



## THE LAW LIBRARY OF VICTORIA

Library  
Bulletin  
12 May 2017

### Library News

#### Law Week 15-20 May 2017

There are lots of interesting events being held during Law Week, including the following in the Library.

More information can be found on the [Law Week website](#).

#### Switch On... in the Law Library: Finding the Law in the Law Library of Victoria

Tuesday 16 May, 1:15pm - 1:40pm.

Held as part of Law Week 2017, this session will introduce you to the legal information held in the collection. Learn about the comprehensive online and print legal resources available to you, and discover the hidden treasures held in this magnificent building.

#### Lyrical Lunchtimes

Thursday 18 May, 1:15pm - 2:15pm

The Law Library of Victoria and BottledSnail Productions present Lyrical Lunchtimes, a series of classical concerts designed to provide an opportunity to relax and reflect in the beautiful surrounds of the Supreme Court Library.

BottledSnail Productions is a not-for-profit organisation that exists to give Melbourne lawyers a creative outlet. Cast, crew and committee members are almost exclusively drawn from Melbourne's legal profession.

More information: <https://www.lawlibrary.vic.gov.au/services/events>.

#### 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

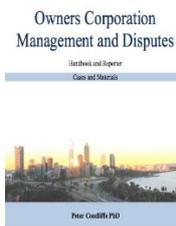
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# New Books

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/).

Judicial officers and court staff can borrow any of the books listed. Contact your jurisdictional librarian to request an item.

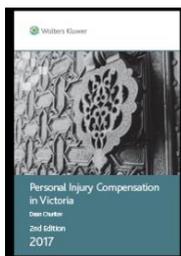
Members of the legal profession and the public can request any of the books to read on site at the Supreme Court Library.



Condliffe, Peter, *Owners corporation management and disputes: Cases and Materials*

3<sup>rd</sup> ed., [Melbourne], Peter Condliffe, 2017.  
Call Number: 346.5043 CON.3 (VCAT Library)

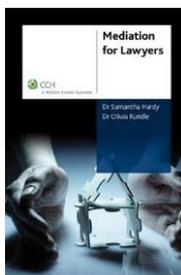
[Link to the book in the catalogue](#)



Churilov, Dean, *Personal injury compensation in Victoria*

2<sup>nd</sup> ed., North Ryde, N.S.W., CCH, 2017.  
Call Number: 346.0323 CHU.2 (Supreme Court Library)

[Link to the book in the catalogue](#)



Hardy, Samantha, *Mediation for Lawyers*

Sydney, N.S.W., CCH, 2010.  
Call Number: 347.9409 HAR (Supreme Court Library)

[Link to the book in the catalogue](#)



Robinson, Mark, *Administrative law: The laws of Australia*

Pymont, N.S.W., Thomson Reuters, 2016.  
Call Number: 342.06 ADM (VCAT Library)

[Link to the book in the catalogue](#)

# Legislation

## Victorian Bills

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

- [Appropriation \(2017-2018\) Bill 2017](#)
- [Appropriation \(Parliament 2017-2018\) Bill 2017](#)
- [City of Greater Geelong Amendment Bill 2017](#)
- [Corrections Legislation Miscellaneous Amendment Bill 2017](#)
- [State Taxation Acts Amendment Bill 2017](#)
- [Sex Offenders Registration Amendment \(Miscellaneous\) Bill 2017](#)

## Victorian Assents

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

- [Consumer Acts Amendment Act 2017 No. 13/2017](#)
- [Creative Victoria Act 2017 No. 14/2017](#)
- [Lord Mayor's Charitable Foundation Act 2017 No. 15/2017](#)
- [Small Business Commission Act 2017 No. 16/2017](#)
- [Statute Law Repeals Act 2017 No. 17/2017](#)

## Proclamations

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

- *Estate Agents Amendment (Underquoting) Act 2016 No 58/2016*
  - Sections 1-13 came into operation on 1 May 2017 (SG35 21.2.2017)
- *Working with Children Amendment Act 2016 No 72/2016*
  - Part 1 (sections 1-3), Part 3 (sections 22-27) came into operation on 01 May 2017 (SG111 4.4.2017)

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

- *Land (Revocation of Reservations - Regional Victoria Land) Act 2016 No. 59/2016*
  - Sections 1-12 came in by forced commencement on 1 May 2017 s.2(2)
- *Powers of Attorney Amendment Act 2016 No. 64/2016*
  - Sections 1-17 came in by forced commencement on 01 May 2017 s. 2(2)
- *Traditional Owner Settlement Amendment Act 2016 No 67/2016*
  - Sections 11-24, 28-37 came in by forced commencement on 01 May 2017 s. 2(2)



## EXHIBITIONS IN THE LIBRARY

### Argus from 100 years ago

The Supreme Court Library has the Argus newspaper from 1917 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](#) [#argus1917](#)

# High Court Cases

CRIMINAL LAW - Fault element - Intent - Inferential reasoning - Importation of commercial quantity of border controlled drug - Where accused persons brought substance into Australia - Where substance concealed in items - Where accused persons denied intent to import substance - Where accused persons perceived real or significant chance of presence of substance when entering Australia - Whether permissible to infer intent for purposes of Criminal Code (Cth) from awareness of real or significant chance of presence of substance - Whether process of inferential reasoning identified in *Bahri Kural v The Queen* (1987) 162 CLR 502; [1987] HCA 16 applicable - Whether jury directions conflated intent with recklessness.

WORDS AND PHRASES - "inferential reasoning", "intent to import", "intention", "jury directions", "real or significant chance", "reckless", "unsafe verdict". Criminal Code (Cth), s5.2, s5.4, s5.6, s307.1.

***Smith, Maltimore v The Queen; The Queen v Afford, Steven Lakamu Siosiu***

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

10/05/2017

CRIMINAL LAW - Infliction of grievous bodily harm - Meaning of "inflicts" - Where appellant caused complainant to contract human immunodeficiency virus - Whether infliction requires force and immediate physical injury - Whether communication of infection or disease amounts to infliction - Consideration of *R v Clarence* (1888) 22 QBD 23 and *R v Dica* [2004] QB 1257.

CRIMINAL LAW - Fault element - Recklessness - Foresight of risk - Where appellant diagnosed with human immunodeficiency virus - Where appellant knew of possibility of transmitting virus through unprotected sexual intercourse - Whether foresight of possibility of risk sufficient to establish recklessness.

WORDS AND PHRASES - "always speaking", "contemporary ideas and understanding", "grievous bodily harm", "inflicts", "maliciously", "recklessly". Crimes Act 1900 (NSW), s5, s35(1)(b), s36.

***Aubrey, Michael v The Queen***

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

10/05/2017

CRIMINAL LAW - Justification and excuse - Resisting actual and unlawful violence threatened to person - Where appellant stabbed deceased - Where appellant acquitted of murder but convicted of manslaughter - Where s31(1) of Criminal Code (Q) not left to jury - Whether appellant able to rely on s31(1) to deny criminal responsibility in relation to offence of manslaughter - Whether s31(2) renders s31(1) unavailable wherever evidence discloses that act of accused constitutes offence described in s31(2) regardless of charge. Words and phrases - "act", "criminally responsible", "liable to punishment", "offence". Criminal Code (Q), s31.

