Gothic Lodge Pty Ltd [1994] 1 VR 191 - Collector of Customs v Chemark Services Pty Ltd (1993) 42 FCR 585 - Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd [2013] VSC 344. ***CB Cold Storage P/L (ACN 005 031 265) v IMCC Group (Australia) P/L (ACN 148 964 345)***

Croft J

[\[2017\] VSC 23](#)

07/02/2017

NEGLIGENCE - Claim against former solicitors - Summary judgment sought by solicitors - plaintiff did not attend - Allegations of bias and other reasons not to proceed unfounded - advocates' immunity applies in respect of some allegations - No loss shown in respect of others - No real prospect of success - Summary judgment granted.

***Karam, Akram v Mazzeo, Lennon***

Lansdowne AsJ

[\[2016\] VSC 813](#)

22/12/2016

PUBLIC LAW - Application by Secretary for renewal of a supervision order - Whether respondent represents an unacceptable risk of committing a relevant offence - Supervision order revoked - Serious Sex Offenders (Detention and Supervision) Act 2009.

***In the matter of the Serious Sex Offenders (Detention and Supervision) Act 2009 and In the matter of an application under s 28 of the Act for Renewal of a Supervision Order: Secretary to the Department of Justice and Regulation v Fletcher, Robin Angas***

Priest JA

[\[2017\] VSC 32](#)

08/02/2017

## Criminal Division

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), s25(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

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

06/01/2017

CRIMINAL LAW - Bail - Show cause situation - Charges of aggravated burglary (imitation firearm), aggravated burglary (person present), aggravated burglary (intention to assault), aggravated burglary (intention to assault and imitation firearm), armed robbery, intentionally causing injury, common law assault and common law false imprisonment - Previous failure to answer bail - Unacceptable risk - Cause not shown - Bail refused.

***In the matter of the Bail Act 1977 and In the matter of an Application for Bail by Johnstone, Kaiden***

Beach JA

[\[2017\] VSC 48](#)

15/02/2017

CRIMINAL LAW - Coincidence evidence - Evidence Act 2008 s98, s101 - Accused charged with murder of an infant - Evidence proposed to exclude alternative hypothesis of accidental injury - Whether or not evidence of injuries to sibling of deceased relevant to issues relating to injuries to the deceased - Whether or not the evidence has significant probative value - Whether or not the probative value substantially outweighs prejudicial effect upon the accused.

***The Queen v Debresay, Mussie***

T Forrest J

[\[2016\] VSC 642](#)

16/08/2016

CRIMINAL LAW - Evidence - Admissibility - Description of the use of a 'bag' by the accused in relation to assault causing death - Relevance - Whether or not references to the bag temporally connected to alleged assault - Whether or not probative value of evidence outweighs the danger of unfair prejudice - Evidence Act 2008 - s55, 137.

***The Queen v Debresay, Mussie***

T Forrest J

[\[2016\] VSC 502](#)

19/08/2016



CRIMINAL LAW - Evidence - Admissibility - VARE/VATE - Evidence of a four/five year old child - Whether or not VARE recordings admissible as evidence in chief pursuant to Criminal Procedure Act 2009 s368 - Hearsay - Previous representations admissible pursuant to Evidence Act 2008 s66 - Whether or not danger of unfair prejudice outweighs probative value - Evidence Act 2008 s55, s137 - Whether or not evidence can be effectively tested in cross examination - Whether or not forensic disadvantage can be effectively ameliorated by judicial direction - Residual Common Law discretion to exclude evidence on basis of unfairness - *Haddara v The Queen* (2014) VSCA 100 - *IMM v R* (2016) HCA 14 - *Bayley v R*, [2016] VSCA 160.

***The Queen v Debresay, Mussie***

T Forrest J

[\[2016\] VSC 487](#)

16/08/2016

CRIMINAL LAW - Fitness to stand trial - Psychiatric examination of accused - Adjournment of trial - Orders for future medical examination - Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s9(2), s10(1)(d)(i) and (ii) and s11 and pts 2 and 3.

***Director of Public Prosecutions [DPP] v Natale, Rocco***

Bell J

[\[2017\] VSC 26](#)

02/02/2017

CRIMINAL LAW - Ruling - Crimes Act 1958 s464C and s464H - Caution and rights of the accused not properly administered or incomplete - Evidence Act 2008 s138 and s139 - Evidence Act 2008 s90 and s137.

***The Queen v Dunlop, Gayle***

Lasry J

[\[2016\] VSC 676](#)

09/11/2016

CRIMINAL LAW - Sentence - Causing injury intentionally - Assist offender - Principal offence of manslaughter - Pleas of guilty - Presence of remorse - Offender has intellectual disability within the meaning of the Disability Act 2006 (Vic) - Total effective sentence of 18 months' imprisonment and CCO with justice plan condition of 8 months' duration

***Director of Public Prosecutions [DPP] v Berg, Luke Warren***

Jane Dixon J

[\[2016\] VSC 611](#)

21/09/2016

# 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.

ACCIDENT COMPENSATION - Application to amend Statement of Claim.

