



PUBLIC SECTOR NEWSLETTER - NEW SOUTH WALES

From time to time, we receive enquiries from the public sector as to particular obligations, including those under the Model Litigant Policy. One such issue is whether agencies have any obligation to produce documents to third parties in circumstances where there is no compulsion of law (ie a Subpoena, Compulsory Notice or Court Order). In most cases, the answer is likely to be no (subject to any relevant policies as to the provision of documents to third parties which may exist). The Model Litigant Policy does not require an agency to act against its interests, for example, it is not a breach of the Model Litigant Policy to make any proper claims for legal professional privilege. One exception is the obligation to provide reasonable assistance to claimants in identifying a proper defendant (if one is not identified or incorrectly identified). Further, there are other mechanisms by which third parties can gain access to documents, namely through the GIPA process.

MEDIA

NSW tenancy agreements potentially unenforceable against interstate landlords

The legal loophole emerged after the Court of Appeal declared in February that the NSW Administrative and Civil Tribunal, which handles a range of small civil disputes, has no jurisdiction if one party lives in another state <http://www.abc.net.au/news/2017-07-14/nsw-residential-tenancy-agreements-may-be-invalid/8709240>

Former Australian of the Year finalist says she has been 'bullied' at ICAC hearing

Eman Sharobeem lashes out on the final day of hearings at the Independent Commission Against Corruption, declaring she has been "abused, bullied and terrorised" <http://www.abc.net.au/news/2017-07-13/former-australian-of-the-year-finalist-says-she-feels-bullied/8706710>

Fair use, or free use? Behind the interests and alliances that stand to gain from changes to Australia's copyright law

Lobby groups behind a high profile campaign on Wikipedia urging a switch to US-style copyright law in Australia have links to interests, including multinationals such as Google, which will gain substantially from any change to a so-called "fair use" system <https://www.businessinsider.com.au/australia-copyright-reform-interest-groups-2017-7>

Upside.Digital sees a \$39,600 downside for breaching Spam Act

The ACMA found that Upside.Digital sent and caused to be sent a significant number of marketing emails that did not clearly contain the name and contact details of its clients who authorised the sending of the messages involved <http://www.acma.gov.au/Industry/Marketers/Anti-Spam/Ensuring-you-dont-spam/upside-digital-sees-a-39600-downside-for-breaching-the-spam-act>

Australian Bar Association: Legal assistance funding requires rethink to ensure sustainability

The President of the Australian Bar Association, Will Alstergren QC, has highlighted the need for a complete rethink of legal assistance budgets to ensure its sustainability to provide equal and fair access of legal advice and assistance to all <http://austbar.asn.au/index.php/news-media/australian-bar-association-president-legal-assistance-funding-requires-reth>

ACCC appeals Tribunal's Tabcorp ruling

An appeal on the merits is not available for Tribunal merger authorisation decisions, but the ACCC is seeking judicial review, alleging three reviewable errors, including that the Tribunal

erred in its reasoning that 'it could only conclude that the proposed acquisition was likely to result in a detriment if the Tribunal concluded that there would be a substantial lessening of competition' See ACCC Media Release, 10 July 2017: <https://www.accc.gov.au/media-release/accc-appeals-tribunal-decision-in-tabcorp-tatts-merger>

Governments must end youth detention abuse

The Australian Human Rights Commission today expressed continuing and deep concern about the abuse of young people in detention, saying the focus on punitive measures is failing young people <http://www.humanrights.gov.au/news/media-releases/governments-must-end-youth-detention-abuse>

Human Rights Commissioner calls for OPCAT input

Human Rights Commissioner Edward Santow is seeking submissions on Australia's implementation of the Optional Protocol to the Convention against Torture (OPCAT) <http://www.humanrights.gov.au/news/stories/human-rights-commissioner-calls-opcat-input>

Statement by the Australian Information and Privacy Commissioner on personal information of Australian telecommunication customers

In light of the information provided, the OAIC considered that these allegations did not point to a failure on the part of the three providers to ensure reasonable steps are being taken to protect the personal information of Australian telecommunication customers at offshore call centres, and that no further regulatory action is warranted at this time <https://www.oaic.gov.au/media-and-speeches/statements/statement-by-the-australian-information-and-privacy-commissioner-timothy-pilgrim-on-personal-information-of-australian-telecommunication-customers>

