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PUBLIC SECTOR NEWSLETTER - NEW SOUTH WALES

IN THE MEDIA

Government moving in the right direction on Federal Judicial Commission

The Law Council of Australia has long advocated for the establishment of a standalone Federal Judicial Commission and considers the government is moving in the right direction by seeking independent legal advice on its establishment, to ensure the independence of the judiciary and the separation of powers. <https://www.lawcouncil.asn.au/media/media-releases/government-moving-in-the-right-direction-on-federal-judicial-commission>

Health sector targeted for cyber-crime

The Australian Cyber Security Centre (ACSC) has published a security snapshot of key cyber threats in the health sector, advising hospitals, research organisations and others on how to protect themselves from cyber security threats. <https://www.cyber.gov.au/acsc/view-all-content/reports-and-statistics/2020-health-sector-snapshot>

Australia's UPR (3rd Cycle)

Australia's human rights record was considered by members of the United Nations during its third Universal Periodic Review (UPR) on 20 January 2021. The Law Council is grateful for the advice of its expert advisory committees, sections and constituent bodies in informing this submission. At the recent review, 122 countries made close to 250 recommendations for Australia. <https://www.lawcouncil.asn.au/media/news/australia-s-upr--3rd-cycle>

NSW

Scales on Local Court bench approach balance

The NSW Local Court is on the cusp of achieving gender balance following the appointment of five new magistrates. <https://www.dcj.nsw.gov.au/news-and-media/media-releases/scales-on-local-court-bench-approach-balance>

IN PRACTICE AND COURTS

HCA Practice Directions

[Opening of the Registry](#)

High Court of Australia, 1 of 2021

This Practice Direction takes effect on 8 February 2021. Practice Direction No 2 of 2020 is revoked. The office hours of the Registry shall be from 9.00am to 1.00pm and from 2.00pm to 5.00pm.

Federal Court of Australia - Updates

The February Full Court and Appellate sitting period commenced on Monday, 1 February 2021.

Streaming pilot

The Court is preparing to roll out a streaming platform, to be piloted in some upcoming Full Court matters.

The platform will enable the members of the public to live stream a hearing via a fixed link accessible on the Court list and the Court's website, avoiding the need to obtain access to a specific Teams link and reducing the complexity of admitting and managing numerous parties in a Teams meeting.

CDPP Publications

[Timely prosecutions](#) [NLD]

ACMA Consultations

[Compliance priorities 2021-22 – consultation 02/2021](#)

We're developing our compliance priorities for our 2021-22 work program. Submissions close on 05 March 2021.

[OAIC: Our FOI disclosure log](#)

The information described in our disclosure log has been released by the OAIC under the Freedom of Information Act 1982 (FOI Act) and is available for public access. 08 February 2021 - FOI request - *A copy of NobleOak's Notifiable Data Breach Form*.

Current Consultations

Environment and Communications References Committee.

[Press Freedom](#) On 9 February 2021, the reporting date was extended from 17 February 2021 to 4 March 2021.

Finance and Public Administration Legislation Committee

[Data Availability and Transparency Bill 2020 \[Provisions\] and Data Availability and Transparency \(Consequential Amendments\) Bill 2020 \[Provisions\]](#)

[Operation and management of the Department of Parliamentary Services](#)

On 13 November 2020, the reporting date was extended to 11 March 2021.

[Commonwealth Electoral Amendment \(Banning Dirty Donations\) Bill 2020](#)

Senate referred the Commonwealth Electoral Amendment (Banning Dirty Donations) Bill 2020 for inquiry and report by 16 March 2021.

Legal and Constitutional Affairs Legislation Committee [Regulatory Powers \(Standardisation Reform\) Bill 2020 \[Provisions\]](#)

[Judges' Pensions Amendment \(Pension Not Payable for Misconduct\) Bill 2020](#)

Legal and Constitutional Affairs References Committee [Nationhood, national identity and democracy](#)

Select Committee on Foreign Interference through Social Media

[Foreign Interference through Social Media](#)

Standing Committee for the Scrutiny of Delegated Legislation

[Exemption of delegated legislation from parliamentary oversight](#)

Finance and Public Administration References Committee [The current capability of the Australian Public Service \(APS\)](#)

LCA Submissions

05 February 2021— Law Council

[Fair Work Amendment \(Supporting Australia's Jobs and Economic Recovery\) Bill 2020](#)

AAT Bulletin

The AAT Bulletin is a weekly publication containing a list of recent AAT decisions and information relating to appeals against AAT decisions, including immigration and citizenship. [Issue No. 3/2021, 8 February 2021](#)

[Commonwealth Integrity Commission: consultation draft](#)

The Australian Government has released an exposure draft of legislation to establish the new Commonwealth Integrity Commission (CIC) and make other consequential legislative amendments. A [fact sheet](#) about the key features of the CIC has also been released. The consultation page includes links to the draft legislation and further information about other issues under consideration.

