



## THE LAW LIBRARY OF VICTORIA

# Library Bulletin

12 October 2018

## Library News

### Lyrical Lunchtimes in October

Thursday 18 October, 1.15pm - 2.15pm

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

Join us for the last lunchtime concert for 2018. All are welcome, entry is free, no need to register. Take a seat or wander the beautiful surrounds and enjoy the music.

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

### SUBSCRIBE TO THE LIBRARY BULLETIN

If you would like to receive the Library Bulletin by email, please contact us at [llv@courts.vic.gov.au](mailto:llv@courts.vic.gov.au)

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



Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016 has just been published. Copies of the book can be ordered from the Supreme Court Library, please phone 03 9603 6282 for details.

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

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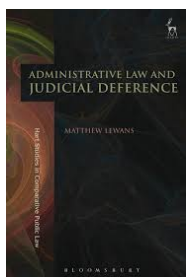
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# New Books

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

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

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



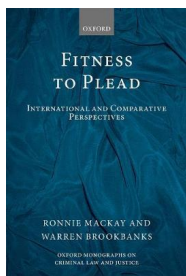
Administrative law and judicial deference

Matthew Lewans

Oxford : Hart Publishing, 2016

342.06 LEW (Supreme Court Library)

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



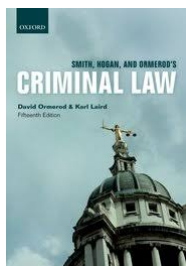
Fitness to plead : international and comparative perspectives

Edited by Ronnie Mackay and Warren J Brookbanks

Oxford, UK : Oxford University Press, 2018.

345.04 MAC (Supreme Court Library)

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



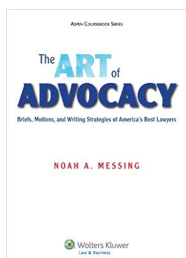
Smith, Hogan, and Ormerod's criminal law

David Ormerod, Karl Laird.

Oxford, United Kingdom : Oxford University Press, 2018.

345 SMI.15 (Supreme Court Library)

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



The art of advocacy : briefs, motions, and writing strategies of America's best lawyers

Noah A. Messing

New York : Wolters Kluwer Law & Business, 2013

347.052 MES (Supreme Court Library)

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



# Legislation

## Victorian Bills

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

## Victorian Assents

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

## Proclamations

No Victorian Proclamations have been made or come into operation by forced commencement since the last Library Bulletin.

## EXHIBITIONS IN THE LIBRARY

### Argus from 100 years ago

The Supreme Court Library has the Argus newspaper from 1918 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](#) [#argus1918](#)

# High Court of Australia Cases

CRIMINAL LAW - Prohibited drug - Appeal against conviction - Fresh evidence - Miscarriage of justice - Where appellant convicted of possession of prohibited drug with intent to sell or supply it to another - Where expert witness gave evidence at trial casting doubt on credibility of appellant's testimony - Where expert witness gave evidence in earlier proceedings inconsistent with evidence given in appellant's proceedings - Where earlier inconsistent evidence not disclosed to appellant at trial - Where Court of Appeal of Supreme Court of Western Australia admitted expert witness's earlier inconsistent evidence as fresh evidence but determined that no miscarriage of justice had occurred - Whether miscarriage of justice occurred.

WORDS AND PHRASES - "credible and cogent", "fresh evidence", "miscarriage of justice", "new evidence", "onus of proof", "significant possibility of acquittal", "yield".

*Misuse of Drugs Act 1981 (WA)*, ss 6(1)(a), 11(a).

## ***Rodi v Western Australia***

Kiefel CJ, Bell, Keane, Nettle and Gordon JJ

[\[2018\] HCA 44](#)

10 October 2018

EQUITY - Knowing assistance in breach of fiduciary duty - Remedies - Account of profits - Causation - Where employees of first respondent breached fiduciary duties to respondents by assisting appellant, and then joined appellant - Where appellant knowingly assisted in breaches of fiduciary duty - Where primary judge found profits of appellant's business not direct result of appellant's knowing assistance - Whether account of profits available.

EQUITY - Knowing assistance in breach of fiduciary duty - Remedies - Account of profits - Assessment of quantum - Whether knowing assistant obliged to account for entire capital value of business acquired - Whether account of profits may be ordered in respect of anticipated profits.

WORDS AND PHRASES - "account of profits", "actual profits", "anticipated profits", "as a result of", "but for", "causation", "disgorgement" "knowing assistance", "material contribution".

## ***Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd***

Kiefel CJ, Gageler, Keane, Nettle and Edelman JJ

[\[2018\] HCA 43](#)

10 October 2018

# Victorian Court of Appeal Cases

ADMINISTRATIVE LAW - Judicial review - Ultra vires - Discrimination law - Request to Human Rights Commission to conduct compliance review - Review directed at statutory authorities responsible for fire services - Review of authorities' programs and practices - Whether review requested by person whose compliance was to be reviewed - Request made by executive branch of Government - Separate legal personality of statutory authorities - Review not authorised by request - Whether alternative source of power available - Appeal allowed (by majority) - *Equal Opportunity Act 2010* ss 151, 152, 155, 157.

