



PUBLIC SECTOR NEWSLETTER - VICTORIA

Thankfully Victoria is continuing to move forward in the fight against COVID-19 with the numbers continuing to drop and regional Victoria's restrictions easing.

In this edition, the Federal Government is looking at the issue of judicial impartiality, the Australian Public Service Commission has released guidance for the use of social media and the Australian Law Reform Commission has considered the issues of attributing criminal responsibility to corporations.

In another ongoing issue, there has been some continuing consternation about the proposed law to allow the Federal Government to cancel arrangements between Australian based institutions and foreign governments.

In the Courts which continue to operate, there have been a number of administrative law decisions, the most interesting of which is the decision in *Ko v Hall & Ors [2020] VSCA 224* which considered whether a determination of a Medical Panel made out of time makes the determination invalid.

We hope you enjoy this edition of our public sector newsletter.

IN THE MEDIA

Attorney General: Reviews of Judicial Impartiality and the Legislative Framework for Corporations and Financial Services Regulation

The Morrison Government has referred two matters to the Australian Law Reform Commission (ALRC) for review. First, on the issue of judicial impartiality, and the second, a review of the legislative framework for corporations and financial services regulation. (11 September 2020) <https://www.attorneygeneral.gov.au/media/media-releases/reviews-judicial-impartiality-and-legislative-framework-corporations-and-financial-services-regulation-11-september-2020>

Why unis are worried about a federal power to cancel their foreign 'arrangements'

A proposed law would give the federal government power to cancel arrangements between foreign governments and Australian states, territories, local councils and public universities. It's fairly clear the Commonwealth has the constitutional power to do this. (10 September 2020) <https://theconversation.com/why-unis-are-worried-about-a-federal-power-to-cancel-their-foreign-arrangements-145689>

APSC: New APS guide on social media conduct

The Australian Public Service Commission (APSC) has released updated guidance for APS employees and Agencies on how to conduct themselves on social media. It said APS employees had a right to participate in online society, just as they had rights as citizens of Australia to engage in community life. (10 September 2020) <https://www.apsc.gov.au/social-media-guidance-australian-public-service-employees-and-agencies>

Pandemic prompts family violence strategy

Services Australia has launched its Family and Domestic Violence Strategy 2020-23 emphasising support for people affected by family violence when forced to stay home during the pandemic. (10 September 2020) <https://www.servicesaustralia.gov.au/sites/default/files/family-and-domestic-violence-strategy-2020-23v2.pdf>

LCA: ASIO's extraordinary detention powers extended until March 2021

The LCA says COVID-19 should not be used an excuse to curtail Australia's personal freedoms that are unrelated to the pandemic. Law Council President, Pauline Wright, noted the highly extraordinary nature of these powers, which have no equivalent in the laws of Australia's closest intelligence partners, including the United States, United Kingdom, Canada and New Zealand. (04 September 2020) <https://www.lawcouncil.asn.au/media/media-releases/asio-extraordinary-detention-powers-extended-until-march-2021>

Strengthening controls on high-risk terrorist offenders

The Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 – introduced in Federal Parliament – will establish an extended supervision order scheme to ensure that high risk terrorist offenders who are released into the community at the end of their custodial sentences are subject to close supervision in proportion to the level of risk they pose to community safety. (03 September 2020) <https://minister.homeaffairs.gov.au/peterdutton/Pages/strengthening-controls-on-high-risk-terrorist-offenders.aspx>

ALRC: The Attribution Game - Corporate Fault and Attribution of Criminal Responsibility

In its Final Report on Corporate Criminal Responsibility, the ALRC recommended that there be a single legislative method for attributing criminal responsibility to corporations. (03 September 2020) <https://www.alrc.gov.au/news/the-attribution-game-corporate-fault-and-attribution-of-criminal-responsibility/>

ALRC Review: Law Council urges caution on changes to fundamental principles of criminal responsibility

The LCA is urging the parliament to take a cautious approach when considering fundamental principles of criminal law. Unless the corporation could prove that it took reasonable precautions to prevent the individual officer from committing the crime, it would be guilty. (01 September 2020) <https://www.lawcouncil.asn.au/media/media-releases/alrc-review-law-council-urges-caution-on-changes-to-fundamental-principles-of-criminal-responsibility>

ACMA: Telstra, Optus, TPG and Dodo breach NBN service continuity rules

The ACMA has found TPG, Optus, Dodo and Telstra in breach of consumer protection rules after more than 1,500 of their customers were left without telco services while trying to migrate to the NBN. All four companies have provided court-enforceable undertakings to introduce measures to improve compliance with the service continuity rules. (01 September 2020) <https://www.acma.gov.au/articles/2020-08/telstra-optus-tpg-and-dodo-breach-nbn-service-continuity-rules>

