

29 MARCH 2017

ISSUE 14



## PUBLIC SECTOR NEWSLETTER - NEW SOUTH WALES

In **BREAKING NEWS**, the [Court of Appeal determines local government council merger proposal was denied procedural fairness in merger fight](#), as reported in recent [news](#).

In other news this fortnight, her Honour Justice Ward has been appointed as the new Chief Judge in Equity in The New South Wales Supreme Court, replacing her Honour Justice Bergin who is retiring.

### MEDIA

#### New Supreme Court judges in NSW

Attorney General Mark Speakman has announced the appointments of a new Chief Judge in Equity, a new judge of appeal and two new Supreme Court judges.

<http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2017/New-Supreme-court-judges0308-7633.aspx>

<http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2017/new-nsw-supreme-court-judge-appointed.aspx>

#### Unconscious bias training now available to all Australian lawyers

In a national first, a customised unconscious bias training program aimed specifically at the legal profession is now accessible from this week.

[http://www.lawcouncil.asn.au/lawcouncil/images/1714\\_-\\_Unconscious\\_bias\\_training\\_now\\_available\\_to\\_all\\_Australian\\_lawyers.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/1714_-_Unconscious_bias_training_now_available_to_all_Australian_lawyers.pdf)

#### Audit Office of NSW – CBD and South East Light Rail Project

A report was released in November 2016 by the NSW Auditor-General on the CBD and South East Light Rail Project. Transport for NSW is on track to deliver the project, but it will come at a higher cost with lower benefits than in the approved business case. <http://www.audit.nsw.gov.au/publications/latest-reports/cbd-and-south-east-light-rail-project>

#### Australian National Audit Office - The Approval and Administration of Commonwealth Funding for the WestConnex Project

The ANAO assessed whether appropriate steps were taken to protect the Commonwealth's interests and whether value for money was obtained in respect to the \$3.5 billion in Commonwealth funding committed to the NSW Government for the WestConnex project.

<https://www.anao.gov.au/work/performance-audit/approval-and-administration-commonwealth-funding-westconnex-project>

### CASES

[Minister for Indigenous Affairs v MJD Foundation Limited \[2017\] FCAFC 37](#)

ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES – Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) – whether scheme of Act evinces an intention that an administrative decision to grant funding from the Aboriginal Benefits

Account be revocable  
 ADMINISTRATIVE LAW – whether s 33 of Acts Interpretation Act 1901 (Cth) authorises the revocation of an administrative decision  
 STATUTES – interpretation – whether s 33 of Acts Interpretation Act 1901 (Cth) authorises the revocation of an administrative decision

[Chief of the Defence Force v Gaynor \[2017\] FCAFC 41](#)

CONSTITUTIONAL LAW – implied freedom of political communication – termination of respondent’s commission in Australian Defence Force – regulation 85 of the Defence Force (Personnel) Regulations 2002 (Cth) – primary judge set aside termination because respondent’s political comments protected by implied freedom of political communication – appeal allowed – primary judge erred in applying Lange test at wrong level – McCloy v State of New South Wales [2015] HCA 34; (2015) 89 ALJR 857 applied

CONSTITUTIONAL LAW - s 116 of the Constitution – s 116 not engaged  
 ADMINISTRATIVE LAW – primary judge found no administrative grounds made out – respondent contended primary judge erred in applying ss 5(1)(b), (f), (h), 5(2) (a), (b), (c) of the Administrative Decisions (Judicial Review) Act 1977 (Cth) – primary judge correct to reject administrative law challenges

[Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd \(No 8\) \[2017\] FCA 233](#)

PRACTICE AND PROCEDURE – reasons for judgment originally published in redacted form because of public interest in maintaining confidentiality of informer and integrity of pending criminal investigation – application by informer for listing of restriction on publication – absence of continued public interest in non-publication Held: restriction on publication lifted. Judgment published in unredacted form. Australian Competition & Consumer Commission v Chaste Corporation Pty Ltd (No 6) [2013] FCA 1112; (2013) 223 FCR 426; Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 7) (2015) 235 FCR 563

[Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission \(Freedom of information\) \[2017\] AATA 269](#)

FREEDOM OF INFORMATION – exemptions claimed under ss 42 (legal professional privilege), 45 (breach of confidence), 47C (deliberative processes) -47E(d) (certain operations of agencies), 47F (personal privacy) and 47G (business interests) of the Freedom of Information Act 1982 – varied.