***United Firefighters' Union of Australia v Victorian Equal Opportunity and Human Rights Commission and Secretary to the Department of Justice and Regulation***

Maxwell P, Tate and Priest JJA

[\[2018\] VSCA 252](#)

4 October 2018

CRIMINAL LAW - Aggravated burglary - Sentence of 4 years, 6 months' imprisonment - Assault police officer in due execution of duty - Sentence of 3 years with 1 year, 6 months cumulation on sentence for aggravated burglary - Total effective sentence of 6 years' imprisonment with non-parole period of 4 years - Facts on which applicant pleaded guilty could not constitute offence of assaulting police officer in due execution of duty under s 31(1)(b) of *Crimes Act 1958* but could constitute offence of intentionally obstructing police officer under that section - Parties agree that indictment be amended under s 165 *Criminal Procedure Act 2009* to substitute correct charge - Crown concession that sentencing discretion reopened in respect of substituted charge - Resentenced to 2 years' imprisonment with cumulation of 1 year on substituted charge - Total effective sentence of 5 years, 6 months' imprisonment.

CRIMINAL LAW - Separate aggravated burglary - Sentenced by different judge to 4 years, 6 months' imprisonment - Possessing a firearm while a prohibited person - Sentence of 2 years, 3 months with 6 months' cumulation on sentence for aggravated burglary - Total effective sentence of 5 years - Judge ordered 2 years and 6 months of this sentence be served cumulatively on earlier sentence by different judge - Combined total effective sentence of 8 years, 6 months, with new single non-parole period of 6 years, 6 months - Judge intended pre-sentence detention for both sets of offences be reckoned as already served in respect of combined total effective sentence but failed to make declaration to that effect - Judge did not specify commencement date for new single non-parole period - Correctional authorities treated non-parole period as commencing on date of later sentence with effect that applicant would become eligible for parole approximately 1 year before end of combined total effective sentence rather than 2 years as intended by judge - No complaint about individual sentences or order for cumulation - Parties agree applicant should be resentenced solely for purpose of correcting pre-sentence detention declaration and end date for non-parole period - Orders accordingly.

CRIMINAL LAW - Sentence - Offender serving prior sentence when new sentence imposed - Fixing of new single non-parole period - Commencement date for that non-parole period - *Sentencing Act 1991* s 14 - *R v Rich (No 2)* (2002) 4 VR 155 considered.

***Spiteri, Stephen v The Queen***

Whelan and Kyrou JJA

[\[2018\] VSCA 254](#)

8 October 2018

CRIMINAL LAW - Appeal - Conviction for murder - Applicant inflicted fatal stab wound to deceased's neck during violent altercation - Numerous other stab wounds also inflicted - Whether verdict unsafe or unsatisfactory - Whether infliction of fatal wound conscious, voluntary and deliberate act - Mens rea - Whether substantial miscarriage of justice occurred by reason of both intentional and reckless murder having been left to the jury - Whether change in prosecution case gave rise to substantial miscarriage of justice - Application for leave to appeal refused.

***Herodotou, Elias v The Queen***

Beach, Kaye and Weinberg JJA

[\[2018\] VSCA 253](#)

4 October 2018

CRIMINAL LAW - Appeal against conviction - Applicant convicted of seven charges of sexual penetration of a child under 16 years - Convicted of two charges of indecent act with a child under 16 years - Whether judge erred in granting leave to cross-examine an unfavourable witness - Whether verdicts of the jury were unsafe and unsatisfactory - Application for leave to appeal against conviction refused.

CRIMINAL LAW - Appeal against sentence - Pleaded not-guilty - Applicant sentenced to 17 years nine months' imprisonment with a non-parole period of 13 years - Whether sentencing judge's discretion miscarried - Whether judge treated lack of regard by applicant to consequences of offending and lack of insight and remorse as aggravating factors.

***Deacon, Jesse (a Pseudonym) v The Queen***

Kaye, T Forrest JJA and Taylor AJA

[\[2018\] VSCA 257](#)

12 October 2018



CRIMINAL LAW - Appeal against conviction - Applicant convicted of three charges of sexual penetration of a child under 16 years and two charges of indecent act with a child under 16 years - Whether verdicts of guilty unreasonable or cannot be supported by the evidence - Whether jury must have entertained a reasonable doubt as to the veracity of the complainant's evidence - Whether substantial miscarriage of justice occurred - Whether note written by complainant outlining abuse admissible - Whether admitted by error - Application for leave to appeal against conviction refused.

CRIMINAL LAW - Appeal against sentence - Pleaded not-guilty - Applicant sentenced to six years nine months' imprisonment with a non-parole period of three years nine months - Whether sentencing judge erred in making orders for cumulation that were manifestly excessive - Whether total effective sentence manifestly excessive - Whether sentencing judge treated lack of remorse and lack of regard by applicant for consequences of offending as aggravating factors.

***Smith, Jenni Margaret v The Queen***

Kaye and T Forrest JJA and Taylor AJA

[\[2018\] VSCA 258](#)

12 October 2018

CRIMINAL LAW - Application for leave to appeal against sentence - One charge of grooming for sexual conduct a child under 16 years - Hundreds of explicit messages and images - Arrangement to meet for sex - Attended arranged meeting to carry out his intention with condoms - Believed victim was 14 - Plea of guilty - Sentenced to a total effective sentence of three years' imprisonment with a non-parole period of 15 months - Manifest excess - Seriousness of grooming offences - Not reasonably arguable that so far outside the range of a reasonable discretionary judgment as to itself bespeak error - Leave to appeal refused.

***Tuting, Sean Kerry v The Queen***

Tate JA

[\[2018\] VSCA 250](#)

1 October 2018

CRIMINAL LAW - Application for leave to appeal against sentence - Two charges of rape - One charge of threat to kill - Victim applicant's wife - Violence - Anal penetration contrary to Coptic religious faith - Anal injury - 'Extremely serious' offending - Absence of remorse - Exercise of dominion over victim's body by using physical force and ignoring distress - Specific deterrence - General deterrence - Sentenced as serious sex offender on third charge - Total effective sentence of 10 years 6 months - Non-parole period of 7 years 9 months - Whether manifestly excessive - Leave to appeal refused.

