



## PUBLIC SECTOR NEWSLETTER - NEW SOUTH WALES

This fortnight has seen a lot of new appointments: to the Australian Law Reform Commission, the Administrative Appeals Tribunal and the Federal Court - as well as a new Royal Commissioner.

### Appointment of President of the Australian Law Reform Commission

The appointment of Professor Sarah Derrington as the new President of the Australian Law Reform Commission (ALRC) has been announced, for a five-year term. She replaces Professor Rosalind Croucher, who was recently appointed as the President of the Australian Human Rights Commission <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FourthQuarter/Appointment-of-Royal-Commissioner-1-December-2017.aspx>

### Appointments to the Administrative Appeals Tribunal

The Attorney-General, Senator the Hon George Brandis QC, has announced 19 appointments and 14 re-appointments to the AAT. Each appointment is for seven years and commenced from 1 December 2017 unless otherwise indicated <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FourthQuarter/Appointment-of-President-of-the-Australian-Law-Reform-Commission-30-November-2017.aspx>

### Appointment to the Federal Court of Australia

The Attorney-General announces the appointment of Mr Simon Steward QC as a judge of the Federal Court of Australia. Mr Steward will commence in the Melbourne Registry on 1 February 2018 <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FourthQuarter/Appointment-to-the-Federal-Court-of-Australia-30-November-2017.aspx>

### Appointment of Royal Commissioner

The Turnbull Government will, having consulted His Excellency, recommend the Governor General appoint former High Court Judge the Honourable Kenneth Madison Hayne AC as Royal Commissioner into Misconduct in the Banking, Superannuation and Financial Services Industry <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FourthQuarter/Appointment-of-Royal-Commissioner-1-December-2017.aspx>

## MEDIA

### New guilty plea reforms fail to win over NSW's top lawyers

The benefits expected from an overhaul of the criminal justice system in New South Wales are a "mirage", according to a key section of the state's legal profession <http://www.abc.net.au/news/2017-12-03/lawyers-not-convinced-legal-reforms-will-clear-backlog/9218536>

### National supervision for high risk offenders

The NSW and South Australian Governments will lead a national effort to design a scheme to ensure the nation's most dangerous sex, violence and terrorism offenders remain subject to High Risk Offender orders imposed on them no matter where they are in Australia, NSW Attorney General Mark Speakman announced recently <http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2017/national-supervision-for-high-risk-offenders.aspx>

### Interim Parliamentary Report on the Status of the Human Right to Freedom of Religion or Belief

The Joint Standing Committee of Foreign Affairs, Defence and Trade has released the Interim Report into the Legal Foundations of Religious Freedom in Australia. The Interim Report is the first report to be released in the inquiry into the status of the human right to freedom of religion or belief, after a number of public consultations throughout the year [http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024110/toc\\_pdf/InterimReport.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024110/toc_pdf/InterimReport.pdf;fileType=application%2Fpdf)

### Improving the native title system for all Australians

The Turnbull Government has released an options paper considering how the native title system could be improved to better support all stakeholders involved with native title. The options paper considers reforms to the Native Title Act 1993 (Cth) to make the native title system operate more effectively for all Australians <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FourthQuarter/Improving-the-native-title-system-for-all-Australians-28-November-2017.aspx>

### HRLC: The Senate votes YES to marriage equality

The Senate passed the Marriage Amendment (Definition and Religious Freedoms) Bill. The Bill, to amend the Marriage Act, passed 43-12 following days of debate <https://www.hrlc.org.au/news/2017/11/29/the-senate-votes-yes-to-marriage-equality>

### Ombudsman's Inspection Report Released

The Turnbull Government welcomes the independent report on the Commonwealth Ombudsman's inspection of the AFP's unauthorised access to a journalist's telecommunications data. The Ombudsman made one recommendation: that the AFP immediately review its approach to metadata awareness and training to ensure that all staff exercising metadata powers have a thorough understanding of the legislative framework and their responsibilities <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FourthQuarter/Ombudsmans-Inspection-Report-Released-28-November-2017.aspx>

### National protection for domestic violence victims in NSW

New domestic violence orders will be automatically enforceable across State and Territory borders to increase victim protection, Minister for the Prevention of Domestic Violence and Sexual Assault Pru Goward and Attorney General Mark Speakman announced. Police will be able to prosecute offenders for breaches of domestic violence orders – even if they occur in a different state <http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2017/national-protection-for-domestic-violence-victims.aspx>