NSW

[COVID-19: Information for Attending Court - Friday 12 February 2021](#)

The New South Wales Bar Association's consolidated guide to COVID-19-related court arrangements has today again been updated in terms of recent developments, and includes today's Supreme Court of NSW.

[NSW Law Society: Applications open for the Access to Justice Innovation Fund](#)

The \$1 million fund from the State Government supports innovative ideas to improve or enhance access to justice in NSW. Grants of between \$50,000 and \$250,000 are available for low cost, high impact projects that make a difference for those who need it most.

Extension of strata and community lands COVID-19 Regulations

Regulations were published on 12 November 2020 which extend the COVID-19 measures as previously provided for strata and community lands to 13 May 2021. The measures include alternative means of holding meetings and execution of documents by an owners corporation or community association. See [Community Land Management Amendment \(COVID-19\) Regulation \(No 2\) 2020](#) and [Strata Schemes Management Amendment \(COVID-19\) Regulation \(No 2\) 2020](#).

[DCJ NSW: Review of the Advocate for Children and Young People Act](#)

The review will determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing these objectives. The discussion paper is available [here](#). Submissions close on 12 March 2021.

[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.

PUBLISHED - ARTICLES, PAPERS, REPORTS

[2020 Sector Snapshot: Health](#)

Cyber Security Centre: February 2021

This report provides a high-level overview of the cyber security environment within the health sector over a twelve month period (1 January to 31 December 2020).

CASES

[Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd \[2021\] HCA 2](#)

Appeal allowed. Administrative law – Apprehended bias – Relief – Jurisdiction of inferior courts – Where first respondent applied for additional mining leases and amendment to existing environmental authority ("applications") – Where appellant and others lodged objections to applications – Where first decision of Land Court of Queensland ("Land Court") recommended that both applications be rejected – Where Supreme Court of Queensland rejected arguments by first respondent that recommendations made by Land Court affected by apprehended bias, but held recommendations involved errors of law and remitted certain matters to Land Court for reconsideration – Where second decision of Land Court constituted by different Member recommended

applications be approved subject to conditions – Where amendment to environmental authority granted by delegate of second respondent – Where Court of Appeal allowed cross-appeal by first respondent and held that recommendations in Land Court’s first decision affected by apprehended bias – Whether open to Court of Appeal, after finding that recommendations in Land Court’s first decision affected by apprehended bias, not to refer matters to which recommendations related back to Land Court for full reconsideration, and instead to make consequential orders limited to declaration that procedural fairness not observed – Whether matters to which recommendations related should not be referred back to Land Court on basis of discretion to refuse relief. Environmental Protection Act 1994 (Qld), Ch 5. Judicial Review Act 1991 (Qld), s 30. Land Court Act 2000 (Qld). Mineral Resources Act 1989 (Qld), Ch 6.

[Kingdom of Spain v Infrastructure Services Luxembourg S.a.r.l. \[2021\] FCAFC 3](#)

ARBITRATION – international arbitration – applications for recognition and enforcement of awards of the International Centre for Settlement of Investment Disputes (ICSID) under s 35(4) of the International Arbitration Act 1974 (Cth) (‘Arbitration Act’).

PRIVATE INTERNATIONAL LAW – foreign state immunity – where foreign state respondent asserts sovereign immunity – interaction between s 9 of the Foreign States Immunities Act 1985 (Cth) (‘Immunities Act’) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) which is given the force of law by s 32 of the Arbitration Act – where s 9 of the Immunities Act provides that a foreign state is immune from the jurisdiction of the courts of Australia in a proceeding – where s 10 of the Immunities Act provides that a foreign state is not immune in a proceeding in which it has submitted to jurisdiction whether by agreement or otherwise – whether by Art 54(2) of the ICSID Convention the foreign state respondent has agreed to submit itself to the jurisdiction within the meaning of s 10 of the Immunities Act.