***Samuels, Hayden (a Pseudonym) v The Queen***

Tate JA

[\[2018\] VSCA 251](#)

1 October 2018

CRIMINAL LAW - Sentence - One charge of possessing firearm while a prohibited person, one charge of aggravated burglary and one charge of causing serious injury recklessly - Total effective sentence of 7 years, 9 months' imprisonment with non-parole period of 5 years, 9 months - Whether applicant doubly punished for possessing loaded firearm - Whether production of loaded firearm after entry into building relevant to aggravated burglary charge - Whether parity principle infringed - Application for leave to appeal refused.

***Salapura, Stevan v The Queen***

Whelan and Kyrou JJA

[\[2018\] VSCA 255](#)

8 October 2018

CRIMINAL LAW - Sentence - Two charges of intentionally causing a bushfire - Total effective sentence of 3 years, 9 months' imprisonment combined with a community correction order for 3 years, 9 months - Fires lit at base of two eucalyptus trees in a park reserve - Fires caused minor damage to trees and were extinguished before spreading - Appellant sentenced in 2001 to total effective sentence of 4 years' imprisonment for five arson charges - Appellant suffers from mental illness - Offending linked to alcoholism - While on remand, appellant underwent treatment and undertook courses that gave him insight into his offending - Crown concession of 'significant concerns' about severity of sentence - Sentence manifestly excessive - Resentenced to total effective sentence of 2 years, 9 months' imprisonment with community correction order for 2 years, 6 months.

CRIMINAL LAW - Community correction order - Whether electronic monitoring can be ordered under s 48LA of *Sentencing Act 1991* in relation to alcohol exclusion condition imposed under s 48J.

CRIMINAL LAW - Compensation order - Whether sentencing court has jurisdiction to make compensation order in favour of Country Fire Authority to recover costs of extinguishing fire - *Sentencing Act 1991* pt 4 divs 2 and 2B.

***Robson, Stuart Dean v The Queen***

Kyrou and Kaye JJA

[\[2018\] VSCA 256](#)

9 October 2018

LEGAL PRACTITIONERS - Disciplinary proceedings - Professional misconduct - Professional misconduct constituted by communicating in opponent's absence with court (magistrate) concerning matter of substance in current proceeding and without promptly telling opponent - Applicant found guilty of professional misconduct at VCAT - Application for leave to appeal to Trial Division refused - Application for leave to appeal Trial Division's refusal of leave to appeal from VCAT - Application for leave to appeal refused - *Legal Profession Act 2004*, s 4.4.3(1)(a) - *Professional Conduct and Practice Rules 2005*, rr 18.5 and 18.6 - *Victorian Civil and Administrative Tribunal Act 1998*, s 148.

LEGAL PRACTITIONERS - Disciplinary proceedings - Professional misconduct - Concessions made by applicant at VCAT - Points not argued below - Whether applicant should be permitted to resile from concessions or put arguments not put below - Whether communications concerned matter of substance - Whether VCAT findings contradictory - Whether any error of law in VCAT hearing or determination - Whether finding in breach of the *Charter of Human Rights and Responsibilities* - Whether permissible to charge applicant with 'course of conduct charge' - Whether applicant denied procedural fairness - Proposed appeal having no real prospect of success - Application for leave to appeal refused.

***Gullquist, Michael v Victorian Legal Services Commissioner***

Tate, Beach and McLeish JJA

[\[2018\] VSCA 259](#)

11 October 2018

# Supreme Court of Victoria Cases

CONTRACTS - General contractual principles - Interpretation and construction - Legal and equitable security interests - Whether equitable charge arises under loan agreements - Whether loan agreement gives rise to equitable security interest separately to formal Company Charge.

PRACTICE & PROCEDURE - Application to intervene - Present utility of leave - Contingent facts and interests necessary for leave to be of any utility.

## ***Down Town Visuals v Panorama Investments (No 2)***

Digby J

[\[2018\] VSC 584](#)

8 October 2018

## **Commercial Court**

CORPORATIONS - Receivers, managers and controllers - Application to restrain receivers - Jurisdiction over receivers - Where receivers appointed under security instrument - Whether appointment is valid - Whether power of appointment must be exercised 'reasonably' - Whether 'unreasonable' conduct is a ground for setting aside appointment - Relief refused - *Corporations Act 2001* (Cth), s 148A.

PRACTICE AND PROCEDURE - Urgent injunction application - Requirements for interlocutory injunction - Whether plaintiff can show serious question to be tried - Whether balance of convenience favours injunctive relief - Injunction refused.

## ***Northway Panels v Warry***

Digby J

[\[2018\] VSC 581](#)

24 September 2018

COSTS - Indemnity costs - *Colgate Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 - *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 - Breach of overarching obligations - *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302 - No reasonable basis of claims - Commencement and continuation of proceedings in wilful disregard of known facts - *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 - *J Corp Pty Ltd v Australian Building Labourers Federation Union of Workers (WA Branch) (No 2)* [1993] FCA 42 - *Macedon Ranges Shire Council v Thompson* [2009] VSCA 209 - Offers of compromise - Rejection of offer plainly unreasonable - *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority* (2005) 13 VR 435 - *Mischel v Mischel Holdings Pty Ltd (In liq)* [2012] VSC 421 - Non-party costs orders - *Civil Procedure Act 2010* ss 10, 29, pt 2.3 - *Supreme Court Act 1986* s 24(1) - *Supreme Court (General Civil Procedure) Rules 2015* r 63.31.

