

16 JUNE 2017

ISSUE 20



## PUBLIC SECTOR NEWSLETTER - NEW SOUTH WALES

Former NSW Labor minister Ian Macdonald was sentenced to ten years (with a non-parole period of seven years) in prison after being found guilty of misconduct in public office <https://www.caselaw.nsw.gov.au/decision/5923622ce4b058596cba6b6d>

Mr Obeid has appealed against his conviction for misconduct in public office and sentence, with the appeal being heard in Sydney recently.

This followed the announcement by the NSW Government of the introduction of legislation to strip former politicians of their taxpayer-funded pension entitlement if they are convicted of a serious criminal offence during their time in office. <https://www.nsw.gov.au/your-government/the-premier/media-releases-from-the-premier/parliamentary-pension-entitlements-2/>

### MEDIA

#### Review of victims' role in sentencing in NSW

Attorney General Mark Speakman has requested the Sentencing Council to review victims' input into the sentencing of offenders to examine whether they can have a stronger voice or be given more support. The Sentencing Council will also examine how the current sentencing process affects victims and will research positive developments in other Australian and overseas jurisdictions (05 June 2017)

<http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2017/Review-of-victims%27-role-in-sentencing.aspx>

#### Judge Johnstone reappointed as Children's Court President

Judge Peter Johnstone's term as President of the Children's Court of NSW has been extended for a further four years. (03 June 2017)

<http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2017/judge-johnstone-reappointed-as-childrens-court-president.aspx>

#### General Data Protection Regulation guidance for Australian businesses

The OAIC has published new guidance for Australian businesses on the European Union's General Data Protection Regulation (GDPR) requirements. In the lead-up to the commencement of the GDPR requirements, businesses should confirm whether they are covered by the GDPR, and if so, take steps to implement any necessary changes to ensure compliance (31 May 2017)

<https://www.oaic.gov.au/media-and-speeches/news/general-data-protection-regulation-guidance-for-australian-businesses>

#### Introducing the APS Privacy Code

As part of an address to the AGS FOI and Privacy Forum on May 19, Commissioner Pilgrim outlined the reasons and aspirations behind the introduction of the APS Privacy Code (26 May 2017)

<https://www.oaic.gov.au/media-and-speeches/news/introducing-the-aps-privacy-code>

#### Sheriff's Office Boosts Ranks & Lauds Its Best

The new Sheriff's Officers will be deployed to courts in Sydney and major regional centres in NSW, such as Coffs Harbour, Dubbo, Newcastle and Tamworth. They will be part of a workforce of more than 280 Sheriffs responsible for court security, administering the jury system, performing seizures of assets and evictions (26 May 2017)

<http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2017/Sheriffs-office-boosts-rank-and-lauds-its-best.aspx>

#### Reconciliation can be advanced by constitutional change

A PwC report makes a range of excellent evidence-based recommendations that align with Law Council positions. These include identifying opportunities for Indigenous self-determination, designing better through care and reintegration programs to reduce recidivism,

improving cultural awareness, investing more in prevention and early intervention (26 May 2017)

<https://www.lawcouncil.asn.au/media/media-releases/reconciliation-can-be-advanced-by-constitutional-change>

#### **IPC: NSW Taking Action against Revenge Porn**

The NSW Attorney General has given notice in the NSW Parliament to introduce a Bill to amend the Crimes Act 1900 to create offences relating to non-consensual recording and distribution of intimate images. The 'revenge porn' Bill recognises the serious impacts that can occur when individuals lose their privacy in this devastating manner says Privacy Commissioner (25 May 2017)

<http://www.ipc.nsw.gov.au/news-media/news/nsw-taking-action-against-revenge-porn>

#### **NSW Criminal Courts Statistics 2016**

Between 2012 and 2016, the median delay in the NSW District Court between committal for trial and finalisation rose by 56%, from 243 days to 378 days. The median time between arrest and trial finalisation is now 714 days (up from 512 days in 2012). This increase has occurred against the backdrop of substantial increases in the workload of both the District Criminal Court (24 May 2017)

[http://www.bocsar.nsw.gov.au/Pages/bocsar\\_news/NSW-Criminal-Courts-Statistics-2016.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_news/NSW-Criminal-Courts-Statistics-2016.aspx)

#### **Safer Pathway Program: Victim experiences**

The first evaluation of the effect of the new Safer Pathway program on the safety of victims of domestic violence has shown mixed results, according to a new report released today by the NSW Bureau of Crime Statistics and Research (23 May 2017)

[http://www.bocsar.nsw.gov.au/Pages/bocsar\\_news/cjb202-Safer-Pathway-Program-Victim-experiences.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_news/cjb202-Safer-Pathway-Program-Victim-experiences.aspx)

#### **CASES**

[Australian Energy Regulator v Australian Competition Tribunal \(No 3\) \[2017\] FCAFC 80](#)

The Court has upheld the applications for judicial review in respect of the Tribunal's construction of the Rules in relation to the value of imputation credits (gamma). The Court has otherwise dismissed the AER's applications.

