



THE LAW LIBRARY OF VICTORIA

Library
Bulletin
24 November
2017

Library News

The Law Library of Victoria Instagram

We have an Instagram account ([@LawLibraryVic](#)) where you can see some great photos of our lovely heritage building (both inside and out). While photography is not permitted in the Court, visitors to the library are encouraged to take photographs of our wonderful building with their mobile devices to share with their followers. Please tag us if you come in to visit us.

Tour of the Supreme Court Library Tuesday 12 December, 1:15pm - 1:45pm

Take a tour and get to know the history and architecture of the Supreme Court Library. This 30 minute tour is recommended for those who want a brief introduction to the Library and its heritage, exploring the Ground and First Floors.

For more information or to RSVP please email libraryevents@supcourt.vic.gov.au. Visit our website for more upcoming events at <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

Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016



Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016 has just been published. Copies of the book can be ordered from the Supreme Court Library, please phone

03 9603 6282 for details. The book costs \$60 and there is a \$10 discount for members of the Royal Historical Society of Victoria (RHSV).

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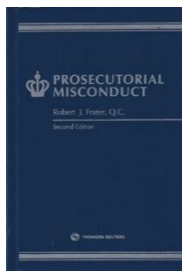
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New Books

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

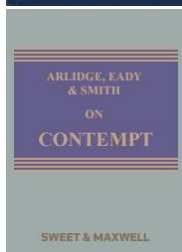
Judicial officers and court staff can borrow any of the books listed. Contact your jurisdictional librarian to request an item.

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



Frater, Robert J., *Prosecutorial misconduct*
2nd ed., Thomson Reuters Canada, Toronto, 2017
Call number: 345.715042 FRA.2 (Supreme Court Library)

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



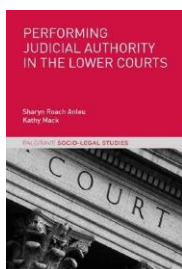
Londono, Patricia et al, *Arlidge, Eady & Smith on contempt*
5th ed., Sweet & Maxwell, London, 2017
Call number: 345.0234 ARL.5 (Supreme Court Library)

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



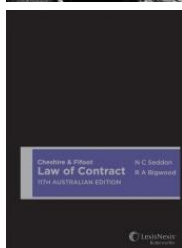
MacFarlane, Peter and Ross, Ysaiah, *Ethics, professional responsibility and legal practice*
LexisNexis Butterworths, Chatswood, 2017
Call number: 174.3 MAC (Supreme Court Library and Magistrates' Court Library)

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



Roach Anleau, Sharyn and Mack, Kathy, *Performing judicial authority in the lower courts*
Macmillan Education Palgrave, London, 2017
Call number: 347.9401 ROA (County Court Library)

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



Seddon, N.C. and Bigwood, R.A., *Cheshire & Fifoot law of contract*
11th ed., LexisNexis Butterworths, Chatswood, 2017
Call number: 346.022 CHE.A11 (Supreme Court Library, County Court Library and VCAT Library)

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



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 [#argus1917](https://twitter.com/lawlibraryvic)

Legislation

Victorian Bills

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

- [*Health and Child Wellbeing Legislation Amendment Bill 2017*](#)
- [*Road Safety Amendment \(Automated Vehicles\) Bill 2017*](#)

Victorian Assents

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

- [*Caulfield Racecourse Reserve Act 2017*](#) No. 58/2017

Proclamations

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

- *Family Violence Protection Amendment Act 2017* No. 19/2017
 - Parts 3-5 (sections 42-55) of this Act came into operation on 16 November 2017 (SG388 15.11.2017)
 - Part 9 Division 2 (section 65) of this Act came into operation on 25 November 2017 (SG388 15.11.2017)
- *National Domestic Violence Order Scheme Act 2016* No. 53/2016
 - Parts 2-8 (sections 4-81), 10 (88-128) of this Act came into operation on 25 November 2017 (SG388 15.11.2017)
- *Planning and Building Legislation Amendment (Housing Affordability and Other Matters) Act 2017* No. 47/2017
 - Part 2 Division 2 (sections 7-9) of this Act came into operation on 15 November 2017 (SG388 15.11.2017)

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

- *Caulfield Racecourse Reserve Act 2017* No. 58/2017
 - Parts 1 (sections 1-4), 7 (sections 45-52), Schedule 1 of this Act came in by forced commencement on 23 November 2017 s.2(1)
- *Drugs, Poisons and Controlled Substances Miscellaneous Amendment Act 2017* No. 40/2017
 - Sections 4, 5, 8-18, 20, 24-26 of this Act came in by forced commencement on 1 November 2017 s.2(2)
- *Heritage Act 2017* No. 7/2017
 - Sections 1-309 of this Act came in by forced commencement on 1 November 2017 s.2(2)

High Court Cases

MIGRATION - Refugees - Appeal from Supreme Court of Nauru - Procedural fairness - Where Refugee Status Review Tribunal must act according to principles of natural justice - Where Refugee Status Review Tribunal did not provide appellant with notice of adverse country information relevant to Tribunal's determination on which it ultimately relied - Whether failure by Tribunal to put substance of information to appellant constituted breach of requirements of procedural fairness.

WORDS AND PHRASES - "complementary protection", "natural justice", "procedural fairness".

HFM045 v The Republic of Nauru

[\[2017\] HCA 50](#)

15/11/2017

Victorian Supreme Court Cases

Court of Appeal

ACCIDENT COMPENSATION - Appeal - Transport accident - Personal injury - Quantum of damages for pain and suffering and pecuniary loss - Jury awarded \$100,000 in damages for pain and suffering and \$70,000 for pecuniary loss - Whether amounts awarded manifestly inadequate - No error - Verdict reasonably open to the jury on the evidence - Application for leave to appeal refused.