***Wilson v Waigani P/L & Ors (No 2)***

Croft J

[\[2018\] VSC 569](#)

2 October 2018

COURTS AND JUDGES - Application for disqualification for apprehended bias - Trial completed in 2 proceedings - Trial orders made - Completed applications for indemnity costs in both proceedings - Costs ruling given and orders made, except with respect to the costs of the indemnity costs applications - Application to disqualify made without notice immediately before the hearing on the costs of the indemnity costs applications - Whether findings in costs ruling give rise to a reasonable apprehension of bias - Application dismissed.

***United Petroleum Australia P/L & Ors v Herbert Smith Freehills (a firm) & Anor; Herbert Smith Freehills (a firm) v United Petroleum Australia P/L & Anor (No 3)***

Elliott J

[\[2018\] VSC 587](#)

8 October 2018

PRACTICE AND PROCEDURE - Confidentiality - Claim by purchaser of a gas storage facility against vendor for misleading and deceptive conduct and breach of warranty - Large damages claim - Whether the parties are trade rivals - Whether nature of information concerned and competitive relationship between the parties warrants documents being subject to a confidentiality regime - Documents directly relevant to issues in the proceeding - Documents confidential and commercially sensitive - Third party interests - Confidentiality regime imposed - *IOOF Holdings Ltd v Maurice Blackburn Pty Ltd (No 2)* [2016] VSC 594 applied.

***Lochard Energy (Iona Operations Holding) P/L & Ors v EnergyAustralia Investments P/L & Ors***

Daly AsJ

[\[2018\] VSC 539](#)

27 September 2018

PRACTICE AND PROCEDURE - Legal professional privilege - Claim in respect of documents produced by third party pursuant to plaintiff's subpoena - Section 131A of *Evidence Act 2008* (Vic) ('Act') does not apply - Third party engineering consultant retained by defendant during relevant period - Whether any duty of confidence owed, such that communications exchanged pursuant to retainer were confidential - Finding that retainer carried an implied obligation of confidence - Whether the nature of the retainer established or informed the purpose of individual communications initiated or received pursuant to that retainer - Finding that the scope of the third party's retainer informs the determination of the purpose of individual communications but not the question of protection by legal professional privilege - *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357, applied - Contract for sale between the parties contained provision for expert determination process - Meaning of 'Australian court' under the Act - Whether the common law doctrine of litigation privilege extends to the expert determination process - *Evidence Act 2008* (Vic), s 119 - *Dura Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2011] VSC 377, referred to - *AWB v Cole (No 5)* [2006] 155 FCR 30, applied - *Ingot Capital Investments Pty Ltd v Macquarie Capital Markets Ltd* (2006) 67 NSWLR 91, referred to - Finding that common law test does not extend to the expert determination process - Whether defendant has waived privilege by appointing the third party as its technical expert, or any 'issue waiver' - *Commissioner of Taxation v Rio Tinto* (2006) 151 FCR, 341, referred to - *Cargill Aust Ltd & ors v Viterro Malt Pty Ltd & ors (No 7)* [2018] VSC 99, applied - *Viterro Malt Pty Ltd & ors v Cargill Australia & ors* [2018] VSCA 118, applied - No waiver of privilege.

***Alphington Developments P/L (ACN 164 529 864) v Amcor Ltd (ACN 000 017 374) (No 3)***

Daly AsJ

[\[2018\] VSC 544](#)

20 September 2018

PRACTICE AND PROCEDURE - Preliminary discovery - Whether reasonable cause to believe that applicant has or may have right to obtain relief against respondent - Whether after making all reasonable inquiries, the applicant has not sufficient information to enable the applicant to decide whether to commence a proceeding in the Court to obtain that relief - Whether there is reasonable cause to believe that respondent has in its possession any document relating to the question whether the applicant has the right to obtain the relief and that inspection of the document by the applicant would assist the applicant to make the decision - *Supreme Court (General Civil Procedure) Rules 2015*, r 32.05.

***Asahi Beverages P/L (ACN 004 243 994) v RFGA Management P/L (ACN 071 765 609)***

Derham AsJ

[\[2018\] VSC 606](#)

12 October 2018

TAXATION AND REVENUE - Whether transfers of land to trustees exempt as transfer to trustee to be held solely as trustee for transferor - *Comptroller of Stamps v Yellowco Five Pty Ltd* [1993] 2 VR 529 - *Commissioner of State Revenue v Victoria Gardens Developments Pty Ltd* (2000) 46 ATR 61 - *White Rock Properties Pty Ltd v Commissioner of State Revenue* [2015] VSCA 77 - *Duties Act 2000* s 35(1)(a).

PRACTICE AND PROCEDURE - Victorian Civil and Administrative Tribunal - Appeal against Tribunal orders - *Victorian Civil and Administrative Tribunal Act 1998* s 148(1).

***MD Commercial P/L (ACN 156 573 983) and AJ Commercial P/L (ACN 156 573 992) v Commissioner of State Revenue***

Croft J

[\[2018\] VSC 560](#)

2 October 2018

TRUSTS - Whether liquidator entitled to treat assets as trust assets - Whether distribution of property to be governed by parts 5.5 and 5.6 of the *Corporations Act 2001* (Cth) - *Commonwealth v Byrnes (in their capacity as joint and several receivers and managers of Amerind Pty Ltd (recs & mgrs apptd) (in liq))* (2018) 354 ALR 789 and *Jones (in his capacity as liquidator of Killarnee Civil & Concrete Contractors Pty Ltd (in liq)) v Matrix Partners Pty Ltd* (2018) 354 ALR 436 applied.

