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ISSUE 87



PUBLIC SECTOR NEWSLETTER - NEW SOUTH WALES

Welcome to Issue 87 of the NSW Public Sector Newsletter.

This issue includes important COVID-19 related developments in New South Wales, including arrangements for electronic witnessing of legal documents, the fast tracking of projects to boost the economy and deliver jobs, and a further economic stimulus package to safeguard council jobs, services and infrastructure.

In other news, the Federal Government has launched its COVID-19 tracking app, amidst continuing privacy concerns and the Federal Court of Australia has granted leave to the Australian Information Commissioner to serve legal documents on Facebook in respect of its alleged breaches of Australian privacy law.

This issue of the Newsletter also provides a round-up of COVID-19 related policy and legal developments federally and around the country, as well as the usual summary of practice notes, cases and legislation.

COVID-19 USEFUL LINKS

[Australian Government latest COVID-19 news, updates and advice](#)

[Businesses and employment updates](#)

[Latest NSW Health Updates](#)

[NSW Government COVID-19 website](#)

[Self isolation and mandatory quarantine](#)

[Travel and transport advice](#)

IN THE MEDIA

COVID-19 arrangements for electronic witnessing of legal documents

President of the Law Society of NSW has welcomed the passing of an emergency regulation which allows for the witnessing of legal documents to be conducted electronically during the COVID-19 pandemic. The temporary provisions, which have been added to the

Electronic Transactions Regulation 2017, provide altered arrangements for the witnessing of documents. (23 April 2020) <https://www.lawsociety.com.au/resources/news-and-media/COVID-19-arrangements-for-electronic-witnessing-of-legal-documents>

Accelerated planning projects to deliver jobs and boost the economy

Thousands of new homes, new industrial complexes and six schools are among the first wave of projects that will have their assessments fast-tracked to boost the state's economy. (28 April 2020) <https://www.nsw.gov.au/news/accelerated-planning-projects-to-deliver-jobs-and-boost-economy>

\$395m economic stimulus package to safeguard council jobs, services and infrastructure

The NSW Government announced an economic stimulus package to limit the impacts of COVID-19 by keeping more people in jobs and allow councils to deliver for communities across the state. (26 April 2020) <https://www.nsw.gov.au/news/395m-economic-stimulus-package-to-safeguard-council-jobs-services-and-infrastructure>

COVIDSafe: Australian government launches COVID-19 tracing app amid lingering privacy concerns

Australians can now download the government's controversial COVID-19 contact tracing app, COVIDSafe, amid ongoing concerns about privacy of those using the app. The Health minister has published a determination that prevents the data being used for other purposes, including for law enforcement purposes or court orders, and the data must be held within Australia. (26 April 2020) <https://www.theguardian.com/australia-news/2020/apr/26/australias-coronavirus-tracing-app-set-to-launch-today-despite-lingering-privacy-concerns>

Government media release COVIDSafe: [New app released to slow the spread of COVID-19](#)

LCA: Privacy protections must be built into COVID-19 tracking app

While the Law Council of Australia acknowledges the government's desire to improve the efficiency of COVID-19 contact tracing arrangements through the roll out of a tracing app, the privacy settings of any such app will require careful scrutiny, with many in the community understandably hesitant about the collection of their personal information by the government. (20 April 2020) <https://www.lawcouncil.asn.au/media/media-releases/privacy-protections-must-be-built-into-covid-19-tracking-app>

Domestic Violence in the wake of COVID-19 in NSW

Concerns have been raised that social isolation strategies implemented to address the COVID-19 pandemic may inadvertently increase the incidence of domestic violence. The Bureau of Crime Statistics and Research have compiled preliminary statistics to monitor any early signs of increase in domestic violence. (23 April 2020) https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2020/mr-Domestic-Violence-in-the-wake-of-COVID-19.aspx

OAIC Statement on Facebook proceedings

The Federal Court of Australia granted leave to the Australian Information Commissioner to serve legal documents on US-based Facebook Inc and Facebook Ireland. The Court found that "the material demonstrates a genuine argument about contravention, sufficient to justify causing the respondents to be subject to the litigation in Australia where the merit of that argument can be judicially determined." (22 April 2020) <https://www.oaic.gov.au/updates/news-and-media/statement-on-facebook-proceedings/>

OAIC takes stand over virus transparency

The Office of the Australian Information Commissioner (OAIC) has joined with its State and Territory counterparts to issue a public statement on the importance of transparency during the current COVID-19 pandemic. (21 April 2020) <https://www.informationcommissioners.org/covid-19>