Collins, Toni Lee v Staminirovitch, Kristian

Santamaria, Kyrou, and Kaye JJA

[\[2017\] VSCA 342](#)

23/11/2017

ADMINISTRATIVE LAW - Judicial review - Magistrates' Court proceeding by solicitor to enforce agreement by client to pay \$10,000 in costs - Client self-represented - Magistrate took control of proceeding, redefined client's case without hearing any evidence from her and cross-examined solicitor - During hearing magistrate decided that agreement was unenforceable at common law and that Legal Profession Act 2004 was irrelevant - Self-executing order granting leave to amend within 30 days to plead quantum meruit - Time limit not met - Self-executing order took effect resulting in proceeding being struck out - Judge dismissed application for judicial review in exercise of discretion - Whether judge had discretion to do so - Whether suitable alternative remedy to judicial review available to solicitor.

ADMINISTRATIVE LAW - Judicial review - Whether error of law on face of Magistrates' Court record - Whether magistrate's reasons recorded in transcript form part of record - Administrative Law Act 1978 s10 - Whether magistrate's conduct denied solicitor procedural fairness, gave rise to apprehended bias and resulted in trial not being according to law - Whether judge erred in not making findings on these grounds of review - Grounds established - Judge erred in dismissing application for judicial review - Appeal allowed.

LEGAL PRACTITIONERS - Proceeding to enforce costs agreement - Legal Profession Act 2004 overrides common law principles which are inconsistent with Act - Able Demolitions and Excavations Pty Ltd v Barry Kenna & Co [2016] VSCA 312 applied.

Kuek, Gabriel v Wade, Lamprini and Magistrates' Court of Victoria

Tate, and Kyrou JJA

[\[2017\] VSCA 329](#)

15/11/2017

APPEAL - Application for leave to appeal - Trial judge dismissed appeal from Magistrates' Court - Trial judge concluded that three of four grounds of appeal were totally unmeritorious - No proposed ground of appeal with any real prospect of success - Leave to appeal refused - Magistrates' Court Act 1989 s109, Civil Procedure Act 2010 s7, s47(1), s48 - Magistrates' Court (General Civil Procedure) Rules 2010 r5.09(1), (4); 21.13(1); 46.10(b).

Kuek, Gabriel v Phillips, Julie

Whelan JA and McDonald AJA

[\[2017\] VSCA 322](#)

21/11/2017

CRIMINAL LAW - Appeal against sentence - Trafficking in a drug of dependence - Large quantities of methylamphetamine supplied in four transactions to dealer who onsold to undercover police operative - Sentence of 42 months' imprisonment on trafficking charge - Whether judge failed to give appropriate weight to element of entrapment involved in transactions - Relevant principles - No error disclosed.

CRIMINAL LAW - Appeal against sentence - Whether judge erred in characterising applicants' offending as falling within upper-mid level range - No error disclosed.

CRIMINAL LAW - Appeal against sentence - Whether sentences manifestly excessive - No error disclosed.

CRIMINAL LAW - Appeal against sentence - Judge imposed same sentence on applicants even though first applicant had a lesser role in offending - Parity principle infringed - Appeal allowed - First applicant resentenced to 3 years' imprisonment on trafficking charge.

Kada, Haval v The Queen; Kada, Hadil v The Queen

Tate and Kyrrou JJA, Beale AJA

[\[2017\] VSCA 339](#)

22/11/2017

CRIMINAL LAW - Appeal - Interlocutory appeal - Joint trials - Severance - Evidence - Admissibility - Coincidence evidence - Multiple charges of rape - Multiple complainants - Consent in issue in each case - Whether evidence of complainants as to absence of consent cross-admissible - Whether probative of accused's state of mind - Evidence not cross-admissible - Appeal allowed - Indictment severed - Phillips v The Queen (2006) 225 CLR 303 applied - Crimes Act 1958 s38 - Evidence Act 2008 s55, s56, s98, s101.

Jacobs, Glen (a Pseudonym) v The Queen

Maxwell P, Ashley JA, and Forrest AJA

[\[2017\] VSCA 309](#)

26/11/2017

CRIMINAL LAW - Appeal - Interlocutory ruling - Using carriage service to procure person under 16 years of age for sexual activity - Using carriage service to groom person under 16 years of age for sexual activity - Using carriage service to transmit indecent communications to person under 16 years of age - Trial judge refused application to recall prosecution witnesses for cross-examination - Refusal to certify - Leave to review refusal to certify refused - Criminal Procedure Act 2009 s295, s296, s297.

Reeves, Lucas (a Pseudonym) v The Queen

Santamaria and Coghlan JJA

[\[2017\] VSCA 343](#)

22/11/2017

CRIMINAL LAW - Appeal - Leave to Appeal - Conviction - Application for extension of time - Election to renew application - Interests of justice - Delay - Merits of proposed appeal - Application for extension of time refused.

Chen, Guang v The Queen

Osborn, Whelan, and Ashley JJA

[\[2017\] VSCA 335](#)

17/11/2017

CRIMINAL LAW - Appeal - Sentence - Course of conduct charge - Incest - Victim was offender's natural daughter (aged 8-10) - 'Sentence of five years' imprisonment - Whether manifestly excessive - Whether findings as to number of incidents open at law and reasonably open on the evidence - Indecent assault - Sentence of two years' imprisonment - Whether manifestly excessive - Serious assault - Victim was offender's natural daughter (aged 4-6) - Leave to appeal refused - Criminal Procedure Act 2009 sch 1 cl 4A, Sentencing Act 1991 s5(2F).

McCray, Dennis (a Pseudonym) v The Queen

Maxwell P and Croucher AJA

[\[2017\] VSCA 340](#)

22/11/2017

CRIMINAL LAW - Appeal - Sentence - Crown appeal - Rape (4 charges) - Sleeping victim - Offender heavily intoxicated - Mitigating effect of intellectual disability, mental illness - Sentenced to 8 months' imprisonment and 3-year community correction order - Whether manifestly inadequate - Whether Verdins principles applicable - Whether 'realistic connection' between offender's condition and offending - Offending purposeful, deliberate and persistent - Causal significance of intoxication - Undue weight given to mitigating factors - Sentence not commensurate with gravity of offending - Whether residual discretion should be exercised - Appeal allowed - Resentenced to 4 years and 6 months' imprisonment, with non-parole period of 3 years and 3 months - Verdins v The Queen (2007) 16 VR 269, Hasan v The Queen (2010) 31 VR 28 applied.