CASES

[Malek Fahd Islamic School Limited v Minister for Education and Training \[2017\] FCA 757](#)

ADMINISTRATIVE LAW – application for extension of time to file an originating application – whether acceptable explanation for delay – whether delay caused prejudice – whether substantive application has merits – application for interlocutory relief to refrain delaying of payment of financial assistance pursuant to the Australian Education Act 2013 (Cth) – whether serious question to be tried – where balance of convenience lies. Held: application for extension of time and interlocutory relief granted. Constitution ss 96, 122

[Buttigieg and Comcare \[2017\] AATA 1002](#)

PRACTICE AND PROCEDURE – whether application for confidentiality order to be disclosed to other party – s 38AA decision-maker has an ongoing requirement to lodge documents relevant to the review – document includes surveillance – legal professional privilege and public interest immunity still apply – the application itself is to be disclosed to other party or parties but not the document over which the confidentiality is sought – matter adjourned. The applicant, Mr Buttigieg, has applied for review of a decision made by the respondent, Comcare

['LW' and Department of Human Services \(Freedom of information\) \[2017\] AICmr 65](#)

Freedom of Information – Whether reasonable steps taken to locate documents – (CTH) Freedom of Information Act 1982 s 24A

['LV' and Department of Defence \(Freedom of information\) \[2017\] AICmr 64](#)

Freedom of Information – Whether reasonable steps taken to locate documents – (CTH) Freedom of Information Act 1982 s 24A

[Patrick Conheady and Australian Taxation Office \(Freedom of information\) \[2017\] AICmr 63](#)

Freedom of Information – Whether disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency – Whether contrary to public interest to release conditionally exempt documents – (CTH) Freedom of Information Act 1982 ss 11A(5), 47E(d)

['LU' and Department of Defence \(Privacy\) \[2017\] AICmr 61](#)

Privacy – Privacy Act – Information Privacy Principles – Privacy Act 1988 (Cth) s52 – IPP 4 – Data security failure – IPP 10 – Unauthorised use of sensitive personal information – Compensation awarded – Non-economic loss – Section 52(3) expenses awarded

['LS' and 'LT' \(Privacy\) \[2017\] AICmr 60](#)

Privacy – Privacy Act 1988 (Cth) – s 52 – Australian Privacy Principles – APP 12 – Access to personal information – APP 12.3 – Serious threat to life, health or safety – Breach of APP 12.5 – Failure to consider steps (if any) to give access – Breach of 12.9 – Failure to give written reasons for refusal – Use of intermediary – Compensation awarded – non-economic loss – Aggravated damages not awarded

[James v The Owners – Strata Plan No 11478 \[2017\] NSWCA 166](#)

APPEAL – leave to appeal – litigant in person – allegations of negligence, oppression and fraud on minority concerning conduct and

management of strata scheme by Owners Corporation rejected on bases including failure to prove loss/detriment – where applicant sought to refer to expert evidence not used at trial – no evidence why not available at trial – whether leave to appeal should be granted
PRACTICE AND PROCEDURE – procedural fairness – where primary judge refused numerous adjournment applications by litigant in person claiming to be not fit to conduct case – where primary judge afforded litigant in person latitude in conduct of case – whether denial of procedural fairness warranting grant of leave to appeal

[Durie v Wollongong City Council \[2017\] NSWCATAP 148](#)

GOVERNMENT INFORMATION – where applicant applied under the Government Information (Public Access) Act 2009 (NSW) for personal information – where Wollongong City Council refused to provide that information – where Tribunal affirmed Council's decision – whether Tribunal made an error of law by not giving sufficient weight to considerations in favour of disclosure – whether Tribunal made an error of law by making a finding of fact without evidence – whether leave should be given to the applicant to appeal on grounds other than questions of law

[Rowell v Department of Family and Community Services \[2017\] NSWCATAD 221](#)

GIPA ACT- Government Information – disclose personal information - prejudice the effective exercise of an agency's functions - Unreasonable diversion of resources

[Whitehouse v Commissioner for Fair Trading \[2017\] NSWCATOD 108](#)