COMPANIES - Winding Up - Application for orders under section 90-15 of Schedule 2 - Insolvency Practice Schedule (Corporations) to the *Corporations Act 2001* (Cth) - Whether liquidator entitled to relief from liability under section 1318 of the *Corporations Act 2001* (Cth) or section 67 of the *Trustee Act 1958* (Vic) - Whether liquidator entitled to be paid their remuneration, costs and expenses under section 556(1) of the *Corporations Act 2001* (Cth).

***Byrnes, Matthew in his capacity as liquidator of St. George's Development Company P/L (in liquidation) (ACN 149 242 955)***

Kennedy J

[\[2018\] VSC 595](#)

11 October 2018

## Common Law Division

COMPANIES - Whether advance by lender company was made to borrower company or to the effective controller of the borrower company personally - Advance deposited into borrower company account - Whether advance then became the property of the company even if intended to be for the controller personally - On the whole of the evidence advance intended to be made to effective controller of borrower company personally - Advance did not become the property of the company and is traceable to its later use - *Re Veli; Ex parte AE Developments Pty Ltd v Scott* (1988) FCR 204 considered and applied.

TRUSTS - Whether advance subject to a *Quistclose* trust - Evidence of lender and borrower that advance to be used to pay the deposit on purchase of identified property - Advance so used - Other factors that suggest that this was not the intended exclusive use of the advance - Conduct of borrower subsequent to the advance inconsistent with a mutual intention that advance could only be so used - Held: *Quistclose* trust in favour of lender not established - *Rambaldi (Trustee) v Commissioner of Taxation* [2017] FCA 567 distinguished.

***AAD Services P/L (In liq) v ALD Wholesale P/L & Anor***

Lansdowne AsJ

[\[2018\] VSC 585](#)

8 October 2018



CONSTRUCTIVE TRUST - Where plaintiff pleaded on oral declaration of trust - At trial claim recast to assert constructive trust based on written declaration of trust - No evidence of written declaration of trust - Claim dismissed

***Pescos, Stavros (also known as Steven Pescos) v Pescos, Eftihia***

McMillan J

[\[2018\] VSC 580](#)

2 October 2018

CONTEMPT OF COURT - Civil contempt - Breach of order and undertaking - Undertaking given by director of company - No reasonable basis for giving undertaking - Objective finding of contumacy - Conviction recorded - Sentencing principles - Whether 'double punishment' of company and officer - Company fined \$50,000 and director sentenced to four months' imprisonment - *Deputy Commissioner of Taxation v Gashi (No 3)* (2011) 85 ATR 262; *CFMEU v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527; *Vaysman v Deckers Outdoor Corporation Inc* (2014) 222 FCR 387 referred to.

***Moira Shire Council v Sidebottom Group P/L (ACN 102 558 869) and Australian Rubber Manufacturers P/L (ACN 086 752 329) (No 3)***

Zammit J

[\[2018\] VSC 556](#)

1 October 2018

CONTEMPT OF COURT - Newspaper publication in print and online - Express linkage of prior convictions with ongoing criminal proceedings - Previous general warning by DPP to avoid publishing material which has a tendency to prejudice the administration of justice - Previous specific warnings by DPP with respect to possible breach of sub judice contempt principle by publication of prior convictions - Plea of guilty - Apology - Remedial actions - Efficacy of systems to prevent inadvertent contempt - Specific deterrence - General deterrence - Conviction and fine - Indemnity costs.

***The Queen (on the application of the Director of Public Prosecutions) v Nationwide News P/L (ACN 008 438 828)***

Taylor J

[\[2018\] VSC 572](#)

2 October 2018

COSTS - Where applicant sought revocation of a grant of letters of administration on intestacy - Where applicant delayed and withheld relevant information during proceedings - No point of principle.

***In the matter of the Estate of Dusia Solowei (deceased). Soloway, Nicholas v Soloway, Barry***

McMillan J

[\[2018\] VSC 586](#)

4 October 2018

INTERPRETATION OF STATUTES - Whether Minister has power to revoke order under s 64(1) of the *Fisheries Act 1995* (Vic) where declaration has been made under s 64(1)(d)(i) of that Act - Minister has such power - Challenge fails - *Fisheries Act 1995* (Vic) ss 3, 38, 50B, 51, 52, 55, 57, 58, 59, 60, 61(1)(c), 64, 64A, 64AB, 65A, 66A, 66C, 66D, 66E, 67, 148(9), 152(3).

INTERPRETATION OF STATUTES - Whether power to make regulation setting a 'catch limit' as a condition on a licence giving access to a fishery where there is an order in place under s 64(1) of the *Fisheries Act 1995* (Vic) in respect of that fishery - There is such power - Challenge fails - *Fisheries Act 1995* (Vic) ss 3, 4 (definition of 'catch limit'), 38, 52, 53, 54, 55, 153, Schedule 3.

ADMINISTRATIVE LAW - Judicial review - Decision of Minister to revoke order made under s 64(1) of the *Fisheries Act 1995* (Vic) - Whether made for an impermissible purpose - Whether irrelevant considerations taken into account - Whether failure to take into account mandatory relevant considerations - Whether legally unreasonable - Whether failure to afford procedural fairness - No ground made out - Decision not invalid - *Fisheries Act 1995* (Vic) ss 3, 3A, 64.

ADMINISTRATIVE LAW - Judicial review - Making of *Fisheries Amendment (Catch Limit for Scallop Dive (Port Phillip Bay) Fishery) Regulations 2017* (Vic) - Whether made for an impermissible purpose - Whether failure to afford procedural fairness - No ground made out - Regulation not invalid - *Fisheries Act 1995* (Vic) ss 3, 55, 153(1).

