NSW Government Bulletin
Summer edition

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HOLDING REDLICH

Welcome to our annual summer edition of NSW Government Bulletin

In this special edition of our fortnightly publication, our team looks at the issues and reforms that emerged over 2017 in key areas affecting government - and also cast forward to examine the expected major trends and developments for 2018.

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Dispute Resolution & Litigation partner Greg Wrobel and paralegal Janelle Moussa

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Judicial review of adjudicator's determination

The position that an adjudicator's determination under security for payment legislation is only reviewable for jurisdictional error was challenged in 2017.

The decisions of *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 and *Maxcon Constructions Pty Ltd v Vadasz (No 2)* [2017] SASCFC 2 concluded that an adjudicator's determination under security of payment legislation in NSW and South Australia respectively cannot be judicially reviewed on any basis other than for jurisdictional error of law. In other words, an adjudicator's decision cannot be challenged on the basis of an error of law on the face of the record. However, the High Court has granted special leave to hear appeals in both matters.

The High Court will now need to decide if an adjudicator's determination can be challenged on non-jurisdictional grounds. The High Court's decisions will be ones to watch in 2018, as any finding contrary to the existing line of authority will certainly have significant implications for the construction industry and security of payment legislative regimes across the country.

Commonwealth developments:

Statutory Interpretation

Recent case law has reaffirmed the importance the courts place on context in determining the meaning of statutory text.

In the Federal Court decision of *Uber B.V. v Commissioner of Taxation* [2017] FCA 110, Justice Griffiths found that UberX drivers were supplying "taxi travel" to passengers within the meaning of s 144-5(1) of the *A New Tax System (Good and Services Tax) Act 1999* (Cth) and were thus required to register for GST purposes regardless of revenue generated. Justice Griffiths found that a broad approach to the interpretation of the word "taxi" was appropriate based on the policy and surrounding legislative context of the provision. As stated by Justice Griffiths at [122] *"the consideration of text often requires consideration of context and questions of context should be addressed in the first instance and not merely at a subsequent stage…"* In *Oreb v ASIC (No 2)* [2017] FCAFC 49, the Full Court of the Federal Court held that the word *"and"* in s 206F(1) of the *Corporations Act 2001* (Cth) did not have a conjunctive effect by referring to its predecessor provision and the explanatory memorandum to reforms of the *Corporations Act 2001* (Cth). In *DFS Australia Pty Ltd v Comptroller-General of Customs* [2017] FCA 547, the insertion of the word *"legal"* to the phrase *"owner of the goods"* in the *Customs Regulations 1926* (Cth) was held by his Honour Justice Burley to have a substantive effect. This was based on reflecting on the explanatory statement of the Amending Regulations and contemporaneous amendments to the *Customs Act 1901* (Cth). In *Privacy Commissioner v Telstra Corp Ltd* [2017] FCAFC 4, it was determined that, as a matter of statutory construction, the phrase *"about an individual"* in the National Privacy Principle 6.1 did have a substantive effect in which it limited the information that the original applicant was entitled to be provided with to personal information to which the applicant was the subject matter.

Judicial review of procurement decisions

Currently, there are limited options for tenderers who seek to challenge Commonwealth tender decisions. In some cases, this has involved an application pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in which the tenderer must demonstrate that the procurement decision was an administrative decision made under an enactment. However, the introduction of the *Government Procurement (Judicial Review) Bill 2017* (Cth) (**Procurement Bill**) to Parliament in mid-2017 may have significant implications for Commonwealth procurement if passed.

The Procurement Bill provides suppliers with new rights in relation to breaches of the Commonwealth Procurement Rules (**CPRs**) by Commonwealth entities. In particular, the Procurement Bill provides that:

- Suppliers' complaints are to be investigated and reported on by the Commonwealth entity's accountable authority; and
- the Federal Circuit Court and the Federal Court are to be vested with jurisdiction to grant an injunction or order compensation in relation to a contravention of the CPRs.

The Procurement Bill is currently being debated in the Senate as it progresses through Parliament, with a Report from the Finance and Public Administration Committee recommending the Senate pass the Procurement Bill as it is consistent with Australia's international obligations in relation to government procurement.

If passed, the implications of the Procurement Bill will be far-reaching, and will certainly see regional suppliers and small and medium enterprises receive a greater ability to raise complaints about the procurement process. The Procurement Bill should be monitored in 2018 and its proposed changes understood by Government agencies who run procurements subject to the CPRs.

Abolition of limited merits review of decisions made under National Energy Laws

On 30 October 2017, the *Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017* (Cth) (**Competition and Consumer Amendment Bill**) was assented to. The effect of the Competition and Consumer Amendment Bill is that decisions of the Australian Energy Regulator (**AER**) under the National Electricity Law and National Gas Law (**National Energy Laws**) are no longer subject to limited merits review by the Australian Competition Tribunal (**Tribunal**).

However, the Tribunal can still review decisions relating to the disclosure of confidential or protected information under the National Energy Laws. Applicants will still be able to seek judicial review of the decisions of the AER in Federal Court.