### New innovation and technology hub to tackle the future of law and the legal profession

Two new strategic alliances between UNSW and Allens and the Law Society of NSW will aim to tackle the challenges of technological change and its impact on lawyers, law and the legal system <https://newsroom.unsw.edu.au/news/business-law/new-innovation-and-technology-hub-tackle-future-law-and-legal-profession>

### Part-time commissioners appointed for review of the Family Law Act

The Attorney-General has appointed two part-time commissioners to assist the Australian Law Reform Commission's first comprehensive review of the family law system. This review is now underway and is due report to Government in March 2019 <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FourthQuarter/Part-time-commissioners-appointed-for-review-of-the-Family-Law-Act.aspx>

### Electoral Bill 2017: NSW Government Modernises the Electoral System

On the 22 November 2017, the Legislative Council of New South Wales passed the Electoral Bill 2017 (the "Bill"). This Bill repeals and replaces the Parliamentary Electorates and Elections Act 1912 with the aim of making provision for the conduct of State Parliamentary elections <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3453>

### Expert panel examining religious freedom supported, marriage equality should now be passed swiftly

The establishment of an expert panel, chaired by the Hon Phillip Rudduck, to examine the human right to religious

freedom is a welcome development that will help uncouple this important debate from the straight-forward Senator Dean Smith Bill to legalise same-sex marriage <https://www.lawcouncil.asn.au/media/media-releases/expert-panel-examining-religious-freedom-supported-marriage-equality-should-now-be-passed-swiftly>

### HRLC: Doctors, lawyers, experts unite in call to raise the age of criminal responsibility

Following Universal Children's Day, doctors, lawyers, health and human rights experts from across Australia are calling for the age when children can be held criminally liable to be raised to at least 14 years so that primary school aged children are not entangled in the criminal justice system <https://www.hrlc.org.au/news/2017/11/20/experts-unite-in-call-to-raise-age-of-criminal-responsibility>

### Copyright Agency sues NSW Government

The Copyright Agency says it has been 'pushed to the last resort' and is suing the NSW Government over the non-payment of fees for copyrighted material being shared within and between state government agencies <https://www.businessinsider.com.au/the-nsw-government-is-being-sued-for-7-5-million-in-copyright-fees-2017-11>

## CASES

### [Wing v Fairfax Media Publications Pty Limited \[2017\] FCAFC 191](#)

PRACTICE AND PROCEDURE – consideration of an application seeking an order pursuant to s 40 of the Federal Court of Australia Act 1976 (Cth) that, to the extent permitted by law, the proceeding be heard by a jury – where the applicant has brought a proceeding for defamation against the respondents – where allegedly defamatory material was published in multiple places including New South Wales and the Australian Capital Territory – where the normal mode of trial of a civil proceeding in the Federal Court of Australia is by a judge without a jury – where the ends of justice will not be advanced or promoted if a jury hears and determines the factual issues in this case, rather than a judge – where judges of the Federal Court of Australia regularly apply a normative standard to the interpretation of statements and the assessment of reasonableness – where ss 21 and 22 of the Defamation Act 2005 (NSW) are not relevant to the exercise of the discretion in s 40 of the Federal Court of Australia Act 1976 (Cth)

CONSTITUTIONAL LAW – consideration of alleged inconsistency between ss 21 and 22 of the Defamation Act and ss 39 and 40 of the Federal Court of Australia Act for the purposes of s 109 of the Constitution (Cth) – where there is direct inconsistency between ss 39 and 40 of the Federal Court of Australia Act and ss 21 and 22 of the Defamation Act – alternatively ss 21 and 22 of the Defamation Act are not picked up by s 79 of the Judiciary Act 1903 (Cth) because a law of the Commonwealth otherwise provides.

### [Ng v Attorney-General \[2017\] FCA 1392](#)

ADMINISTRATIVE LAW – application for judicial review of decision by delegate of Attorney-General to refuse to make order under s 19APA(1)(d) of Crimes Act 1914 (Cth) to amend terms of release on licence from prison – transfer of prisoner from China to Australia – alleged breach of

natural justice (Ground A) – alleged error of law due to improper construction of ss 19AP and 19APA of Crimes Act 1914 (Cth) (Ground B) – alleged adoption of rule or policy without regard to individual merits of case (Ground C) – alleged failure to carry out statutory task (Ground D) – alleged regard to irrelevant consideration (Ground E) – whether memorandum to delegate formed part of delegate’s reasons – whether letter from delegate regarding licence conditions constituted application of policy without regard to individual merits of case – held: memorandum did not constitute any part of delegate’s reasons – held: no application of policy without regard to individual merits of case – held: no basis to conclude that Chinese sentence was disproportionate – held: no breach of procedural fairness – held: application dismissed on all grounds

[Malek Fahd Islamic School Limited v Minister for Education and Training \(No 2\) \[2017\] FCA 1377](#)

ADMINISTRATIVE LAW – judicial review of a decision of a delegate of the Minister for Education and Training to delay making further payments of financial assistance to New South Wales in respect of a school – where delegate voluntarily provided a detailed statement of reasons for her decision – whether delegate failed to take into account a mandatory relevant consideration in the exercise of her power under s 110(1)(c) of the Australian Education Act 2013 (Cth), being the effect of delaying the payments on students at the school.