LCA: Call for release of pro-democracy leaders arrested in Hong Kong

The Law Council of Australia joins with international legal associations to express our profound concern regarding the arrest of 15 prominent democracy figures in Hong Kong on Saturday, 18 April 2020 and to call for their immediate release. (20 April 2020) <https://www.lawcouncil.asn.au/media/media-releases/call-for-release-of-pro-democracy-leaders-arrested-in-hong-kong>

\$5000 on-the-spot fine to protect all workers

Anyone coughing or spitting on any worker will face a \$5000 on-the-spot fine with tough measures introduced to protect health care staff and police now extended to all workers. Health Minister Brad Hazzard said anyone at work or travelling to or from work would be protected, after several recent incidents involving retail and transport workers. (19 April 2020) https://www.health.nsw.gov.au/news/Pages/20200419_01.aspx

The Family Court of Australia and Federal Circuit Court of Australia formalises support for alternative dispute resolution with the introduction of an Arbitration List

To support the development and promotion of arbitration for property matters in family law, the Family Court of Australia and the Federal Circuit Court of Australia (the Courts) have established a new specialist list in each Court, to be known as the National Arbitration List. (16 April 2020) <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/news/mr160420>

Appointment of the Family Court and Federal Circuit Court Chief Executive Officer and Principal Registrar

The Morrison Government has appointed Mr David Pringle as the Chief Executive Officer and Principal Registrar of the Family Court of Australia and CEO of the Federal Circuit Court of Australia. (16 April 2020) <https://www.attorneygeneral.gov.au/media/media-releases/appointment-family-court-and-federal-circuit-court-chief-executive-officer-and-principal-registrar-16-april-2020>

Press freedom remains under threat despite High Court ruling

The High Court unanimously ruled that the warrant relied on by the Australian Federal Police to raid the home of News Corporation journalist Annika Smethurst was invalid, and the raid was therefore unlawful. However laws that criminalise public interest reporting remain in place, leaving journalists and whistleblowers exposed to police investigation and prosecution. The Law Council of Australia and Human Rights Law Centre both discuss the judgment and their concerns about the ongoing vulnerability of public interest journalism. (15 April 2020) <https://www.lawcouncil.asn.au/media/media-releases/high-court-decision-highlights-ongoing-vulnerability>
<https://www.hrlc.org.au/news/2020/4/15/press-freedom-remains-under-threat-despite-high-court-ruling>

IN PRACTICE AND COURTS

Federal Circuit Court of Australia

[Practitioner and litigant guide to virtual hearings and Microsoft Teams](#)

This Guide is for proceedings conducted in the Family Court of Australia and the Federal Circuit Court of Australia. (22 April 2020)

High Court of Australia

Practice Notes

[Evidence by Affidavit](#)

High Court of Australia, 3 of 2020 - This Practice Direction takes effect on 15 April 2020.

The Registrar may accept the filing of the affidavit signed by the deponent but not sworn or affirmed before a qualified witness on the understanding that, if required, the affidavit will later be sworn or affirmed when circumstances allow.

Law Council of Australia Submissions

21 April 2020— Law Council

[Human rights and technology](#)

[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. 13/2020, 20 April 2020.

[ACMA: New rules for phones to assist people with special communications needs](#)

ACMA has registered updated industry rules to ensure information about the accessibility features of different phone models is readily available. The updated rules will apply to phone equipment including portable, mobile, wireless and satellite phones sold in Australia. Consumers can visit the [Accessible Telecoms](#) website for more information on products suitable for people with disability and specific communications needs. View information on the [Accessibility Code](#). (21 April 2020)

[ACMA: Australian content options paper released](#)

The Australian Government has released the [Supporting Australian stories on our screens options paper](#). The paper outlines several options, ranging from keeping the status quo to deregulation. In the past weeks, the COVID-19 pandemic has heightened existing issues and pressures. In response, the ACMA has implemented [temporary measures](#) to support commercial and subscription television licensees. (16 April 2020)

ANAO Performance Audits in Progress

Due to table: June, 2020; Open for contribution

[Administration of financial disclosure requirements under the Commonwealth Electoral Act](#)

Due to table: June, 2020 Open for contribution

[Management of the Australian Government's Register of Lobbyists — follow-up](#)

Australian Bushfires Disaster Emergency Declaration — Understanding your privacy obligations

The Attorney-General has made the [Privacy \(Australian Bushfires Disaster\) Emergency Declaration \(No. 1\) 2020](#) (the emergency declaration) under Part VIA of the Privacy Act 1988 (Cth) (Privacy Act). The emergency declaration was made in response to bushfires in Australia resulting in death, injury and property damage occurring from August 2019 into 2020. The emergency declaration expires on 20 January 2021.