Commonwealth litigation

An in depth look at the Model Litigants Bill

Construction & Infrastructure partner Scott Alden, partner Greg Wrobel, lawyer Victoria Gordon and paralegal Jack Collins

Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017

The Australian legal system is premised on parties having equal bargaining power. However, the wealth of power and economic resources afforded to governments, as well as their level of experience within the justice system, means that opposing parties are often placed at a disadvantage in legal proceedings.

On 15 November 2017, the *Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017* (the **Bill**) was introduced into Parliament which, if passed, will subject Commonwealth litigants to enforceable model litigant obligations.

Background

The Bill is in response to a 2014 report by the Commonwealth Productivity Commission (**Commission**) into access to justice in Australia. In their report, the Commission recommended that governments, as well as their agencies and representatives, should be subject to model litigant obligations, with compliance to be monitored and enforced through an independent mechanism for dealing with complaints.

However, in 2016 the Commonwealth Government dismissed the Commission's recommendation on the basis that the increased burden placed upon Commonwealth litigants could give rise to technical arguments that would subsequently result in additional costs and delays in litigation and therefore be inconsistent with the overriding purpose of our justice system to provide just, quick and cheap resolution of legal proceedings.

This standpoint failed to recognise that the Commission's recommended model litigant obligations include specific requirements requiring claims to be dealt with promptly and keep costs to a minimum. Further, the obligations also preclude litigants from relying unnecessarily on technical arguments. Therefore, on one view, the introduction of the model litigant obligations into legislation is likely to translate into reduced costs and delays for those seeking to access justice.

Effects of the Bill

If passed, the Bill will make amendments to the *Judiciary Act 1903* (Cth) that enact the Commission's recommendations requiring the Attorney-General to oblige Commonwealth litigants to act as model litigants, in line with current practice.

A 'commonwealth litigant' would include the Commonwealth, a person suing or being sued on behalf of the Commonwealth, a Minister (or former Minister) of the Commonwealth, a person holding office (or who held office) under an Act or a law of a Territory, a member (or former member) of the Defence Force and a company in which the Commonwealth has a controlling interest. It does not include the Australian Government Solicitor when providing certain state government services.

If passed, the requirement to act as a model litigant would also extend to persons acting for Commonwealth litigants, but does not extend to criminal prosecutions and related proceedings.

The obligations do not apply to non-commonwealth government counter-parties in any proceedings.

The model litigant obligations are defined by reference to the Commonwealth's obligations to act as model litigants under the Commonwealth Legal Services Directions 2005 and include:

- acting honestly and fairly in handling claims and litigation brought by or against the Commonwealth;
- dealing with claims promptly and not causing unnecessary delay;
- making an early assessment of the Commonwealth's prospects of success and potential liability in legal proceedings;
- paying legitimate claims without litigation;
- acting consistently in the handling of claims and litigation;
- endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible including through alternate dispute resolution;
- keeping the costs of litigation to a minimum;
- not relying on technical defences unless the Commonwealth would be prejudiced otherwise;
- not pursuing appeals unless there are reasonable prospects for success or the appeal is otherwise justified in the public interest, and
- apologising where the Commonwealth is aware that it or its lawyers have acted wrongfully or improperly.

The Bill would also amend the *Ombudsman Act 1976* (Cth) (**Ombudsman Act**) to establish a process by which the Ombudsman can investigate alleged contraventions of these obligations and impose upon the Ombudsman a requirement to include the details of any such complaints in annual reports.

Under the current Ombudsman Act, the Ombudsman has scope to either cease investigating or not to investigate a complaint if the actions subject to the complaint relate to a commercial activity of a Department or prescribed authority. If passed, the Bill would remove this decision making power from the Ombudsman when it receives a complaint about legal work, by excluding legal work from the ambit of a commercial activity of the Commonwealth litigant.

Moreover, Courts would be empowered to order a stay of proceedings should they be satisfied that these obligations have been contravened, or are likely to be contravened and the Court may make any order they deem appropriate. This could include an order with regards to the litigant's future conduct, or alternatively a costs order could be issued against the Commonwealth litigant, reprimanding them for failing to operate in accordance with these obligations.

Conclusion

If passed, the Bill would reinforce existing model litigant obligations on the Commonwealth and establish an independent mechanism for dealing with complaints.

Private litigants should be aware of these obligations that will likely be imposed on Commonwealth litigants and their legal counsel under the Bill, and be prepared to invite the Court to enforce this higher standard and hold the Commonwealth to account.

Data and privacy

New laws to hit next month

General counsel and privacy expert Lyn Nicholson

After a year where privacy remained firmly in the spotlight (including high-profile breaches at Equifax, Dominos and most recently Medicare), there is little likelihood that these issues are going to fade away any time soon.

In fact, for many privacy is currently top of mind as last-minute preparations are made for the introduction of the Federal Government's new mandatory breach notification laws that are set to commence next month.

While these changes do not apply to state and local government entities, most contractors and third parties that they deal with will have to comply. To be protected in the event of a breach of information by a supplier, now is a good time to get up-to-speed on the changes and ensure your contracts deal with their compliance.

