



PUBLIC SECTOR NEWSLETTER - NEW SOUTH WALES

The biggest news in this past fortnight is, without doubt, the Liberal Party's leadership spill, which has seen Malcolm Turnbull ousted from the country's top job, with Scott Morrison successfully becoming Australia's 30th Prime Minister.

Given the substantial media coverage surrounding this, we have elected not to incorporate that into this edition. This newsletter focuses on delivering a snapshot of other current news, case law and legislation relevant to government lawyers.

MEDIA

A waterfront block in NSW was sold for \$38k, now the deal has been referred to ICAC

The sale of government land on the New South Wales central coast waterfront for the bargain price of \$38,000 has locals up in arms and prompted Greens MP David Shoebridge to refer the matter to the Independent Commission Against Corruption. <http://www.abc.net.au/news/2018-08-18/islamic-leader-accused-of-land-clearing-claims-exempt-from-law/10133930>

Appointment of Australian Information Commissioner and Privacy Commissioner

Ms Angelene Falk has been appointed Australian Information Commissioner and Privacy Commissioner for a three year term that came into effect from 16 August 2018. <https://www.attorneygeneral.gov.au/Media/Pages/Appointment-of-australian-information-commissioner-and-privacy-commissioner.aspx>

HRLC: Australian Government's national facial recognition regime needs to be overhauled

New laws proposed by the Department of Home Affairs would create a massive database of photos of millions of ordinary Australians, including children, from passports,

state and territory drivers' licences and more. <https://www.hrlc.org.au/news/facial-recognition-regime-needs-to-be-overhauled>

New laws to prevent image-based abuse one step closer

New laws to protect against technology-facilitated abuse are one step closer after the Government's Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2018 passed the House of Representatives. The new laws will actively discourage potential offenders through both civil and criminal penalties which complement existing state and territory law. <https://www.attorneygeneral.gov.au/Media/Pages/new-laws-to-prevent-image-based-abuse-one-step-closer.aspx>

Counter-terrorism powers and offences extended

The Government has secured passage of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2018 to extend critical counter-terrorism powers and offences for a further three years. Both the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the Independent National Security Legislation Monitor (INSLM) reviewed the powers in the Bill and recommended they be extended. <https://www.attorneygeneral.gov.au/Media/Pages/Counter-terrorism-powers-and-offences-extended.aspx>

LCA: Decision to release exposure draft on encrypted access bill important step to getting the law right

The release of an exposure draft of the Australian Government's Assistance and Access Bill 2018 prior to its final introduction into Parliament is something that has been long called for by the Law Council and a step that is strongly welcomed. <https://www.lawcouncil.asn.au/media/media-releases/decision-to-release-exposure-draft-on-encrypted-access-bill-important-step-to-getting-the-law-right>

Data Commissioner to safeguard data

An Interim Commissioner has been appointed to the Office of the National Data Commission to start work on safeguarding the integrity, management and use of Government-held information. He said plans were afoot for a new Data Sharing and Release Act to simplify the complex web of more than 500 privacy and secrecy provisions that currently exist across Government Departments. <https://psnews.com.au/2018/08/13/data-commissioner-to-safeguard-data/>

My Health Record opt-out period extended and penalties outlined

The Australian Government has extended the opt-out period for My Health Record by an extra month to 15 November 2018. Under the Healthcare Identifiers Act 2010, specifically subsection 14(2), healthcare providers cannot be authorised to collect, use or disclose a healthcare identifier and subject to severe penalties, including two years in jail and a fine of \$126,000. <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2018-hunt107.htm>

Eminent Jurist to Lead Digital Assets Review

NSW Attorney General Mark Speakman today announced retired Federal Court judge Hon Dr Annabelle Bennett AO SC will lead a review of laws about access to people's social media accounts and other digital assets after they die or become incapacitated. <https://www.justice.nsw.gov.au/Pages/media-news/media-releases/2018/jurist-to-lead-digital-assets-review.aspx>

Note: An options paper seeking stakeholder submissions will be published later this month. For more information visit www.lawreform.justice.nsw.gov.au

PUBLISHED - ARTICLES, PAPERS, REPORTS

[Internet activity – proposed record keeping rules: consultation paper](#)

Australian Competition and Consumer Commission: 09 August 2018.

The purpose of this consultation is to seek submissions from a range of stakeholders, including industry and data users, on the ACCC's proposed Internet Activity Record Keeping Rule (RKR).

[Strategic governance of risk: Lessons learnt from public sector audit](#)

ANAO: 08 August 2018.

Grant Hehir, Auditor-General for Australia, attended the Institute of Internal Auditors-Australia 'Public Sector Internal Audit Conference' on 31 July 2018, and presented an opening keynote session titled Strategic governance of risk: Lessons learnt from public sector audit.

