



PUBLIC SECTOR NEWSLETTER - NEW SOUTH WALES

The dual-citizenship issues surrounding some Australian senators and politicians have taken centre stage recently in the media. The hearing to determine the status of Senators Matthew Canavan, Malcolm Roberts, Larissa Waters and Scott Ludlam and the Hon. Barnaby Joyce MP, have been listed for hearing in the High Court of Australia in October. <http://www.abc.net.au/news/2017-08-24/october-date-set-for-federal-politicians/8838246>

The High Court [Submission](#) for Senator Canavan shows indicative dates, with links to the other submissions.

MEDIA

Revenge porn is a crime in NSW

New offences in the Crimes Act 1900 criminalise the recording and distributing of intimate images of a person without consent. As well as the possibility of fines and jail time for perpetrators, courts can order offenders to take reasonable steps to recover, delete or destroy images taken or distributed without consent. Perpetrators of intimate image abuse now face a maximum sentence of three years jail and an \$11,000 fine <https://www.nsw.gov.au/news-and-events/news/revenge-porn-is-a-crime/>

NSW commissioner didn't want tent city powers

NSW's police commissioner says he did not want the powers bestowed to clear the tent city in Sydney. The powers enable police to remove people from crown land, including Martin Place, if the lands minister deems there is a 'public safety issue' <http://www.skynews.com.au/news/national/nsw/2017/08/24/nsw-commissioner-didn-t-want-tent-city-powers.html>

Organised Crime in Australia Report - a \$36 billion a year problem

The Organised Crime in Australia report released today confirms that organised crime is costing Australia \$36 billion a year. That equates to \$1,561 out of every individual Australian's pocket and adds 6.3 per cent to the average cost of living <https://www.ministerjustice.gov.au/Media/Pages/Organised-Crime-in-Australia-Report-a-36-billion-a-year-problem-24-august-2017.aspx>

Crackdown on money laundering and terrorism financing

The Coalition Government has today announced the first stage of reforms to strengthen the Anti-Money Laundering and Counter-Terrorism Financing Act and increase the powers of the AUSTRAC. The reforms implement the first phase of the recommendations of the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act. <https://www.ministerjustice.gov.au/Media/Pages/Crackdown-on-money-laundering-and-terrorism-financing-17-august-2017.aspx>

Community safety drives disqualification laws

The NSW Government is toughening sanctions on those who repeatedly flout driver licence laws, but also providing a road back to lawful driving for disqualified drivers who can demonstrate they can be trusted. <http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2017/community-safety-drives-disqualification-laws.aspx>

CASES**[Casenote: Knight v Victoria \[2017\] HCA 29: Parole and Judicial Power](#)**

In *Julian Knight v The State of Victoria & Anor* [2017] HCA 29 (17 August 2017) the High Court of Australia has in a unanimous decision held, answering a question posed in a special case, that section 74AA of the Corrections Act 1986 (Vic) (the Corrections Act) is not invalid on the ground that it is contrary to Chapter of the Commonwealth Constitution.

[Australian Conservation Foundation Incorporated v Minister for the Environment and Energy \[2017\] FCAFC 134](#)

ADMINISTRATIVE LAW – appeal from a decision dismissing a judicial review challenge – where the Minister’s decision was to approve a coal mine project – alleged error by the Minister in failing to determine the “impact” of combustion emissions on the Great Barrier Reef – consideration of s 527E of the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) – where the Minister’s reasons reflect a proper discharge of his statutory duty – appeal dismissed.

[Burrabungba v State of Queensland \[2017\] FCAFC 133](#)

ADMINISTRATIVE LAW - appeal from a decision dismissing an application for judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) - whether the decision of the National Native Title Tribunal failed in the discharge of its obligations by ignoring the content of submissions made by the appellant and Ms Bobongie.