Australia's new Notifiable Data Breach scheme

Key changes:

- The new laws will require a potential breach incident to be assessed and for individuals affected to be notified about the breach within 30 days if there is suspicion of serious harm
- Individuals affected must be advised about what steps they should take in response
- If it is determined that a Notifiable Data Breach has occurred, this must be reported to the Australian Information Commissioner
- Failure to notify will incur a fine.

Read more about the changes here.

Last minute checklist:

For those set to be directly impacted, there is still some time to refine key privacy procedures before the formal introduction of the new laws.

Key procedures include:

- Devising structures to prevent breaches occurring in the first instance
- Reviewing the contractual arrangements in place with suppliers and other service providers that may have access to, hold or use, personal information about their clients. Not only is it necessary to ensure that privacy compliance is dealt with as a contractual matter with an organisation's suppliers, but also that there are audit and operational provisions to ensure security

Being prepared in the event that your organisation is involved in a data breach – how will you respond and who are your key spokespeople? Being prepared and having an incident response plan can ensure the potentially significant costs are minimised.

We look forward to seeing what the year ahead will bring in the Data and Privacy space. Stay tuned for more updates and see here for a list of our recent news articles.

Practice and procedure

An update on federal diversity jurisdiction

Construction & Infrastructure partner Christine Jones and graduate Eleanor Grounds

Last year brought guidance on, and 2018 will see the ultimate clarification of, the ability of state tribunals to deal with disputes arising between residents of different states. This came in two forms: a decision of the NSW Court of Appeal which has since been appealed to and heard by the High Court, and amendments to the New South Wales Civil and Administrative Tribunal's (**NCAT**) enacting legislation.

Burns v Corbett; Gaynor v Burns [2017] NSWCA 3

Mr Burns, a NSW resident, complained to the NSW Anti-Discrimination Board about remarks made by Ms Corbett, a Victoria resident, and Mr Gaynor, a Queensland resident, which Mr Burns argued were public acts vilifying homosexuals in breach of the *Anti-Discrimination Act 1977* (NSW).

When the former Administrative Decisions Tribunal (now NCAT) ordered Ms Corbett to make a public and private apology and Ms Corbett subsequently refused to do so, Mr Burns commenced proceedings in the Supreme Court of NSW for contempt of court.

Ms Corbett's argued that NCAT did not have jurisdiction because, at all relevant times, she was a resident of Victoria.

The New South Wales Court of Appeal held that:

- *A state tribunal which is not a "Court of a State" is unable to exercise judicial power to determine matters between residents of two states, because the state law which purports to authorise the tribunal to do so is inconsistent with the conditional investment by s 39(2) of the Judiciary Act (when read with s 39A) of all such jurisdiction in state courts.*
- Section 39(2) of the *Judiciary Act 1903* (Cth) provides, relevantly, that "Courts of the State" have federal jurisdiction in all matters in which the High Court has original jurisdiction. Pursuant to s 75(iv) of the Constitution, the High Court has original jurisdiction in all matters "between States, or between residents of different States, or between a State and a resident of another State". The operation of these provisions means NCAT, which is not a "Court of a State", does not have jurisdiction to hear and resolve matters between residents of different states.

The case was appealed to the High Court which heard the matter on 5 and 6 December 2017, but is yet to hand down judgment.

Justice Legislation Amendment Act (No 2) 2017 (NSW)

The *Justice Legislation Amendment Act (No 2) 2017* (NSW) introduced amendments to the *Civil and Administrative Tribunal Act 2013* (NSW) (**NCAT Act**) to deal with the jurisdiction gap arising from *Burns v Corbett*. The amendments, which commenced on 1 December 2017, insert Part 3A into the NCAT Act. Specifically, section 34B of the NCAT Act now provides that a person with standing to make an original application or external appeal may, with the leave of an authorised court, make the application or appeal to the District Court or the Local Court instead of the Tribunal.

The authorised court may only grant leave for the application or appeal to be made to the court if satisfied that:

1. the application or appeal was first made with the Tribunal
2. the Tribunal does not have jurisdiction to determine the application or appeal because its determination involves the exercise of federal diversity jurisdiction

3. the Tribunal would otherwise have had original jurisdiction or external appellate jurisdiction enabling it to determine the application or appeal, and
4. substituted proceedings on the application or appeal would be within the jurisdictional limit of the court.

Furthermore, an authorised court may remit an application or appeal to NCAT to determine it if the court is satisfied that NCAT has the jurisdiction to determine.

What now?

We await a decision from the High Court, which heard argument just before Christmas. Follow this link to the transcripts and submissions.

To some extent, given the new provisions now in force in the NCAT Act, the High Court's decision is academic as regards new applications. However, it is worth noting that the amendments to the NCAT Act don't assist matters underway before the amendments took effect. We are aware of a number of matters which are 'parked' awaiting the outcome. The decision will also have a bearing on the jurisdiction of other tribunals in other states, as demonstrated by the Attorneys-General for four other states intervening.

