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ISSUE 11



PUBLIC SECTOR NEWSLETTER - NEW SOUTH WALES

Welcome to the first edition of the Thomson Geer Public Sector Newsletter for 2017, the year starting with the resignation of the New South Wales Premier Mike Baird.

In this edition includes:

- The NSW Court of Appeal's decision to uphold the planned amalgamation of Woollahra, Waverley and Randwick Councils.
- The NSW Law Reform Commission's consultation paper relating to mediation and options for implementation including the application of the provisions to non-statutory mediation.
- Materials released by the NSW Information Commissioner to assist agencies in satisfying their obligations to create and update their Agency Information Guide.

MEDIA

Vivid Festival risk assessment 'fundamentally flawed'

An inquest into the drowning death of Irishman Brendan Hickey during Sydney's Vivid festival in 2014 finds a risk assessment for the event did not identify the risk posed by the water's open edge.

<http://www.abc.net.au/news/2016-12-22/brendan-hickey-drowning-inquest-finds-risk-assessment-flawed/8141132>

NSW making third party insurance claims law clear

A new report by the NSW Law Reform Commission (LRC) recommends replacing a 70-year-old insurance law to reduce uncertainty for insurers, the business community and consumers. Businesses are concerned the old law could prevent their directors and officers from having their legal costs covered by their insurer when defending civil actions.

<http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2016/making-third-party-insurance-claims-law-clear.aspx>

Resolving legal disputes away from court (NSW)

Attorney General Gabrielle Upton is encouraging the community to have a say on how to make it easier to resolve legal disputes without going to court. The Law Reform Commission's consultation paper proposes to standardise ADR. The community, lawyers and mediators can have their say until 17 March 2017.

<http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2016/resolving-legal-disputes-away-from-court.aspx>

CASES

[Woollahra Municipal Council v Minister for Local Government \[2016\] NSWCA 380](#)

STATUTORY CONSTRUCTION – Local Government Act 1993 (NSW) (LGA), s

218E – proposals to alter the boundaries of or amalgamate local government areas – meaning of “proposal” – whether proposal to amalgamate constituted “proposal” – referral of proposal by Minister to Departmental Chief Executive for examination and report pursuant to LGA, s 218F – ss 218F(2) and 263(2A) require that inquiry be held for the purpose of function of examination and report in relation to a proposal for the amalgamation of two or more areas – delegate of Department Chief Executive conducted consultations with public but did not actively ask questions – delegate met with accounting firm conducting analysis and modelling privately – whether statutory requirement of “inquiry” met – meaning of “inquiry” – role of “inquiry” in exercise of functions of examination and report by Delegate of Department Chief Executive

ADMINISTRATIVE LAW – examination and report on proposal for local government amalgamation by delegate of Departmental Chief Executive pursuant to LGA, s 218F – mandatory relevant considerations pursuant to ss 218F(2) and 263(3)(a)-(f) – whether delegate required to have regard to financial advantages or disadvantages of proposal for residents and ratepayers of individual local government areas concerned and whether delegate conducted examination

PROCEDURAL FAIRNESS – extent of obligation to afford procedural fairness – whether delegate under a duty to notify affected local government council of key material upon which it proposed to rely in preparation of report – no absence or loss of opportunity to make submissions in relation to material – review and comment by Boundaries Commission following referral of proposal for local government amalgamation to delegate of Departmental Chief Executive for examination and report pursuant to LGA s 218F – extent of obligation to afford procedural fairness – whether Boundaries Commission’s required to afford affected local government council reasonable opportunity to respond to delegate’s report

ADMINISTRATIVE LAW – proposal for amalgamation of local government areas under LGA s 218E – accounting firm provided public statements regarding Minister’s proposal for amalgamation of three local government areas – statements represented that accounting firm had conducted “independent analysis and modelling” – whether accounting firm independent – whether statements misleading – whether

misleading statements impugned statutory process under LGA

[Millers Point Fund Incorporated v Lendlease \(Millers Point\) Pty Ltd \[2016\] NSWLEC 166](#)