CRIMINAL LAW - Sentencing - Sentencing hearings - Expert evidence - Mental functioning of offenders - Expert reports relied on by defence - No objection by prosecution - Prosecutor later sought leave to cross-examine expert - Importance of cross-examination where prosecutor disputes expert opinions or their factual foundations - Need for timely service of expert reports - County Court of Victoria, Practice Note PNCR 1-2017 - Sentencing Hearings: Expert Reports on Mental Functioning of Offenders, 1 July 2017 [8.1].

Director of Public Prosecutions [DPP] v Davis, Christopher Ian

Maxwell P, Tate JA, and Beale AJA

[\[2017\] VSCA 341](#)

23/11/2017

CRIMINAL LAW - Appeal - Sentence - One charge of rape - Not guilty plea - Serious sexual offender - Sentenced to eight years' imprisonment - Cumulation of six years on earlier sentence of ten years' imprisonment for three charges of rape - New total effective sentence of 16 years' imprisonment - New non-parole period of 12 years - Whether manifestly excessive - Totality - Whether inconsistent with current sentencing practice - Whether more severe than necessary for the protection of the community - Extensive and troubling history of violent offences - R H McL v The Queen (2000) 203 CLR 452, Gordon (a pseudonym) v The Queen [2013] VSCA 343, Director of Public Prosecutions (Vic) v Bales [2015] VSCA 261, discussed - Appeal dismissed - Sentencing Act 1991 s6D, s6E.

Matheas, Christos v The Queen

Maxwell P, Tate, and Coghlan JJA

[\[2017\] VSCA 330](#)

15/11/2017

CRIMINAL LAW - Appeal - Sentence - Robbery - Intentionally Causing Serious Injury - Intentionally Causing Injury - Specific error alleged - Whether parity principle infringed - Identical sentences imposed on three co-offenders - Appeal dismissed.

CRIMINAL LAW - Application for leave to appeal - Sentence - Robbery - Intentionally Causing Serious Injury - Intentionally Causing Injury - Whether parity principle infringed - Identical sentences imposed on three co-offenders - Application for leave granted - Appeal dismissed.

Sefo, Joseph v The Queen; Alagaelua, Antone v The Queen

Kaye JA and Beale AJA

[\[2017\] VSCA 336](#)

17/11/2017

CRIMINAL LAW - Director's appeal against sentence - Negligently causing serious injury by driving - 20 months' imprisonment and community correction order of 2 years - Whether sentence manifestly inadequate - Appeal allowed - Respondent resentenced to 5 years' imprisonment with non-parole period of 3 years - Harrison v The Queen (2015) 49 VR 619, Director of Public Prosecutions v Dalgliesh [2017] HCA 41 considered.

Director of Public Prosecutions [DPP] v Barry, Guy Anthony

Weinberg and Kyrrou JJA, and Beale AJA

[\[2017\] VSCA 344](#)

24/11/2017

CRIMINAL LAW - Interlocutory appeal - Application to review decision by County Court judge refusing certification under s295(3) of the Criminal Procedure Act 2009 - Applicant charged with multiple offences involving three young girls - Charges included carnal knowledge of a girl under the age of 16, and carnal knowledge of an unmarried female between the ages of 16 and 18 - Offences alleged to have occurred between 1971 and 1975 - Whether trial on s50 of the Crimes Act 1958 charges necessarily unfair - Whether permanent stay should be granted - Reasonably open for trial judge to refuse permanent stay - Application for review dismissed.

Bradley, Chris (a Pseudonym) v The Queen

Weinberg, Kyrrou JJA, and Beale AJA

[\[2017\] VSCA 332](#)

15/11/2017

CRIMINAL LAW - Interlocutory appeal - Application to review decision by County Court judge refusing certification under s295(3) of the Criminal Procedure Act 2009 - Applicant charged with maintaining a sexual relationship with a child under 16, common assault and intentionally causing injury - Whether charges overlap with prior charges resolved by guilty pleas to some charges - Whether applicant now disadvantaged - Whether permanent stay should be granted - No error disclosed in trial judge's ruling - House v The King (1936) 55 CLR 499 applied - Application for review dismissed.

Martin, Victor (a Pseudonym) v The Queen

Weinberg, Whelan, and Kyrrou JJA

[\[2017\] VSCA 328](#)

13/11/2017

CRIMINAL LAW - Sentence - Application for leave to appeal against sentence - Armed robbery - Intentionally causing injury - Total effective sentence of 4 years' imprisonment with non-parole period of 22 months - Manifest excess - Whether sentence imposed manifestly excessive - Not reasonably arguable that sentence manifestly excessive - Application for leave to appeal refused.

Thomas, Roxann Lucy v The Queen

Beach JA

[\[2017\] VSCA 333](#)

16/11/2017

INSURANCE - Disability income insurance policy - Total disability policy - Total disablement benefit - Partial disablement benefit - Sickness - Whether insured, solely due to sickness, unable to perform one or more duties of occupation important in producing income - Whether judge erred in not accepting that applicant, solely due to sickness, was unable to perform one or more duties of her occupation important to producing income - No error established - Application for leave to appeal refused.

APPEAL - Application for leave to appeal - Applicant's proceeding dependent upon credibility and reliability of applicant's evidence - Advantages enjoyed by trial judge - Judge's findings not glaringly improbable or contrary to compelling inferences - Different case advanced by applicant on appeal from case advanced at trial - Applicant not permitted to advance new case which could possibly have been met by further evidence at trial - *Whisprun v Dixon* (2003) 77 ALJR 1598 referred to.