HLRC: Government must strengthen corporate criminal liability for human rights abuse

Human rights and legal organisations have welcomed proposals by the Australian Law Reform Commission to strengthen Australia's corporate criminal laws in relation to human rights abuses committed by Australian companies overseas. (01 September 2020) <https://www.hrlc.org.au/news/2020/8/31/government-must-strengthen-corporate-criminal-liability-for-human-rights-abuse>

Victorian government seeking legal advice over draft foreign relations laws

The Andrews government is seeking legal advice on proposed new federal laws which could tear up its

controversial Belt and Road agreement with China, potentially setting up another fight over foreign policy with the Commonwealth. (10 September 2020) <https://www.theage.com.au/politics/federal/victorian-government-seeking-legal-advice-over-draft-foreign-relations-laws-20200909-p55tso.html>

Drug and alcohol counsellor from St Paul's Prevention Rehabilitation convicted and sentenced to jail following IBAC investigation

A drug and alcohol counsellor and coordinator, who was employed at St Paul's Prevention Rehabilitation, Anthony Dieni, has been convicted at the County Court of Victoria following an investigation by the Independent Broad-based Anti-corruption Commission (IBAC). (04 September 2020) <https://www.ibac.vic.gov.au/media-releases/article/drug-and-alcohol-counsellor-from-st-pauls-prevention-rehabilitation-convicted-and-sentenced-to-jail-following-ibac-investigation>

Victorian eviction moratorium extended - News alert

The Victorian Government has put in place a moratorium on evictions, rent relief for eligible tenants, suspension of rental increases, and a continued dispute resolution process. The moratorium also made changes to how a tenant or landlord may end a tenancy during the moratorium period. (04 September 2020) <https://www.consumer.vic.gov.au/latest-news/victorian-eviction-moratorium-extended-news-alert>

VAD Laws Giving More Victorians Choice Over Their Death

Just over one year since its implementation, our voluntary assisted dying laws are giving Victorians suffering with a terminal illness greater choice over the timing and manner of their death. The report also shows the widespread need for the legislation, with 38 per cent of applications from people living in regional Victoria. (01 September 2020) <https://www.premier.vic.gov.au/vad-laws-giving-more-victorians-choice-over-their-death>

IN PRACTICE AND COURTS**[Department of the Prime Minister and Cabinet \(PM&C\): Corporate Plan 2020-24](#)**

The plan sets out six key purposes for the Department, including: Growing the economy, incomes and creating jobs; Vibrant and resilient regions; Strengthening families and communities; Enhancing Australia's international and national security; Governing well; and Preparing well to respond to critical issues. (10 September 2020)

[LSC: Regulation of litigation funding schemes](#)

The Legal Services Council has amended the Legal Profession Uniform General Rules 2015 with effect from 22 August 2020 so the prohibitions in s 258(1) and (3) of the Legal Profession Uniform Law do not apply in relation to litigation funding schemes now regulated as managed investment schemes. The new rule will operate for 12 months to allow for consultation.

[ACMA position paper: Misinformation and news quality on digital platforms in Australia](#)

A position paper to guide code development—includes a model code framework for consideration, including objectives and outcomes to be achieved for the benefit of Australian users of digital platforms. The ACMA anticipates to have in place a single, industry-wide code by December 2020.

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.

Parliamentary committee inquiries currently seeking submissions include:

[Inquiry into the impact of social media on elections and electoral administration](#)

The Electoral Matters Committee is accepting submissions to its Inquiry into the impact of social media on elections and electoral administration. Submissions close on 30 September 2020.

CASES

[Francis and Sport Integrity Australia \(Freedom of information\) \[2020\] AATA 3314](#)

FREEDOM OF INFORMATION – Confidentiality Order – Freedom of Information Act 1982 – Claim exempt documents containing material obtained in confidence (section 45, Freedom of Information Act) – Claim disclosure of document would disclose deliberative matter (section 47C, Freedom of Information Act) or would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency (section 47E(d), Freedom of Information Act) – Confidentiality Order Granted

[Steel Smith Engineering Pty Ltd v McPhee & Ors \[2020\] VSC 571](#)

ADMINISTRATIVE LAW – Judicial review – Medical panel opinion – Whether medical panel made typographical error or erred in reaching conclusion of ‘no current work capacity’ – Whether medical panel erred by limiting inquiry of ‘no current work capacity’ to only five identified employment options – Whether medical panel reasons and conclusions lacked intelligible justification – Whether medical panel failed to take into account mandatory consideration of employment history – Whether medical panel failed to give proper and adequate written reasons – Accident Compensation Act 1985 ss 91, 98C – Workplace Injury Rehabilitation and Compensation Act 2013 (Vic) ss 3 and 313 – Minister for Immigration and Ethnic Affairs v

Wu Shan Liang (1996) 185 CLR 259 – Wingfoot Australia Partners Pty Ltd v Kocak (2013) 22 CLR 480 – Minister for Immigration and Citizenship v Li & Ors [2014] FCAFC 1; (2013) 249 CLR 332 – Gruma Oceania Pty Ltd v Bakar [2014] VSCA 252.