ADMINISTRATIVE LAW – application for judicial review of decision of the Australian Competition Tribunal (Tribunal) reviewing decision of the Australian Energy Regulator (AER) – nature and scope of review by the Tribunal – whether the Tribunal erred in its construction of provisions of the National Gas Law or National Gas Rules – return on debt – transition between methods of deciding the return on debt – where the AER did not allow revision of the service provider's proposal – whether the Tribunal purported to review a decision of a type that did not fall within its jurisdiction - Administrative Decisions (Judicial Review) Act 1977 (Cth) s 3, Sch 3

[Australian Energy Regulator v Australian Competition Tribunal \(No 2\) \[2017\] FCAFC 79](#)

The Tribunal had set aside the AER's Final Decisions

and remitted the matter to the AER to make the decisions again in accordance with certain directions.

ADMINISTRATIVE LAW – application for judicial review of decision of the Australian Competition Tribunal (Tribunal) reviewing decisions of the Australian Energy Regulator (AER) – nature and scope of review by the Tribunal – whether the Tribunal erred in its construction of provisions in the National Electricity Rules relating to the determination of the rate of return on debt, the value of imputation credits and the operating expenditure criteria – whether the Tribunal allowed the distribution network service providers to raise matters that were not raised and maintained by them in submissions to the AER, contrary to s 71O(2) of the National Electricity Law

Administrative Decisions (Judicial Review) Act 1977 (Cth) s 3, Sch 3

[State of New South Wales \(Department of Justice - Corrective Services\) v Huntley \[2017\] FCA 581](#)

HUMAN RIGHTS – direct discrimination - whether unlawful discrimination in employment on ground of a disability contrary to sections 5 and 15 Disability Discrimination Act 1992 (Cth) - whether failure to make reasonable adjustments for the aggrieved person contrary to section 5(2) – where employer did not allege at trial that making the adjustments would impose an unjustifiable hardship – where short-term return to work only put in place contrary to medical advice - whether defence in section 21A that aggrieved person unable to carry out the inherent requirements of the particular work established – where employer relied at trial upon generic documents to establish inherent requirements – whether discrimination of a nature covered by the section 21A defence – where failure by employer to comply with its policies subjected aggrieved person to a detriment and denied aggrieved person access to a benefit

DAMAGES – where no issue raised at trial as to quantum of damages – whether assessment of damages tainted by erroneous finding of breach of implied term of trust and confidence in employment contract

PRACTICE AND PROCEDURE - where issues raised for the first time on appeal – where prejudice to respondent – leave refused to raise new issues

EVIDENCE – section 79, Evidence Act 1995 (Cth) - where medical reports annexed only to affidavits of other witnesses - observations on failure to provide medical reports in admissible form

[Commonwealth of Australia \(as represented by the Department of Infrastructure and Regional Development v Uren & Ors \(No.2\) \[2017\] FCCA 1014](#)

ADMINISTRATIVE LAW – Commonwealth tenancy dispute – termination of long term tenancy agreement – application for extension of time within which to apply for a warrant of possession – extension necessitated by respondents' appeal and stay of orders previously made – consideration of circumstances of respondents – discretion

under s.121 of the Residential Tenancies Act 2010 (NSW) – application for extension of time granted

[Ellis v Junction Group Pty Ltd Trading As V Burger Bar \[2017\] FCCA 1045](#)

PRACTICE AND PROCEDURE – Dismissal for non-appearance – where no application to appear other than in person – where applicant aware of necessity to make application to appear other than in person.

[Sea Shepherd Australia and Department of Immigration and Border Protection \(Freedom of information\) \[2017\] AICmr 48](#)

Freedom of Information – Whether disclosure could cause damage to the international relations of the Commonwealth – (CTH) Freedom of Information Act 1982 s 33(a)(iii)

[Morgan v District Court of New South Wales \[2017\] NSWCA 105](#)