WORDS AND PHRASES - Sickness - Totally disabled - Partially disabled - Unable to perform one or more duties of occupation important in producing income.

Fenton, Amanda v AIA Australia Ltd (formerly American International Assurance Company (Australia) Ltd)

Tate, Osborn, and Beach JJA

[\[2017\] VSCA 331](#)

17/11/2017

OCCUPATIONAL REGULATION - Horse racing - Rules of racing - Interpretation - Prohibited substances - Cobalt detected in urine samples taken from horses - Trainers charged with causing cobalt to be administered to enhance performance - Whether absolute offence - Whether proof of knowledge or awareness required - Alternative charges based on proof of detection - Certified laboratory findings as prima facie evidence of detection - Whether certification procedure exclusive mode of proof - Charges dismissed by Victorian Civil and Administrative Tribunal - Appeal on questions of law - Appeal allowed in part - Racing Act 1958, Australian Rules of Racing AR 8(j), 175(h), 178, 178D, 178DD, 196(5), Local (Victorian) Rules of Racing LR 73A, Victorian Civil and Administrative Tribunal Act 1998 s148.

EVIDENCE - Proof - Modes of proof - Regulatory offences - Prima facie evidence provisions - Provision for certified findings to constitute prima facie evidence - Whether proof by other means impliedly excluded - Certification procedure not exclusive - Australian Rules of Racing AR 178D.

Racing Victoria Ltd v Kavanagh, Mark and O'Brien, Danny

Maxwell P, McLeish JA, and Cavanough AJA

[\[2017\] VSCA 334](#)

17/11/2017

PRACTICE - Costs - Judicial review - Interlocutory ruling in Magistrates' Court - No right of appeal - Appellant sought judicial review - Undesirable fragmentation of proceedings - Leave to appeal granted only because point of general importance - No order for costs of appeal - *Kuek v Victoria Legal Aid* (2001) 2 VR 289 applied - Supreme Court (General Civil Procedure) Rules 2015 056.

Victorian WorkCover Authority v BSA Ltd; Nikolovski, Alen and The Magistrates' Court of Victoria (No 2)

Maxwell P, Osborn and Kaye JJA

[\[2017\] VSCA 337](#)

21/11/2017

PRACTICE AND PROCEDURE - Application to remove caveat - Whether application competent given no appeal from trial judge's dismissal of caveat removal application below - Appropriate for application to be brought in the Court of Appeal - Sufficient connection with substance of application for leave to appeal - Application to remove caveat refused - Supreme Court Act 1986 s10(1), s10 (3).

Sim Development P/L (ACN 165 339 524) and Cai, Hong (aka Roy Cai) v Greenvale Property Group P/L (ACN 159 975 498)

Tate and McLeish JJA

[\[2017\] VSCA 345](#)

17/11/2017

STATUTES - Statutory Interpretation - Fidelity Fund paid claim caused by solicitor's alleged default - Board's power of subrogation against solicitor - Whether proof of dishonesty required - Unnecessary to prove dishonesty - Payment out of Fidelity Fund triggers right of subrogation - Legal Services Board v Werden [2011] VSC 74, Law Society of NSW v Bruce (1996) 40 NSWLR 77 - Legal Profession Act 2004.

Delahunty, Ross v Victorian Legal Services Board

Ferguson CJ, Whelan and Coghlan JJA

[\[2017\] VSCA 327](#)

13/11/2017

Commercial Court

BUILDING CONTRACTS - Building and Construction Industry Security of Payment Act 2002 (Vic) - Section 7(2)(b) meaning of 'in the business of building residences' - Whether the Act applies - Applicant not 'in the business of building residences' - No jurisdiction in adjudicator to determine adjudication application - Adjudication determination quashed.

Golets, Markian v Southbourne Homes P/L (ACN 160 896 971) and McMullan, John

Vickery J

[\[2017\] VSC 705](#)

23/11/2017

COSTS - Apportionment of costs sought as a reflection of success in relation to discrete issues within the application - Consideration of time spent on particular issues at hearing - Found appropriate to award on an 'issue basis' pursuant to GT Corporation Pty Ltd v Amare Safety Pty Ltd (No 3) [2008] VSC 296 - Viterra Parties' successful application in relation to the independence of in-house counsel and production of a document over which privilege was claimed - Held Viterra Parties to pay sixty per cent of the Cargill Parties' costs of 14 February 2017 summons - No order as to costs of the hearing on 11 April 2017.

EVIDENCE - Legal Professional Privilege - Whether waiver of privilege is implied in relation to specified documents - Waiver sought by reason of Cargill parties having placed in issue their knowledge of certain practices, so as to lay open to scrutiny privileged communications which evidence or otherwise bear upon that knowledge - Held that no conduct on the part of the Cargill Parties was inconsistent with maintenance of legal professional privilege over documents which evidence their knowledge of relevant matters - There must be something more than merely pleading a state of mind - Mann v Carnell (1999) 201 CLR 1 - Application dismissed.

Cargill Australia Ltd (ACN 004 684 173) v Viterra Malt P/L (ACN 096 519 658) & Ors and Cargill, Incorporated & Ors (No 3)

Daly AsJ

[\[2017\] VSC 650](#)

17/11/2017

PRACTICE AND PROCEDURE - Implied undertaking - Discovered document - Document used to commence another proceeding - Application for retrospective leave - Special circumstances - Relevance of voluntary disclosure - Prejudice - Limitation period - Leave granted.

CONTEMPT - Whether applicant for leave required to purge contempt - Nature of application for leave - Nature of implied undertaking.