JUDICIAL REVIEW – request to modify Barangaroo concept plan – whether PAC correctly construed Casino Control Act 1992 – whether PAC properly exercised its powers, duties and functions under s 75W of the Environmental Planning and Assessment Act 1979 - request to modify Barangaroo concept plan - whether PAC took into account irrelevant considerations in contravention of s 75W of the Environmental Planning and Assessment Act 1979

JUDICIAL REVIEW – development application to construct Crown Casino Hotel Resort in Barangaroo – whether contingent on the modification of the Barangaroo concept plan

JUDICIAL REVIEW – development application to construct Crown Casino Hotel Resort in Barangaroo – whether PAC took into account irrelevant consideration in contravention of s 79C of the Environmental Planning and Assessment Act 1979

[Secretary, Department of Planning and Environment v AGL Energy Limited; Secretary, Department of Planning and Environment v AGL Upstream Infrastructure Investments Pty Limited \[2017\] NSWLEC 2](#)

SENTENCING – characterisation of offences – approach to consideration of offences collectively – accumulation and totality where multiple offences – fines imposed

SENTENCING - publication orders – availability to be ordered when legislation providing for them came into force after commission of offences but before charges laid – legislative prohibition on retrospective application of increased penalty – held publication orders are to be characterised as a penalty and not able to be required in these circumstances

CRIMINAL PROCEDURE – prosecutor’s application for moiety of fines imposed – purpose for ordering such payment being to compensate for investigation and other expenses – statutory power now available to make additional order for such purposes – appropriate to make an order in present circumstances

[Commissioner of Police v Danis \[2017\] NSWCATAP 7](#)

GOVERNMENT INFORMATION (PUBLIC ACCESS) – Agency refusal to deal with

access application – Set aside by Tribunal – Appeal – Interpretation of agency discretion to refuse to deal with access application – Whether Tribunal’s further order requiring agency to disclose within scope of proceedings. Government Information (Public Access) Act 2009, ss 58, 60(1)(d); Administrative Decisions Review Act 1997, s 65.

[Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner \[2016\] FCAFC 184](#)

STATUTORY INTERPRETATION – Remedies for contravention of statutory prohibitions – Civil proceeding for penalty – Additional power to make any order considered appropriate – Whether power to order another person not to indemnify respondent against his or her liability to pay penalty. PRACTICE AND PROCEDURE – Natural justice – Financial report of respondent tendered for limited purposes including demonstration of its asset base and revenue – Whether report could be used for another purpose not stated at trial – Whether respondent denied natural justice by extended use of report without warning. PRACTICE AND PROCEDURE – Natural justice – In fixing penalty for contravention of statute, whether primary judge entitled to infer, from previous proceedings, the existence of a “strategy” by respondent to conduct litigation in a certain way – Whether respondent entitled to be warned of the possibility of such an inference.

[Bird v Registrar, Federal Court of Australia \[2016\] FCAFC 188](#)

PRACTICE AND PROCEDURE – where a registrar of the Federal Court of Australia refused to accept application for mandamus, habeas corpus and related orders for filing – where primary judge held that application constituted an abuse of process – whether primary judge erred in law in dismissing application – grounds of appeal misguided – cross-vesting – appellant seeks relief against State official and tribunals – Federal Court does not have jurisdiction to grant relief against State officials and tribunals – Federal Court of Australia Act 1967 (Cth) s 23, Judiciary Act 1903 (Cth) s 39B(1A) PRACTICE AND PROCEDURE - appellant invited to show cause why vexatious proceeding order should not be made pursuant to s 37AO Federal Court of

Australia Act 1976 (Cth) – conclusion that applicant had instituted proceedings frequently and without reasonable cause in Australian courts – s 37AO order made Constitution ss 75, 76; Administrative Decisions (Judicial Review) Act 1977 (Cth)

[Roadshow Films Pty Ltd v Telstra Corporation Ltd \[2016\] FCA 1503](#)