ADMINISTRATIVE LAW – judicial review – relationship between criminal jurisdiction at first instance and jurisdiction on appeal by way of rehearing – review of decision of District Court in its criminal jurisdiction on appeal from Local Court – where Local Court committed jurisdictional error by summarily hearing indictable offence and convicting applicant – whether District Court committed jurisdictional error by dismissing appeal – whether misconstruction of statutory elements of offence by inferior court constitutes jurisdictional error CRIMINAL LAW – particular offences – offences relating to postal services, telecommunications and computers – meaning of “offensive” in Criminal Code (Cth), s 474.17(1) – whether Criminal Code (Cth), s 474.17(1) limited to communications received by persons in s 474.17(2) ADMINISTRATIVE LAW – judicial review – relief – where only one order that inferior court could make consistent with Supreme Court’s reasoning – whether Supreme Court should make that order in exercise of supervisory jurisdiction

[CRP v Department of Family and Community Services \[2017\] NSWCATAD 164](#)

PRIVACY – Personal Information – Whether work address personal information – Basis of disclosure – Purpose of disclosure – Conflict in evidence – Closure of parties cases prior to consideration of all evidence – Request for residue to be determined without hearing – Appropriate remedies – Powers of Tribunal to make orders and recommendations

## PRACTICE AND PROCEDURE

### AAT Bulletin

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

[Issue No. 22/2017, 29 May 2017](#)

[Issue No. 21/2017, 22 May 2017](#)

### OAIC: Notifiable Data Breaches draft resources

Draft resources on the Notifiable Data Breaches (NDB) scheme have been published to assist organisations in understanding their compliance obligations from 22 February 2018. The OAIC is still in the process of developing resources about a number of other topics relating to the NDB scheme. These will be published on the OAIC website, any comments on the draft resources are open until 14 July 2017.

<http://www.oaic.gov.au/ndb>

### AHRC: OPCAT submissions

The Human Rights Commissioner has released a consultation paper and a call for submissions on Australia’s implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The Federal Government intends to ratify OPCAT by December 2017. Parties wishing to respond to the OPCAT consultation paper should do so by 21 July 2017 (25 May 2017)

[Consultation paper and Call for submissions](#)

### ANAO: Performance audit in-progress

Due to table: July, 2017, the audit objective is to assess the effectiveness and efficiency of entities’ implementation of the Freedom of Information Act 1982.

[Administration of the Freedom of Information Act 1982](#)

### AIJA Court Media Officers’ Conference

The Conference will be held Thursday 31 August and Friday 1 September 2017 in Sydney

<https://aija.org.au/events/court-media/>

### Commonwealth Consultations

October 2017 - Closing date for comments to the FCA on the General Practice Notes

<http://www.fedcourt.gov.au/law-and-practice/practice-documents/new-practice-notes>

### NSW Law Society Submissions May 2017

[Criminal Legislation Amendment \(Organised Crime and Public Safety\) Act 2016](#)

[First review of the Dust Diseases scheme](#)

### ICAC: Early bird discount registration now open for the Australian Public Sector Anti-Corruption Conference

Register by 15 August 2017, to take advantage of the early bird discount, via the APSACC 2017 website

[Early bird discount registration now open for the Australian Public Sector Anti-Corruption Conference](#)

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

Tables of prosecution briefs with the DPP and outcomes, last updated 26 May 2017

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

**ICAC public inquiry into corruption allegations concerning former Immigrant Women's Health Service CEO (Operation Tarlo)**

The ICAC Operation Tarlo public inquiry has adjourned until Tuesday 13 June 2017

[ICAC public inquiry into corruption allegations concerning former Immigrant Women's Health Service CEO \(Operation Tarlo\)](#)

**ARTICLES, PAPERS, REPORTS****ANAO: Corporate Planning in the Australian Public Sector**

The objective of the audit was to assess the selected entities' progress in implementing the corporate planning requirements under the Public Governance, Performance and Accountability Act 2013 and related PGPA Rule 2014

<https://www.anao.gov.au/work/performance-audit/corporate-planning-australian-public-sector-2016-17>

**LEGISLATION****Commonwealth****Enhancing Online Safety (Intimate Images and Other Measures) Legislative Rules 2017**

These Rules confer an additional function on the Children's eSafety Commissioner to improve the online safety of Australians at risk of having intimate images of themselves shared without their consent and develop a seniors' digital learning portal and outreach program to increase the digital literacy and online safety skills of older Australians

[Enhancing Online Safety \(Intimate Images and Other Measures\) Legislative Rules 2017](#)

**Terrorism Insurance Act 2003 – Risk Retention Direction 2017**

This direction increases the maximum retention levels for individual reinsureds to \$12.5 million, and increases the maximum industry retention to \$150 million on 1 July 2017, and to \$200 million on 1 July 2018. The direction repeals the Treasurer to Australian Reinsurance Pool Corporation (Risk Retention) Direction 2003 and Treasurer to Australian Reinsurance Pool Corporation (Risk Retention) Direction 2007