***Pickering, Rodney Peter v The Queen***

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

03/05/2017

MIGRATION - Unlawful non-citizens - Power to detain - Where plaintiffs unauthorised maritime arrivals - Where plaintiffs brought to Australia from regional processing country for temporary purpose of medical treatment - Where plaintiffs detained under s189 and s196 of Migration Act 1958 (Cth) until removal from Australia - Whether s189 and s196 validly authorise detention while in Australia for temporary purpose - Whether plaintiffs detained for lawful purpose - Whether duration of detention capable of objective determination. Words and phrases - "detention of non-citizen", "duration of detention", "opinion, satisfaction or belief of officer", "purpose of detention", "temporary purpose", "transitory person", "unauthorised maritime arrival", "unlawful non-citizen". Constitution, s51(xix). Migration Act 1958 (Cth), s189, s196, s198, s198AD, s198AH, s198B.

***Plaintiff M96A/2016 & Anor v Commonwealth of Australia & Anor***

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

03/05/2017

PROCEDURE - Enforcement of Australian judgment debt in foreign jurisdiction - Where respondents obtained certificate under s15(1) of Foreign Judgments Act 1991 (Cth) certifying finality of Australian judgment - Where application for such certificate may not be made until expiration of any stay of enforcement of judgment in question - Where judgment debtor bankrupt - Whether certificate valid - Whether s58(3) of Bankruptcy Act 1966 (Cth) operated to impose a stay of enforcement for purposes of Foreign Judgments Act 1991 (Cth).

WORDS AND PHRASES - "enforcement by execution", "stay of enforcement of the judgment". Bankruptcy Act 1966 (Cth), s58(3), s60(1)(b), s60(2). Foreign Judgments Act 1991 (Cth), s3(1), s15.

***Talacko, Judith Gail (as appointed representative of the estate of Jan Emil Talacko) v Bennett, Alexandra & Ors***

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

03/05/2017

# Victorian Supreme Court Cases

## Court of Appeal

ADMINISTRATIVE LAW - Judicial review of decision by County Court judge concerning response to subpoena duces tecum refused - Traffic offence - Appeal to County Court following conviction by magistrate - Subpoena seeking production of red light camera manual - Subpoena initially struck out as fishing - Relief in nature of certiorari and mandamus granted by Supreme Court - On remitter to County Court further sections of manual provided to applicant - Originating motion seeking inspection of entire manual dismissed in Supreme Court - Application for leave to appeal - Application for stay of costs order - No error - Application for leave to appeal 'totally without merit' - Applications refused - Supreme Court Act 1986 s14D.

***Cai, Jack v The County Court of Victoria and Corbett, Michelle of the Traffic Camera Office***

Priest JA and Beach JA

[\[2017\] VSCA 109](#)

11/05/2017

APPEALS - Court of Appeal - Appeal against decision of Associate Justice reserved to Court of Appeal - Supreme Court Act 1986, s17B.

STATUTORY INTERPRETATION - Text of legislation - Legislative intention - Whether Parliament intended to include the child of a deceased's domestic partner within the meaning of 'stepchild' - Where interpretation begins with the statutory text read in context - Whether use of extrinsic materials required - Interpretation of Legislation Act 1984, s35.

FAMILY PROVISION - Application by adult daughter of deceased's former domestic partner - Whether appellant an 'eligible person' - Whether appellant a 'stepchild' within the meaning of pt IV of the Administration and Probate Act 1958 - Popple v Rowe [1998] 1 VR 651 referred to - Administration and Probate Act 1958, s90.

WORDS AND PHRASES - 'stepchild' - 'eligible person'.

***Scott-Mackenzie, John Ewen (as executor of the will of Siegfried Ruopp, deceased) v Bail, Laurace***

Beach and Ferguson JJA, and McMillan AJA

[\[2017\] VSCA 108](#)

10/05/2017

CRIMINAL LAW - Appeal - Conviction - Rape, intentionally causing injury, making threat to kill and false imprisonment - Charges relating to two complainants - Evidence not cross-admissible - Joint trial conducted despite risk of prejudice - Whether failure to sever led to miscarriage of justice - Whether trial counsel 'flagrantly incompetent' - *TKWJ v The Queen* (2002) 212 CLR 124, *Knowles (a pseudonym) v The Queen* [2015] VSCA 141, *Nicholls v The Queen* [2016] VSCA 250, *Patel v The Queen* (2012) 247 CLR 531 discussed - Whether trial judge's directions sufficient to 'cure' potential prejudice - No obligation to direct jury as to each piece of evidence as against each charge/complainant - Distress evidence not 'intractably neutral' merely because it supports multiple hypotheses - Post-offence conduct admissible as supporting inference of awareness of guilt - *R v Ciantar* (2006) 176 A Crim R 504 and *R v Mocenigo* [2014] VSCA 231 distinguished - No forensic disadvantage direction required despite one being sought at trial - Jury's verdict on charge 3 not 'unsafe and unsatisfactory' - *R v Ferguson* (2009) 24 VR 531 applied - Application for leave to appeal refused.

CRIMINAL LAW - Appeal - Sentence - Total effective sentence of 13 years and 4 months' imprisonment with a 10 year non-parole period - Whether individual sentences and total effective sentence manifestly excessive - Individual sentences within range that was reasonably open - Cumulation between charges 3 and 4 and on charge 7 manifestly excessive - Leave to appeal granted, appeal allowed, sentences set aside - Applicant resentenced to 11 years and four months' imprisonment with non-parole period of eight years.

***Mulligan (a Pseudonym), Aaron v The Queen***

Redlich, Weinberg, and Priest JJA

[\[2017\] VSCA 94](#)

02/05/2017

CRIMINAL LAW - Appeal - Conviction - Unreasonable verdict - Obtaining financial advantage by deception (2 counts), attempting to obtain financial advantage by deception (1 count) - Circumstantial case - Sale of allegedly fake Brett Whiteley paintings pursuant to joint criminal enterprise - Judge gave invitation to jury in accordance with *R v Prasad* (1979) 23 SASR 161 - Jury rejected invitation and entered verdicts of guilty - Appeals conceded by Crown - Whether jury must have entertained reasonable doubt regarding applicants' guilt - Whether inference of guilt only reasonable inference available on evidence - *R v Baden-Clay* (2016) 90 ALJR 1013, 1020-1 [46]-[48], 1023-4 [65]-[66], referred to - Appeals allowed.

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

Weinberg, Priest, and McLeish JJA

[\[2017\] VSCA 104](#)

08/05/2017

CRIMINAL LAW - Appeal - Sentence - Affray - Recklessly cause serious injury - Offender absconded during jury deliberations - Whether waiver of right to be present and make submissions on sentence - Whether power to proceed to sentence in absence of offender should be exercised 'sparingly' - *Mokbel v The Queen* (2010) 30 VR 115 applied; *R v Jones* (1998) 72 SASR 281 considered - No assessment of prospects of rehabilitation or need for specific deterrence - Discretion to proceed to sentence properly exercised - Whether sentence manifestly excessive - Whether non-parole period of 78 per cent of head sentence excessive and reserved for cases where a negative finding made in relation to prospects for rehabilitation - Whether reasons for fixing particular non-parole period required - *Kumova v The Queen* (2012) 37 VR 538; *R v Detanamo* [2007] VSCA 160; *Mak v The Queen* [2011] VSCA 5; *R v JZ* (1998) 7 VR 693 applied.

***Taupati, Junior v The Queen***

Redlich, Santamaria, and Ferguson JJA

[\[2017\] VSCA 106](#)

08/05/2017

CRIMINAL LAW - Appeal - Sentence - Aggravated burglary and associated offences - Victim appellant's estranged wife - Appellant diagnosed with schizophrenia - Sentenced to Court Secure Treatment Order for 7 years - Whether manifestly excessive - Whether Verdins principles given sufficient weight - Community protection - No error - Appeal dismissed - R v Verdins (2007) 16 VR 269 - Veen v The Queen (No 2) (1988) 164 CLR 465 - Sentencing Act 1991 s94A, s94C.