CASES

[Commissioner of Taxation v ACN 154 520 199 Pty Ltd \(in liq\) \(formerly EBS & Associates Pty Ltd\) \[2018\] FCA 1140](#)

ADMINISTRATIVE LAW – application for judicial review of decision by Administrative Appeals Tribunal to issue direction under s 37(2) of Administrative Appeals Tribunal Act 1975 (Cth) – where direction compels applicant to produce internal legal advices prepared in relation to respondent – whether Tribunal erred in forming opinion that the internal legal advices "may be relevant" to its review – whether asserted error was a jurisdictional error or an error within jurisdiction – whether subjective material can be relevant to objective assessment – held: basis on which Tribunal formed an opinion that legal advices may be relevant was not open to it – held: Tribunal's decision to issue direction was made without lawful formation of the opinion giving rise to jurisdiction and thus constituted jurisdictional error.

[Lavender v Director of Fisheries Compliance, Department of Industry Skills and Regional Development \[2018\] NSWCA 174](#)

CONSTITUTIONAL LAW – legislation and legislative powers – extraterritorial operation of legislation – whether the Fisheries Management Act 1994 (NSW) and Fisheries Management (Abalone Share Management Plan) Regulation 2000 (NSW) invalid CONSTITUTIONAL LAW – operation and effect of the Commonwealth Constitution – inconsistency of laws (Constitution, s 109) – whether Fisheries Management Act 1994 (NSW) and Fisheries Management (Abalone Share Management Plan) Regulation 2000 (NSW) inconsistent with Commonwealth legislation CONSTITUTIONAL LAW – operation and effect of the Commonwealth Constitution – alteration of limits of States (Constitution, s 123) – whether Fisheries Management (Abalone Share Management Plan) Regulation 2000 (NSW) alters the limits of New South Wales.

[O'Hare v Department of Fair Trading \[2018\] NSWCATOD 134](#)

Administrative law – administrative review – application to review a decision not to take action against a real estate agent following a complaint from the public under the Property, Stock and Business Agents Act 2002 – administrative review sought by member of the public – no jurisdiction in Administrative and Equal Opportunity Division to determine application – applicant with standing.

[Whitaker v Illawarra Shoalhaven Local Health District \[2018\] NSWCATAD 183](#)

ADMINISTRATIVE REVIEW – Government Information (Public Access) – consideration of impact of personal circumstances on access applicant – consideration of whether information provided to a workers compensation investigation conducted by an external investigator appointed by an external insurer was

confidential information provided in accordance with the Agency's Managing Misconduct Policy – information provided to workers compensation investigation when it was on the cards that information would have to be disclosed to worker in future – information not confidential information prepared for misconduct investigation – consideration of whether release would reveal an individual's personal information – consideration of whether release would expose a person to a risk of harm or of serious harassment or serious intimidation – no evidence of risk – consideration of competing public interest.

[Lipscombe v Blue Mountains City Council \[2018\] NSWCATAD 182](#)

ADMINISTRATIVE LAW – Government Information (Public Access) Act -- legal professional privilege – whether privilege waived – sufficiency of evidence to establish weight to apply significantly to factors against disclosure.

[CJU v NSW Ministry of Health \[2018\] NSWCATAD 181](#)

ADMINISTRATIVE REVIEW – privacy – review of conduct of a public sector agency – whether conduct of the agency was a breach of the disclosure information protection principle in the Privacy and Personal Information Protection Act 1998 - disclosure of personal information.

[DLT v Justice Health and Forensic Mental Health Network \[2018\] NSWCATAD 180](#)

ADMINISTRATIVE REVIEW – accredited certifier – finding of unsatisfactory professional conduct – conduct not sufficiently serious to amount to professional misconduct – appropriate penalty.

[Levick v Building Professionals Board \[2018\] NSWCATOD 125](#)

ADMINISTRATIVE REVIEW – accredited certifier – finding of unsatisfactory professional conduct – conduct not sufficiently serious to amount to professional misconduct – appropriate penalty.

[Fraud Detection and Reporting Pty Ltd v Department of Justice \[2018\] NSWCATAP 191](#)

GIPA application-excluded information-held no entitlement to information Recording of Tribunal proceedings – application by party-held no valid reason for exercise of discretion Non-publication order-representative of party has made threats and engaged in inappropriate conduct-use of social media-held non-publication order justified.

[Dezfouli v Justice Health and Forensic Mental Health Network \(No 9\) \[2018\] NSWCATAD 170](#)

ANTI-DISCRIMINATION – Where complaint of sexual harassment declined by President of Anti-Discrimination Board as lacking in substance – Application for leave to proceed with complaint -- Whether fair or just to grant leave NON-PUBLICATION ORDER – Principle of open

justice – Whether desirable to make order prohibiting publication of name of individual against whom applicant's complaints had been made.