[Sklavos v Australasian College of Dermatologists \[2017\] FCAFC 128](#)

HUMAN RIGHTS – disability discrimination – Disability Discrimination Act 1992 (Cth) (“DDA”), ss 5 and 6 – where the appellant was refused admission to the Australasian College of Dermatologists having failed to meet the College’s entrance examination condition – where the appellant suffered from a disability described as a specific phobia of the College’s examination – where the appellant claimed the refusal to be simultaneously direct and indirect discrimination – whether direct discrimination and indirect discrimination are mutually exclusive – direct discrimination is concerned with disparate treatment whereas indirect discrimination is concerned with adverse impact – whether the primary judge misconstrued s 5(2) of the DDA – the primary judge did not so err – refusal for failure to meet the examination condition involves no nexus between the conduct and the disability – s 5 not relevant to whether the College discriminated against the appellant on the ground of his disability

STATUTORY INTERPRETATION – consideration of the proper construction of s 5(2) of the DDA – whether the introduction of an obligation

to make reasonable adjustments changed the causation requirement in s 5(2) as compared to s 5(1) – s5(2) still requires there to be a nexus to disability from conduct (unfavourable treatment) and not from effect

DAMAGES – whether the primary judge erred in finding that appellant had not proved that he had suffered any damage by being refused fellowship – where evidence adduced of the income of a successful dermatologist and of an unsuccessful general practitioner – duty of the Court to do the best that it can in assessing damages does not extend to speculating about whether any loss had been suffered at all when it is within the power of an applicant to call such evidence.

[Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal; \[2017\] FCAFC 124](#)

ADMINISTRATIVE LAW – consideration of an application for judicial review of a decision made by the Australian Competition Tribunal – where the Tribunal made an order setting aside a decision of the Minister not to declare a service under s 44H of the Competition and Consumer Act 2010 (Cth) and made an order declaring a service pursuant to s 44K(8) of the Act.

COMPETITION – consideration of the decision of the Full Court of the Federal Court of Australia in *Sydney Airport Corporation Ltd v Australian Competition Tribunal and Others* [2006] FCAFC 146; (2006) 155 FCR 124 – where declaration relates to services provided by coal port infrastructure facilities – scope of s 44H(4)(a) and of s 44H(4)(f) – where ordinary meaning of “access” in the context of access to a service is a right or ability to use a service – where the exercise of power under s 44H calls for a comparison between the future state of competition in a dependent market with access and no access to the service or with increased access and restricted access to the service.

[Pintarich v Deputy Commissioner of Taxation \[2017\] FCA 944](#)

ADMINISTRATIVE LAW – application for judicial review of a decision by the Deputy Commissioner of Taxation to grant partial remission of a general interest charge pursuant to s 8AAG of the Taxation Administration Act 1953 (Cth) – where prior to the impugned decision a letter had been sent to the applicant – whether that letter evidenced the making of an earlier decision to grant full remission of the general interest charge – whether the impugned decision was ultra vires – where applicant relied upon grounds in s 5(1)(c) and (d) of the Administrative Decisions (Judicial Review) Act 1977 (Cth) – whether the decision-maker lacked jurisdiction to make the impugned decision – whether the decision was not authorised by the enactment in pursuance of which it was purported to be made.

INCOME TAX – application for remission of a general interest charge on an income tax debt – whether decision to partly remit charge vitiated by earlier purported decision to remit entire charge.

[Fitzgibbon v Turnbull \[2017\] FCA 968](#)

ADMINISTRATIVE LAW – freedom of information – application for access to document (Coalition Agreement) – claim by Minister that the document was not an official document of the Minister within the meaning of s 4(1) of the Freedom of Information Act 1982 (Cth) – application to the Administrative Appeals Tribunal for review of a decision by the Information Commissioner holding that the document sought was not an official document of a Minister – applicant applied at a directions hearing in the Tribunal for an order that his legal representatives be allowed to inspect the document as a matter of procedural fairness under s 39 of the Administrative Appeals Tribunal Act 1975 (Cth) – whether the Tribunal erred in its interlocutory decision that it did not have the power to order that the applicant's legal representatives be allowed to inspect the document and, if the Tribunal did have that power, that it would decline to exercise it – Held: application for judicial review dismissed. Administrative Appeals Tribunal Act 1975 (Cth) ss 2A, 35, 37, 39
Freedom of Information Act 1982 (Cth) ss 4(1), 15, 55K, 57A, 63, 64

[Fulton v Chief of the Defence Force \[2017\] FCA 913](#)

ADMINISTRATIVE LAW – Chief of the Defence Force – review of termination decision – review of redress of grievance decision – redress of grievance complaint in respect of termination of service in the Australian Defence Force – whether procedural unfairness where applicant not given opportunity to be reheard in investigation conducted on the papers – whether procedural unfairness where applicant denied access to personal documents work account – consideration relevant to judicial review of decision based on opinion as to suitability to continue as a member of the Australian Defence Force.