***Guyen, Muhittin v The Queen***

Osborn and Priest JJA, and Kidd AJA

[\[2017\] VSCA 92](#)

02/05/2017

CRIMINAL LAW - Appeal - Sentence - Cultivation of a commercial quantity of a narcotic plant - Sentence of 4 years' imprisonment - Non-parole period of 2 years and 6 months - Whether failure to give mitigatory weight to length of time on remand and time spent in lockdown a specific error - Manifest excess - Role of applicant in joint criminal enterprise Whether lesser sentence required if offender not a principal or organiser - Applied Nguyen v The Queen (2016) 311 FLR 289; R v Olbrich (1999) 199 CLR 270; R v Harris [1998] 1 Cr App R (S) 38 - Considered DPP (Cth) v Thomas [2016] VSCA 237; DPP v Basic [2016] VSCA 99; Stanley (a Pseudonym) v The Queen [2017] VSCA 54 - Leave to appeal granted - Appeal dismissed.

***Nguyen, Anh Tuan v The Queen***

Redlich, Weinberg, and Osborn JJA

[\[2017\] VSCA 100](#)

05/05/2017

CRIMINAL LAW - Appeal - Sentence - Parity - Knowingly deal with proceeds of crime - Applicant sentenced to 15 months' imprisonment, co-offender sentenced to 6 months' imprisonment with 18-month Community Correction Order - Whether disparity of sentences justified - Material differences - Applicant committed further offences on bail - Co-offender's impaired mental functioning - Verdins principles 2, 5, 6 applicable - Reasonably open to judge to differentiate - Leave to appeal refused.

***Truong, Boi Lien v The Queen***

Maxwell ACJ, Redlich and Kyrou JJA

[\[2017\] VSCA 105](#)

04/05/2017

CRIMINAL LAW - Application for leave to appeal - Conviction - Indecent act with a child under 16 (four charges) - Whether judge erred in admitting evidence of complaint to complainant's boyfriend - Whether evidence tainted by a process of innocent infection - Whether judge should have given jury direction that evidence incapable of bolstering the complainant's credit - Jury direction not sought at trial - Leave to appeal refused.

***Dunn, Jason (a Pseudonym) v The Queen***

Tate JA

[\[2017\] VSCA 95](#)

03/05/2017

CRIMINAL LAW - Application for leave to appeal - Sentence - Aggravated burglary, intentionally causing injury, possessing a firearm whilst a prohibited person and possession of a drug of dependence (methamphetamine) - Total effective sentence of six years' imprisonment - Non-parole period of four years - Double punishment - Denial of procedural fairness - Taking into account irrelevant matters - Arguable breach of rule in *De Simoni v The Queen* (1981) 147 CLR 383 - Manifest excess - Crown concessions - Leave to appeal granted.

***Robinson, Mark v The Queen***

Tate JA

[\[2017\] VSCA 98](#)

03/05/2017

CRIMINAL LAW - Application for leave to appeal - Sentence - Aggravated burglary, intentionally causing injury, storing a firearm in an insecure manner whilst unlicensed and possession of ammunition without a licence - Total effective sentence of five years and six months' imprisonment - Non-parole period of three years - Parity - Manifest excess - Crown concessions - Leave to appeal granted.

***Robinson, Edward v The Queen***

Tate JA

[\[2017\] VSCA 101](#)

03/05/2017

CRIMINAL LAW - Sentence - Appellant convicted of a charge of blackmail for which he was sentenced to 5 years' imprisonment and a charge of breaching a personal safety intervention order for which he was sentenced to 6 months' imprisonment - Total effective sentence of 5 years and 6 months with a non-parole period of 3 years and 6 months - Sentencing discretion miscarried in relation to blackmail charge because judge impermissibly relied on matters external to the charged conduct - Sentence for blackmail manifestly excessive - Appeal allowed - Appellant resentenced to total effective sentence of 4 years with non-parole period of 2 years and 9 months.

***Aitkin, Darren v The Queen***

Weinberg and Kyrrou JJA

[\[2017\] VSCA 103](#)

08/05/2017

CRIMINAL LAW - Sentence - Application for leave to appeal - Cause serious injury recklessly - False imprisonment - Making a threat to kill - Total effective sentence of eight years' imprisonment - Non-parole period of five years and six months - Specific error - Principles applicable to youthful offenders did not apply - Manifest excess - Leave to appeal refused.

***Nolan, Shannon v The Queen***

Tate JA

[\[2017\] VSCA 97](#)

03/05/2017

CRIMINAL LAW - Sentence - Application for leave to appeal - Use of a carriage service to access child pornography material - Knowingly possessing child pornography material - Total effective sentence of four years and six months' imprisonment - Non-parole period of three years - No specific error in assessing prospects of rehabilitation - Manifest excess - Leave to appeal granted.

***Maine, Robert v The Queen***

Tate JA

[\[2017\] VSCA 96](#)

03/05/2017

CRIMINAL LAW - Sentence - Crown appeal - Respondent sentenced to 23 months' imprisonment followed by 18 month Community Correction Order for intentionally causing serious injury - Unprovoked attack on innocent victim - Ongoing consequences of injuries - Whether sentence manifestly inadequate - Whether Verdins principles justified degree of leniency afforded - Offence required significant term of imprisonment - Respondent resentenced to five years' imprisonment with non-parole period of three years.

***Director of Public Prosecutions [DPP] v Weber, James Paul***

Weinberg, Priest, and Kyrou JJA

[\[2017\] VSCA 93](#)

02/05/2017

CRIMINAL LAW - Sentencing - Appeal against sentence of seven years and six months' imprisonment - Applicant pleaded guilty to numerous charges including multiple arson offences and assaulting emergency worker - Applicant had consumed methylamphetamine in days before offending - Applicant had an acquired brain injury and mental health issues - Need for judge to explain ways mental impairment taken into account when sentencing - Crown conceded principle of parsimony required shortest custodial term - Sentence manifestly excessive - Applicant resentenced to term of imprisonment combined with lengthy Community Correction Order - R v Verdins (2007) 16 VR 269, Boulton v The Queen (2014) 46 VR 308, R v Koumis (2008) 18 VR 434, R v Pato [2011] VSCA 223.

CRIMINAL LAW - Sentencing - Offence of arson - Community Correction Order regime for arson offences permits lengthy imprisonment combined with CCO - Applicant resentenced to five years' imprisonment and four year Community Correction Order - Primary objective of Community Correction Order should be rehabilitative - Interaction between Community Correction Order and parole - Sentencing Act 1991 s11, s44.

***Tannous v The Queen***

Redlich and Ferguson JJA

[\[2017\] VSCA 91](#)

02/05/2017

NEGLIGENCE - Duty of care - Statutory construction - Whether responsible authority owed duty of care as 'road authority' - Whether exclusionary provision applied defeating liability - Whether reserve in which injury sustained properly characterised as 'pathway' or 'roadside' - Consideration of statutory text - Ordinary and natural meaning - Provision in context of Act as a whole - Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 cited - Restricted role of ejusdem generis rule - Use of legislative examples - Road Management Act 2004 s3, s40, s48, s107, cl 6 pt 1 sch 7 - Interpretation of Legislation Act 1984 s35(a), s36A.

NEGLIGENCE - Breach - Duty of care - Whether reasonable care taken by responsible authority - Proper identification of risk of harm - Assessment of foreseeability and magnitude of risk to be considered prospectively, not retrospectively - Shirt factors to be applied in a manner that is not formulaic - Wyong Shire Council v Shirt (1980) 146 CLR 40 cited - Court entitled to rely on common sense and common knowledge in assessing existence of risk - Wrongs Act 1958 s48. WORDS AND PHRASES - Meaning of 'pathway' - Meaning of 'roadside' - Road Management Act 2004 s3.