Property and real estate

A guide to the key changes to the Retail Leases Act

Property & Real Estate partner Lindsay McGregor

In 2017 we saw changes to the *Retail Leases Act 1994* (NSW) (the **Act**) come into force following the introduction of the *Retail Leases Amendments (Review) Act 2017 No.2*. The changes to the Act have been introduced with the aim of giving effect to the recommendations resulting from the recent statutory review of the Act, mainly aiming to achieve an increase in transparency, certainty and fairness for all parties involved in the retail leasing sector.

The most significant changes to the Act are as follows:

Disclosure statements and undisclosed outgoings

All contributions to the landlord's outgoings must now be specified in the disclosure statement. If outgoings are not disclosed in the Landlord disclosure statement, the landlord will not be able to recover the outgoings for the duration of the lease. In addition, if the actual amount of any disclosed outgoing is more than was estimated in the tenant's Disclosure Statement, unless there was a reasonable basis for the inaccurate disclosure, only the amount as disclosed will be recoverable. Landlords are advised to keep a record of their calculations to support that the outgoings were determined on a reasonable basis.

Disclosure statements and termination

If a tenant terminates a lease during the first six months as a result of not receiving, or as a result of receiving a misleading disclosure statement, the tenant may recover its costs of entering into the lease including fitout costs.

Variations to the disclosure statement

Any agreed amendments can now be reflected on the disclosure statement in writing by the landlord and the tenant. This saves the landlord from having to reissue the disclosure statement each time an amendment has been agreed.

Minimum term

The minimum five year term for retail leases has now been abolished and section 16 certificates are no longer required.

Excluded premises

Premises that were previously considered retail premises under the Act (such as ATMs, vending machines, public telephones, children's rides, internet booths, private post boxes and certain storage uses) are now excluded from the operation of the Act.

Market premises

Premises used as a permanent retail market will now be captured under the Act.

Lease execution and registration

A fully signed copy of the lease must be provided to tenants within three months of its return by the tenant. Further, a lease for a term longer than three years must be registered within three months of its return by the tenant.

Bank guarantees

At the end of the term, the landlord must return the tenant's bank guarantees within two months of the tenant satisfying its obligations under the lease.

Online sales and percentage rent

The exclusions from turnover now include revenue from online transactions other than where the transaction takes place in the premises or the goods are delivered to the premises. This will require the tenant to provide information to the lessor about turnover rent from online transactions.

Mortgagee consent fees

Mortgages consent fees will not be recoverable from lessees.

Demolition

Termination on the grounds of proposed demolition will only be permissible when demolition requires vacant possession of the premises.

Tribunal jurisdiction

The NSW Civil and Administrative Tribunal's monetary jurisdiction is increased from $400,000 to $750,000.

Amending the amendments

Since the revised Act has come into effect, it has already been amended by the *Statute Law (Miscellaneous Provisions) Bill (No 2) 2017* in regards to disclosure statements. Schedule 2 of the Act provided that landlord's must disclose outgoings for the first 12 months of the lease, or if the lease is for less than 12 months, for the term of the lease. From 7 December 2017, the tenant's outgoings will again be estimated for the "accounting period of the lessor that is current when this disclosure statement is given or (if this disclosure statement is given less than one month before the start of the next accounting period of the lessor) for that next accounting period". The amendment to Schedule 2 brings the disclosure statement form into line with other provisions of the Act.

Moving forward

The amendments to the Act have an impact on both the landlord and the tenant of the retail premises, and both parties and their agents will need to understand the significance of the changes. It is important that all lease and disclosure statement templates are updated to ensure compliance with the Act.

While some of the changes will operate retrospectively, most will only apply to leases entered into from 1 July 2017.

Planning and environment

2017 in review

Planning & Environment partner Breellen Warry, special counsel Peter Holt and lawyer Rachael Jordan

Planning reform in NSW requires patience and timing. In 2017 the NSW Government demonstrated both its infinite patience and impeccable timing.

The highlights of the year have been the commencement of the *Biodiversity Conservation Act 2016* (**BC Act**) in August and the passing of the *Environmental Planning and Assessment Amendment Act 2017 (***EP&A Amendment Act**) in early November.

These two significant pieces of legislative reform will likely set the tone for a busy (and transitional arrangements filled) 2018.

Commencement of biodiversity and native vegetation reforms

The suite of legislation reforms which included the *Biodiversity Conservation Act 2016, Biodiversity Conservation Regulation 2017* and *Biodiversity Conservation (Savings and Transitional) Regulation 2017* commenced on 25 August 2017 (and has implications for application of provisions of the *National Parks & Wildlife Act 1974* and the *Environmental Planning and Assessment Act 1979* (**EP&A Act**)).

The BC Act repealed the *Threatened Species Conservation Act 1995* and *Nature Conservation Trust Act 2001*. In addition, the *Native Vegetation Act 2003* has now been repealed, and native vegetation is now managed under the *Local Land Services Act 2013* and the *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017*.

At its heart, the BC Act establishes the framework whereby landholders can establish stewardship sites to create biodiversity credits. These credits will be available to the market to offset the impacts of development or clearing. In the alternative, developers can make payments into the Biodiversity Conservation Fund to discharge an offset obligation. You can read more about the scheme here.