Slea P/L (ACN 106 752 434) v Connective Services P/L (ACN 107 366 496) & Ors according to the Schedule attached; Connective Services P/L (ACN 107 366 496) & Anor v Slea P/L (ACN 106 752 434) & Ors

Judd J

[\[2017\] VSC 706](#)

22/11/2017

PRACTICE AND PROCEDURE - Preliminary discovery - Applicants former directors or employees of, or unitholders in, the respondents - Applicants departed the respondents in 2014 following an oppression proceeding brought by the first two applicants - Applicants subsequently received profit distributions that did not reflect previously projected profit for that year - Some explanation for adjustments to the 2014 profit and some financial documents provided - Whether any applicant has shown facts that might reasonably support a right to relief - Whether sufficient information already provided - Scope of the documents sought too wide - More limited discovery ordered to some applicants - Supreme Court (General Civil Procedure) Rules 2015, r32.05.

Du Chateau, Gregory Walter John; Exactbuild P/L (ACN 004 409 912) ATF Greg Du Chateau Family Trust; Chun, Philip; Eighth Order P/L (ACN 004 330 083) ATF Philip Kai Family Trust; Chun, Kara ATF Kara Chun; Chai, Christina; Jaz Group (Aust) P/L (ACN 126 489 978) ATF Wang Family Trust v Philip Chun and Associates P/L (ACN 004 401 649); Philip Chun Building and Surveying P/L (ACN 131 489 686); Philip Chun Access P/L (ACN 130 553 068); Philip Chun ESM P/L (ACN 130 553 212) and Philip Chun Advanced Technology P/L (ACN 133 521 990)

Lansdowne AsJ

[\[2017\] VSC 667](#)

01/11/2017

TRUSTS AND TRUSTEES - Judicial advice and directions - Trustee Act 1958, s51 - Supreme Court (General Civil Procedure) Rules 2005, O54(2) - Civil Procedure Act 2010.

Traparco P/L (ACN 005 088 559) (who applies in the capacity of trustee of the KW Mackenzie "I" Trust) v Pescott, Caroline Margaret; Mackenzie, Elizabeth Georgina; Morris, Fiona Jennifer; Tralando P/L (ACN 155 128 920) (as trustee for the Caroline Trust); Tralando No. 2 P/L (ACN 165 238 040) (as trustee for the Caroline No. 2 Trust); Mackenzie, Kenneth William, a person under disability, by his litigation guardian Dickson, Timothy James Alexander; Pescott, Edward Ponsonby; Pescott, Oliver Hyde, a minor, by his litigation guardian, Pescott, Roger Neil; Davey, Robert Hugh (in his capacity as trustee of the KW Mackenzie "A" Trust) and Dixon, Timothy James Alexander (in his capacity as trustee of the KW Mackenzie "A" Trust)

Croft J

[\[2017\] VSC 649](#)

14/11/2017

Common Law Division

ADMINISTRATION & PROBATE - Wills and codicils - Testamentary capacity - Elderly person with dementia - Change of bequests from previous wills - Whether testatrix capable of evaluating claims on her bounty - Evidence of cognitive impairment - Failure to know or approve contents of codicils - Suspicious circumstances - Application allowed - *Robertson v Smith* [1998] 4 VR 165; *Veall v Veall* (2015) 46 VR 123 considered.

In the matter of the Will and Estate of Matiasz, Maria, deceased. Application of Jakubowicz, Dr Igor

Zammit J

[\[2017\] VSC 677](#)

20/11/2017

ADMINISTRATIVE LAW - Judicial review - Procedural fairness - Diagnosis that could not reasonably be anticipated - Insufficiency of Medical Panel reasons - Application to quash Medical Panel's Opinion - Mandamus remitting medical questions for reconsideration by a new Medical Panel - Admissibility of further expert medical evidence - Workplace Injury Rehabilitation and Compensation Act 2013, s282, s284.

Aged Care Services P/L v Kontopoulos, Edna; McRae, Dr Roderick; Brann, Dr Susan; Bourke, Mr John and Helme, Professor Robert

Digby J

[\[2017\] VSC 684](#)

15/11/2017

ADMINISTRATIVE LAW - Judicial review - Question referred to Medical Panel under s28LWE of Wrongs Act 1958 - Panel gave determination outside the time prescribed by s28LZG(3)(a) - Whether determination valid.

Wentworth, Nicole v Bass Coast Regional Health; Kyaw, Zarli; Glowinski, Remy; Van Ammers, Edmond and Ernest, David (Deputy Convenor of Medical Panels)

Emerton J

[\[2017\] VSC 403](#)

11/07/2017

COSTS - Estate litigation - Defendant named executor in deceased's will - Plaintiffs beneficiaries under the will - Plaintiffs sought orders removing defendant as executor of the estate - No grant of probate - Proceeding misconceived - Whether plaintiffs entitled to costs out of the estate - Supreme Court Act 1986, s24.

In the matter of the will and estate of Mason, Anthony Ivan, deceased and In the matter of s34 of the Administration and Probate Act 1958. Between: Scott, Amanda and Scott, Deborah v Petsas, John (as executor of the will and estate of Anthony Ivan Mason, deceased)

McMillan J

[\[2017\] VSC 687](#)

14/11/2017

COSTS - Where discovery proceeding not adjudicated on the merits - Where plaintiff sought costs against the defendants - Where defendants sought costs from the plaintiff - Whether conduct of the parties was reasonable - No point of principle.

PRACTICE AND PROCEDURE - Where plaintiff sought the proceeding to remain on foot - Civil Procedure Act 2010 - Wharf Properties Ltd v Eric Cumine Associates (No 2) (1991) 51 BLR 1.

Bovill, Ian Douglas (in his personal capacity and in his capacity as an executor of the estate of Sheila Rosslyn Bovill, deceased) v Bovill, Christopher Scott (in his capacity as an executor of the estate of Sheila Rosslyn Bovill, deceased) and others according to the attached Schedule

McMillan J

[\[2017\] VSC 697](#)

20/11/2017

COSTS - Where plaintiff sought information about deceased's estate and administration account from defendant - Where defendant refused to provide the information sought - Where defendant failed to comply fully with orders of the Court - Whether defendant acted reasonably - Whether plaintiff acted reasonably in requesting the information.