***Greater Shepparton City Council v Clarke, Steven Graham***

Santamaria, Beach, and Kaye JJA

[\[2017\] VSCA 107](#)

09/05/2017

PRACTICE AND PROCEDURE - Application for stay on execution of judgment pending appeal - Principles - Whether real risk that appeal will be rendered nugatory - Whether circumstances of applicants' impecuniosity related to conduct of respondents - Stay granted.

PRACTICE AND PROCEDURE - Application for security for costs - Weight to be given to impecuniosity of respondents - Whether circumstances of respondents' impecuniosity related to conduct of applicants - Application refused.

***He, William Jingcheng; J.C. He International Trade P/L (ACN 162 966 483); Liu, Cisely v Huang, Liangping; Top Union Business P/L (in liq) (ACN 162 966 485)***

Santamaria and Beach JJA, and Keogh AJA

[\[2017\] VSCA 102](#)

05/05/2017

PRACTICE AND PROCEDURE - Costs - Costs of determination of preliminary issue - Costs of appeal - Unsatisfactory procedure adopted by the parties at first instance - No order as to costs at first instance - Basis for making competing orders as to costs of the appeal against each party - Counterbalancing of costs orders - No order as to costs of appeal.

***F J v Commonwealth of Australia (No 2)***

Tate, Santamaria, and Beach JJA

[\[2017\] VSCA 99](#)

03/05/2017

## Commercial Court

CONTRACT - Question of enforceability of judgment debt by the first defendant against the plaintiffs - Nature of agreement - Whether agreement between the plaintiffs and the first defendant enforceable - Extent to which extrinsic evidence is admissible as to the terms of agreement - Whether or not payment discharged the plaintiffs' debt in full - No release of the balance of the judgment debt was intended - Part payment not good consideration for release of full amount of judgment debt.

CONTRACT - Effect of settlement agreement reached between the first defendant and fourth plaintiff - Plaintiffs jointly and severally liable for judgment debt - No evidence about the terms of the settlement agreement - Release of a single debtor releases all other joint debtors - Settlement agreement found to constitute a release of all plaintiffs - Associated Retailers Ltd v Toys Unlimited Pty Ltd and ors [2011] VSC 297; Walker v Bowry (1924) 35 CLR 48; Pollack v National Australia Bank [2002] FCAFC 55 referred to and followed.

TRADE PRACTICES - Whether first defendant engaged in misleading and deceptive conduct - Terms and scope of retainer - Whether solicitor acted in trade or commerce - Section 18 Australian Consumer Law - Dual Homes Pty Ltd v Moores Legal Pty Ltd and anor (2016) 306 FLR 227 and LT King Pty Ltd and anor v Besser and anor (2002) 172 FLR 140 referred to and followed.

NEGLIGENCE - Terms of retainer between plaintiffs and their solicitors - Whether there was a breach of retainer and/or duty of care on the part of solicitors.

***Konstandellos, Nikolaos; Konstandellos, Alkiviadis; Dounias, Lambrini v Harplex P/L (ACN 188 350 074); Kelly & Chapman (a firm)***

Daly AsJ

[\[2017\] VSC 183](#)

26/04/2017

CORPORATIONS - Application by liquidators for directions - Liquidators winding up a company that acted as a trustee carrying on a family restaurant - Company now a bare trustee - Liquidators seek a direction that they are justified in being reimbursed out of the trust assets for the reasonable cost and expenses in conducting investigations and examinations into claims by creditors and possible claims by the company - Held liquidators justified in proceeding on the basis that they are entitled as of right to be reimbursed their reasonable costs and expenses incurred in such investigations and examinations as those activities fall within the salvage principles in *Universal Distributing* - Section 511 Corporations Act 2001 (Cth).

***In the matter of Re Mamounia P/L (in liq) Mamounia P/L (in liquidation) ACN 007 091 349 and Deane, Shane and Giasoumi, Nicholas in their capacity as joint and several liquidators of Mamounia P/L (in liquidation) ACN 007 091 349***

Robson J

[\[2017\] VSC 230](#)

11/05/2017

CORPORATIONS - Scheme of arrangement - Takeover scheme - Approval of calling a meeting of shareholders to vote on proposed scheme - Tests to be applied - Consideration of foreign resident arrangements - Performance rights held by some shareholders to be cancelled to assist scheme - Whether members with performance rights constitute a separate class - Payments to be made to the managing director and specific employees - Whether managing director who was to receive payment should also make a recommendation to members - Corporations Regulations 2001 (Cth) reg 8301 - Payment for shares to be reduced by amount of special dividend from target - Whether financial assistance to bidder - Consideration of whether members should be entitled to receive hard copy of booklet despite agreeing to receive communications from company by email - Corporations Act 2001 (Cth) s411.

***In the matter of SMS Management & Technology Ltd. SMS Management & Technology Ltd and DWS Ltd***

Robson J

[\[2017\] VSC 257](#)

05/05/2017

CORPORATIONS - Shareholders in a family-owned company proposed gifting their shares in the company to another company controlled by the donors' children - Whether donors executed valid share transfers - Whether the donors of the shares did all that was necessary for them to do to effect a gift of the shares - Where register of members not produced - Where no evidence that share transfers prepared and signed - Held donee of the gift had not established that the donors had done all that was necessary for them to transfer the shares to the donee - Held donors entitled to be registered as members of the company - Sections 176, 231, 1091D and 1322(4) of the Corporations Act 2001 (Cth) (Corporations Act).

EQUITY - Circumstances where equity will enforce a gift.

EVIDENCE - Presumption of regularity - Whether presumption applies to infer shares were validly transferred from the existence of an intention by the donors to transfer the shares and subsequent conduct consistent with the shares having been transferred. EVIDENCE - Whether inferences that shares were transferred outweighed by direct evidence that no transfers were signed by the donees.

***Colbart P/L v Parsons, Kate (as litigation guardian for Kevin Francis Gerraty); Parsons, Kate (as litigation guardian for Rosemarie Cecilia Gerraty); Gerraty, Francine Marie; Chambeyron P/L***

Robson J

[\[2017\] VSC 241](#)

11/05/2017

EVIDENCE - Exclusion of evidence of settlement negotiations - Evidence Act 2008 (Vic) s131(1)(a), s131(2)(g) - Statements made by solicitor at mediation - Whether statements made 'in connection with an attempt to negotiate a settlement of the dispute' - Objective or neutral facts - Whether statements necessary to contradict or qualify evidence that has been adduced that is likely to mislead the court.

*Slea P/L (ABN 16 081 276 811) v Connective Services P/L (ACN 107 366 496) , Connective Osn P/L (ACN 106 761 326), Millsave Holdings P/L (ACN 115 160 097), Connective Group P/L (ACN 162 397 060), Connective Broker Services P/L (ACN 161 731 111), Connective Lender Services P/L (ACN 161 731 460), Connective Funder Services P/L (ACN 161 732 645), Connective Group IP Holdings (No 1) P/L (ACN 165 282 084), Connective Group IP Holdings (No 2) P/L (ACN 165 281 925) and Haron, Mark Seamus*

Almond J

[\[2017\] VSC 232](#)

04/05/2017

PRACTICE AND PROCEDURE - Application for summary dismissal of proceedings by defendants under s63 of Civil Procedure Act 2010 (Vic) - Plaintiffs allege the defendants enforced mortgage without compliance with Farm Debt Mediation Act 2011 (Vic) ('FDMA') - Notices to pay served under Transfer of Land Act 1958 (Vic) prior to commencement of FDMA which plaintiffs contend had been waived - Finding there had been no waiver of the notice and enforcement action within the meaning of the FDMA had commenced prior to the commencement of the FDMA - Enforcement action not subject to the provisions of the FDMA - Proceedings dismissed.