[CJU v SafeWork NSW \[2018\] NSWCATAD 171](#)

Privacy - bias The applicant's complaint is that Mr Covi of the respondent had breached her privacy and confidentiality without her consent in October 2016 by the release of information to the NSW Crown Solicitor's Office (CSO) in response to an enquiry in connection with a related dispute about a breach of the applicant's privacy with the NSW Health Service (NSW Health).

[Manning v Bathurst Regional Council \[2018\] NSWCATAD 176](#)

ADMINISTRATIVE LAW – government information – fees and charges - where agency required the payment of an advance deposit – how deposit should be calculated - whether financial hardship can be considered in estimating the processing charges – whether advance deposit should be set aside.

[Walker v NSW Department of Premier and Cabinet \[2018\] NSWCATAD 178](#)

ADMINISTRATIVE LAW – public access to government information – access to Cabinet information – reasonable grounds for claim that information is Cabinet information –waiver – meaning of 'report' - reasonableness of searches - the Applicant requested access to the following information: "Report by Consultancy KPMG - Analysis and Modelling on Council Mergers".

PRACTICE AND PROCEDURE

[NSW Justice: Task Force - Terms of Reference](#)

The Task Force is established with the objective of assessing the circumstances and CSNSW's subsequent investigation and management of a number of inappropriate relationships between CSNSW staff and offenders. The Task Force will also look into any other allegations of such inappropriate relationships that surface during the term of the Task Force.

[NSW Justice: Review of the Crime Commission Act 2012](#)

The Crime Commission Act 2012 is being reviewed to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. Submissions closed on 20 August 2018.

[Strengthening child sexual abuse laws in NSW](#)

The NSW Government has prepared a discussion paper that identifies issues and poses questions about possible options for child sexual abuse law reform. The paper considers the recommendations made by the Royal Commission and the recommendations of the NSW Parliament's Joint Select Committee on Sentencing of Child Sexual Assault Offenders.

[ICAC: Operation Skyline public inquiry](#)

The Operation Skyline public inquiry into allegations concerning the Awabakal Local Aboriginal Land Council is adjourned until Monday, 17 September 2018.

[ICAC: Operation Dasha public inquiry](#)

The Operation Dasha public inquiry into allegations concerning the former Canterbury City Council is currently adjourned.

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

Tables summarising information about briefs that are with the DPP, and prosecution outcomes. Last updated 14 August 2018.

LEGISLATION

COMMONWEALTH

Acts Compilation

[Administrative Decisions \(Judicial Review\) Act 1977](#)
C2018C00324 • Act No. 59 of 1977.

Bills

[Plebiscite \(Future Migration Level\) Bill 2018](#)

16/08/2018 – The Plebiscite (Future Migration Level) Bill 2018 (the Bill) would establish the legislative framework for a compulsory, in-person vote in a national plebiscite that would ask Australians, in view of the level of population increase from migration in the ten years to 2016: “Do you think the current rate of immigration to Australia is too high?”.

NSW

Proclamations commencing Acts

[Companion Animals and Other Legislation Amendment Act 2018 No 27](#) (2018-438) – published LW 17 August 2018

Regulations and other miscellaneous instruments

[Child Protection \(Offenders Registration\) Amendment \(Restructuring of NSW Police Force\) Regulation 2018](#) (2018-439) – published LW 17 August 2018.

[Young Offenders Amendment \(Restructuring of NSW Police Force\) Regulation 2018](#) (2018-450) – published LW 17 August 2018.

Bills introduced Government

[Criminal Procedure Amendment \(Pre-trial Disclosure\) Bill 2018](#)
[RSL NSW Bill 2018](#)

Bills passed by both Houses of Parliament

[Unexplained Wealth \(Commonwealth Powers\) Bill 2018](#)

Proclamations commencing Acts

[Crimes Amendment \(Publicly Threatening and Inciting Violence\) Act 2018 No 32](#) (2018-422) – published LW 10 August 2018 - The legislation creates a new offence in the Crimes Act of publicly threatening or inciting violence against people on the grounds of race, religious affiliation, sexual orientation, gender identity, intersex or HIV/AIDS status.

Regulations and other miscellaneous instruments

[Local Government \(Regional Joint Organisations\) Further Amendment Proclamation 2018](#) (2018-426) – published LW 10 August 2018.

[Subordinate Legislation \(Postponement of Repeal\) Order 2018](#) (2018-428) – published LW 10 August 2018.

Bills introduced Government

[Unexplained Wealth \(Commonwealth Powers\) Bill 2018](#)

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

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