ADMINISTRATIVE REVIEW – Home Building – Application for contractor licence – Where application rejected on basis that applicant did not meet requirements of an instrument made by the respondent – Whether there is legislative authority for the respondent to make the instrument as a binding instrument – Finding that the instrument is a policy – How Tribunal is to take into account the policy - Whether the applicant meets the terms of the instrument, read as a policy – Whether the Tribunal is satisfied that the applicant has the requisite qualifications and experience to be a builder

[Chief Executive of the Office of Local Government v Bagnall \(No.1\) \[2017\] NSWCATOD 106](#)

Local Government; disciplinary action against councillor; referral of matter to the Tribunal under s 440J (2) (b) of the Local Government Act. Preliminary issue as to whether Tribunal lacks jurisdiction to consider the matter on a proper construction of the Council's Procedures for Administration of the Model Code of

Conduct and the Local Government Act . Enforceability of the Procedures and whether binding on the Chief Executive. Double jeopardy. Determination that Tribunal has jurisdiction to hear the matter referred, on proper construction of the Procedures and the Act; and that the double jeopardy principle was not applicable.

[Allchin v Police Integrity Commission \[2017\] NSWCATAD 219](#)

GOVERNMENT INFORMATION – access application – adequacy of search – excluded information

[McGinn v Secretary, Family and Community Services \[2017\] NSWIRComm 1039](#)

DISMISSAL – employee dismissed pursuant to statutory power – common law tests not relevant – exercise of power to be considered within statutory structure of contract - refusal to work established – requirement for procedural fairness – procedural fairness afforded – statutory power correctly used
DISMISSAL – even where statutory power basis for dismissal, test remains test under Act – dismissal neither harsh, nor unreasonable nor unjust – application dismissed
JURISPRUDENCE OF COMMISSION - Commission not court of strict pleading – tests applicable to striking out defences not applicable to employer's reply in s.84 proceedings – summary judgment not available to applicant in proceedings brought under s.84

PRACTICE AND PROCEDURE

[Accountability and the Law 2017 Conference](#)

The conference will be held on 17 August in Canberra by the Australia Institute

[Law Council of Australia Submissions July 2017](#)

[Feedback on Notifiable Data Breaches Scheme Draft Resources](#)

[Australia-Vietnam 2017 Human Rights Dialogue: Civil Society Consultation](#)

[Civil Penalty Regime for Non-Consensual Sharing of Intimate Images](#)

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. 28/2017, 10 July 2017](#)

[Issue No. 27/2017, 03 July 2017](#)

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/>

NCAT [Fees and charges as at 1 July 2017](#)

NCAT's fees and charges schedule for the filing of applications, appeals and other services will change at 1 July 2017

ICAC: [Early bird discount registrations are 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 above link to the APSACC 2017 website

ICAC: [Operation Tarlo public inquiry](#)

The Operation Tarlo public inquiry has adjourned (13 July 2017)

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

Last updated 13 July 2017

Victims' involvement in sentencing

The NSW Attorney General has asked us to conduct a review of victims' involvement in the sentencing process. The deadline for preliminary submissions is Monday 31 July 2017 <http://www.sentencingcouncil.justice.nsw.gov.au/Pages/Current-projects/VIS/Victims.aspx>

Sentencing Trends & Issues No 46 –**Common offences in the NSW Local Court**

Amanda Jamieson, Senior Research Officer (Legal) Brandi Baylock, Research Officer (Statistics) Patrizia Poletti, Principal Research Officer (Statistics) Editor: Roslyn Cook: 07 July 2017. General findings about offender characteristics, the frequency with which statutory, regulatory and common law offences come before the court, and their classification under the Australian and New Zealand Standard Offence Classification (ANZSOC) are discussed. https://www.judcom.nsw.gov.au/wp-content/uploads/2017/07/sentencing_trends_46.pdf

LEGISLATION**Commonwealth****[National Rental Affordability Scheme Amendment \(Administrative Processes\) Regulations 2017](#)**

14/07/2017 - These regulations address concerns that have been identified in the administration of the National Rental Affordability Scheme (NRAS or the Scheme). The Regulations are designed to remove unfair and disproportionate consequences for non-compliance with certain provisions.

NSW**Regulations and other miscellaneous instruments**

[Witness Protection Regulation 2017](#) (2017-346) – published LW 7 July 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 is appointed to the following NSW Government sub-panels:

- | | |
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| 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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