*Muranna Park P/L (ACN 086 934 045) & Ors (according to the schedule attached) v Southern Mortgages Ltd (ACN 089 763 413) & Ors (according to the schedule attached)*

Gardiner AsJ

[\[2017\] VSC 222](#)

03/05/2017

PRACTICE AND PROCEDURE - Discovered document - Implied undertaking not to use document except for purposes of litigation - Contents of document read aloud in open court during argument in interlocutory hearing - 'Alternative derivative source' - Whether implied undertaking brought to an end - Tender of document as exhibit in later hearing - *Harman v Secretary of State for the Home Department* [1983] 2 AC 280; *Hearne v Street* (2008) 235 CLR 125; *Sybron Corporation and Anor v Barclays* [1985] 1 Ch 299; *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10; *British American Tobacco Australia Services Ltd v Cowell* (2003) 8 VR 571 considered.

PRACTICE AND PROCEDURE - Application to stay or dismiss proceedings - Supreme Court (General Civil Procedure) Rules 2015 (Vic) r22.16, r23.01 - Abuse of process of the court - Separate proceeding substantially based on content of document the subject of the implied undertaking - Civil Procedure Act 2010 (Vic) s62, s63 - Corporations Act 2001 (Cth) s1324. CORPORATIONS - Prohibition against financial assistance to acquire shares - Corporations Act 2001 (Cth) s260A - Enforcement of pre-emptive rights in company's constitution - Whether financial assistance.

CORPORATIONS - Standing - Pre-emptive rights - Whether exclusively members' rights - Interest of the company - Corporations Act s140 - Statutory contract.

*Connective Services P/L (ACN 107 366 496); Connective Osn P/L (ACN 106 761 326) v Slea P/L (ACN 106 752 434); Minerva Financial Group P/L (ACN 124 171 759); Millsave Holdings P/L (ACN 115 160 097); Haron, Mark Seamus*

Almond J

[\[2017\] VSC 182](#)

12/05/2017

PRACTICE AND PROCEDURE - Transfer of proceedings to Federal Court of Australia - Interests of justice - Relevant factors - *BHP Billiton Limited v Schultz* (2004) 221 CLR 400 - *Dwyer v Hindal Corporate Pty Ltd* (2005) 52 ACSR 335 - *Irwin v State of Queensland* [2011] VSC 291 - Corporations Act 2001, s1337H, s1337L - Jurisdiction of Courts (Cross-vesting) Act 1987, s5(2)(b), s5(2)(b)(iii).

***Webster, John William Cruse (as trustee for the Elcar P/d Super Fund Trust) v Murray Goulburn Co-Operative Co Ltd (ACN 004 277 089); Tracy, Philip W; Helou, Gary; Jones, Kenneth W; Akers, Natalie; Bodman, William T; Hawkins, Peter J O; Ihlein, Michael F; Morris, Edwin Duncan; Munzel, Graham N; Pye, John P; van de Wouw, Martin J***

Croft J

[\[2017\] VSC 249](#)

12/05/2017

TAXATION - Changes in beneficial ownership of dutiable property - Dutiable property becoming the subject of a different trust - Relevance of dutiable property nevertheless continuing to be held by the same trustee - *Costa & Duppe Properties Pty Ltd v Duppe* [1986] VR 185 - *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* (1998) 45 NSWLR 639 - *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98 - *Trust Company of Australia Ltd (as trustee for the Clayton 3 Trust) v Commissioner of State Revenue* (2007) 19 VR 111 - Duties Act 2000 s7(2), (4), s8, s12 and s36B.

***Rakmy P/L (ACN 065 263 872) v Commissioner of State Revenue***

Croft J

[\[2017\] VSC 237](#)

12/05/2017

## Common Law Division

ADMINISTRATIVE LAW - Jurisdictional Error - Jurisdictional fact - Children Youth and Families Act 2005 (Vic) - Whether existence of certain 'facts' required to enliven power vested in Governor in Council by Order to establish a remand centre and youth justice centre under s478 (a) and (c) or power under s484 vested in the Secretary of the Department of Health and Human Services to cause the removal of a person from one youth justice facility to another - Control of Weapons Act 1990 (Vic) - Whether existence of certain 'facts' required to enliven power vested in Governor in Council by Order to exempt a class of persons from prohibitions under the Act - Entitlements under s482(2), prohibitions under s487, and purpose under s 478 of Children Youth and Families Act 2005 (Vic) considered - Statute not mandating jurisdictional fact - No jurisdictional error - Children Youth and Families Act 2005 (Vic), s1, s3, s8, s9, s10, s11, s478, s482, s484, s487, s488; Control of Weapons Act 1990 (Vic) s5AA, s8B.

ADMINISTRATIVE LAW - Jurisdictional Error - Denial of procedural fairness - Decision by delegate of Secretary to remove a person in the lawful custody of the Secretary from a youth remand centre to Greenvale youth remand centre - Whether remandee has a right to be heard - Whether denial of procedural fairness - No jurisdictional error - Children Youth and Families Act 2005 (Vic) s1, s3, s8, s9, s10, s11, s478, s482, s484, s487, s488.

CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES - Unit at Barwon maximum security adult gaol excised and established as a youth justice centre and a youth remand centre - Order in Council - Public authority - Whether acts incompatible with a human right - Whether in making decision proper consideration given to a human right - Protection of children in their best interests - Protection from cruel, inhuman or degrading treatment - Humane treatment when deprived of liberty - Public authorities - Whether demonstrably justified that rights subject to reasonable limits - Proper consideration - Effect of incompatibility and failure to give proper consideration - Remedies available - Habeas Corpus and Certiorari considered - Declarations and injunctions granted - Charter of Human Rights and Responsibilities Act 2006 (Vic) s1, s7(2), s10(b), s17(1), s17(2), s22(1), s38(1), s39(1).

CHILDREN - Detention of children in remand centres and youth justice centres - Unit at Barwon maximum security adult gaol excised and established as a youth justice centre and a youth remand centre - Rights and entitlements of children in lawful custody of the Secretary of the Department of Health and Human Services - Children Youth and Families Act 2005 (Vic) s1, s3, s482, s484, s487, s488.

***Certain Children by their litigation guardian Sister Marie Brigid Arthur v Minister for Families and Children & Ors***

John Dixon J

[\[2017\] VSC 251](#)

11/05/2017

APPEAL - Application by second mortgagee/guarantee for payment of funds out of court in part satisfaction of alleged debt owing as shortfall due under loan agreement - Objection by mortgagor/guarantor otherwise entitled to residue - Whether mortgagor/guarantor indebted to second mortgagee/guarantee as guarantor of defaulting borrower under agreement - Order for payment of funds to mortgagor/guarantor by associate justice - whether in error - Whether finding that second mortgagee/guarantee had failed to prove its debt involved error of law - Whether onus lay on mortgagor/guarantor to prove discharge of debt - Whether onus discharged - Supreme Court (General Civil Procedure) Rules 2015 (Vic) O 77, Transfer of Land Act 1958 (Vic) s77(3(d)).