COPYRIGHT – Section 115A of Copyright Act 1968 (Cth) – where proceedings brought by copyright owners against carriage service providers (“CSPs”) providing internet access to customers – whether CSPs should be ordered to take reasonable steps to disable access to various online locations that infringe or facilitate the infringement of copyright – proper interpretation of s 115A(1) – appropriate form of injunctions and ancillary orders relating to existing and future scope and operation of injunctions – whether applicants should be required to pay CSPs’ costs of complying with injunctions and, if so, in what amounts – whether applicants should pay CSPs’ costs of the proceedings

[The Australian and Prime Minister of Australia \[2016\] AICmr 84](#)

Freedom of Information – Whether the Prime Minister’s diary is an official document of a Minister – Whether disclosure could reasonably be expected to cause damage to international relations of the Commonwealth or Commonwealth-State relations – Whether the document contains deliberative matter prepared for a deliberative process – Whether disclosure of personal information unreasonable – (CTH) Freedom of Information Act 1982 ss 4(1), 33, 47B, 47C, 47F

[CDV v Illawarra Shoalhaven Local Health District \[2016\] NSWCATAD 302](#)

PRIVACY – Personal Information – Health Information – Conflict of Evidence – Weight of Evidence – Civil Standard – Absence of Evidence of Breach – Possibility of Breach

[Seven Network v Commissioner of Police, NSW Police Force \[2017\] NSWCATAD 31](#)

GOVERNMENT INFORMATION – Applicant withdrew proceedings for review of a decision to refuse access to information – Tribunal dismissed proceedings – Whether Tribunal has jurisdiction to review the decision the subject of the proceedings which have been dismissed – No power to

renew or reinstate proceedings – Tribunal
functus officio - No jurisdiction

PRACTICE AND PROCEDURE

AAT Bulletin

[Issue no 1 2017](#)

[Issue no 2 2017](#)

Attorney-General's appointments announced for 2017

[Administrative Appeals Tribunal](#)

Seventeen appointments to the AAT
announced.

[Federal Circuit Court](#)

Amanda Tonkin appointed to the Canberra
Registry of the Federal Court of Australia.

[Solicitor-General](#)

His Excellency the Governor-General has
accepted the advice of the Government
to appoint Dr Stephen Donaghue QC as
Solicitor-General of the Commonwealth of
Australia.

Attorney-General's Department: Telecommunications Data in Civil Proceedings

A consultation paper has been released
for public comment in particular on
the circumstances in which parties to
civil proceedings request access to
telecommunications data; the impact on
civil proceedings if parties are unable to
access telecommunications data and the
kinds of civil proceedings or circumstances
where the Telecommunications Act 1997
No. 47 (Cth) should not apply. Submissions
close on 27 January 2017.

[https://www.ag.gov.au/Consultations/
Pages/Access-to-telecommunications-
data-in-civil-proceedings.aspx](https://www.ag.gov.au/Consultations/Pages/Access-to-telecommunications-data-in-civil-proceedings.aspx)

Council of Australasian Tribunals National Conference, 8-9 June 2017

COAT National conference will be held
in conjunction with the COAT NSW
Conference in Sydney on 8 & 9 June 2017.

<http://www.coat.gov.au/>

High Court of Australia: The Honourable Justice Stephen Gageler

The Equitable Duty of Loyalty in Public
Office. Chapter in Bonyhady (ed.) Finn's
Law: An Australian Justice, (Federation
Press, 2016).

[http://www.hcourt.gov.au/assets/
publications/speeches/current-justices/
gagelerj/Gageler_Chapter_from_Bonyhady_
Text_File.pdf](http://www.hcourt.gov.au/assets/publications/speeches/current-justices/gagelerj/Gageler_Chapter_from_Bonyhady_Text_File.pdf)

ICAC: Statements and alerts

[Prosecution briefs with the DPP and
outcomes](#)

NCAT: Updated forms

The NSW Civil and Administrative Tribunal
(NCAT) have released the following updated
forms: [Financial management application](#)
and [Guardianship application](#).