In the matter of the will and estate of Joan Marie Anthony (deceased) and In the matter of an application pursuant to order 54 of the Supreme Court (General Civil Procedure) Rules 2015, rule 6.03 Supreme Court (Administration and Probate) Rules 2014 and section 28 of the Administration and Probate Act 1958. Rogan, Peter George v Rogan, Anthony John (who is sued as executor of the estate of the deceased)

McMillan J

[\[2017\] VSC 668](#)

02/11/2017

COURTS AND JUDGES - Judges - Disqualification - Apprehended bias - Discretion to recuse - Case management practices and principles - Civil Procedure Act 2010, s7 - Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337.

Hughes, Lachlan Owen Stuart and Sles, Kerrie Louise (as executors of the will of Douglas William Gardiner, deceased) v Gardiner, James Alexander & Ors (according to the schedule)

McMillan J

[\[2017\] VSC 699](#)

20/11/2017

EVIDENCE - Defendant's objection to plaintiff's affidavits - Whether matters objected to are inadmissible or should otherwise be excluded - No point of principle.

In the matter of Part IV of the Administration and Probate Act 1958. In the matter of the estate of Carbo, Arthur, deceased. Partosh, Lisa Jane v Czarnik, Klaus (in his capacity as executor of the will of Arthur Carbo, deceased)

McMillan J

[\[2017\] VSC 686](#)

14/11/2017

JUDICIAL REVIEW - Building damaged by fire - Building Surveyor's Emergency Works Order - Refusal to cancel order - Judicial review sought of making of order and refusal to cancel it - Application to stay order - Stay refused - Building Act 1993 s102, s105.

Cremorne Commercial No 1 P/L (ACN 605 088 113) and Cremorne Commercial No 2 P/L (ACN 605 088 122) v Prince, Arnold (in his capacity as Municipal Building Surveyor)

Ginnane J

[\[2017\] VSC 714](#)

17/11/2017

JUDICIAL REVIEW AND APPEAL - Application to determine whether appeal brought within time - Whether matters alleged and orders sought are within jurisdiction of the Court - Appeal of decision of Victorian Legal Services Board to appoint external interveners for a law practice - Self-represented litigant - Legal Profession Uniform Law 2014, s358.

PRACTICE AND PROCEDURE - Appeal of decision of Victorian Legal Services Board to appoint external interveners for a law practice - Whether appeal is 'lodged' with the Registry of the Supreme Court when it is sent to the Registry by email - Distinction between 'lodged' and 'filed' - Angus Fire Armour v Customs (1988) 83 ALR 449 - Hong Ye v Minister for Immigration and Multicultural Affairs (1998) 153 ALR 327 - Linfox Transport (Aust) Pty Ltd v Toohey Legal [2004] VSCA 122 - Legal Profession Uniform Law 2014, s358 - Electronic Transactions (Victoria) Act 2000.

STATUTORY INTERPRETATION - Applicable Principles - Interpretation of Legislation Act 1984, s35(a) - Colonial Range Pty Ltd v CES-Queen (Vic) Pty Ltd [2016] VSCA 328. WORDS AND PHRASES - 'Lodged' - 'Filed'.

Kaczmariski, Eugene v Victorian Legal Services Board and Critchley, Matthew

Ierodiaconou AsJ

[\[2017\] VSC 690](#)

16/11/2017

JUDICIAL REVIEW - Evidence (Miscellaneous Provisions) Act 1958 (Vic), s28(2) - Whether a referral to the Victorian Civil and Administrative Tribunal under the National Law is a 'civil suit action or proceeding' within the meaning of s28(2) of the Act - Access to patient's medical records without consent - Statutory interpretation - Departure from previous decision of a trial judge - Health Practitioner Regulation National Law (Victoria) Act 2009 (Vic) - Royal Women's Hospital v Medical Practitioners Board [2005] VSC 225.

Kemp, Dr Geoffrey v Medical Board of Australia

J Forrest J

[\[2017\] VSC 691](#)

15/11/2017

JUDICIAL REVIEW - Natural justice - Apparent bias - Application for declaration of breach - Horse owner and director of Board of Racing Victoria allegedly disclosed information to horse trainers subject to cobalt investigation that their horses had tested positive - On referral from Racing Integrity Council of Racing Victoria, Racing Integrity Commissioner investigated allegations and made findings of misconduct against him - After delivery of confidential report to Racing Victoria, Commissioner unilaterally published media release disclosing findings and details of investigation - Whether gave rise to reasonable apprehension of bias - Whether fair-minded lay observer could reasonably conclude that Commissioner might not have fairly and impartially conducted investigation and made findings - Standard of impartiality expected of persons exercising statutory investigative functions - Commissioner in position of accuser (in effect) and investigator and determiner (in fact) - Relevance of subsequent conduct and statements when assessing whether a reasonable apprehension of bias can be maintained in respect of concluded proceeding or decision - Racing Act 1958 (Vic) s37A-s37E, Supreme Court (General Civil Procedure) Rules 2005 (Vic) O56.

Moodie, David v Racing Integrity Commissioner

Bell J

[\[2017\] VSC 693](#)

21/11/2017

PRACTICE AND PROCEDURE - Application for administrative transfer of proceeding to County Court - Proposed amendment to pleadings - New claims not justiciable in Supreme Court - Transfer application made after completion of pre-trial interlocutory steps - Interests of justice - Overarching purpose of case management in civil proceedings - Courts (Case Transfer) Act 1991, s26 - Civil Procedure Act 2010, s7, s8, s9 and s47 - AON Risk Services Australia Limited v Australian National University (2009) 239 CLR 175.

Miller, Daniel Charles v Miller, Graeme John and Graeme Miller Wines P/L (ACN 111 748 933)

McMillan J

[\[2017\] VSC 709](#)

21/11/2017

PRACTICE AND PROCEDURE - Application to amend statement of claim - Where amendment made to avoid summary dismissal application.