Despite the commencement of the BC Act however, the new assessment and offsetting scheme has yet to take effect in connection with the majority of planning applications, given the savings and transitional provisions in place. For example, the old threatened species assessment regime will, generally speaking (and subject to some limitations), continue to apply to:

- any development applications lodged under Part 4 prior to 25 February 2018; and
- any applications for State significant development or State significant infrastructure made by 25 April 2019.[1]

In addition, the new scheme will not generally apply to any development applications lodged under Part 4 prior to 25 August 2018 within the local government areas of Camden, City of Campbelltown, City of Fairfield, City of Hawkesbury, City of Liverpool, City of Penrith and Wollondilly.[2]

Reform of the *Environmental Planning and Assessment Act 1979*

Touted as the best of the left over bits of the Planning Bill which was defeated in 2013, the Government passed the *Environmental Planning and Assessment Amendment Act 2017* in November 2017.

The former Planning Minster Rob Stokes sought to characterise the provisions in the EP&A Amendment Act as part of a process of evolution (the natural extension of the principles embedded in the original 1979 Act) rather

1 See clauses 27 and 28 of the Biodiversity Conservation (Savings and Transitional) Regulation 2017.
2 See clauses 27 and 28 of the Biodiversity Conservation (Savings and Transitional) Regulation 2017.

than revolution (the approach inherent in the *Planning Bill 2013* that would have seen the repeal of the EP&A Act).

As part of its revised approach the Government dropped the push towards 80 per cent of development applications being assessed as code assessable development and sought to focus on the reforms that would improve the overall operation of the EP&A Act.

In truth, the goals of the EP&A Amendment Act were somewhat more lofty that that. The new provisions (which are yet to commence) would introduce new objects seeking to promote good design and amenity of the built environment, the sustainable management of built and cultural heritage (including Aboriginal cultural heritage), and to promote the proper construction and maintenance of buildings.

On the basis that more community consultation is always a good thing in the planning space, planning authorities will now be required to prepare a community participation plan explaining how it will consult and engage with the community in plan-making and development decisions. Decision-makers will also be under an obligation to give reasons for their decisions when granting consent to development applications.

Strategic planning at the local level will also get a shot in the arm. Councils will now be required to prepare local strategic planning statements which will establish a 20-year vision for land use priorities and the broader aspirations of the council for its local government area. These changes will hopefully see the emphasis shift from a focus on plan making, towards a process of more regular monitoring and review. Local environmental plans and State environmental planning policies will now be required to be reviewed every five years.

And finally, after nearly seven years, the former Part 3A (Major Infrastructure and Other Project) provisions will be repealed in their entirety. Existing Part 3A approvals are to be transitioned to either State Significant Development or State Significant Infrastructure and, in future, proponents will have to modify their approvals under somewhat narrower modification powers (in the case of State significant development). Read more here.

The Government has foreshadowed that it intends to start some of the provisions in early 2018, but initiatives like the introduction of community participation plans and local strategic planning statement will require further consultation before they can be introduced.

Changes to staged development and the introduction of mandatory local planning panels

Staged development applications

While the broader legislative reforms were being subject to widespread public consultation there were two matters that warranted more urgent attention.

The first related to staged development. In June 2017, the Court of Appeal struck down a development consent for State significant development at Walsh Bay. The application was said to be a staged development application within the meaning of section 83B of the EP&A Act comprising a concept and a single stage. The Court of Appeal found that the definition of a staged development must by necessity involve two or more subsequent stages.

In response to concerns about the implication of that decision the Government introduced validating legislation in August to rename staged development applications as "concept development applications" and to allow a concept approval and a single subsequent detailed application. While the legislation did not save the Walsh Bay development it did validate other staged development applications involving a single stage.

The legislation also includes a new provision which seeks to make it clear that the impacts of carrying out the development may be considered when the concept proposal is being assessed but must be considered where approval to carry out works is sought (the other issue in the appeal). Read more here.

Mandatory local planning panels

The other piece of deft troubleshooting involved requiring councils in metropolitan Sydney and Wollongong to implement local planning panels. The proposal to establish panels originally formed part of the wider reform proposals in the EP&A Amendment Act which were consulted on between May 2016 and the end of January 2017.

In August 2017, the Government felt that it needed to move swiftly as part of moves to improve the probity and integrity of the planning system, in part due to the widely reported

antics of the former Auburn deputy mayor.

As a result of those changes, councils within the Sydney area and Wollongong will be required to have independent local planning panels in place by 1 March 2018. The panels will comprise three independent experts and a community member. Their role will be largely to assess development applications with a capital investment value of more than $5 million or where the council has an interest in the applications. Councillors, property developers and real estate agents are ineligible to be panel members. The Government has also said that it will revise upwards the threshold for regionally significant development from $20 million to $30 million so that a larger proportion of development applications will be determined at the local level.

Review of State environmental planning policies

The Department of Planning and Environment has had for the last two years a process of reviewing State environmental planning policies (**SEPPs**). Over the course of 2017, we saw some significant reforms or proposed reforms to a number of SEPPs. These have included:

The Education SEPP

State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (**Education SEPP**) commenced on 1 September 2017. The Education SEPP transferred the educational establishment provisions in *State Environmental Planning Policy (Infrastructure) 2007* that related to schools and TAFEs into a stand-alone SEPP. The Education SEPP also made provision for universities and early education and care facilities.

