



PUBLIC SECTOR NEWSLETTER - VICTORIA

The last fortnight has seen the announcement of additional funding to help children avoid the child protection system, the consideration of additional security requirements for gun stores and new laws passed making prisons and youth justice centres 'drone free zones'.

Meanwhile the debate in relation to mandatory sentencing and the unprecedented attack on the Victorian judiciary continues.

The last fortnight also saw the delivery of some interesting decisions on disability discrimination, conflict of interest, special circumstances justifying the extension of time to seek judicial review and the right of access to health information.

We hope you enjoy this edition of our Victorian Public Sector Newsletter.

IN THE MEDIA

Putting kids first: Evidence-based trials to improve safety in Victoria

The Minister for Families and Children Jenny Mikakos announced \$6.1 million to test a range of evidence-based programs to better protect children and keep them out of the child protection system.

<https://www.premier.vic.gov.au/putting-kids-first-evidence-based-trials-to-improve-safety/>

Victoria may legislate to tighten gun shop security after Melbourne robbery

The State Government considers tightening security requirements for gun stores after more than 50 firearms were stolen from a Melbourne shop.

<http://www.abc.net.au/news/2018-01-30/gun-shop-security-in-question-after-thefts/9373406>

Tightening prison security with drone ban now in force

Prisons and youth justice centres are now officially drone-free zones, with new laws passed by the Victorian Government coming into effect. Under the ban, anyone caught intentionally or recklessly flying a drone at or below 120 metres above a prison or youth facility, or within 120 metres of the facility boundary, faces up to two years in prison.

<https://www.premier.vic.gov.au/tightening-prison-security-with-drone-ban-now-in-force/>

Why mandatory sentencing fails: LIV

The LIV has long held that independent, qualified and experienced judicial officers are best placed to impose an appropriate sentence, taking into account all the circumstances of the case. Standardised sentencing forces judges to depart from the "intuitive synthesis" model and take into account a fixed term that may be inappropriate in the circumstances.

<https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/Jan-Feb-2018/Why-mandatory-sentencing-fails>

Debate rises over Victorian judiciary attack

The Victorian Bar has become the latest to go on record condemning recent political attacks on the Victorian judiciary, however some in the legal profession appear to be finding said attacks warranted.

<https://www.lawyersweekly.com.au/wig-chamber/22589-debate-rises-over-victorian-judiciary-attack>

CASES

[Eisele v Commonwealth of Australia \[2018\] FCA 15](#)

DISCRIMINATION - disability discrimination - alleged discrimination against person with associate with disability - reasonable adjustments - where aggrieved person was applicant for a Subclass 457 visa under the Migration Act 1958 (Cth) - where associate with disability had applied for approval as a business sponsor - whether primary judge erred in dismissing application - appeal dismissed.

PRACTICE AND PROCEDURE - subpoenas - applicable principles - where subpoenas addressed to two witnesses were set aside on basis that the evidence proposed to be adduced would be irrelevant - whether primary judge erred in setting aside subpoenas - Constitution, s 75(v)

[Sarikaya v Swinburne University of Technology \[2018\] VSC 7](#)

JUDICIAL REVIEW- Supreme Court (General Civil Procedure) Rules 2015, Order 56 - Application in the nature of certiorari and mandamus - Extension of time within which to commence proceeding - Special circumstances required - No special circumstances disclosed - No arguable case for judicial review - Application dismissed.

[Ji v Bluestars Real Estate Pty Ltd \[2018\] VSC 11](#)

JUDICIAL REVIEW - Solicitors - Conflict - Application to restrain solicitor from acting - Administration of justice and appearance of justice - Actual conflict - Need for informed independent advice - Proportionality of costs - Civil Procedure Act 2010 (Vic), s 24(a) and (b) - Legal Profession Uniform Law Application Act 2014 (Vic), sch 1, ss 419, 423(2)(c) - Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 11.3, Legal Profession Uniform Conduct (Barristers) Rules 2015, r 119.

[Maynard v MoneyGram Payment Systems Inc \[2018\] VSC 7](#)

JUDICIAL REVIEW AND APPEALS – Application for leave to appeal pursuant to Section 148 of the Victorian Civil and Administrative Tribunal (VCAT) Act 1998 (Vic) – Plaintiff transferred payments to third party pursuant to online scam via defendant's kiosk in a convenience store – Defendant not liable for the loss suffered by plaintiff - Whether the Tribunal Member applied the correct legal test to determine the standard of reasonable care required by the defendant – *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40, referred to - Whether the Tribunal Member's findings were open to make on the evidence – Whether plaintiff's challenges amounted to impermissible merits review - No arguable case that Tribunal Member erred in identifying applicable legal test – Tribunal Member's findings open to make on the evidence – *Secretary to Department of Premier and Cabinet v Hulls* [1999] VSCA 117; [1999] 3 VR 331, referred to - *Myers v Medical Practitioners' Board of Victoria* [2007] VSCA 163; (2007) 18 VR 48, referred to - Application dismissed.