[Cheetham v Goulburn Motorcycle Club Inc \[2017\] NSWCA 83](#)

JUDICIAL REVIEW – planning consent – whether proposed development prohibited under local environmental plan – whether characterisation of proposal a jurisdictional fact to be determined by the court
PLANNING LAW – development consent granted for a “motorcycle facility” – whether the development consent was for a prohibited use under Goulburn Mulwaree Local Environmental Plan 2009 – whether consent was for a “recreation facility (major)” – extent to which reference can be made to documents referred to in conditions of consent in construing the consent.
STATUTORY INTERPRETATION – definition in statutory instrument – how to construe “means” and “includes” – reliance on factual context.

[Attia v Health Care Complaints Commission \[2017\] NSWSC 1066](#)

ADMINISTRATIVE LAW – appeal – decision of the Civil and Administrative Tribunal that the plaintiff's registration as a pharmacist be cancelled – regulatory system for registered pharmacists – regulatory system for pharmaceutical wholesalers – interaction of regulatory schemes – protective legislation and statutory objects – whether the finding of unsatisfactory professional conduct under s 139B(1)(a) constituted an error of law because the impugned conduct was undertaken by the plaintiff as the office holder of a licenced pharmaceutical wholesaler corporation and not in the practice of a pharmacy – whether impugned conduct in practice of practitioner's profession – procedural fairness – hearing rule – whether the determination by the Tribunal to take into account matters not within the particulars of the complaints breach of procedural fairness – notice and litigation of non-particularised issues – a single stage process – relevant principles – orders – leave partially refused – appeal dismissed.

[DBU v Secretary, Department of Education \[2017\] NSWCATAD 257](#)

ADMINISTRATIVE REVIEW – Education and Care Services National Law – family day care – service approval – breach of condition of approval – failure to commence ongoing operation within 6 months – meaning of commence ongoing operation – whether approval should be cancelled
JURISDICTION – basis of Tribunal's jurisdiction to review decision – administrative review jurisdiction – general jurisdiction – meaning of administrative review in the Education and Care Services National Law.

[Mclvor v Commissioner for Fair Trading \[2017\] NSWCATAD 258](#)

ADMINISTRATIVE REVIEW – Home Building Act 1989 – individual contractor licence – fit and proper – convicted of criminal offences – currently on parole – no evidence of rehabilitation – community standards.

[Lather v Roads and Maritime Services \[2017\] NSWCATOD 124](#)

ADMINISTRATIVE LAW – Merits Review – authority to drive private hire vehicle – criminal convictions – good behaviour bonds – reputation – fit and proper.

PRACTICE AND PROCEDURE

The Management of Risk by Public Sector Entities

ANAO; 15 August 2017 – The audit objective was to access how effectively the selected public sector entities manage risk <https://www.anao.gov.au/work/performance-audit/management-risk-public-sector-entities>

Modern Slavery Consultation

The first step is an extensive consultation period with industry on the Government's Modern Slavery in Supply Chains Reporting Requirement discussion paper. The consultation paper is available online at the [modern slavery consultation](#) page on the Attorney-General's Department website. The deadline for submissions is 20 October 2017 <http://www.ministerjustice.gov.au/Media/Pages/Proposed-new-laws-to-help-end-modern-slavery-16-August-2017.aspx>

LCA Submissions

23 August 2017 - ASIC's Access to Telecommunications Intercept Material <https://www.lawcouncil.asn.au/resources/submissions/asics-access-to-telecommunications-intercept-material>

LCA: Australia's access to justice crisis laid bare: national Justice Project releases papers

The Law Council of Australia has today said that countless Australians are being denied access to justice as its national Justice Project moves into the consultation phase. [Consultation papers](#), overseen by a Steering Committee of eminent lawyers, academics and jurists including former High Court Chief Justice, the Hon. Robert French AC, have been released today for feedback. Submissions close on 30 September 2017 <https://www.lawcouncil.asn.au/media/media-releases/australias-access-to-justice-crisis-laid-bare-national-justice-project-releases-papers-starts-listening-tour>

New Multicultural Access and Equity Plan for 2017-18

OSAUC has recently published the *Multicultural Access and Equity Plan for 2017-18* <https://www.oaic.gov.au/media-and-speeches/news/new-multicultural-access-and-equity-plan-for-2017-18>

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. 34/2017, 21 August 2017](#)
[Issue No. 33/2017, 14 August 2017](#)

Australian Public Sector Anti-Corruption Conference (APSACC) 2017

The Office of the Commonwealth Ombudsman is proud to partner with the Australian Public Sector Anti-Corruption Conference (APSACC) 2017. The conference will run from 14-16 November 2017 at Westin, Sydney. <http://www.ombudsman.gov.au/news-and-media/other-resources/australian-public-sector-anti-corruption-conference-apsacc-2017>

NSW

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

Tables of prosecution briefs with the DPP and outcomes, last updated 24 August 2017.