PUBLIC INTERNATIONAL LAW – foreign state immunity – interpretation of the ICSID Convention – whether the ICSID Convention excludes any claim for foreign state immunity in proceedings for the recognition and enforcement of an award – meaning of recognition and enforcement in Art 54 and execution in Art 55 – where Art 55 provides that nothing in Art 54 shall be construed as derogating from the law in force in any Contracting State in relation to immunity from execution.

Foreign States Immunities Act 1985 (Cth) Pts II, IV; ss 3, 7, 9, 10; International Arbitration Act 1974 (Cth) Pt IV; ss 32, 34, 35; Judiciary Act 1903 (Cth) s 39B; Federal Court Rules 2011 (Cth) r 36.32; Convention on the Recognition and Enforc.

[Ashby v Commonwealth of Australia \[2021\] FCA 40](#)

ADMINISTRATIVE LAW – application for review of decision to refuse application for an act of grace payment under s 65(1) of the Public Governance, Performance and Accountability Act 2013 (Cth) –

where act of grace payment sought for the purpose of satisfying legal fees incurred in litigation relating to alleged conduct by a member of the Parliament of Australia – where previous litigation discontinued before trial by the applicant due to purported financial pressure – where the Member of Parliament was granted an act of grace payment in relation to his legal fees – whether there was an error by the delegate of the Minister in failing to assess the claim in support of the act of grace application that the applicant was a whistle-blower, alternatively that this claim was not assessed to the requisite level of detail – whether the delegate’s finding that there was no basis for an argument that the previous act of grace payment to a litigant had an influence over the litigation was irrational – whether the delegate failed to have regard to relevant evidence that the proceeding was not highly politicised – whether there was any error in the delegation rendering the decision-making power of the delegate void – held: the delegate did not fail to assess the whistle-blower claims made by the applicant and was not required to give further or better consideration to these claims – the delegate’s finding that the act of grace payment made to the Member of Parliament did not influence the litigation was not irrational and was not outside of the exercise of their jurisdiction – there was no failure to deal with evidence relating to the claims that the proceeding was highly politicised – the applicant’s construction of the delegation power was not sensible or pragmatic and the conduct of the delegate in this case was clearly contemplated by the delegation’s authorising Act – application dismissed with costs.

Administrative Decisions (Judicial Review) Act 1977 (Cth) ss 5, 16)

Fair Work Act 2009 (Cth)

Financial Management and Accountability Act 1997 (Cth) s 33

Secretary of the Department of Finance (Cth), Public Governance, Performance and Accountability (Finance Secretary to Finance Officials) Delegation 2020 (No 1) (22 January 2020) sch 1A pt 11

Members of Parliament (Staff) Act 1984 (Cth)

Judiciary Act 1903 (Cth) s 39B

Public Governance, Performance and Accountability Act 2013 (Cth) ss 65(1), 107, 109

Public Governance, Performance and Accountability Rule 2014 (Cth) s 24

Safety, Rehabilitation and Compensation Act 1988 (Cth).

[The Commissioner of the Australian Federal Police v Pratten \[2021\] NSWSC 69](#)

PROCEEDS OF CRIME – pecuniary penalty under s 116 of Proceeds of Crime Act 2002 (Cth) – defendant convicted of obtaining financial advantage by deception by concealment of taxable income contrary to s 134.2(1) of the Criminal Code Act 1995 (Cth) – benefit derived from offending – whether penalty can be calculated by reference to tax payable on concealed income – determination of penalty does not depend on Court’s assessment of income tax payable by defendant – whether penalty can be imposed without evidence of Commissioner of Taxation’s assessment

of income tax payable on assessable income – order made CONSTITUTIONAL LAW – Notices to Attorneys General pursuant to Judiciary Act 1903 (Cth) s 78B – where short notice given and some responses not received – whether court can proceed – where notices misconceived – no adjournment required CONSTITUTIONAL LAW – whether making of pecuniary money order breaches Ch III of the Constitution – whether penalty sought is justiciable – whether abuse of process – no issue of principle CIVIL PROCEDURE – application for referral to pro bono legal panel and stay of proceedings – no issue of principle CIVIL PROCEDURE – motion for leave to issue subpoena to parties' solicitor – where written instructions given to expert in evidence – where evidence sought relates to legal advice privilege – motion dismissed *The Commissioner of the Australian Federal Police v Pratten* [2021] NSWSC 69.