[Anderson v Stonnington Council \[2020\] VSCA 229](#)

STATUTORY INTERPRETATION – Subordinate instruments – Subordinate instrument amended to extend heritage overlay to property while development works in progress – Whether ‘right’ to complete works for purpose of Interpretation of Legislation Act 1984 s 28(2)(e) – ‘Right’ to be identified by reference to instrument – Western Australian Planning Commission v Temwood Holdings Pty Ltd [2004] HCA 63; (2004) 221 CLR 30, applied – Resort Management Services Ltd v Noosa Shire Council [1996] QCA 441; [1997] 2 Qd R 291, considered – Common opportunity to take advantage of absence of regulation not a ‘right’ – Robertson v City of Nunawading [1973] VicRp 81; [1973] VR 819, applied – Asserted right defined imprecisely – Asserted right a mere opportunity – Leave to appeal granted – Appeal dismissed.

PLANNING AND ENVIRONMENT – Existing uses – Whether development works ‘use’ for purpose of Planning and Environment Act 1987 s 6(3)(d) – ‘Use’ does not extend to development – Nancy Shetland Pty Ltd v Melbourne and Metropolitan Board of Works (1974)

PRACTICE AND PROCEDURE – Application for leave to amend application for leave to appeal – Appeal from decision of judge of Trial Division to dismiss appeal on questions of law from Tribunal – Amendment sought to reintroduce issue withdrawn before Tribunal – Whether in interests of justice to permit amendment – Medical Practitioners Board v Lal [2009] VSCA 109; (2009) 23 VR 702, Commissioner of State Revenue v Mondous (2018) 55 VR 643, applied – Proposed amendment raised confined legal issue – Any evidentiary deficiencies to applicants’ disadvantage – Leave to amend granted.

[Ko v Hall & Ors \[2020\] VSCA 224](#)

ADMINISTRATIVE LAW – Judicial review – Medical panel – Whether medical panel gave decision outside time prescribed by s 28LZG(3) of Wrongs Act 1958 – Whether giving of decision outside time prescribed makes decision invalid – Whether parties can agree to extension of time after time has expired – Mikhman v Royal Victorian Aero Club [2012] VSC 42 considered – Wrongs Act 1958, s 28LZG(3).

STATUTORY INTERPRETATION – Legislative intention – Statutory purpose – Validity of act done in breach of statutory provision – Construction of statutory provision in its context – Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 applied – Wrongs Act 1958, pt VBA.

[Schmael v Leach \[2020\] VSC 562](#)

ADMINISTRATIVE LAW – Judicial review – Opinion of a Medical Panel – Panel’s opinion that there was no organic cause for worker’s upper body chronic pain – Where Panel formed opinion without obtaining results of MRI examinations ordered by worker’s treating surgeon – Admissibility of MRI results not before Panel – Whether Panel’s opinion legally unreasonable – Whether Panel failed to make obvious inquiry – Whether failure to inquire was material to Panel’s opinion – Whether Panel procedurally unfair – Jurisdictional error established – Whether questions should be reconsidered by differently constituted Medical Panel – Workplace Injury Rehabilitation and Compensation Act 2013 (Vic), s 312.

– Adjustment disorder and Somatic and Symptom Disorder – Medical panel concluded employment not a significant contributing factor to injury – Procedural fairness – Apprehended bias – Failure to properly consider mandatory considerations – Reasons of medical panel not inadequate – Conclusion not expressed ‘out of the blue’ – Decision of medical panel set aside – Accident Compensation Act 1985, s 5(1B) – Workplace Injury Rehabilitation and Compensation Act 2013, ss 272, 274, 302, 313.

[Jones v Fish & Ors \[2020\] VSC 542](#)

ADMINISTRATIVE LAW – Judicial review – Opinion of medical panel – Application for certiorari – Application for mandamus – Injury to plaintiff’s cervical spine

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- 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
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- (a) Calling 03 8080 3604; or
- (b) Emailing legalhelpdesk@tglaw.com.au

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