In the matter of the Estate of Wright, Rozalia, deceased. Molnar, Andreas v Butas, Zoltan (in his capacity as the Executor of the Estate of Wright, Rozalia, deceased) (No 2)

McMillan J

[\[2017\] VSC 710](#)

22/11/2017

PRACTICE AND PROCEDURE - Costs - Costs of proceeding up to and including trial - Indemnity costs - Offers of compromise - Calderbank offers - Settlement offers - Whether defendants unreasonably failed to agree to settlement offers proposed by the plaintiff - Whether defendants unreasonably failed to make settlement offers - Defamation Act 2005, s40 - Supreme Court (General Civil Procedure) Rules 2015, r26.02 and r26.08.

PRACTICE AND PROCEDURE - Overarching obligations - Alleged failure to disclose documents critical to resolution of dispute - impact of failure on Court's discretion as to costs - Civil Procedure Act 2010, s26, s28, s29.

PRACTICE AND PROCEDURE - Interest - Interest on defamation damages - Period over which interest to be paid - Entitlement to interest until judgment - Interest from the commencement of the proceeding - Whether good cause is shown to the contrary - Supreme Court Act 1986, s60.

Sheales, Damian v The Age Company P/L & Ors

John Dixon J

[\[2017\] VSC 605](#)

06/10/2017

PRACTICE AND PROCEDURE - Self-represented litigant - Application to vacate trial date - Numerous prior applications to vacate - No fresh evidence before the Court - Whether in the interests of justice to vacate - Case management principles - Civil Procedure Act 2010 s7 - Supreme Court (General Civil Procedure) Rules 2015 O13.

Hingst, David v Construction Engineering (Aust) P/L (ABN 623 9278 1199) (No 2)

Zammit J

[\[2017\] VSC 700](#)

21/11/2017

PROBATE - Application to remove executor - Allegation that executor in conflict between interest and duty - *Miller v Cameron* (1936) 54 CLR 572.

In the matter of the Estate of Wright, Rozalia, deceased. Molnar, Andreas v Butas, Zoltan (in his capacity as the Executor of the Estate of Wright, Rozalia, deceased) (No 3)

McMillan J

[\[2017\] VSC 711](#)

22/11/2017

REAL PROPERTY - Caveat - Previous caveat removed by Court order - Order that no caveat be lodged without leave - Titles Office knowledge of orders - Titles Office accepting lodgement of further caveat subject to proof that leave granted - No leave granted - Titles Office practice - Appropriateness of rejecting further caveat - Appropriate orders - Indemnity costs - Transfer of Land Act 1958 s90, s103, s104.

Andrews Family Holdings P/L (ACN 147 560 692) in its capacity as Trustee for the Shadow Glen Holding Unit Trust v Yellow Tractor P/L (ACN 151 340 519); Annesley, Paul David and The Registrar of Titles

Ginnane J

[\[2017\] VSC 695](#)

14/11/2017

REAL PROPERTY - Caveat - Removal of caveat - Whether a caveatable interest as a purchaser under a contract - Caveator not a party to contract - Caveator deregistered company - Whether promissory notice valid payment of purchase price - Caveat removed - Transfer of Land Act 1958 s90(3).

CONSTITUTIONAL LAW - Notices of constitutional questions - No constitutional issue arising in proceeding - Judiciary Act 1903 (Cth) s78B.

Andrews Family Holdings P/L (ACN 147 560 692) in its capacity as Trustee for the Shadow Glen Holding Unit Trust v Yellow Tractor P/L (ACN 151 340 519) ; Annesley, Paul David and The Registrar of Titles

Ginnane J

[\[2017\] VSC 682](#)

08/11/2017

Criminal Division

CRIMINAL LAW - Bail - Giving money to another person with the intention of supporting or promoting the commission of an offence against s6 of the Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth) - Entitlement to bail - Whether bail should be granted - Presumption of entitlement to bail - No relevant prior criminal history - Whether applicant unacceptable risk if released on bail - Whether risks ameliorated by imposition of strict conditions - Bail granted on strict conditions.

In the matter of the Bail Act 1977 and In the matter of an Application for Bail by Kocoglu, Isa

Beach JA

[\[2017\] VSC 715](#)

23/11/2017

CRIMINAL LAW - Bail - Second application to this Court - Charge of trafficking in a commercial quantity of drug of dependence, namely 1, 4-butanediol - Unrelated charges of fraud - Whether exceptional circumstances justifying bail - Whether applicant, if bailed, presents an unacceptable risk of, inter alia, interfering with witnesses - Delay of two years between arrest and completion of trial on drugs charge - Whether hardship to applicant because of absence of medication for ADHD while in custody makes delay more significant - Co-accused facing additional serious drugs charges bailed in interim - Surety of \$500,000 offered - Bail granted on strict conditions - *Bchinnati v DPP* [2016] VSC 815.

Bchinnati, Omar v Director of Public Prosecutions [DPP] (Vic) (No 2)

Croucher J

[\[2017\] VSC 620](#)

15/11/2017

CRIMINAL LAW - Sentence - Conspiracy to defraud the State of Victoria - Giving secret commissions - Offences occurred over four year period - Plea of guilty - Undertaking to give evidence against co-offenders - Other mitigating circumstances - Total effective sentence 4 years and 5 months with a minimum of 3 years.

The Queen v Salter, Darrel

John Dixon J

[\[2017\] VSC 698](#)

21/11/2017

CRIMINAL LAW - Sentence - Infanticide - Section 6 Crimes Act 1958 - Plea of guilty - Originally charged with murder - Diagnosed depressive disorder - Maximum penalty five years' imprisonment - Age of child a relevant sentencing factor - Denunciation - Just punishment - Where pre-sentence custody exceeds appropriate sentence - Community Corrections Order - Whether appropriate.

The Queen v Nikat, Sofina Shezia

Lasry J

[\[2017\] VSC 713](#)

23/11/2017

CRIMINAL LAW - Sentence - Murder - Spontaneous stabbing - Believed victim was paedophile - Early guilty plea - No remorse - Sentenced to 21 years' imprisonment with 17 years non-parole.