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

Bell J

[\[2017\] VSC 217](#)

10/05/2017

CAVEAT - Removal of caveats - Caveats lodged by persons claiming interests by adverse possession - Subject land vested in ASIC - Plaintiff owner of neighbouring land is applicant to ASIC to purchase subject land - Standing of plaintiff not disputed - Serious question to be tried established - Balance of convenience favours caveators - Caveators applied pursuant to s60 of the Transfer of Land Act 1958 for an order vesting the land in them for an estate in fee simple - Whether disputes of fact warrant maintenance of caveat subject to condition that caveators commence proceedings - Conditional order for the removal of the caveats made - Ex Parte Vincent (1886) 12 VLR 566; Re Jasper's Caveat [1923] VLR 650; Evandale Estates Pty Ltd v Keck [1963] VR 647; McMahon v McMahon [1979] VR 239; Piroshenko v Grosjman (2010) 27 VR 489; Carbon Black Pty Ltd v Launer [2015] VSCA 126; Sylina v Solanki [2014] VSC 2.

***Olandezos, Nicholas v Bhatha, Satnam Singh; Bhatha, Jaswinder; Australian Securities and Investments Commission; Registrar of Titles***

Derham AsJ

[\[2017\] VSC 234](#)

05/05/2017

CONTRACT - Dispute between builder and owners - Entitlement of builder to transfer of land pursuant to Deed of Settlement - Enforceability of Deed of Settlement - Whether Deed entered into under duress or unconscionable conduct - Terms of Deed upheld in favour of builder. PRACTICE AND PROCEDURE - Whether proceeding can be decided on a summary basis - Whether real prospect of success - Civil Procedure Act 2010 (Vic) s63(1).

***Merrion P/L (ACN 141 640 128) v Loustas, Arthur; Sier, Peter John; Sier, Vincent John; 405 High Street P/L (ACN 158 418 565)***

Daly AsJ

[\[2017\] VSC 95](#)

14/03/2017

EQUITY - Equitable remedies - Specific performance - Sale of land - Vendor's unwillingness to complete - Legally binding contract - No vitiating factors - Vendor claiming importunity to sell from own agent and 'mistake' in signing contract - Purchasers with clean hands and no unconscientious conduct - Contract price below valuation as subsequently obtained - Whether damages adequate remedy - Discretionary principles - Decree for specific performance summarily granted.

***Luhan, Richard and Luhan, Robert and Micallef, Georgia and RT Edgar Boroondara P/L & Ors***

Mukhtar AsJ

[\[2017\] VSC 246](#)

10/05/2017

JUDICIAL REVIEW AND APPEALS - Appeal from an Associate Judge - Application to appeal decision of an Associate Justice refusing leave to amend statement of claim - Application to appeal order of an Associate Justice in relation to gross costs order for interlocutory costs - Whether Associate Justice failed to take into consideration relevant law and evidence - No error in fact or law - Appeal dismissed - Orders of Associate Justice varied.

***Angeleska, Snezana (known as Slaveska) v The State of Victoria & Ors***

J Forrest J

[\[2017\] VSC 238](#)

01/05/2017

JUDICIAL REVIEW - Application for extension of time within which to make applications for leave to appeal - Application for leave to appeal - Extension of time within which to apply for leave granted - Victorian Civil and Administrative Tribunal Act 1998, s148 - Supreme Court (Miscellaneous Civil Proceedings) Rules 2008, Rules 4.05(2), 4.07(2) and 4.09(1).

***Pavlovic, Joseph v Commonwealth Insurance Ltd (ACN 067 524 216)***

Digby J

[\[2017\] VSC 252](#)

02/05/2017

JUDICIAL REVIEW - Statutory interpretation - Application to be deemed not to be a prohibited person under Firearms Act - Family violence intervention order with no firearms condition - Exercise of discretion - Firearms Act 1996, s3, s189.

***Robin Swebbs v Magistrates' Court of Victoria; Chief Commissioner of Police; Symons, Tracy***

Ginnane J

[\[2017\] VSC 229](#)

04/05/2017

LANDLORD AND TENANT - Lease of café premises - Premises fitted with mechanical ventilation system from kitchen - Shared ductwork with nearby restaurant premises - Dispute about adequacy of extraction and exhaust system from leased premises - Tenant's claim that installation of shared system was contrary to building legislation and standards and therefore 'illegal' - Alleged non-disclosure of 'illegal' works by landlord - Claim for return of all rent paid and cancellation of bank guarantee - Dispute resolution - Retail premises - Whether this was a 'retail tenancy dispute' under Retail Leases Act 2003 (Vic) - Exclusive jurisdiction in VCAT - Whether dispute 'arising under or in relation' to retail lease lease - Retail Leases Act 2003 (Vic) s81.

LANDLORD AND TENANT - Lease of café premises - Premises fitted with mechanical ventilation system from kitchen - Shared ductwork with nearby restaurant premises - Tenant's assertion that ventilation system was in breach of Building Act or regulations - Tenant's claim for prospective orders under enforcement provisions of Building Act - Whether tenant has standing to under statutory enforcement provisions - Building Act 1993 (Vic), s253.

***Raptis, Thanasis v City of Melbourne and 333 Choice Properties P/L***

Mukhtar AsJ

[\[2017\] VSC 247](#)

10/05/2017

PARTNERSHIP - Appeal from decision of a Magistrate pursuant to s109 of the Magistrates' Court Act 1989 (Vic) - Company director provided a guarantee of debts owing by the company to a limited partnership - Composition of partnership in contractual documentation different from the partnership bringing the proceeding - Whether limited partnership properly sued the guarantor in the firm name - Partnership Act 1958 (Vic) Part 3 - Whether certificates under s58 of Partnership Act conclusive evidence of the limited partnership and its members.

CIVIL PROCEDURE - Whether guarantor made admissions as to the plaintiff's status as a party to an agreement - Whether learned Magistrate erred in finding that the plaintiff had no standing to sue on that agreement - Whether learned Magistrate erred in failing to stay proceeding to enable plaintiff to join parties - *Spotless Pty Ltd v NCON Australia Pty Ltd* [2012] VSCA 271 referred to.

***L & H Group (a Limited Partnership) v White, Clyde Peter and Quin, David Charles in their capacity as Trustees of the Bankrupt Estate of Young, Mr John Stanley***

Daly AsJ

[\[2017\] VSC 188](#)

26/04/2017

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 - Covenant registered on applicant's title requiring the use of certain building materials - Applicant applied for a permit to allow removal of the covenant - Tribunal ordered that a permit be issued varying but not removing the covenant - Whether covenant is enforceable - Whether covenant sufficiently identified the land to be benefited - Leave to appeal granted - Appeal allowed - Order that permit issue permitting removal of the covenant.

***Beman P/L v Boroondara City Council; Hiscock, Malcolm; Keenan, Elizabeth and Grace Park Residents Association Inc***

Emerton J

[\[2017\] VSC 207](#)

04/05/2017

PLANNING & ENVIRONMENT - Application for leave to appeal from the Victorian Civil and Administrative Tribunal under s148 of the Victorian Civil and Administrative Tribunal - Whether the Tribunal's decision was unreasonable in the Wednesbury sense - Whether the Tribunal relied on a fact or matter about which no evidence was tendered - Whether the Tribunal misconstrued Stonnington Planning Scheme cl 55.03-1 Standard B6 - Leave to appeal refused.

***Jones, Damian Laurence v 2Scale Design P/L***

Emerton J

[\[2017\] VSC 253](#)

08/05/2017

PRACTICE AND PROCEDURE - Application to amend defence - workplace incident - Limitation of Actions Act 1958 (Vic) - whether substantial delay will be caused by the amendment - wasted costs - whether there is irreparable element of unfair prejudice caused by amendment - whether grant of amendment will lessen public confidence - Supreme Court (General Civil Procedure) Rules 2015, r36 - *Aon Risk Services Australia v Australia National University* (2009) 239 CLR 175 considered - Application granted.