The other key changes under the Education SEPP were that registered non-government schools can now carry out certain development without consent in accordance with an approved code of practice, an expansion of what can be carried out as either exempt or complying development and a provision that enables development consent to be granted for the purpose of a school that is State significant development even though it would contravene a development standards imposed under and environmental planning instrument.

The changes related to child-care facilities make those facilities permitted with development consent across a greater range of zones, impose certain non-discretionary development standards relating to location, the amount of indoor and outdoor space, and site areas and dimensions and require those applications to consider the Child Care Planning Guideline (**Guideline**). The Guideline is designed to ensure centre-based child care facilities are assessed against a consistent criteria across NSW and that the building will comply with the National Quality Framework that regulates early education and care services at the Commonwealth level when it is built. Certain provisions in Council's development control plans no longer apply to the assessment of an application for a centre-based care facility.

The Environment SEPP

An explanation of intended effect was released for the proposed new *State Environmental Planning Policy (Environment)* (**Environment SEPP**) which is proposed to replace the *State Environmental Planning Policy No. 19—Bushland in Urban Areas, State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011, State Environmental Planning Policy No. 50—Canal Estate Development, Greater Metropolitan Regional Environmental Plan No. 2—Georges River Catchment, Sydney Regional Environmental Plan No. 20—Hawkesbury-Nepean River (No.2-1997), Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 and the Willandra Lakes Regional Environmental Plan No. 1—World Heritage Property*.

Changes to SEPP 64 Advertising and Signage

As of 29 November 2017, advertising on trailers on roads, road shoulders, nature strips and land owned by public authorities such as RMS has been banned under changes to *State Environmental Planning Policy No 64—Advertising and Signage*. Where an advertising trailer is proposed to be parked on private land which is visible from a road, footpath, and other public land, development consent under Part 4 of the EP&A Act is required. From early 2018, councils will be empowered to issue fines of up to $3,000.00 for business, or $1,500.00 for individuals who continue to use the trailers for advertising in this way.

Changes to SEPP 70 Affordable Housing

State Environmental Planning Policy No 70—Affordable Housing (Revised Schemes) (**SEPP 70**) is a mechanism that allows specified councils to prepare an affordable housing contribution scheme for certain precincts, areas or developments associated with an upzoning within their local government area. Schemes currently operate in the City of Sydney at Green Square, Ultimo-Pyrmont and the Southern Employment Lands. An explanation of intended effect for SEPP 70 was released for public comment in December which proposes the inclusion of five Councils: Randwick City, Inner West, Northern Beaches, City of Ryde and the City of Canada Bay within the framework of the SEPP. The explanation will be on exhibition until the end of January 2018.

Looking ahead to 2018: a period of transition, further consolidation and implementation

Following the commencement of the BC Act and the passage and the EP&A Amendment Act it is fair to say that 2018 will likely be characterised as a period of transition, further consolidation and implementation.

We know that local planning panels are set to commence on 1 March 2018.

The Government has also said it will consult further on community participation plans and local strategic planning statement before those provisions are commenced.

2018 will also be the year where we see the practical implementation of the BC Act and associated reforms and how that scheme will play out as developers are required to apply the scheme as part of certain proposals.

Hopefully the process of regularly reviewing SEPPs will continue throughout 2018. We are still waiting for the commencement of *State Environmental Planning Policy (Coastal Management) 2016* which was the subject of public consultation from late 2016 until January 2017. We have also yet to see the outcomes of the proposed amendments to *State Environmental Planning Policy No 44—Koala Habitat Protection* which were consulted on in November last year. Hopefully both will commence in 2018 with plenty of notice being given to stakeholders to enable them to accommodate the changes.

We also know that the process of reviewing the *Environmental Planning and Assessment Regulation 2000* has begun. It may be that we have a draft Regulation to look forward to sometime late in 2018.

Finally, the Government has said that it will look to resolve the long-standing tensions associated with having Aboriginal cultural heritage dealt with under the *National Parks and Wildlife Act 1974*. Public consultation is currently underway and workshops are scheduled for early in the new year. This year will see the 10-year anniversary of the Apology to Australia's Indigenous Peoples. There is no better time to move to give Aboriginal cultural heritage the respect it deserves.

Workplace relations and safety

Senior managers set to come under the spotlight in 2018

Workplace Relations & Safety partner Michael Selinger

Last year saw some important work health and safety legislative developments that are likely to shape the way regulators deal with businesses in 2018, particularly in the construction and labour hire industries.

Senior managers across all organisations and industries are also set to come under the spotlight.

We summarise the key changes that took place in 2017 and outline how they will impact you and your organisation over the next 12 months.