[ALZ v SafeWork NSW \[2017\] NSWCATAP 51](#)

PRIVACY – health information – complaint about conduct of internal review into previous contravention of Privacy and Personal Information Protection Act 1998 (NSW) and Health Records and Information Privacy Act 2002 (NSW) - meaning of “lawful purpose” when collecting personal and health information - relationship of Information Protection Principles and Health Privacy Principles to one another – effect of contravention of collection principles on contravention of use principles

[Miskelly v Transport for NSW \[2017\] NSWCATAD 75](#)

Government Information (Public Access) – public interest considerations in favour of disclosure – public interest considerations against disclosure – weight of evidence – presumption in favour of disclosure not displaced.

[Bronze Wing International Pty Ltd v SafeWork NSW \[2017\] NSWCA 41](#)

ADMINISTRATIVE LAW – decision cancelling licences and security clearance under Explosives Act 2003 (NSW) – whether holders were fit and proper persons – external review by NCAT at first instance and on appeal to Appeal Panel – further appeal on question of law to Supreme Court – further appeal to Court of Appeal – nature and extent of appeal on question of law – whether error need be shown in decision of Appeal Panel – whether denial of procedural fairness – whether Briginshaw test applied to findings by NCAT – construction of Explosives Act 2003 s 6 – relevance of conduct of proceedings and evidence of licensees to determination of fitness and propriety – appeal dismissed further appeal to Court of Appeal – nature and extent of appeal on question of law – whether error need be shown in decision of Appeal Panel – whether denial of procedural fairness – whether Briginshaw test applied to findings by NCAT – construction of Explosives Act 2003 s 6 – relevance of conduct of proceedings and evidence of licensees to determination of fitness and propriety – appeal dismissed



[Meriton Property Services Pty Limited & Ors v UrbanGrowth NSW \[2017\] NSWCATAD 71](#)

Access to government information - access application - information contained in tender documents - overriding public interest against disclosure - prejudice the supply of confidential information that facilitates the effective exercise of an agency's functions - disclosure of information provided in confidence - reveal commercial-in-confidence provision in a government contract - diminish the competitive commercial value of any information to any person- prejudice any person's legitimate business, commercial and financial interests

[CNP v Commissioner for Fair Trading \[2017\] NSWCATAD 70](#)

PRIVACY – Personal Information – Absence of Evidence of Breach – Whether hearing information amounts to a collection – Whether information held – Data protection

[Joseph v NSW Commissioner of Police \[2017\] NSWCA 31](#)

ADMINISTRATIVE LAW – refusal of an application for the issue of a firearms dealer licence under the Firearms Act 1996 (NSW) – evidence relating to the applicant's allegedly fraudulent conduct – criminal charges withdrawn but conduct established on the balance of probabilities – conduct relevant to the licence application – a lesser standard of proof than the criminal standard could be applied in making findings concerning the conduct – relevance of reasons for withdrawal of criminal prosecution ADMINISTRATIVE LAW – refusal of an application for the issue of a firearms dealer licence under the Firearms Act 1996 (NSW) – whether decision maker obliged to refer to relevant material where no express or implied statutory obligation to consider it and adequate reasons for the decision given

[Lazarus v Independent Commission Against Corruption \[2017\] NSWCA 37](#)

CONSTITUTIONAL LAW - Commonwealth Constitution, Chapter III - implied limitation on State legislative power - State statute validating acts undertaken by ICAC which were beyond power - statute extended to acts relevant to pending criminal appeals - whether impermissible interference in judicial process or repugnancy to integrity of judicial function STATUTORY

CONSTRUCTION - statute validating past acts undertaken by ICAC - whether validation extended to acts connected with pending criminal proceedings - both applicants had pending appeals against conviction when statute commenced - evidence in Crown case against one applicant obtained pursuant to summonses issued by ICAC which were beyond power - other applicant convicted of giving false or misleading evidence to ICAC in the course of investigation which was beyond power - whether presumption against retrospectivity caused statute not to apply to validate conduct which was the subject of pending criminal proceedings - relationship between submissions on statutory construction and constitutional validity