[Lawson v Minister for Environment & Water \(SA\) \[2021\] NSWCA 6](#)

NATIVE TITLE – extinguishment – compensation – whether extinguishment occurred (i) under legislation vesting land in South Australia or (ii) pursuant to resumption under the Public Works Act 1912 (NSW) STATUTORY INTERPRETATION – legislative purpose – whether land vested in South Australia for an estate in fee simple under the River Murray Waters Act 1915 (NSW) – right to compensation under the Public Works Act 1912 (NSW) – whether possessory title and any other interests extinguished STATUTORY INTERPRETATION – approaches – whether literal reading appropriate – whether a particular construction would be contrary to the purpose of an Act.

[North Coast Environment Council v Environment Protection Authority \[2021\] NSWCATAD 29](#)

ADMINISTRATIVE LAW – government information – access application – provided to an agency in confidence – diminish the competitive commercial value of information – prejudice legitimate business, commercial or financial interests – public interests in favour of disclosure – public interests against disclosure – whether overriding public interest against disclosure.

[Norkin v University of New England \[2021\] NSWCATAD 28](#)

FREEDOM OF INFORMATION – government information – refusal to deal with application – remittal

[Votano v Building Professionals Board \[2021\] NSWCATOD 7](#)

ADMINISTRATIVE REVIEW – building certifier – application for accreditation – experience requirements – whether applicant has required experience *Votano v Building Professionals Board* [2021] NSWCATOD 7.

[Pillinger v Northern Sydney Local Health District \[2021\] NSWCATAD 14](#)

ADMINISTRATIVE LAW – access to government information – investigation into complaints – whether overriding public interest against disclosure *Pillinger v Northern Sydney Local Health District* [2021] NSWCATAD 14.

[Dare v SafeWork NSW \[2021\] NSWCATAD 12](#)

ADMINISTRATIVE LAW – Administrative review – review of decision to cancel and disqualify the accreditation of an assessor of high risk work licences under cl 134 of the Work Health and Safety Regulation 2017 – whether Conditions for conducting high risk work license assessments in NSW breached – decisions set aside and varied.

[The Australian Press Council Inc v Southey \[2021\] NSWCATAP 9](#)

HUMAN RIGHTS – Anti-discrimination – transgender grounds – preliminary question – definition of 'services' – whether adjudication of complaint by private organisation, the Australian Press Council, is within the definition of 'services' *The Australian Press Council Inc v Southey* [2021] NSWCATAP 9.

[EJS v NSW Trustee and Guardian \[2021\] NSWCATAD 10](#)

ADMINISTRATIVE LAW – review under section 62 NSW Trustee and Guardian Act 2009 (NSW) – Trustee and Guardian - interests and welfare of protected person – whether to pursue refund of legal costs – financial management order. *EJS v NSW Trustee and Guardian* [2021] NSWCATAD 10.

LEGISLATION

Commonwealth

Act Compilation

[Administrative Appeals Tribunal Act 1975](#)

02/02/2021 - Act No. 91 of 1975 as amended

Regulation

[Australian Security Intelligence Organisation](#)

[Amendment \(Permitted Disclosure\) Regulations 2021](#)

This instrument amends the Australian Security Intelligence Organisation Regulation 2016 to make consequential and technical updates following the commencement of Schedule 1 to the Australian Security Intelligence Organisation Amendment Act 2020.

Bills

[Regulatory Powers \(Standardisation Reform\) Bill 2020 \[Provisions\]](#)

On 10 December 2020 the Senate referred the provisions of the Regulatory Powers (Standardisation Reform) Bill 2020 to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 19 February 2021.

NSW

Regulations and other miscellaneous instruments

[Administrative Arrangements \(Administration of Acts—Amendment\) Order 2021](#) (2021-35) – published LW 12 February 2021.

[Administrative Arrangements \(Administrative Changes—Ministers and Public Service Agencies\) Order 2021](#) (2021-36) – published LW 12 February 2021

Bills introduced - Government

[Prevention of Cruelty to Animals Amendment Bill 2021](#)

KEY CONTACTS

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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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