***Drew, Kevin v Patrick Stevedores Holdings P/L***

Clayton JR

[\[2017\] VSC 231](#)

03/05/2017

PRACTICE AND PROCEDURE - Plaintiff's application to re-open case after evidence concluded and before closing submissions delivered refused - Principles involved - Consideration of interests of justice - Whether the defendants misled the plaintiff about intention to call witnesses or required to warn the plaintiff that they may not call witnesses - Whether the court must ensure it receives all relevant evidence - Civil Procedure Act 2010 (Vic), s7, s8, s9.

***Advanced Fuels Technology P/L (ACN 079 473 699) v Blythe, Sean Darrell; Wilson, Timothy; O'Leary, Timothy Shane; NGV Group P/L (ACN 163 139 053); Envirotrans P/L (ACN 114 292 250)***

Macaulay J

[\[2017\] VSC 250](#)

10/05/2017

PRACTICE AND PROCEDURE - Plaintiffs issued claim against the defendants in negligence for operating a water pump in hot weather on 'Black Saturday' causing loss and damage to Plaintiffs - Relevant events occurred in 2009 and writ issued 2015 - Defendants made an application for dismissal for want of prosecution - Rule 24.01(a) of the Supreme Court (General Civil Procedure) Rules 2015 - Relevant considerations - Conduct - Effluxion of time - Inordinate and inexcusable delay - Prejudice - *Slaveska v Elenchevski* [2013] VSCA 283 applied - *Chan & Ors v Chen & Ors* [2013] VSC 538 applied - *Sullivan v Greyfriars Pty Ltd* [2015] VSCA 196 applied - s7, s8, s9 and s25 of the Civil Procedure Rules 2010 - Overarching Purpose - Inordinate and inexcusable delay established - Serious prejudice to Defendants not established - Defendants' application dismissed.

***Nelson, John Walter; Nelson, Suzanne Kaye v Harvey, Michael; Harvey, Fleur ; Geary, Gerald Patrick; Geary, Barbara Maree***

Ierodiaconou AsJ

[\[2017\] VSC 228](#)

28/04/2017

PRACTICE AND PROCEDURE - Plaintiffs issued claim against the State in negligence for failing to provide police protection after '000' emergency call - Relevant events occurred in 2007 and writ issued 2010 - State identified deficiencies in pleadings and denied liability - Plaintiffs' solicitors sought instructions on discontinuance against the State - Plaintiffs' solicitors no longer able to contact plaintiffs - Filed notice of ceasing to act in 2014 - Whether proceeding should be dismissed for want of prosecution - Whether claim against the State should be summarily disposed of because it is not the proper defendant - Civil Procedure Act 2010 (Vic) s8, s62, s63 - *Sullivan v Greyfriars Pty Ltd* [2015] VSCA 196.

***Smith, Kerry and Abrahams, Kevin v The State of Victoria***

Ierodiaconou AsJ

[\[2017\] VSC 190](#)

03/05/2017

PROPERTY LAW - Restrictive covenant - Two covenants over land - Construction - Declaration that restriction to 'one shop or shops with or without dwelling house attached' does not preclude construction of one shop and twelve apartments - Alternate application to discharge or modify restrictions in covenants pursuant to the Property Law Act 1958 (Vic), s84 - Whether discharge or modification will not substantially injure the persons entitled to the benefit - Application refused - Applicable legal principles - Property Law Act 1958, s84(1)(c) & s(2)(b).

***Conlan, Margaret Mary by her litigation guardian Conlan, John Patrick v Benton, Michelle & Ors (in accordance with the Schedule attached)***

Derham AsJ

[\[2017\] VSC 244](#)

09/05/2017

REAL PROPERTY - Costs order made against defendant in separate proceedings - Failure to pay legal costs - Undertaking to court not to dispose of, deal with, encumber or diminish value of interest in real property - Whether transfer of land executed with intent to delay, hinder or otherwise defraud creditors - Whether Registrar of Titles should be directed to cause the Land Titles register to be amended - Whether caveat validly lodged - Whether balance of convenience favoured removal of caveat - Caveat removed - Property Law Act 1958, s172 - Transfer of Land Act 1958, s103(1).

PRACTICE AND PROCEDURE - Restraint on dealing with real property - Whether there exists an arguable case against the defendants - Whether there is a danger that the prospective judgment will be wholly or partly unsatisfied as a result of the dissipation of assets - Balance of convenience - Real and unacceptable risk that judgment will not be wholly satisfied established - Supreme Court (General Civil Procedure) Rules 2015, Order 37A.

***Prior, Stephen v Lakic, Bogdanka; Lakic, Zdravko; Lakic, Boris; and Lakic, Njegos and The Registrar of Titles***

Digby J

[\[2017\] VSC 255](#)

11/05/2017

STATUTORY INTERPRETATION - transport accident legislation - availability of compensation for bicycle riders involved in collisions with motor vehicles - requirement for cyclist to be 'travelling to or from [the] place of employment' - cyclist lived and undertook employment on farm - during purely recreational ride beginning and ending at farm, cyclist ran into motor vehicle and suffered serious injuries - Victorian Civil and Administrative Tribunal affirmed decision of Transport Accident Commission refusing application for compensation - appeal - whether tribunal erred in law in interpreting eligibility provision so as to require a connection between ride and employment at the place - upon introduction of accident compensation for bicycle riders, similar eligibility provisions in workers' compensation legislation had long-accepted meaning requiring that connection - whether Parliament intended to adopt this meaning - whether workers compensation and transport accident compensation legislation in pari materia - 'transport accident', 'travelling to or from his or her place or employment' - Victorian Civil and Administrative Tribunal Act 1998 (Vic) s148(1), Transport Accident Act 1986 (Vic) s3(1), s3(1A), s35(1), Accident Compensation Act 1985 (Vic) s82(1), s83(2)(b).

***Wilson, Richard v Transport Accident Commission***

Bell J

[\[2017\] VSC 209](#)

03/05/2017

WORKCOVER - Employer - Worker - Deemed Worker - Right of subrogation of employer's rights by Victorian WorkCover Authority - Claimed error on the face of the record - Employer and worker - Relevant principles of construction - Workplace Injury Rehabilitation and Compensation Act 2013 (Vic) s3 definitions of 'employer' and 'worker', s10, s12, s39(1), s69, s71(1), s71(4), s73(1), Part 3 Div 4, s435, Part 10, Sch 1 Pt 1 cl 9.

JUDICIAL REVIEW AND APPEALS - Jurisdiction of Magistrates' Court - Preliminary question - Discretion - Fragmentation of hearing in an inferior court - Magistrates' Court Act 1989 (Vic) s109, Administrative Law Act 1978 (Vic) s10, Supreme Court (General Civil Procedure) Rules 2015 (Vic); Magistrates' Court General Civil Procedure Rules 2010 (Vic) r47.04-47.05.

***Victorian WorkCover Authority v BSA Ltd & Ors (according to the Schedule)***

Garde J

[\[2017\] VSC 224](#)

04/05/2017

EVIDENCE - Plaintiff's objections to defendants' affidavits - Whether matters objected to are inadmissible or should otherwise be excluded - Evidence Act 2008, s55, s135, s140.

WILLS AND ESTATES - Application for grant of probate - Caveat lodged on grounds of testamentary undue influence, alternatively, revocation of deceased's will.

***Demediuk, Barbara v Demediuk, Peter Mark; Willis, Sandra and Demediuk, Nicholas Ivan***

McMillan J

[\[2017\] VSC 236](#)

05/05/2017

## Criminal Division

CRIMINAL LAW - Bail - Applicant 16 years of age - Charges of rape and commit indictable offence while on bail - Show cause situation - Whether unacceptable risk of offending - s3B, s4(4)(a), s4(4)(d), Bail Act 1977 (Vic).