ADMINISTRATIVE LAW - Judicial review - Decision of delegate of Minister to make order under s 64A(1) of the *Fisheries Act 1995* (Vic) - Decision effectively lapsed - Futile to consider challenge to process of making order - *Fisheries Act 1995* (Vic) s 64A.

***Port Phillip Scallops P/L (ACN 196 513 393) v The Minister for Agriculture for the State Of Victoria and The State of Victoria***

Cavanough J

[\[2018\] VSC 589](#)

5 October 2018

JURISDICTION - Cross-vesting - Application to transfer proceeding to Family Court - Claim against property brought by third party to matrimonial proceedings - Interests of justice criterion - Application dismissed.

***Geron, Aviel v Geron, Chaim; LB Geron Enterprises P/L (ACN 619 424 289); Andrews, Elizabeth Ruth and Registrar of Titles***

Moore J

[\[2018\] VSC 582](#)

9 October 2018

PLANNING AND ENVIRONMENT - Costs - Claim for compensation under s 100 of the *Planning and Environment Act 1987* (Vic) - Claim for interest under s 60(1) of the *Supreme Court Act 1986* (Vic) - Calderbank offer - Claim for indemnity costs - Prematurity - *Land Acquisition and Compensation Act 1986* (Vic) s 91 - *Hazeldene's Chicken Farm Pty Ltd v Victorian Work Cover Authority (No 2)* (2005) 13 VR 435; [2005] VSCA 298 - Award of costs.

***Minister for Energy, Environment and Climate Change v Megson, Patricia Suzanne and Morton, David Alex (as joint executors of the will of John Alex Morton) (No 2)***

Garde J

[\[2018\] VSC 583](#)

9 July 2018

PRACTICE AND PROCEDURE - Group proceeding - Solicitors for the defendant made settlement offers directly to group members - Whether solicitors for defendant may communicate with group members and insurers - Whether communications misleading or unfair - Whether improper conduct on behalf of the defendant - Ordered that further correspondence be sent to group members - *Supreme Court Act 1986* (Vic) s 33ZF.

***Lenehan, Anthony James v Powercor Australia Ltd (ACN 064 651 109)***

John Dixon J

[\[2018\] VSC 579](#)

3 October 2018

PRACTICE AND PROCEDURE - Joinder - Application by plaintiff by counterclaim to add parties - *Supreme Court (General Civil Procedure) Rules 2015* r 9.06(b) - Leave granted to join additional parties to counterclaim.

PRACTICE AND PROCEDURE - Application by plaintiff by counterclaim to amend counterclaim as against the fourth defendant by counterclaim - *Supreme Court (General Civil Procedure) Rules 2015* r 36.01 - *Mandie v Memart Nominees Pty Ltd* [2016] VSCA 4 - Relevant test whether amendments raise a claim or defence that has no real prospect of success - Amendments substantially allowed.

***Bowden, Steven v Murray Valley Aboriginal Cooperative; Murray Valley Aboriginal Cooperative v Ottrey, Leigh and Egan, Philip; Egan, Philip v Murray Valley Aboriginal Cooperative***

Ierodiaconou AsJ

[\[2018\] VSC 591](#)

8 October 2018

PRACTICE AND PROCEDURE - Preliminary discovery - Whether reasonable grounds to believe that applicants may have right to obtain relief against respondent - Whether sufficient information to enable applicants to decide whether to commence proceeding - *Supreme Court (General Civil Procedure) Rules 2015* r 32.05.

EVIDENCE - Parliamentary privilege - Statements made to Parliamentary Committees and reports of such Committees - Whether statements and reports may be tendered in evidence - Whether statements can be used to prove the truth of the facts contained in the statements - *Bill of Rights 1689* (UK) art 9; *Constitution Act 1975* (Vic) s 19; *Parliamentary Privileges Act 1987* (Cth) s 16(3); *Evidence Act 2008* (Vic) s 10.

***Victorian Taxi Families Inc and Redfield Court Holdings P/L (ACN 092 473 080) v Taxi Services Commission (ABN 90 176 780 477)***

Derham AsJ

[\[2018\] VSC 594](#)

12 October 2018

PROBATE - Application for grant of probate in common form - Objection to grant on grounds that deceased lacked testamentary capacity - Where plaintiff and defendant compromised proceeding as well as foreshadowed claim by defendant for further provision from the estate - Where non party residuary beneficiary did not consent to compromise - Validity of testamentary document to be determined by Court - Application for grant continued on undefended basis - Probate of will granted in solemn form - *Veall v Veall* (2015) 46 VR 123.

***In the matter of the Will and Estate of Vallance, Freda Marcel, deceased. Harper, Fiona Annette v Vallance, David John***

McMillan J

[\[2018\] VSC 573](#)

27 September 2018

PROBATE - Application for revocation of grant of probate - Whether particulars of grounds of undue influence and lack of knowledge and approval establish a prima facie case - *Re Kouvakas; Lucas v Konakas* [2014] NSWSC 786 - *Bridgewater v Leahy* (1998) 194 CLR 457 - *Nock v Austin* (1918) 25 CLR 519.

***In the matter of the will of Theodoulou, Antonios (in the will called Antonios Theodoulou (also known as Antonios Yianni Theodoulou), deceased. Ligidakis, Jane v Karatjas, Anne***

McMillan J

[\[2018\] VSC 601](#)

11 October 2018

PROBATE - Application to remove executors - *Administration and Probate Act 1958, s 34 - Trustee Act 1958, s 48.*

COURTS - Pseudonym order - Inherent jurisdiction of the Court - No proper basis for pseudonym order - *ABC v D1; Ex parte The Herald & Weekly Times Limited* [2007] VSC 480.