Current Senate Inquiries

Select Committee on [COVID-19](#)

Environment and Communications References Committee

[Press Freedom](#)

On 16 March 2020, the Committee presented a progress report recommending that the Senate grant an extension of time to report until 20 May 2020.

Legal and Constitutional Affairs References Committee

[Nationhood, national identity and democracy](#)

On 23 March 2020 the committee's reporting date was extended to 9 September 2020.

Legal and Constitutional Affairs Legislation Committee

[Federal Circuit and Family Court of Australia Bill 2019 \[Provisions\]](#) and [Federal Circuit and Family Court of Australia \(Consequential Amendments and Transitional Provisions\) Bill 2019 \[Provisions\]](#) Report by 20 November 2020.

NSW

DCJ: COVID-19. Video tech for witnessing legal documents

Last published on 22 April 2020

[COVID-19. Video tech for witnessing legal documents](#)

DCJ: COVID-19. Free help for pandemic legal issues

Last published on 15 April 2020

[COVID-19. Free help for pandemic legal issues](#)

[NSW Privacy Commissioner Statement: use of mobile phone data for managing the COVID-19 pandemic](#)

The NSW Privacy Commissioner, Ms Samantha Gavel, has issued a statement about the use of aggregated mobile phone data to assist in the NSW Government COVID-19 response. (18 April 2020)

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

The tables on this page each provide information on prosecution briefs that are currently with the Director of Public Prosecutions (DPP), and the outcomes of DPP advice and prosecutions in relation to ICAC investigations over the past five years. (15 April 2020)

[COVID - 19: Information for Attending Court – as at 20 April 2020](#)

The New South Wales Bar Association's consolidated guide to COVID-19-related court arrangements has again been updated in terms of recent developments.

Consultations

[Statutory review of the Crimes \(Serious Crime Prevention Orders\) Act 2016](#)

The NSW Department of Communities and Justice is conducting a review of the Crimes (Serious Crime Prevention Orders) Act 2016 to determine whether the policy objectives remain valid and the terms remain appropriate for securing those objectives. Submissions close on 22 May 2020.

PUBLISHED - ARTICLES, PAPERS, REPORTS

[Monitoring changes in domestic violence in the wake of COVID-19 social isolation measures](#)

BOCAR: 23 April 2020

The statistics only capture the first two weeks of social distancing measures. "These data reflect the early days of social isolation measures and the situation could well change as time goes on. We will continue to closely monitor changes in domestic violence through a range of data sources."

[Rapid implementation of Australian Government initiatives](#)

ANAO: 16 April 2020

This edition of audit insights outlines key messages from Auditor-General reports which have examined the rapid implementation of government initiatives. Topics covered include risk management, governance, resource mobilisation, accountability and program oversight in the context of rapid implementation.

CASES

[Re Young; Re Young \[2020\] HCA 13](#)

High Court – Leave to issue or file proceeding – Removal of proceedings – Where causes said to be pending in Supreme Court of New South Wales said to involve matter "arising under any treaty" within meaning of s 75(i) of Constitution – Where applications for removal of causes into High Court under s 40 of Judiciary Act 1903 (Cth) were refused – Where applicant sought to file documents in the form of applications for leave to appeal and accompanying summons – Where Registrar directed to refuse to issue or file documents without leave of a Justice first had and obtained – Whether appellate jurisdiction of High Court extends to hearing and determining appeal from order granting or refusing removal of cause – Whether order is under implied exception to appellate jurisdiction prescribed by Parliament within meaning of s 73(i) of Constitution – Whether conditions for grant of leave to appeal established.

Words and phrases – "abuse of process", "appellate jurisdiction", "cause", "exception", "federal jurisdiction", "incidental judicial power", "leave to issue or file", "order granting or refusing removal of a cause", "original jurisdiction", "preliminary and discretionary nature", "proceedings inter partes", "removal", "special leave", "substantial injustice", "treaty".

[Smethurst v Commissioner of Police \[2020\] HCA 14](#)

Held: Search warrant was invalid

Police – Search warrants – Validity of warrant – Where police searched premises in reliance on warrant – Where police retained material copied from first plaintiff's mobile phone in reliance on warrant – Where warrant relied upon reasonable grounds for suspecting commission of Commonwealth offence – Where warrant purported to set out offence against s 79(3) of Crimes Act 1914 (Cth) – Whether warrant misstated substance of s 79(3) of Crimes Act – Whether warrant failed to state offence to which it related with sufficient precision.