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

Kaye JA

[\[2017\] VSC 245](#)

09/05/2017

CRIMINAL LAW - Sentence - Manslaughter by unlawful and dangerous act - Accused stabbed brother once to the chest, killing him, after brother engaged in threatening and violent behaviour towards family members - Excessive self-defence/defence of others - Full admissions - Plea of guilty offered early - Profound remorse - Hardship of imprisonment - Reasonable to good prospects of rehabilitation - Nine months of pre-sentence detention denied because of service of another sentence - Totality - Mercy - Unusual case calling for unusual sentence - Sentence of six years and three months' imprisonment with non-parole period of three years and three months - But for plea of guilty, sentence of nine years' imprisonment with non-parole period of six years - Sentencing Act 1991 (Vic), s5, s6AAA & s18.

***The Queen v Brown, Shane Ryan***

Croucher J

[\[2017\] VSC 240](#)

10/05/2017

CRIMINAL LAW - Sentence - Murder - Girlfriend - Defenceless victim - Plea of guilty to manslaughter - Multiple assaults - Multiple episodes of blunt force trauma - Complications of trauma causing death - Shallow penetrating injuries - Difficult background - Applicability of R v Verdins (2007) 16 VR 269 principles - Young offender - 23 years' imprisonment - Non-parole period of 18 years.

***Director of Public Prosecutions [DPP] v Aleluia, Mataio Jordan***

Elliott J

[\[2017\] VSC 204](#)

12/05/2017

CRIMINAL LAW - Sentence - Plea of guilty - Intentionally cause serious injury - Mental illness - Verdins principles, whether applicable - Voluntary cessation of medication - Schizophrenia - Offender under the influence of alcohol, methamphetamine at the time of the index offence - Whether moral culpability reduced - Previous example of offending whilst abstaining from medication and consuming drugs and alcohol - Significant criminal history - Prospects of rehabilitation limited - Remorse - Section 6AAA Sentencing Act 1991 (Vic).

***The Queen v Costa, Tully***

Lasry J

[\[2017\] VSC 208](#)

21/04/2017

CRIMINAL PROCEDURE - Interlocutory appeal - Application for certification following interlocutory ruling refusing accused's application for a permanent stay of proceedings - Whether interlocutory decision is of sufficient importance to warrant expedited review - Criminal Procedure Act 2009 (Vic) s295(3)(b).

***The Queen v Wells, Barry***

John Dixon J

[\[2017\] VSC 242](#)

05/05/2017

## 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) (“the Act”) - Trust established with the purpose of making investments in the property market - Trust had completed 3 unit residential development some years earlier - Disputed building contract involved a 12 unit residential development - Whether Trust in “the business of building residences” - section 7(2)(b) of the Act - Director of Housing (Victoria) v Structx Pty Ltd [2011] VSC 410 (Vickery J) applied.

***Promax Building Developments Pty Ltd v PCarol & Co Pty Ltd***

[\[2017\] VCC 495](#)

Judge Anderson

03/05/2017

**INJUNCTIONS** - interlocutory injunctions - Mareva orders - Principles applicable - Sufficiency of evidence as to risk of dissipation - Risk to be inferred from circumstances giving rise to cause of action - Allegations of dishonesty and fraud in substantive claim - Defendant disobeyed court order.

***PropertyShares Holdings Pty Ltd v Ujma & Ors***

[\[2017\] VCC 490](#)

Judge Cosgrave

02/05/2017

**PLEADINGS** - Allegations of trade secrets - Application for further and better particulars.

***Maitre D Marketing Pty Ltd v Patties Foods Pty Ltd***

[\[2017\] VCC 413](#)

Judge Marks

12/04/2017

# Articles

## Aboriginals

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Culturally appropriate - Imprisonment - Multi-state scheme - Prison location - Cross Border Justice Act 2009 (SA) - WA - SA - NT  
**Whellum, P.** "Missed opportunities for culturally appropriate imprisonment of apy offenders: the Cross Border Justice Act 2009 (SA)." (2017) 8(28) Indigenous L B 20-23.

Institutional racism - Deaths in custody - Historical context - Coronial inquest - Miss Dhu - Aboriginal Legal Service Western Australia - Racial Discrimination Act 1975 (Cth), s18C - WA  
**Barter, A. and D. Eggington.** "Institutional racism, the importance of section 18C and the tragic death of Miss Dhu." (2017) 8(28) Indigenous L B 8-11

## Arbitration

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Family dispute resolution practitioners - Understanding of culture - Children's right to culture - Facilitate parental discussions - Australia  
**Dababneh, B.** "Whose role is it to support the child's right to culture in Australia?" (2017) 28(1) ADRJ 19-34.

Mediation models - Standards - NMAS standards - Informal conflict resolution systems - Mediator personal characteristics - Party self-determination - Power imbalances - Referral - Conflict of interest - Safe respectful space - Australia - Central African Republic - Thailand - Burma  
**Hermann, J. and C. Holland.** "Co-creating mediation models: adapting mediation practices when working across cultures." (2017) 28(1) ADRJ 43-50.

Mediation process - Preparation - Lawyers - Clients - Australia  
**Howieson, J. and L. Iriks.** "Before mediation: designing processes for the next decade - matching process with the purpose." (2017) 28(1) ADRJ 51-56.

Mediators - Service delivery - Trans/gender - Diverse clients - Intersex clients - Non-heterosexual clients - Knowledge of clients - Formation of families - Relationships - Gender identity - Sexuality - Australia  
**Hardy, S. et al.** "Working with trans or gender diverse, intersex and/or non-heterosexual clients: advice for mediators." (2017) 28(1) ADRJ 35-42.

Taxation - Revenue authorities - Alternative dispute resolution - Dispute system design principles - Evaluation - Recommendations - Comparative analysis - UK - Australia  
**Jone, M.** "What can the United Kingdom's tax dispute resolution system learn from Australia? an evaluation and recommendations from a dispute systems design perspective." (2017) 32(1) ATF 59-96.

## Conflict of Laws

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Federal jurisdiction - Conflict of laws - Choice of laws - Applicable law - John Pfeiffer v Rogerson - R v Oregon; ex parte Oregon - Sweedman v TAC - Judiciary Act 1903 (Cth), ss79-80 - Australia  
**Howard, M.** "An outline of choice, and conflicts, of law in federal jurisdiction." (2017) 44(3) Brief 24-27

## Constitutional Law

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Human rights - Constitutional protection - Right to liberty - Arbitrary detention - Rights of individuals - Balance - Protection of community - Constitution (1901) (Cth), Ch. 111 - Comparative analysis - Australia - USA - Canada - South Africa  
**Chetty, K.** "Protection from arbitrary detention in Australia: a proposal for an explicit constitutional right." (2016) 35(2) U Tas L R 79-105.

Judiciary - Impartiality - Independent - Media - Criticism - Lord Chancellor - Censure - Damages - Miller v Secretary of State for Exiting the European Union - UK  
**Jowell, J. "Miller and the duties of the LC." [2017] (Jan) Counsel 28-29.**

Secession - Legal reasons - Historical reasons - North Queensland - Torres Strait Islands - Australia  
**Fellows, J. and M. Chong. "Secessionism in Northern Queensland and the Torres Strait Islands: reality or fantasy." (2014-15) 21 JCULR 89-103.**

## Contract Law

Print-outs - Documents signed electronically - Inappropriate electronic signing - Electronic deeds - Legislation requirements - Electronic Transactions Act 1999 (Cth) - Corporations Act 2001 (Cth) s 127 - Australia  
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