[Fairfield City Council v Abergeldie Contractors Pty Ltd \[2017\] NSWSC 166](#)

ADMINISTRATIVE LAW – judicial review – reviewable decisions and conduct – whether jurisdictional error in making Adjudicator Determination BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) – service of payment claim in respect of reference date CONTRACTS – construction contract – interpretation of contractual terms – “date of practical completion” – when “practical completion” occurred

[Sternberg v Blue Mountains City Council \[2017\] NSWCATAD 67](#)

GOVERNMENT INFORMATION – Decision to refuse to confirm or deny that agency holds information – Whether overriding public interest against disclosure of information confirming or denying that fact – Whether this is to be determined by applying balancing test under s 13

[Attia v Health Care Complaints Commission \[2017\] NSWSC 178](#)

ADMINISTRATIVE LAW – appeal from decision of the Civil and Administrative Tribunal that the plaintiff's registration as a pharmacist be cancelled – where cancellation order implemented by a separate statutory agency prior to commencement of appeal – application for interlocutory restorative injunction – whether Court has power to order the agency to reinstate the plaintiff's name to the register pending determination of the appeal – factors relevant to the exercise of any such discretion

[Ansoul v City of Sydney \[2017\] NSWCATAD 65](#)

GOVERNMENT INFORMATION – access to report of investigation of workplace issues – functions of Council – public interests against disclosure - confidential information - personal information – risk of harm or serious harassment or serious intimidation – legitimate business interests

[CJL v Children’s Guardian \[2017\] NSWCATAD 63](#)

ADMINISTRATIVE LAW-Working with Children Check Clearance sought by way of an enabling order under section 28 of the Child Protection (Working with Children) Act 2012 (NSW)- disqualifying offence under section 61N(2) of the Crimes Act 1900 (NSW)for an act of indecency with a person 16 years and over – conviction in Local Court to a bond under section 10 (1) (b) of the Crimes (Sentencing Procedure) Act 1999 (NSW) for 12 months – sentence treated as a conviction under section 5 Child Protection (Working with Children) Act 2012 (NSW) - assessment of risk posed by applicant- whether the applicant has proven he is not a risk to the safety of children - Tribunal not bound by the rules of evidence - onus of proof- onus of proof not discharged by applicant- enabling order refused

[Anderson v Tweed Shire Council \[2017\] NSWCATAD 61](#)

ADMINISTRATIVE LAW – access to government information – access application – whether disclosure could reasonably be expected to prejudice third person’s interests

## PRACTICE AND PROCEDURE

### OAIC: Centrelink release of personal information into the public domain

The office is making inquiries with the Department of Human Services. Government agencies are entrusted with a significant amount of personal information. This information must be handled in accordance with the Australian Privacy Principles.

<https://www.oaic.gov.au/media-and-speeches/statements/centrelink-debt-recovery-system#centrelink-release-of-personal-information-into-the-public-domain>

### AANA Advertising Code of Ethics

The Australian Association of National Advertisers (AANA) [released its latest addition to the Advertising Code of Ethics](#), which will come into effect on March 1. Slotting into the code under newly made section 2.7, the new provision states, “advertising or marketing communication must be clearly distinguishable as such to the relevant audience”.

### AAT Bulletin

The AAT Bulletin is a weekly publication containing a list of recent AAT decisions and information relating to appeals against AAT decisions.

<http://www.aat.gov.au/AAT/media/AAT/Files/Bulletins/09-17.pdf>

### New South Wales Land and Environment Court - eCourt website

The Land and Environment Court (LEC) has advised that the old eCourt website will be decommissioned on 10 March 2017. The LEC provides information on the procedures for solicitors seeking to retrieve any data from the former eCourt system (including a record of documents filed).

<http://www.lec.justice.nsw.gov.au/Pages/news/news.aspx>

### Right to Information and Privacy Practitioners Network forum

The NSW Right to Information/Privacy Practitioners Network meets regularly to share information about the Government Information (Public Access) Act 2009 (GIPA Act) and privacy matters that affect staff working in the NSW public sector. See the calendar for 15 February 2017 to 15 November 2017.