[http://www.ncat.nsw.gov.au/Pages/
announcements/20161221_new_look_
forms_to_apply_for_a_guardian_or_
financial_manager.aspx](http://www.ncat.nsw.gov.au/Pages/announcements/20161221_new_look_forms_to_apply_for_a_guardian_or_financial_manager.aspx)

NSW Information and Privacy Commission: Agency Information Guide guidance materials released

The NSW Information Commissioner,
Elizabeth Tydd, has released a range of
materials to assist agencies in satisfying
their obligations to create and update
their Agency Information Guide (AIG) in
accordance with Part 3, Division 2, of the
*Government Information (Public Access)
Act 2009* (GIPA Act). These materials
stem from recommendations in the IPC's
report, [Towards a NSW Charter for Public
Participation](#)

[http://www.ipc.nsw.gov.au/news-media/
news/nsw-information-commissioner-
releases-agency-information-guide-
guidance-materials#](http://www.ipc.nsw.gov.au/news-media/news/nsw-information-commissioner-releases-agency-information-guide-guidance-materials#)

NSW Law Reform Commission: Dispute resolution model provisions consultation

The NSW Law Reform Commission has
released for public comment [Consultation
Paper 18 - Dispute resolution: model
provisions](#). Comments close on 17 March
2017.

[http://www.lawreform.justice.nsw.gov.
au/Pages/lrc/lrc_current_projects/
disputeresolution/CP18.aspx](http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/disputeresolution/CP18.aspx)

NSW Supreme Court: Practice Note SC CL 2 - Criminal Proceedings

The purposes of the released [Practice
Note SC CL 2: Supreme Court Common
Law Division - Criminal Proceedings](#), are
to ensure timely and efficient dealings
of criminal proceedings and to assist an
accused person to take advantage of
legislation which provides for a discount
in sentence where an early plea of guilty is
entered.

[http://www.lawlink.nsw.gov.au/practice_
notes/nswsc_pc.nsf/a15f50afb1aa22a9ca257
0ed000a2b08/458355aa6dfafc09ca25808b
0000e643?OpenDocument](http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/458355aa6dfafc09ca25808b0000e643?OpenDocument)

LEGISLATION

New South Wales

Proclamations

- [Law Enforcement Conduct Commission Act 2016 No 61 \(2017-1\)](#) – published LW 13 January 2017

KEY CONTACTS

PANEL RELATIONSHIP CONTACTS

Your contacts responsible for navigating our firm, connecting you with the appropriate expertise and achieving maximum efficiency.

Instructions may be emailed to nswgovtlegal@tglaw.com.au at anytime.



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HELP DESK SERVICES

Thomson Geer is delighted to offer access to NSW Government to its Legal Help Desk on our usual terms of engagement and as set out below.

Scope

We are pleased to be able to work collaboratively with NSW Government to offer the following services (at no charge):

- advice regarding discrete and non-complex legal queries – up to 30 minute teleconference with a Partner, Special Counsel or relevant Senior Associate or, short written advice (max. 1 page);
- the opportunity to 'brainstorm' or discuss topical and complex legal issues with industry specialists – up to 30 minute teleconference with a Partner, Special Counsel or relevant Senior Associate; and
- advice regarding potential transactions – up to 30 minute teleconference with a Partner, Special Counsel or relevant Senior Associate.

(Help Desk Services)

Please note that the Help Desk Services are only available in respect of any matter which is currently unallocated i.e. to this firm or any other firm.

Key Contact and Help Desk Process

You can access the Help Desk by:

- (a) Calling 02 8248 5810; or
- (b) Emailing legalhelpdesk@tglaw.com.au

Once relevant details are received from you (whether that be by email or over the phone) it will be directed to the appropriate Thomson Geer Partner, Special Counsel or Senior Associate. The Help Desk number and email address will be monitored during normal business hours (9.00 am to 5.00 pm (EST), Monday to Friday).

Thomson Geer will use its best endeavours to provide the Help Desk Services within one business day of the query being logged.

SUB-PANEL APPOINTMENTS

Thomson Geer are appointed to the following NSW Government sub-panels:

- | | |
|--|--|
| 1(c) Major commercial matters (incl. ICT) | 4(f) Discrimination |
| 2(a) Commercial and contractual matters | 6(b) General litigation and dispute resolution |
| 4(a) Employment and industrial relations law | 6(c) Debt recovery |

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