Injunctions – Mandatory injunction – Principles applicable – Where plaintiffs sought mandatory injunction requiring destruction or delivery up of material obtained under invalid warrant – Where plaintiffs sought injunction restraining police from making information available to prosecuting authorities

– Whether statutory basis for injunction – Whether plaintiffs identified legal right to support injunction in auxiliary jurisdiction – Whether consequences of trespass provide basis for injunction – Whether s 75(v) of Constitution provides basis for injunction – Whether damages inadequate – Whether injunctive relief should be refused on discretionary grounds.

Constitution, s 75(v); Australian Federal Police Act 1979 (Cth), s 8.; Crimes Act 1914 (Cth), Pts IAA, VII; ss 3C, 3E, 3F, 3H, 3LA, 3ZQU, 79(3); Judiciary Act 1903 (Cth), s 32.

[Australian Information Commission v Facebook Inc \[2020\] FCA 531](#)

PRACTICE AND PROCEDURE – Alleged contraventions of s 13G of the Privacy Act 1988 (Cth) – Interlocutory Application – Application for interim suppression and non-publication orders under s 37AI of the Federal Court of Australia Act 1976 (Cth) – Application for service outside of Australia pursuant to r 10.43(3) and (4) of the Rules – Application for substituted service under r 10.24 of the Federal Court Rules 2011 (Cth) – Application granted

[Cigno Pty Ltd v Australian Securities and Investments Commission \[2020\] FCA 479](#)

CORPORATIONS – financial services and markets – product intervention orders in Pt 7.9A of the Corporations Act 2001 (Cth) – judicial review of the ASIC Corporations (Product Intervention Order – Short Term Credit) Instrument 2019/917 (PIO)

ADMINISTRATIVE LAW – exercise of ASIC's power under s 1023D(3) of the Corporations Act to order by legislative instrument that a person not engage in specified conduct – whether ASIC's delegate asked the correct question – whether threshold state of satisfaction for the exercise of the rule-making power was reached – whether ASIC's delegate considered a requisite "class" of financial products when there was only one existing product

[Godla v Commissioner of Police, New South Wales Police Force \[2020\] FCA 489](#)

ADMINISTRATIVE LAW – application for judicial review of decision under federal statute made by an agent of a state decision-maker, the Commissioner of Police, NSW – pseudonym application – where the Commissioner's agent refused applications by the applicant for permission to travel as required by s 271A.1 of the Criminal Code (Cth) in circumstances where the applicant was named on the NSW Child Protection Register – where the Minister for Foreign Affairs cancelled the applicant's passport and refused to reinstate the applicant's passport – whether decision-makers made reviewable errors under s 5, s 6, or s 7 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) – no other viable grounds of review established – application dismissed with costs

[Herbert v New South Wales Land and Housing Corporation \[2020\] NSWCA 74](#)

CIVIL PROCEDURE – appeal – question of law – request to issue subpoena – refusal of request by Registrar – review of Registrar’s decision CIVIL PROCEDURE – application to vacate hearing date – termination of residential tenancy agreement – effect of COVID-19 pandemic – whether moratorium on rental tenancy evictions – Residential Tenancies Regulation 2019 (NSW), Pt 6A CIVIL PROCEDURE – appearance – failure to file notice of appearance – Uniform Civil Procedure Rules 2005 (NSW), rr 51.5; 6.9; 6.11 CONSTITUTIONAL LAW – operation of State law – whether inconsistent federal law – Government policy not a law – no notice given to Attorneys General – Judiciary Act 1903 (Cth), s 78B – Constitution, s 109 – no inconsistency

[Klewer v Director of Public Prosecutions \(NSW\) \(No 2\) \[2020\] NSWCA 69](#)

ADMINISTRATIVE LAW – judicial review – applicant subject to vexatious proceedings order – whether applicant required leave under the Vexatious Proceedings Act 2008 (NSW) to institute an appeal to the District Court against her convictions and sentences in the Local Court - whether applicant required leave under the Vexatious Proceedings Act to commence judicial review proceedings in the Court of Appeal in circumstances where she did not require leave to commence proceedings in the court whose decision was the subject of the application for judicial review. VEXATIOUS PROCEEDINGS – applicant subject to vexatious proceedings order – whether applicant required leave under the Vexatious Proceedings Act 2008 (NSW) to institute an appeal to the District Court against her convictions and sentences in the Local Court - whether applicant required leave under the Vexatious Proceedings Act to commence judicial review proceedings in the Court of Appeal in circumstances where she did not require leave to commence proceedings in the court whose decision was the subject of the application for judicial review