***Giurina, Licia Vittoria (who brings this proceeding via her administrator State Trustees Ltd) v Giurina, Ermanno Orlando (who is sued as co-executor of the estate of Irmano Eugenia Locher deceased)***

McMillan J

[\[2018\] VSC 599](#)

10 October 2018

PROBATE - Where caveator alleges deceased lacked testamentary capacity - Where caveator and plaintiff executed terms of settlement before determination of prima facie case for grounds of objection - Where caveator sought approval of compromise - *Dowling v St Vincent de Paul Society of Victoria Inc* [2003] VSC 454 - *Robinson v Jones (No 3)* [2015] VSC 508 - *Supreme Court (General Civil Procedure) Rules 2015*, r 15.08, r 54.02(2)(c)(i) - *Trustee Act 1958*, s 19(1)(f).

***In the matter of the Will of Wood, Dennis Edward (also known as Dennis Wood). James, Shandel Lea (as executor of the estate of Dennis Edward Wood, deceased)***

McMillan J

[\[2018\] VSC 597](#)

9 October 2018

WORKERS COMPENSATION - Impairment - Assessment - Medical Panel - Spinal impairment categories - Multilevel fracture of spinal segments - Whether constituted multilevel motion segment structural compromise - Whether 'fracture' - Meaning of 'fracture' - Proper test - Whether origin or cause of 'fracture' relevant - Whether there should be restriction or limitation on the meaning of 'fracture' - *American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition)* DRE Cervicothoracic Category IV Structural Inclusion (2) - *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) pt 6 - *Accident Compensation Act 1985* (Vic) s 91.

***Mohammed v Whittlesea City Council***

Garde J

[\[2018\] VSC 566](#)

3 October 2018

## Costs Court

COSTS - Application for review of the decision of an Associate Justice to uphold the order of the Costs Court - *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 63.57 - Whether the decision of the Associate Justice was attended by legal, factual or discretionary error - No arguable case for review - Application dismissed - *Hobsons Bay City Council v Viking Group Holdings Pty Ltd* [2010] VSC 286 (26 August 2010) - *Schweppes Limited v Archer* (1934) 34 SR (NSW) 178 - *Weingart v Leanne Cain & Associates (No 2)* [2018] VSC 245 (18 May 2018).

***Singh, Gurwinder v Slater and Gordon***

Keogh J

[\[2018\] VSC 574](#)

1 October 2018

## Criminal Division

CRIMINAL LAW - Application for bail - Applicant charged with 64 offences including rape, unlawful assault, contravene a Family Violence Intervention Order, persistent contravention of a Family Violence Intervention Order, attempt to commit an indictable offence, property damage and use a carriage service for child pornography material - requirement to show compelling reasons - whether unacceptable risk - bail opposed - *Bail Act 1977 (Vic)* ss 1B, 3AAA, 4C, 4E and 5AAAA - Bail refused.

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

Taylor J

[\[2018\] VSC 554](#)

21 September 2018

CRIMINAL LAW - Practice and procedure - Application for Change of Venue - Accused charged with murder - Regional location - Pre-trial publicity - *R v Iaria and Panozzo* [2004] VSC 96, applied - Adequacy of arrangements for accommodation of accused during trial - *R v Cardamone* [2017] VSC 225, applied - Application refused - *Criminal Procedure Act 2009*, s 192.

***The Queen v Allan, Jacob Thomas (Change of Venue)***

Taylor J

[\[2018\] VSC 571](#)

1 October 2018

CRIMINAL LAW - Sentence - Manslaughter - Plea of guilty - Parity - Nine years' imprisonment - Non-parole period of six years.

***The Queen v Smart, Ryan Charles***

Tinney J

[\[2018\] VSC 568](#)

26 September 2018

CRIMINAL LAW - Sentence - Manslaughter - Plea of guilty - Co-operation with authorities and undertaking to give evidence - Parity - Seven years six months' imprisonment - Non-parole period of four years six months.

***The Queen v Levy, Craig Jonathon***

Tinney J

[\[2018\] VSC 567](#)

26 September 2018

# County Court of Victoria Cases

Following is a selection of cases recently handed down in the County Court of Victoria. These cases have been selected for inclusion by the presiding judge. If you would like your judgment added to the Library Bulletin, please email the reference librarian in your jurisdiction.

CONTRACT - Furnishings hired out by agreement and not returned - Damages claimed - Agreement to buy chairs and share net proceeds of rental of those chairs and ownership of chairs - Terms of agreement disputed - Defendant paid \$30,427 towards chairs and was later repaid \$30,000 - Whether accord and satisfaction - Whether defendant entitled to any damages or delivery up of chairs.

***Natty v Breen***

Judge Marks

[\[2018\] VCC 1477](#)

14 September 2018

COSTS - Application for costs - Whether or not court should allow costs of both senior and junior counsel - Whether proceeding so complex as to justify briefing of senior counsel - Where legal principles not subject of substantive dispute.

***Harstedt Pty Ltd v Lopez & Ors (No 2)***

Judge Cosgrave

[\[2018\] VCC 1604](#)

5 October 2018

INSURANCE - Insurance contracts - Fraudulent misrepresentations - Whether insurer entitled to avoid the policy.

***Finadri v Westpac Life Insurance Services Ltd***

Judge Murphy

[\[2018\] VCC 1636](#)

10 October 2018



TORTS - Negligence - Duty of care - Solicitor and barristers - Failure to properly advise concerning settlement options - Failure to secure clear instructions - Assessment of prospects of success in original proceeding - Issues of construction and repudiation - Causation - Loss of opportunity to run proceeding to trial and determination - Advocate's immunity in relation to advice on settlement.