Held: delegate’s decision set aside with effect from 6 April 2017; respondent to pay applicant’s costs

[Industrial Relations Secretary v Wattie \[2017\] NSWSC 1662](#)

ADMINISTRATIVE LAW – jurisdictional error – whether refusal of leave by Full Bench of Industrial Relations Commission against decision of Commissioner affected by jurisdictional error itself involved jurisdictional error  
ADMINISTRATIVE LAW – inference drawn from reasons of Commissioner that regulatory context not taken into account, notwithstanding that it was, as a matter of necessary implication, a mandatory relevant consideration – jurisdictional error established  
INDUSTRIAL LAW – what was required to determine whether dismissal was harsh – whether regulatory context was required to be considered in the context of a correctional services officer who assaulted three separate inmates on three occasions – HELD –seriousness of misconduct was required to be assessed to determine whether dismissal was harsh – assessment of seriousness required consideration of regulatory and policy context  
PUBLIC LAW – correctional services officers agents of the State when dealing with inmates in custody in gaols – importance of prohibition of use of force by correctional services officers in the context of the State’s responsibilities towards those it deprives of liberty

[Robinson v Transport for NSW; Robinson v Roads and Maritime Services \[2017\] NSWCATAD 353](#)

GOVERNMENT INFORMATION – Review of implicit decision that agency does not hold information – Inadvertent disclosure of information to which access had been refused by agency – Relevance of inadvertent disclosure to conduct of review by Tribunal – Whether inadvertent disclosure constituted decision to grant access to information – Cabinet information claim – Whether reasonable grounds for claim – Whether certain documents prepared for the purpose of submission to Cabinet –

Whether certain documents would reveal or tend to reveal information concerning any of Cabinet deliberations or decisions – Whether certain documents reveal or tend to reveal the position of a particular Minister on a matter in Cabinet – Whether Tribunal may decide to provide access to part of a document containing Cabinet information but not to the remainder of the document – Legal professional privilege – Whether confidential communications prepared for dominant purpose of lawyer providing legal advice to a client – Whether privilege waived by inadvertent disclosure to applicant – Applicable principles – Whether privilege waived by the provision of advice by a Department to a statutory corporation – Whether RMS is client of in-house solicitor providing advice – Where legal staff in RMS are employed by the Government of NSW – Meaning of “client” in the Evidence Act.

[Turner v Commissioner of Police, NSW Police Force \(No 2\) \[2017\] NSWCATAD 356](#)

ADMINISTRATIVE REVIEW – Government Information – Reasonableness of searches

[Seupule-Feau v Seventh Day Adventist Church \(North NSW Conference\) Ltd \[2017\] NSWCATAD 355](#)

HUMAN RIGHTS - discrimination - less favourable treatment - assessment of less favourable treatment where no actual comparator  
HUMAN RIGHTS - discrimination - causation - meaning of the expression “on the ground of” in s 7(1) of the Anti-Discrimination Act 1977 (NSW)  
STATUTORY INTERPRETATION - whether a failure to act can constitute a “detriment” in s 8(2)(c) of the Anti-Discrimination Act 1977 (NSW)

[CPJ v The University of Newcastle \[2017\] NSWCATAD 350](#)

PROCEDURE – summons to produce documents – where applicant in proceedings under the Privacy Information Protection Act 1998 issued a summons to a third party to produce documents – whether summons has legitimate forensic purpose – taking into account common law principles and the guiding principle, whether summons should be set aside

[Mookhey v Infrastructure NSW \[2017\] NSWCATAD 345](#)

ADMINISTRATIVE LAW – Government information – Cabinet information claim – Whether documents prepared for dominant purpose of submission to Cabinet – Whether documents tend to reveal position taken by Minister – Whether documents tend to reveal Cabinet decisions or deliberations

[Chen v Premier Motors Service Pty Ltd t/as Premier Illawarra \[2017\] NSWCATAD 342](#)