Director of Public Prosecutions [DPP] v Garner, James

Coghlan JA

[\[2017\] VSC 685](#)

09/11/2017

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.

COSTS - Calderbank offer - Multiple offers made - Short time for acceptance.

Westpac Banking Corporation v Anderson (No 2)

[\[2017\] VCC 1691](#)

Judge A Ryan

16/11/2017

DEFAMATION - APPLICATION TO JOIN ADDITIONAL DEFENDANTS - Defamation claim - Plaintiff seeking to join additional defendants on the basis of information obtained from documents discovered by existing defendants - Where limitation period has expired - Whether the test set out in s23B(2) of the Limitation of Actions Act 1958 (Vic) has been satisfied.

Donohue v Round & Ors (Ruling)

[\[2017\] VCC 1711](#)

Judge Smith

22/11/2017

GUARANTEE AND INDEMNITY - Deeds - Construction of deed of loan - Whether evidence of consideration required - Proof of advances - Estoppel by deed - Construction of guarantee and indemnity - Garcia defence - Burden of proof - Evidence of independent advice.

Taranto v Lopes

[\[2017\] VCC 1613](#)

Judge Woodward

22/11/2017

LIMITATION OF ACTIONS - Negligence - Personal injury in course of employment - Whether limitation period should be extended - Prejudice resulting from delay - Documents not retained - Almost 10 year delay.

Bevilacqua v Giovanni Costa & Sons Pty Ltd

[\[2017\] VCC 1474](#)

Judge Tsalamandris

16/11/2017

Magistrates' Court of Victoria Cases

Following is a selection of cases recently handed down in the Magistrates' Court of Victoria. If you would like your judgment added to the Library Bulletin, please email the reference librarian in your jurisdiction.

WORKERS COMPENSATION - Accident Compensation Act 1985 - Application by VWA to set-off weekly payments of compensation payable to worker pursuant to s 97 (4B) of the Accident Compensation Act 1985 against order for compensation made in its favour pursuant to s 86 of the Sentencing Act 1991.

Bruce Frederik Farrell v Deborah Ann Francis & Ors

[\[2017\] VMC 21](#)

Magistrate P Ginanne

22/09/2017

WORKERS COMPENSATION - Injury to both shoulders and psychological reaction - Termination of weekly payments - Whether "no current work capacity" likely to last indefinitely - Suitable employment - Whether ability to work part-time constitutes "current work capacity" - Accident Compensation Act 1985 s5 "suitable employment" "current work capacity", 93c(1)(a).

Angela Nandan v Keilor Hostel For The Aged Association Inc

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

Magistrate B R Wright

02/11/2017

WORKERS COMPENSATION - Workplace Injury Rehabilitation and Compensation Act 2013 - Bilateral knee injuries - Two claims - Accepted workplace injury - Whether plaintiff incapacitated for pre-injury duties - Limited value of surveillance footage - Whether plaintiff's account of pain exaggerated or psychological - Opinions of defendant occupational physician beyond scope of expertise - Work injury comprises material contribution to incapacity for pre-injury duties.

Stergios Xanthoulas v Eire Workforce Solutions Pty Ltd

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

Magistrate P Ginanne

23/11/2017

Articles

Listed below are articles indexed by the Library from journals added to our collection over the last two weeks.

Members of the Judiciary and Court staff please contact your Court Librarian if you require copies. Members of the Legal Profession and the public can view the journals in the Supreme Court Library.

Constitutional Law

Australian Constitution (Cth), Part IV, s116 - Religion - Religious freedom - Judicial interpretation - Terrorism - Migration Act 1958 (Cth) - Immigration - Adelaide Co of Jehovah's Witness Inc v The Commonwealth - Kruger v Commonwealth - Australia

Babie, P. "National security and the free exercise guarantee of section 116: time for a judicial interpretative update." (2017) 45(3) Fed L R 351-381 .

Fundamental rights - Freedoms - Popular sovereignty - Implied constitutional rights - Parliamentary sovereignty - Legislative power - Executive power - Australia

Duke, G. "Popular sovereignty and the nationhood power." (2017) 45(3) Fed L R 415-444.

Courts

Court administration - Budgets - Legal representation - Crown prosecutors - Prosecutions - Criminal proceedings - Magistrate Court - UK

Soubise, L. "Prosecuting in the Magistrates' courts in a time of austerity." [2017] (11) Crim L R 847-859.

Foreign States Immunities Act 1985 (Cth) - Foreign sovereign state - Commercial property - Commercial transactions - Firebird Global Master Fund II Ltd v Republic of Nauru - Australia

Douglas, M. and C. Carr. "The commercial exceptions to foreign state immunity." (2017) 45(3) Fed L R 445-468.

Jury - Juries - Composition - Lengthy trials - Jury direction - Complexity - Judge only trials - Research study - NSW - Australia
Elsley, L. "Are juries up to the job?" (2017)(39) LSJ 32-37.

Criminal Law & Procedure

Juries - Jury verdicts - Crown court - Minority groups - Ethnic minorities - Convictions - Disproportionality - Research study - UK

Thomas, C. "Ethnicity and the fairness of jury trials in England and Wales 2006-2014." [2017] (11) Crim L R 860-876.

Employment Law

Enterprise bargaining - Industrial action - Strike - Lockouts - Employees - Fair Work Act 2009 (Cth), s19, s418, s524 - Australia
Creighton, B., C. Denvir, and S. McCrystal. "Defining industrial action." (2017) 45(3) Fed L R 383-414.

Property Law

Retirement villages - Aged Care Act 1997 (Cth) - Ownership - Leasing - Contracts - Body corporate - Financial product - Corporations Act 2001 (Cth) - Law reform proposals - Australia

Latimer, P. "It's time for federal regulation of retirement villages." (2017) 45(3) Fed L R 185-493.

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