[Terrorism Insurance Act 2003 – Risk Retention Direction 2017](#)

**National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017**

The Bill addresses many of the issues raised in these inquiries for the NDIS. For people with disability, their families and carers, the Bill contains national obligations and standards which apply to all NDIS providers and workers, including through an NDIS Code of Conduct and arrangements for reporting and complaints with appropriate protections and sanctions

[National Disability Insurance Scheme Amendment \(Quality and Safeguards Commission and Other Measures\) Bill 2017](#)

**Social Services Legislation Amendment (Relieving Domestic Violence Victims of Debt) Bill 2017**

This bill inserts provisions into the A New Tax System (Family Assistance) (Administration Act) 1999 and the Social Security Act 1991 to allow social security and family assistance debts to be waived in cases of domestic or family violence

[Social Services Legislation Amendment \(Relieving Domestic Violence Victims of Debt\) Bill 2017](#)

**Statute Update (Winter 2017) Bill 2017**

A Bill for an Act to make various technical and minor amendments of the statute law of the Commonwealth, to repeal certain obsolete Acts

[Statute Update \(Winter 2017\) Bill 2017](#)

**Government Procurement (Judicial Review) Bill 2017**

The Government Procurement (Judicial Review) Bill 2017 (the Bill) will vest the Federal Circuit Court of Australia (FCC) with jurisdiction (concurrently with the Federal Court of Australia) to grant an injunction and/or order payment of compensation in relation to a contravention of the relevant Commonwealth Procurement Rules (CPRs), so far as those rules relate to a covered procurement.

Introduced and read a first time 25 May 2017; Second reading moved 25 May 2017

[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r5871](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5871)

**NSW****Regulations and other miscellaneous instruments**

[Passenger Transport Amendment \(Ticket Offences\) Regulation 2016](#) (2017-235) – published LW 2 June 2017

**Bills revised following amendment in Committee**

[Parliamentary Contributory Superannuation Amendment \(Criminal Charges and Convictions\) Bill 2017](#)

[Statute Law \(Miscellaneous Provisions\) Bill 2017](#)

**Bills passed by both Houses of Parliament**

[Civil Liability \(Third Party Claims Against Insurers\) Bill 2017](#)

[Parliamentary Contributory Superannuation Amendment \(Criminal Charges and Convictions\) Bill 2017](#)

[Statute Law \(Miscellaneous Provisions\) Bill 2017](#)

**Bills assented to**

Parliamentary Contributory Superannuation Amendment (Criminal Charges and Convictions) Act 2017 No 18 – Assented to 01 June 2017

Civil Liability (Third Party Claims Against Insurers) Act 2017 No 19 – Assented to 01 June 2017

Liquor Amendment (Reviews) Act 2017 No 20 – Assented to 01 June 2017

Statute Law (Miscellaneous Provisions) Act 2017 No 22 – Assented to 01 June 2017

**Bills introduced Government**

[Crimes Amendment \(Intimate Images\) Bill 2017](#)

[Parliamentary Contributory Superannuation Amendment \(Criminal Charges and Convictions\) Bill 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](mailto:nswgovtlegal@tglaw.com.au) at anytime.



#### Mark Feetham

Partner  
+61 2 8248 5847  
+61 414 908 225  
[mfeetham@tglaw.com.au](mailto:mfeetham@tglaw.com.au)



#### Loretta Reynolds

Partner, Markets  
+61 3 8080 3705  
+61 403 069 819  
[lreynolds@tglaw.com.au](mailto:lreynolds@tglaw.com.au)

If you would like to receive a Contact Card with full list of contacts please email us.

### NEWSLETTER EDITOR



#### Sylvia Fernandez

Partner  
+61 2 8248 3499  
+61 418 340 118  
[sfernandez@tglaw.com.au](mailto:sfernandez@tglaw.com.au)

### DEDICATED LIBRARIAN

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



#### Warwick Johns

Librarian  
+61 2 9020 5709  
[wjohns@tglaw.com.au](mailto:wjohns@tglaw.com.au)

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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                             |

### SYDNEY

Level 25  
1 O'Connell Street  
Sydney NSW 2000  
+61 2 8248 5800

### MELBOURNE

Level 39  
Rialto South Tower  
525 Collins Street  
Melbourne VIC 3000  
+61 3 8080 3500

### BRISBANE

Level 16  
Waterfront Place,  
1 Eagle Street  
Brisbane QLD 4000  
+61 7 3338 7500

### ADELAIDE

Level 7  
19 Gouger Street  
Adelaide SA 5000  
+61 8 8236 1300