Non-conforming building products

The Grenfell disaster in the UK and the Lacrosse building fire in Melbourne led to a nationwide focus on non-conforming building products. Legislation has been introduced to combat the risk to health and safety from these products. In NSW the *Building Products (Safety) Act 2017* (**Act**) was introduced. Amongst other regulatory powers, such as the ability to ban the use of unsafe products and issue rectification orders, the Act grants the regulator a raft of investigatory powers to support the identification and elimination of unsafe building products. The application of the Act is much broader than cladding and its reach is not confined to residential buildings. The NSW laws followed on from legislative amendments in Queensland which also banned non-conforming building products.

Industrial manslaughter laws

In response to the Dreamworld theme park tragedy, the Queensland government introduced new industrial manslaughter laws. These laws are likely to have a significant impact on the manner in which fatal incidents are investigated and prosecuted.

The regulator will now be able to prosecute both a 'person conducting a business or undertaking' (**PCBU**) and a 'senior officer' if:

1. a worker dies in the course of carrying out work (including where the worker is on a break) for the business or undertaking (or is injured in the course of carrying out work for the business or undertaking and later dies)
2. the PCBU's or senior officer's conduct (either by act or omission) causes the death of the worker
3. the PCBU or senior officer is negligent about causing the death of the worker by the conduct

If the offence is proved to the criminal standard, then the PCBU will face a penalty of up to $10 million if it is a corporation or, in the case of a senior officer or PCBU who is an individual, they will face up to 20 years' imprisonment.

Labour hire licensing laws

The introduction of labour hire licensing laws in Queensland and South Australia will impact the management of health and safety for contractors.

The new *Labour Hire Licensing Act 2017* (Qld), to commence in Queensland on 16 April 2018, aims to prevent the exploitation of workers by introducing a labour hire licensing scheme imposing hefty penalties for non-compliance. More details on this can be found here.

In 2018, as part of the focus on labour hire licensing laws, employers should expect that contractor arrangements involving labour hire will be closely examined by regulators. This will extend to include workers compensation coverage and the discharge of the duty of care in respect of the health and safety of labour hire workers, particularly vulnerable workers such as migrants and young workers.

New international standard

Although not a legislative change, the **WHS** international standard, 'ISO 45001', was approved in its final form in 2017 and is likely to be published in March 2018.

As with the current Australian/New Zealand standard 4801, the international standard 45001 is designed to provide organisations with a framework for creating a safe workplace by implementing systems and processes to eliminate or reduce workplace injury as well as continually improve WHS performance. The standard will assist an organisation to fulfil its legal requirements under the Australian safety laws by outlining an approach for the implementation of reasonably practicable steps to ensure safety. In a sign of an increased international focus on leadership as a critical component in ensuring better safety outcomes, the new standard includes greater requirements on top management to demonstrate leadership and commitment for the protection of all workers' safety.

Implementing and auditing against the new standard will be a matter for businesses to consider closely in 2018, particularly those businesses who are looking to ensure that they have accreditation or certification, including those wishing to tender for work.

Case law – the safety law landscape

We take a look at the prosecutions that the safety regulators across Australia commenced this year and also examine the most significant legislative changes that were implemented.

Prosecutions

The safety regulators across Australia focused on some key risk areas when bringing enforcement proceedings this year.

Plant and machinery

Victoria led the way with unsafe systems of work prosecutions relating to plant and equipment. Three significant cases involved prosecutions of a bakery, a vegetable farm, an abattoir and manufacturer of steel products. Fines ranged from $25,000 to $80,000.

Working from heights

Prosecutions relating to working from heights was one of the most litigated risk areas in 2017. Five significant prosecutions involved a scaffolding company, a residential builder, a roofer, an arborist, and (perhaps ironically) a business that installed, maintained and inspected working at height fall arrest anchorage systems.

Fines ranged from $15,000 to $150,000. Directors were also fined and in one case the penalty was $25,000.

Excavation and earthworks

Excavation work remained a high risk activity which resulted in a number of prosecutions during the year. Two significant cases involved a building company and also a crane company. In one case there was a structure collapse during demolition which injured workers and in the other case there was a trench that had not been properly supported and so collapsed on workers causing them injury. The seriousness of these incidents were reflected in the penalties with fines ranging from $90,000 to $120,000.

Asbestos

There was a lot of activity in relation to asbestos this year, with regulators across the country, and in particular in the ACT and NSW, focusing on the challenges posed by the use of 'fluffy' asbestos in home insulation. Significant media attention about the Perth Children's hospital with ceiling panels that contained asbestos prompted all regulators to be on high alert for similar incidents in their own jurisdictions.

A significant Queensland case saw the Queensland Department of Transport and Main Roads be prosecuted and fined $175,000 when they allowed their workers to use power drills to repair an old bridge that contained asbestos. The bridge, which was not recorded as having any asbestos, was being repaired in the absence of any systems of processes to deal with the potential risk of asbestos exposure.

Unsafe equipment

The risks posed by heavy plant and equipment was also heavily scrutinised. In a significant case in Victoria, the regulator successfully appealed a penalty of $40,000 as being manifestly inadequate in relation to an excavator overloading and almost killing two people. The penalty was increased to $175,000. And in another Victorian decision, a crane collapsed when moving an empty 40-foot shipping container, again narrowly missing a nearby worker.