<http://www.ipc.nsw.gov.au/news-media/events/nsw-right-information-and-privacy-practitioners-network-forum-0>

### NSW ICAC: Prosecution briefs with the DPP and outcomes

Tables showing outcomes of ICAC-related prosecutions and briefs with the Director of Public Prosecutions. Updated 9 March 2017. [Prosecution briefs with the DPP and outcomes](#)

### NSW IPC: Consultation on guidance materials

The NSW Information Commissioner is

seeking feedback on three sets of draft materials developed to provide guidance to regulated sectors under the Government Information (Public Access) Act 2009 (GIPA Act). The consultation period was open until 6 March 2017.

<http://www.ipc.nsw.gov.au/consultation-guidance-materials>

### Management of Selected Fraud Prevention and Compliance Budget Measures

The objective of the audit was to assess the Department of Human Services' and the Department of Social Services' management of selected fraud prevention and compliance Budget measures.

<https://www.anao.gov.au/work/performance-audit/management-selected-fraud-prevention-and-compliance-budget-measures>

## LEGISLATION

### Commonwealth

#### Public Governance, Performance and Accountability Amendment (Fair Work Ombudsman and Registered Organisations Commission Entity) Rules 2017

10/03/2017 -This instrument amends Schedule 1 to the Public Governance Performance and Accountability Rule 2014 to list the Fair Work Ombudsman and Registered Organisations Commission Entity as a PGPA Act entity and repeals the item that lists the Office of the Fair Work Ombudsman as it has been combined into the foregoing entity.

<https://www.legislation.gov.au/Details/F2017L00201>

### Bills

#### Parliamentary Entitlements Amendment (Ending the Rorts) Bill 2017

Registered 27 Feb 2017 Introduced HR 27 Feb 2017. A Bill for an Act to amend the law in relation to parliamentary entitlements, and for related purposes This bill seeks to provide greater accountability and transparency in the administration of Members of Parliament and Senators' work expenses. It responds to significant community concern about the recent misuse of work expenses by a number of parliamentarians. The bill provides for a retrospective audit of all Members' and Senators' travel claims from the period

following the 2013 federal election to the present and requires annual audits to take place in the future. It requires parliamentarians to list the substantive activities – both work-related and personal – undertaken on official travel so the public can have confidence that Commonwealth-funded travel is being undertaken in accordance with both the law and community expectations. It also provides a mechanism for law enforcement agencies to be contacted when there has been misuse of work expenses.

<https://www.legislation.gov.au/Details/C2017B00032>

### Acts

#### Privacy Amendment (Notifiable Data Breaches) Act 2017

Act No. 12 of 2017 as made 27/02/2017

<https://www.legislation.gov.au/Details/C2017A00012>

### Regulations

#### Privacy Amendment (Energy and Water Utilities) Regulations 2017

This regulation amends the Privacy Regulation 2013 to extend permission for energy and water utilities in the Australian Capital Territory and the Northern Territory to disclose credit information.

<https://www.legislation.gov.au/Details/F2017L00170>

### NSW

#### Regulations and other miscellaneous instruments

- [Administrative Arrangements \(Administrative Changes—Law Enforcement Conduct Commission\) Order 2017](#) (2017-60) — published LW 8 March 2017
- [Drug and Alcohol Treatment Regulation 2017](#) (2017-62) — published LW 10 March 2017
- [Explosives Amendment \(Temporary Amnesty\) Regulation 2017 \(2017-63\) — published LW 10 March 2017](#)
- [Local Government \(General\) Amendment \(Minimum Rates\) Regulation 2017 \(2017-64\) — published LW 10 March 2017](#)



## Bills introduced Government

- [Local Government Amendment \(Rates—Merged Council Areas\) Bill 2017](#)

## Non-Government

- [Crimes Amendment \(Zoe's Law\) Bill 2017](#)

- [Public Health \(Medicinal Cannabis\) Bill 2017](#)

## Bills passed by both Houses of Parliament

- [Fines Amendment Bill 2017](#)

## KEY CONTACTS

### PANEL RELATIONSHIP CONTACTS

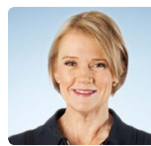
Your contacts responsible for navigating our firm, connecting you with the appropriate expertise and achieving maximum efficiency.

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### DEDICATED LIBRARIAN

Available to assist NSW Government and agencies as required, at no charge.



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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](mailto: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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