[Hamzy v Commissioner of Corrective Services and the State of NSW \[2020\] NSWSC 414](#)

Administrative Law – Judicial Review – Where plaintiff a high risk restricted inmate in a correctional facility administered by the defendant – Challenge to decision of the defendant requiring legal practitioners to undergo criminal records enquiry as part of the approval process to visit high risk restricted inmates – Whether decision unlawful – Whether decision unreasonable – Whether decision infringed or removed the right of a high risk inmate to choose a legal practitioner Administrative Law – Judicial Review – Where plaintiff a high risk restricted inmate in a correctional facility administered by the defendant – Challenge to decision of the defendant to deny the plaintiff access to AVL facilities for the purposes of conferring with his legal representative – Where the defendant took into account the fact that conversations

over AVL could not be monitored – Where defendant also took into account the security risk which would arise if the plaintiff were granted access – Whether defendant’s decision was unreasonable Administrative Law – Judicial Review – Where plaintiff a high risk restricted inmate in a correctional facility administered by the defendant – Challenge to the practice of the defendant to permit limited monitoring of calls between the plaintiff and his legal representative – Whether such a practice unlawful – Whether such a practice amounted to an impermissible intrusion into legal professional privilege Statutory interpretation – Prison legislation – General principles applicable to the interpretation of such legislation – General reluctance of Courts to interfere in matters of prison administration – Necessity to recognise the difficulty of the task of managing prisons – General recognition of Parliament’s intention to give those responsible for the management of prisons a broad discretion commensurate with their task Human Rights Law – Where plaintiff a high risk restricted inmate in a correctional facility administered by the defendant – Where defendant required that communications to which the plaintiff was party during visits in custody be in English – Where plaintiff asserted a right to be able to speak Arabic – Whether the right to freedom of expression encompassed a right of the plaintiff to be able to speak in the language of his choice – Whether provisions of the regulations pursuant to which the defendant acted in requiring that conversations be conducted in English were invalid constitutionally or otherwise Words and phrases – “in English” – “based on”

[Dezfouli v Commissioner of Police \[2020\] NSWCATAD 103](#)

ADMINISTRATIVE LAW – government information – access application – prejudice supply of information – reveal identity of informant – personal information – whether public interest considerations against disclosure outweigh public interest considerations in favour of disclosure

[DTN v Commissioner of Police \[2020\] NSWCATAD 107](#)

PROCEDURE - Time for lodgement of Application under Privacy and Personal Information Protection Act 1998 (NSW) – “the time the applicant first became aware” – imputed knowledge - agency – materials supplied to the applicant’s former solicitor but not to the applicant

[Learnmouth v Secretary, Department of Education \[2020\] NSWCATAD 109](#)

ADMINISTRATIVE LAW – government information – reasonable searches – disclosure against public interest

[Scott-Mackenzie v Independent Liquor and Gaming Authority \[2020\] NSWCATAD 108](#)

ADMINISTRATIVE REVIEW – grant of liquor licence – whether the overall social impact of the licence ... will not be detrimental to the well-being of the local or broader community

[Waters v Silva Portfolios Pty Ltd t/as Ballina Waterfront Village and Tourist Park \[2020\] NSWCATAP 60](#)

APPEALS – appeal on a question of law – procedural fairness – bias – actual bias – apprehended bias – whether Tribunal failed to apply the applicable law
APPEALS – leave to rely on fresh evidence APPEALS – leave to appeal – whether the decision not fair and equitable and against the weight of evidence

LEGISLATION

Commonwealth

[Fair Work Commission Amendment \(Miscellaneous Measures\) Rules 2020](#)

24/04/2020 - This instrument amends the Fair Work Commission Rules 2013.

Part 3—Amendments to require declarations rather than statutory declarations

NSW

Regulations and other miscellaneous instruments

[Child Protection \(Working with Children\) Amendment \(COVID-19 Proof of Identity\) Regulation 2020](#)
(2020-168) — published LW 22 April 2020

[Electronic Transactions Amendment \(COVID-19 Witnessing of Documents\) Regulation 2020](#)
(2020-169) — published LW 22 April 2020

[Administrative Arrangements \(Administration of Acts—Amendment No 3\) Order 2020](#)
(2020-149) — published LW 15 April 2020

[Administrative Arrangements \(Administrative Changes—Ministers and Public Service Agencies\) Order 2020](#)
(2020-150) — published LW 15 April 2020

[Legal Profession Uniform Law Application Amendment \(Savings and Transitional\) Regulation 2020](#)
(2020-151) — published LW 17 April 2020

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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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

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

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