HUMAN RIGHTS – discrimination – grounds – racial discrimination – where applicant complained of race discrimination in the provision of bus services – where it was alleged that buses did not stop directly in front of applicant at bus stops – where it was alleged that bus drivers prevented applicant from photographing their driver authority cards – where it was alleged that bus company did not treat applicant’s complaints seriously – whether bus company has refused to provide services or provided services on certain terms – whether conduct constitutes race discrimination

### [Shoebridge v Department of Education \[2017\] NSWCATAD 343](#)

ADMINISTRATIVE LAW – access to information – reviewable decisions – public interest considerations – personal information – legitimate business interests

## PRACTICE AND PROCEDURE

### High Court of Australia

[High Court of Australia Bulletin \[2017\] HCAB 09 \(27 November 2017\)](#)

### [ANAO: Corporate planning, performance statements and risk management under the PGPA Act](#)

The Commonwealth Parliament regulates Australian Government entities through the Public Governance, Performance and Accountability Act – the PGPA Act. The Act establishes a system of governance, performance and accountability for resources managed by entities. This edition of audit insights looks at recent ANAO audit activity reviewing entities implementation of key components of the PGPA: risk management, corporate planning and performance statements.

### AAT Publication of Decisions Policy

The Administrative Appeals Tribunal (AAT) has revised its [Publication of Decisions Policy](#). The revised interim policy replaces the previous practices that largely reflected those that were in place in the AAT, Migration Review Tribunal and Refugee Review Tribunal, and Social Security Appeals Tribunal prior to amalgamation. Under the revised policy, the Tribunal will generally publish all written decisions in certain types of cases and a randomly selected proportion of decisions in most of the higher volume areas of our jurisdiction.

Full implementation of the policy will be undertaken in stages, starting from 27 November 2017. A copy of the new policy, which contains the publication targets, is available on the [Tribunal's website](#).

### Release of inaugural dashboard and metrics on the public's use of FOI laws

Australian Information Access Commissioners and Ombudsmen have released the inaugural dashboard of metrics on public use of freedom of information (FOI) access rights. The metrics are the first of their kind and will enable the community to examine the performance of their local FOI laws and to advocate accordingly, as well as improving community understanding of how FOI laws work and how to access them. [View the dashboard of FOI metrics here](#).

### [OAIC: Statement from the Australian Information and Privacy Commissioner](#)

It is a timely reminder to Australian businesses and agencies of the reputational value of good privacy practice, with the commencement of the Notifiable Data Breaches Scheme in February 2018, which will require them to notify any individuals likely to be at risk of serious harm due to a data breach.

### OAIC: Retailers mandatory data breach reporting obligations from 2018

From 22 February 2018, retail businesses with an annual turnover of \$3 million or more, or that trade in personal information, will be required to comply with the Notifiable Data Breaches (NDB) scheme. It is important to understand your obligations under the NDB scheme before commencement on 22 February 2018 – find out more, and start preparing for the scheme, with our [draft NDB resources](#). <https://www.oaic.gov.au/media-and-speeches/news/gps-gyms-and-childcare-centres-may-have-obligations-under-the-notifiable-data-breaches-scheme-will-your-organisation>

### DIIS consultation: data on digital future

This paper is the start of the conversation with all Australians and we're asking for your ideas to help develop the strategy. Your responses will help the government to identify the key issues, challenges and opportunities. The paper considers the broader digital economy, including enabling and supporting the digital economy (through digital infrastructure, standards and regulation, and trust, confidence, and security). Consultation closed on 30 November 2017. Access the paper here <https://industry.gov.au/innovation/Digital-Economy/Documents/Digital-Economy-Strategy-Consultation-Paper.pdf>

### 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. 48/2017, 27 November 2017](#)

### Forces of Change – Defining Future Justice Conference 2018

The Australasian Institute of Judicial Administration is pleased to announce the Forces of Change – Defining Future Justice Conference will be held at the Stamford Plaza Brisbane, Queensland from 24 – 26 May 2018. <http://www.futurejustice2018.com/>

## NSW

### [Judicial Commission of NSW: Annual Report 2016–2017](#)

The annual report is designed for judicial officers, our partners, staff, and the community to provide easy-to-read information about how the Commission performed during the financial year.

### Reminder: Supreme Court of NSW: Updated forms for costs assessment

Updated costs assessment forms have recently been published on the [Supreme Court website](#). From 1 January 2018 the registry will only accept these costs assessment forms for processing.

### [APSACC 2017 papers available soon](#)

Available papers from the 6th Australian Public Sector Anti-Corruption Conference will soon be accessible from the APSACC website.