[ICAC November 2017 workshops](#)

Workshops by leading practitioners on conducting investigations, strategic corruption prevention management or effective complaint handling

Royal Commission civil litigation recommendations

The NSW Government is considering the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse about how to provide justice to victims of future institutional child abuse. The Department of Justice has developed a [consultation paper](#) which identifies some of the potential issues and poses questions about possible options for reform. Submissions close on 4 September 2017.

LEGISLATION - COMMONWEALTH

New Bills

[Social Services Legislation Amendment \(Cashless Debit Card\) Bill 2017](#)

[Defence Amendment \(Fair Pay for Members of the ADF\) Bill 2017](#)

[Fair Work \(Registered Organisations\) Amendment \(Ensuring Integrity\) Bill 2017](#)

[Electoral Amendment \(Banning Foreign Political Donations\) Bill 2017](#)

[Australian Bill of Rights Bill 2017](#)

HR 14 August 2017- It is modelled very closely on the Australian Bill of Rights Bill 2001 and is intended to give effect to certain provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. The bill also allows the Australian Human Rights Commission to inquire into any act or practice that may infringe a right or freedom in the Bill of Rights and allows for complaints to be made to the Commission

Bills Progress

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

Senate Third reading agreed to 17 August 2017 - Amends: 18 Acts to modernise language and correct technical errors; six Acts to make amendments consequential on the Acts and Instruments (Framework Reform) Act 2015; and five Acts to repeal spent and obsolete provisions. Also repeals the Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Act 2007, Governor-General Amendment Act 2003, Stevedoring Industry Act 1961 and Stevedoring Industry (Temporary Provisions) Act 1968.

[Fair Work Amendment \(Protecting Vulnerable Workers\) Bill 2017](#)

Senate: Committee of the Whole debate
Amendment details: 6 Opposition agreed to 16 August 2017; Committee of the Whole debate 17 August 2017

Amends the Fair Work Act 2009 to: increase maximum civil penalties for certain serious contraventions of the Act; hold franchisors and holding companies responsible for certain contraventions of the Act by their franchisees or subsidiaries where they knew or ought reasonably to have known of the contraventions and failed to take reasonable steps to prevent them; clarify the prohibition on employers unreasonably requiring their employees to make payments in relation to the performance of work.

Acts

[Fair Work Amendment \(Corrupting Benefits\) Act 2017](#) - 18 August 2017; Act No. 84

NSW

Proclamations commencing Acts

[Crimes \(Administration of Sentences\) Amendment Act 2016 No 47](#) (2017-458) - published LW 25 August 2017

[Crimes Amendment \(Intimate Images\) Act 2017 No 29](#) (2017-462) — published LW 25 August 2017

[Justice Legislation Amendment Act 2017 No 40](#) (2017-463) — published LW 25 August 2017

Regulations and other miscellaneous instruments

[Administrative Arrangements \(Administration of Acts—Amendment No 3\) Order 2017](#) (2017-430) — published LW 25 August 2017

[Civil Procedure Regulation 2017](#) (2017-435) — published LW 25 August 2017

[Crimes \(Sentencing Procedure\) Regulation 2017](#) (2017-436) — published LW 25 August 2017

[Criminal Procedure Regulation 2017](#) (2017-437) — published LW 25 August 2017

[Law Enforcement \(Controlled Operations\) Regulation 2017](#) (2017-444) — published LW 25 August 2017

[Luna Park Site Regulation 2017](#) (2017-467) — published LW 25 August 2017

[NSW Trustee and Guardian Regulation 2017](#) (2017-446) — published LW 25 August 2017

[Oaths Regulation 2017](#) (2017-447) — published LW 25 August 2017

Bills assented to

Environmental Planning and Assessment and Electoral Legislation Amendment (Planning Panels and Enforcement) Act 2017 No 39 - Assented to 14 August 2017

Justice Legislation Amendment Act 2017 No 40 - Assented to 14 August 2017

KEY CONTACTS

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LIBRARY RESOURCE

We have a comprehensive national library, available to assist NSW Government and agencies when 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

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:

- | | |
|--|--|
| 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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