***Spralja v Bullard & Ors***

Judge Woodward

[\[2018\] VCC 437](#)

3 September 2018

# 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 jurisdictional librarian if you require copies. Members of the Legal Profession and the public can view the journals in the Supreme Court Library.

## Alternative Dispute Resolution

Expert determination - Court appointed experts - Courts - Judicial process - Litigation - Australia  
**Lubofsky, G. Setting aside expert determination: a comprehensive review. (2018) 92(7) ALJ 529-545**

## Constitutional Law

Choice of law - Rizeq v Western Australia - Pfeiffer v Rogerson - Judiciary Act 1903 (Cth), s79, s80 - Australia  
**Setllios, J. Choice of law in federal jurisdiction after Rizeq v Western Australia. (2018) 46(1&2) Aust Bar Rev 187 - 203**

## Contract Law

Contractual language - Interpretation - Ambiguity - True rule - Codelfa Construction Pty Ltd v State Rail Authority (NSW) - Australia  
**Prince, T. Still defending orthodoxy: the new front in the war on Codelfa. (2018) 46(1&2) Aust Bar Rev 156-169**

## Criminal Law & Procedure

Criminal liability - Domestic violence - Domestic abuse - Violence - Manslaughter - Suicide - Victims - Women - Risk assessment - UK  
**Munro, V. Aitken, R. Adding insult to injury? the criminal law's response to domestic abuse-related suicide in England and Wales. [2018] (9) Crim L R 732-741**

Evidence - Criminal investigations - Disclosure - Sexual assault - Rape - Sexual abuse - Police powers - Miscarriage of justice - UK

**Smith, T. The "near miss" of Liam Allan: critical problems in police disclosure, investigation culture, and the resourcing of criminal justice. [2018] (9) Crim L R 711-731**

Sentencing - Dangerousness - Dangerous offenders - Protective custody - Imprisonment - Serious harm - Public protection - Risk assessment - R v Smith - Criminal Justice Act 2003 (UK), s224-235 - UK

**Harris, L. Walker, S. Difficulties with dangerousness: the timing of the assessment of risk - part 1. [2018] (9) Crim L R 695-710**

Sentencing - Offenders - Domestic violence offence - Law reform - Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017 (NSW) - NSW

**Mizzi, P. The sentencing reforms: balancing the causes and consequences of offending with community safety. (2018) 30(8) JOB 73-80**

Sentencing - Sentencing guidelines - Sentencing outcomes - Prosecution - Conviction - Penalties - Courts - Judges - Victoria

**Farmer, C. et al. Sentencing inconsistencies: a case study. (2018) 92(7) ALJ 517-528**

## Employment Law

Whistleblowers - Implied freedom - National security - Criminalisation - Unauthorised disclosure - Asylum seekers - Refugees - Political communication - Crimes Act 1914 (Cth), s70 - Public Interest Disclosure Act 2013 (Cth) - Australian Security Intelligence Organisation Act 1979 (Cth), s35P - Australian Border Force Act 2015 (Cth), s42 - Australian Constitution - Australia

**Ireland-Piper, D Crowe, J. Whistleblowing, national security and the constitutional freedom of political communication. (2018) 46(3) Fed L Rev 341-365**

Whistleblowing - Reporting misconduct - Retaliation - Codes of Conduct - Confidentiality agreements - Research study - United States - Canada - Australia

**Dixon, O. 'Pretaliatory' enforcement action for chilling whistleblowing through corporate agreements: lessons from North America. (2018) 46(3) Fed L Rev 427- 453**

## Equity

Equitable compensation - Fiduciary duties - Factual causation - Legal causation - Scope of duty - Deceit - Australia

**Hafeez-Baig, M. Legal and factual causation in equitable compensation claims against defaulting fiduciaries. (2018) 46 (1 &2) Aust Bar Rev 79-103**

Equitable doctrine of accident - Accident - Negligence - History - Marshalling - Junior creditors - Tanwar Enterprises Pty Ltd v Cauchi - Across Australia Finance Pty Ltd v Kalls - Reserve Bank Information Transfer System - RITS - PEXA - Australia

**Mellos, M. An accident waiting to happen: questioning the relevance of the equitable doctrine of accident. (2018) 46(1&2) Aust Bar Rev 126-155**

Financial agreements - Duress - Undue influence - Unconscionable conduct - Family law - Thorne v Kennedy - ANZ Banking Group v Karam - Australia

**Maherm, F. Clarity or confusion? Duress, undue influence and unconscionable conduct in the High Court. (2018) 12(1) J Eq 91-118**

## Legislation

Statutory interpretation - Interpretive approach - Modern approach - Compatibility - Statutory text - High Court - Saeed v Minister for Immigration and Citizenship - Australia

**Meagher, D. The 'modern approach' to statutory interpretation and the principle of legality: an issue of coherence? (2018)46(3) Fed L Rev 397-425**

Statutory interpretation - Meaning thesis - Pragmatic meaning - Australia

**Blaker, J. A statute's meaning need not be its law. (2018) 46(3) Fed L Rev 455-479**

## Practice &amp; Procedure

Injunctions - Extraterritorial injunctions - Jurisdiction - Foreign court - Forum non conveniens - Internet content - "Right to be forgotten" - Requests for removal - Globalisation - Google - UK - US - Canada - Australia

**Douglas, M. Extraterritorial injunctions affecting the internet. (2018) 12(1) J Eq 34-57**

## INFORMATION SESSIONS

The Law Library of Victoria hosts regular information sessions on how to use specific legal research databases.

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Visit our website for upcoming events [lawlibrary.vic.gov.au](http://lawlibrary.vic.gov.au)



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## Law Library of Victoria

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