[Chen Wei & Anor v Na Yu \[2018\] VSC 6](#)

JUDICIAL REVIEW AND APPEALS – Application for leave to appeal pursuant to Section 148 of the Victorian Civil and Administrative Tribunal (VCAT) Act 1998 (Vic) – Finding by Deputy President that funds advanced by applicants to respondent's bank account did not constitute a loan – Adverse findings on credibility of applicants' witnesses by Deputy President - Whether failure of Deputy President to provide a legal characterisation for the transaction constitutes an error of law or amounts to inadequate reasons –

Whether an appellate court can entertain or consider arguments on claims not advanced at first instance – Whether Deputy President arguably erred in failing to characterise payments as money had and received - No prima facie case established for an arguable error of law or inadequate reasons – *Secretary to the Department of Premier and Cabinet v Hulls* [1999] VSCA 117; [1999] 3 VR 331, applied; *Gaycel Pty Ltd v Heski Carpenters Pty Ltd* [2017] VSC 450, referred to – *Casdar Pty Ltd v Fanous* [2017] VSC 616, referred to – *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Limited* [2014] VSCA 353, referred to - Application for leave to appeal dismissed

PRACTICE AND PROCEDURE – Procedural fairness - Self-represented applicants whose native language was not English – Whether translation inadequacies affected Deputy President's assessment of witness credibility - Whether Deputy President sufficiently accommodated applicants' circumstances so as to afford natural justice – Whether hearing a six day trial over four months amounts to procedural unfairness – No procedural unfairness - Application of Sections 97 and 98 of VCAT Act 1998 (VIC) – *Shaw v Gadens Lawyers* [2010] VSC 7, referred to

PRACTICE AND PROCEDURE – Application for removal of affidavit from Court file pursuant to Rule 27.07 of Supreme Court (General Civil Procedure) Rules 2015 – Affidavit filed without leave – Irrelevant to determination of issues in appeal – Scandalous and defamatory material – Application for removal of affidavit from Court file granted

[Nektaria Pty Ltd v Dimitrijevi \(Civil Claims\) \[2018\] VCT 97](#)

Question of jurisdiction where the Applicant sued for "defamation" in a broad sense – parties not represented by legal practitioners – words used loosely in the claim "breach of privacy, defamation, criminal acts, and harassing and stalking clients" – Tribunal not assisted by the parties' submissions – Australian Consumer Law and Fair Trading Act 2012 section 182(1) "consumer and trader dispute" – Australian Consumer Law sections 18(1), 236(1) and 237(1) – "in trade or commerce" – *Australian Ocean Line Pty Ltd v West Australasian Newspapers Ltd* [1983] FCA 66; (1983) 66 FLR 453 – *Fletcher v Nextra Australia Pty Ltd* [2015] FCAFC 52 – Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [2017] FCA 1305 – *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 – *Houghton v Arms* [2006] HCA 59 – *TCN Channel Nine Pty Ltd v Ilvari Pty Ltd* [2008] NSWCA 9 – *Hearn v O'Rourke* [2002] FCA 1179 – *Auswest Timbers Pty Ltd v Secretary to the Department of Sustainability and Environment* [2010] VSC 389

[Michos v Eastbrook Medical Centre Pty Ltd \(Human Rights\) \[2018\] VCAT 119](#)

Health Records Act 2001 (Vic), sections 25, 26 and 34 – right of access to health information – whether medical clinic refused to provide complainant with access to his health information when it did not give him a copy of a report – whether any breach of the Act – whether any compensation would be payable if a breach was established.

LEGISLATION

Victoria

Proclamations

No. 34: [Sentencing Amendment \(Sentencing Standards\) Act 2017](#)

Commencement: Ss 1-16, 43, 44 on 29/11/2017: SG (no. 406) 28/11/2017 p. 1 Ss 17-42 on 01/02/2018: SG (No. 28) 30/01/2018 p.1 Not yet in operation: N/A

Statutory Rules made

[No. 3: Corrections Amendment \(Remotely Piloted Aircraft and Helicopter Ban\) Regulations 2018](#)

Date of Making: 30/01/2018 Commencement: 01/02/2018: reg. 3 Not yet in operation: N/A Sunset Date: 30/01/2028

[No. 4: Serious Sex Offenders \(Detention and Supervision\) Amendment \(Remotely Piloted Aircraft Helicopter Ban\) Regulations 2018](#)

Date of Making: 30/01/2018 Commencement: 01/02/2018: reg. 3 Not yet in operation: N/A Sunset Date: 30/01/2028

[No. 5: Children, Youth and Families Amendment \(Remotely Piloted Aircraft and Helicopter Ban\) Regulations 2018](#)

Date of Making: 30/01/2018 Commencement: 01/02/2018: reg. 3 Not yet in operation: N/A Sunset Date: 30/01/2018

Access Victorian legislation at www.legislation.vic.gov.au

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HELP DESK SERVICES

Thomson Geer is delighted to offer access to the Victorian 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 the Victorian 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
- a dedicated library resource to assist Victorian Government departments and agencies research relevant case law, statutes, regulations and articles.

(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 03 8080 3604; 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.