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

Tables of prosecution briefs with the DPP and outcomes.  
Last updated 28 November 2017.

### [NCAT: Changes to matters affected by federal diversity jurisdiction](#)

Legislative changes on 1 December to the Civil and Administrative Tribunal Act 2013 inserts a new part in the Act. This will allow interstate parties to commence proceedings in the Local or District Court after NCAT has declined to hear the case because of federal diversity jurisdiction.

### [NCAT Annual Report 2016-2017](#)

The Report details the Tribunal's performance against the eight areas of Tribunal excellence set out in the Australia and New Zealand Excellence Framework (June 2017) published by the Council of Australasian Tribunals.

## LEGISLATION

### COMMONWEALTH

#### [Marriage Amendment \(Definition and Religious Freedoms\) Bill 2017](#)

Amends the: Marriage Act 1961 to: redefine marriage as 'a union of two people'; introduce non-gendered language so that the requirements of the Act apply equally to all marriages; enable same-sex marriages that have been, or will be, solemnised under the law of a foreign country to be recognised in Australia; amend the definition of 'authorised celebrant' to include new categories of religious marriage celebrants and certain Australian Defence Force officers; enable ministers of religion, religious marriage celebrants, chaplains and bodies established for religious purposes to refuse to solemnise or provide facilities, goods and services for marriages on religious grounds; and make amendments contingent on the commencement of the proposed Civil Law and Justice Legislation Amendment Act 2017; and Sex Discrimination Act 1984 to provide that a refusal by a minister of religion, religious marriage celebrant or chaplain to solemnise marriage in prescribed circumstances does not constitute unlawful discrimination. Progress: House of Representatives Introduced and read a first time 04 Dec 2017; Second reading moved 04 Dec 2017

### REGULATIONS

#### [Privacy Amendment \(Permitted Disclosures—Energy and Water Utilities\) Regulations 2017](#)

04/12/2017 – This regulation amends the Privacy Regulation 2013 to permit the disclosure of credit information by energy and water utilities in the Australian Capital Territory until 1 January 2019.

#### [Parliamentary Business Resources Regulations 2017](#)

21/11/2017 - This instrument prescribes the public and other resources that may be made available to members of parliament for the conduct of their parliamentary business under the Parliamentary Business Resources Act 2017.

### NSW

#### Regulations and other miscellaneous instruments

[Election Funding, Expenditure and Disclosures \(Adjustable Amounts\) Further Amendment Notice 2017](#) (2017-671) – published LW 1 December 2017

[Law Enforcement \(Powers and Responsibilities\) Amendment \(Police Reorganisation\) Regulation 2017](#) (2017-675) – published LW 1 December 2017

#### Bills introduced Government – week ending 24 November 2017

[Vexatious Proceedings Amendment \(Statutory Review\) Bill 2017](#)

#### Non-Government – week ending 24 November 2017

[Civil Liability Amendment \(Institutional Child Abuse\) Bill 2017](#)

#### Bills passed by both Houses of Parliament – week ending 24 November 2017

[Electoral Bill 2017](#)

[Terrorism \(High Risk Offenders\) Bill 2017](#)

#### Proclamations commencing Acts

[Crimes \(High Risk Offenders\) Amendment Act 2017 No 54](#) (2017-678) – published LW 1 December 2017

[Justice Legislation Amendment Act \(No 2\) 2017 No 44](#) (2017-667) – published LW 1 December 2017

[Crimes \(Domestic and Personal Violence\) Amendment \(National Domestic Violence Orders Recognition\) Act 2016 No 9](#) (2017-641) – published LW 24 November 2017

[Justice Legislation Amendment Act \(No 2\) 2017 No 44](#) (2017-642) – published LW 24 November 2017

#### Bills assented to

Electoral Act 2017 No 66 – Assented to 30 November 2017

Terrorism (High Risk Offenders) Act 2017 No 68 – Assented to 30 November 2017

Building Products (Safety) Act 2017 No 69 – Assented to 30 November 2017

Rural Crime Legislation Amendment Act 2017 No 62 – Assented to 23 November 2017

Statute Law (Miscellaneous Provisions) Act (No 2) 2017 No 63 – Assented to 23 November 2017

For the full text of Bills, and details on the passage of Bills, see [Bills](#).

## 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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## 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)
- 2(a) Commercial and contractual matters
- 4(a) Employment and industrial relations law

- 4(f) Discrimination
- 6(b) General litigation and dispute resolution
- 6(c) Debt recovery