Hazardous substances

In Victoria, a significant prosecution resulted in a penalty of $30,000 after a worker was rendered unconscious after entering a confined space that had a harmful level of contaminate vapour. No job safety analysis had been performed although the source of the hazardous fumes was known before the work was performed. In a NSW case a penalty of $60,000 and an order to pay $31,000 in costs to the prosecutor was imposed on a company that failed to put in place safe systems of work to deal with decanting all-purpose thinners. The company ignored the well-known risk of the volatility of the thinners and did not provide any training or information to its workers to control the risk.

Inadequate risk assessments

In three significant cases, Courts imposed fines of between $40,000 and $150,000 for failure to ensure proper risk assessments of work processes were undertaken. In one NSW case, an arborist failed to use simple mechanical devices to avoid injury to workers from an obviously fragile tree. This was the result of the arborist not properly assessing the risk of the particular tree. In another NSW case, the Court heard that the director of a road works company had modified a vehicles water tank to allow it to hold kerosene but had failed to perform a risk assessment to eliminate the risk of an explosion, which ultimately occurred. And in Victoria, a tree removal company failed to note the risk posed by nearby power lines. The power lines were left live and during the works, a tree collapsed on the power line and electrocuted a worker.

What to expect in 2018

We saw an increase in the number of prosecutions across the country in 2017 with particular focus on these risks of injury.

The regulators will continue to focus on these areas due to the frequency of incidents. We can also expect that the Courts will continue to impose significant fines and, in some cases, look at the personal liability of directors.

Staying in touch

Conference, seminars and fortnightly newsletter

As well as the annual Government lawyers conference, we run seminars specifically tailored for Government lawyers and we produce a fortnightly Government Bulletin, containing news and analysis relevant to those working in the public sector.

If you wish to be added to the circulation list for Government Bulletin and receive details of upcoming seminars, please send an email to zoe.robinson@holdingredlich.com.

Sponsorship

Holding Redlich was the major sponsor of the NSW Law Society's Government Solicitors Conference in 2015, 2016 and 2017.

LinkedIn

We host a LinkedIn group for NSW Government lawyers, through which we distribute Government Bulletin, seminar invitations and the invitation to our annual Government lawyers conference. Search "NSW Government lawyers" under groups in LinkedIn.

Seminars at your agency

Our lawyers are regularly asked to present seminars within agencies and our national knowledge manager regularly presents to NSW Government lawyers on free access online legal research tools and is available to conduct bespoke training on demand.

Our Government team

Holding Redlich advises a range of Commonwealth and State Government agencies. We understand the financial, ethical, legislative and policy frameworks of government and we have a track record of providing effective, responsive and reliable legal services. Moreover, we understand that the legal position on any issue is only one part of the wider picture for government, as it manages a range of stakeholder interests. Many of our lawyers have experience working in government agencies from prior roles or secondments or have a long experience in acting for government.

We are on the **Commonwealth** Legal Services Multi-Use List and provide legal services to Department of Education, Employment and Workplace Relations, Comcare, the Australian Building and Construction Commission, Bureau of Meteorology, Fair Work Ombudsman, the Native Title Tribunal, the Department of Environment, Australia Post, the Clean Energy Finance Corporation, Screen Australia and the National Film and Sound Archive.

We have been on the **Victorian** Government legal services panel (in its various forms) since 2002. We were recently appointed to the new Victorian Government Legal Services Panel in the areas of Construction and Infrastructure Projects, General Commercial, Contracts and Procurement, Property and General Litigation. We are instructed by the Department of Treasury and Finance, Department of Education and Early Childhood Development, Department of Sustainability and Environment, Department of Human Services, VicRoads and Federation Square. We also acted for the Victorian Government in the Cole Royal Commission. We also advise AMES and Rural Workforce Agency Victoria, both of which are part funded by the State.

In **New South Wales** we have been appointed to the NSW government legal services panel (in its various forms) since 2012. Since then we have carried out work for TfNSW, RMS, RailCorp, Sydney Trains, NSW Trains, the Office of Environment and Heritage, the Department of Planning and Environment, the Department of Industry, Regional Infrastructure and Services, the Department of Education and Communities, NSW Health, the Department of Finance, Services and Innovation, the NSW Land and Housing Corporation, NSW Police Force and the Port Authority of NSW. We have also been appointed to the legal services panel for the Barangaroo Delivery Authority.

We have been appointed to the new **Queensland** Government legal services panel. Our Queensland Government clients include Queensland Business Services Authority, Queensland Building and Construction Commission, Residential Tenancies Authority, Workcover Queensland and Screen Queensland.

We have advised significant **State owned corporations** in New South Wales, Victoria and Queensland, including Ausgrid (NSW), Delta (NSW), Endeavour Energy (NSW), Ergon (QLD), Essential Energy (NSW) and SPARQ Solution (QLD).

Holding Redlich is also on the panel of a number of **local Councils** including the City of Sydney, Yarra City, Lake Macquarie City Council, Strathfield Council and Goulburn Valley Regional Collaborative Alliance. We have acted in litigation matters for Cessnock City Council and City of Ryde Council.

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