***De Winkel v Hills Limited and Anor***

[\[2017\] VCC 28](#)

Judge Dean

01/02/2017

# Articles

## Arbitration

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Early neutral evaluation - Judicial initiated proposal - Administrative tribunals - Australia

**de Villers, B.** "Getting to settlement quicker and cheaper: early neutral assessment and judicial initiated proposal." (2017) 44(1) Brief 45-47.

Public-private contracts - Public-private arbitration - Public interest - Implications - Private law paradigm - Commercial dispute - UK

**Brekoulakis, S. and M. Devaney.** "Public-private arbitration and the public interest under English law." (2017) 80(1) Modern L R 22-56

## Bankruptcy

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Corporate law - Comparative law - Economics - Finance law - Legal theory - USA - UK

**Paterson, S.** "Rethinking corporate bankruptcy theory in the twenty-first century." (2016) 36(4) Oxford JLS 697-723.

Insolvency - Financial institutions - Collateral - Close-out netting - Liquidity - Systematic risk - UK

**Paech, P.** "The value of financial market insolvency safe harbours." (2016) 36(4) Oxford JLS 855-884.

## Contract Law

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Minimum performance rule - Damages - Loss - Legal theory - UK

**Pearce, D.** "Of ceilings and flaws: an analytical approach to the minimum performance rule in contract damage." (2016) 36(4) Oxford JLS 781-798.

## Corporations Law

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Fundamental rights - Director's duties - Proportionality - Stakeholder theory - Shareholder value theory - UK

**Bilchitz, D. and L. Jonas.** "Proportionality, fundamental rights and the duties of directors." (2016) 36(4) Oxford JLS 828-854.

## Courts

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Judiciary - Recruitment - Quality assessment - Reasons for decline - Competition - High Court - UK

**Jack, A.** "A low benchmark? judicial recruitment is in crisis." (2017) 167(7729) NLJ 6.

## Criminal Law & Procedure

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Joint criminal enterprise - L v SOWA - Campbell v SOWA - Criminal Code Act 1913 (WA), s7 - WA

**McKechnie, J.** "Joint criminal enterprise: a judicial muddle." (2017) 44(1) Brief 37-39.

Sentencing - Pains of punishment - Proportionality - Parsimony - Penal minimalism - UK

**Hayes, D.** "Penal impact: towards a more intersubjective measurement of penal severity." (2016) 36(4) Oxford JLS 724-750.

## Environmental Law

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Water governance - Arabana people - Climate change adaption project - Cultural indicators - Value of water - Indigenous governance - Co-existent water management - Australia

**Nursey-Bray, M.** "Lore, law and water governance: insights into and managing water for country, Australia." (2016) 8(27) Indigenous L B 12-16.

## Evidence

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Without prejudice - Communications - Negotiations - Admissions against interest - Statutory prohibitions on admissibility - Substance over form - Third parties - Litigation - Exceptions - Costs - Calderbank offers - Evidence Act 1995 (Cth), s 131(1) - Australia.

**Carlean, E., G. Appleby, and A. Reilly.** "The scope and limits of the without prejudice privilege. (2017) 44(1) Brief 30-36.

## Human Rights

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Modern slavery taskforce - Potential victims - Law enforcement - Criminal justice agencies - Government duty - Risk of non-compliance - UK

**Syder, C. and E. Camus-Smith.** "Freedom pass." (2017) 167(7730) NLJ 10-11.

Young offenders - Aboriginal offenders - Youth detention centres - Don Dale - Child abuse - Violence - Royal Commission - NT  
"Taking responsibility for Don Dale." (2016) 8(27) Indigenous L B 4-7.

## Insurance Law

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Compulsory - Motor vehicle insurance - Automated vehicle technology - Legislative changes - Modern Transport Bill - UK

"Driverless car insurance: positive reaction to Department of Transport's proposals." (2017) 167(7730) NLJ 5.

## Legal Aid

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Funding cuts - Unrepresented litigants - Family lawyers - Courts - Judiciary - Legislators - UK

**Allsop, P.** "Without representation by choice or otherwise." (2017) 161(1) Sol J 15.

## Practice & Procedure

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Abuse of process - Res judicata - Issue estoppel - Anshun estoppel - Principal native title caselaw - Abuse arguments - Daniel and Dale - Ashwin (2) - Hayes and Fazeldean - Johnson (No 1) - Johnson (No 2) - Johnson (No 3) - Johnson FC - Australia  
**Keely, T.** (2017) 12(4) NTN 377-385.

Contempt - Media - Public - Court attendance - Open court - Family proceedings - Transparency - Anonymity - UK  
**Burrows, D.** "Contempt & court proceedings (Pt 2)." (2017) 167(7729) NLJ 11-12.

Courts - Information technology - Efficiency - UK

**Solon, M.** "Cloud expertise." (2017) 167(7730) NLJ 20.

## Torts

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Negligence - Claim against defendant - Breach of statutory duty - Court assessment - Acting - Benefit of society - Benefit of members - Protecting - Safety - Interest of others - Acting heroically - Common law principles - UK

**Mulheron, R.** "Legislating dangerously: bad Samaritans, good society and the Heroism Act 2015." (2017) 80(1) Modern L R 88-109

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