

Health Legal Report – March 2019

Welcome to the March 2019 edition of the Health Legal Report.

In this issue of the Health Legal Report we discuss:

- Employment law and privacy: Employees' biometric information considered by the Fair Work Commission in an application for leave to appeal in *Jeremy Lee v Superior Wood Pty Ltd t/a Superior Wood* [2019] FWCFB 95;
- Aged Care Security of Tenure
- Medicare items 132 and 133 – billing exclusion no longer applies
- Latest on mandatory notification data breach scheme figures

We also set out some of the Bills we are tracking throughout Australia, as well as some useful information links.



Employment law and privacy: Employees' biometric information considered by the Fair Work Commission

By Dr Imme Kaschner, Solicitor

Introduction

The Fair Work Commission recently considered if an employee's refusal to provide biometric information (fingerprint scan) for the purpose of a new security system providing access to a work site could provide a valid reason for dismissal, with the former employee arguing that the requirement was not compliant with the Privacy Act 1988 (Cth) in the circumstances, and the dismissal was therefore harsh, unjust or unreasonable.

While finding in favour of the employer in first instance, the Full Bench of the Fair Work Commission has granted leave to appeal to the former employee (*Jeremy Lee v Superior Wood Pty Ltd t/a Superior Wood [2019] FWCFB 95*). The outcome will be highly relevant for employers using or seeking to implement identification systems based on biometric data in various contexts.

Entities can prepare for this development by including the collection of biometric data in their privacy policies and providing relevant collection notices to employees, as well as requiring compliance with relevant policies in employment contracts.

Background

The appellant Mr Lee (**Appellant**) had worked as a casual General Hand at Superior Wood Pty Ltd's (**Respondent**) 2 Queensland sawmills at Melawondi and Imbil for approximately 3.25 years at the time of his dismissal. About 4 months prior to the dismissal, the Respondent had informed employees that it would introduce biometric (fingerprint) scanners at the site to record employees' presence. The Appellant in contrast to other employees refused to use the scanners from the outset, and sought to instead continue to rely on a previously used paper sign-in process, or a "swipe-card" system. The issue was discussed in a number of meetings between the Respondent and the Appellant, with the Respondent insisting that accommodating the Appellant's request was impractical, as it would mean that a single employee was excluded from an improved safety measure. As a result, the Appellant was dismissed on 12 February 2018. He subsequently sought review of the dismissal as being unfair. It was not in dispute that the refusal to submit to the biometric scanning was the sole reason for the dismissal.



The first instance decision

The Fair Work Commissioner (**Commissioner**) dismissed the application for an unfair dismissal remedy (*Jeremy Lee v Superior Wood Pty Ltd [2018] FWC 4762*), (**Decision**).

The Decision was based on the assessment of 2 questions, namely:

- whether the collection of the appellant's biometric information would have been non-compliant with the Respondent's obligations under the Privacy Act; and
- whether the Site Attendance Policy (**Policy**) requiring the fingerprint scanning was unjust or unreasonable.

The Commissioner found that as the Respondent did not have a privacy policy, and had not provided a collection notice indicating how it would use, and protect the sensitive information, such collection (where successful) may have been in breach of the Privacy Act, as the employee records exemption did not apply to requirements for the collection of sensitive information from employees. Under APP 3.3, sensitive information must only be collected where it is reasonably necessary for one or more

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functions of the entity, and with the (actual or implied) consent of the individual.

However, the Commissioner found that the Policy was reasonably necessary in view of the Respondent's business, and was not unlawful, in spite of any possible lack of compliance with the Privacy Act in its application. As such, the Appellant's refusal to comply with the Policy was considered to be unreasonable considering the purpose of the Policy included increased site safety and better payroll administration, and the Respondent would have had to implement a manual pay run for a single employee if the appellant's wishes were accepted.

Grounds for leave to appeal

The Full Bench of the Fair Work Commission (**Full Bench**) granted leave to appeal to the Appellant.

The Full Bench considered that there was an arguable case of appealable error in the Decision in relation to (at [35]):

- *whether the request to comply with the respondent's Site Attendance Policy was lawful and/or reasonable, in all the circumstances of the case, and in the context of the appellant's refusal to provide consent to the disclosure of his personal biometric data;*
- *whether the Commissioner's findings as to the application of the Privacy Act were relevant, and/or appropriately balanced with the exercise of the Commissioner's discretion under Part 3-2 of the Act – Unfair Dismissal;*
- *to the extent the Privacy Act is relevant, whether the exemption in s 7B in respect to an 'employee record held by the organisation and relating to the individual' includes the process by which the employee record is obtained or created;*
- *whether an employee's refusal to provide consent to the collection of sensitive 'information about an individual' in APP 3.3 is a breach of the respondent's Site Attendance Policy; and*
- *whether the 'consent' required by APP 3.3 includes 'implied consent', in circumstances where the employees have registered their fingerprint algorithm to be used by the scanners without first having been notified as required under the Privacy Act.*

The Full Bench also confirmed that the circumstances of the case had not been considered before, and raised important novel and emerging issues, enlivening public interest considerations.

Compliance Impact

Security systems based on biometric scanning (including for fingerprints) are becoming increasingly common as a secure and efficient way of identifying employees for the purpose of e.g. site access, payroll administration, and computer system access. The role of such information under the Privacy Act, and specifically the application of the employee records exemption, have received little judicial or commission attention so far.

While the outcome of the appeal can be expected to bring some clarity to the appropriate interpretation of the Privacy Act in this context, entities can avoid similar controversies by addressing collection, use and disclosure of biometric data as a possible subset of sensitive information in their relevant privacy policies that apply to employee data, by providing appropriate collection notices, and by including a requirement to consent to such collection as a condition in their employment contracts.

We will continue to track this case and provide an update on the outcome of the appeal in future editions of the Health Legal Report.

If you have any questions arising out of this article, please contact [Dr Imme Kaschner](#) on (03) 9865 1311.

Aged Care Security of Tenure

By Chris Chosich, Solicitor

Introduction

All recipients of Commonwealth subsidised residential aged care are entitled to 'security of tenure' under the *User Rights Principles 2014 (Cth)* (**Principles**). These provisions limit the circumstances in which a care recipient may be asked to leave a residential care facility. By doing so, they provide care recipients, and their families, with certainty about the provision of vital services that assist them to live as independently as possible.

However, when a care recipient begins to display challenging behaviours – such as abusing staff or other residents or having raucous social events late at night – approved providers are faced with a conflict between their responsibilities towards that individual care recipient and their responsibilities towards other recipients (or towards staff) in their service. When those responsibilities cannot be reconciled, approved providers may ask 'when can a care resident be required to leave our service?'.

Asking a care recipient to leave an aged care service is not a step that many approved providers take lightly, particularly in light of the increasing public and media attention on aged care regulatory compliance. As such, it is fundamentally important that a care recipient is only asked to leave when permitted by the Principles and in the way that the Principles require.

In effect, there are 3 main issues that require attention:

1. whether there are grounds for terminating the care recipient's residency agreement;
2. whether the Principles allow the approved provider to ask the recipient to leave; and
3. whether the procedural requirements in the Principles have been followed.

These issues are discussed further below.

Issues (1) and (2): Reason for asking recipient to leave

Issues (1) and (2) both deal with the reason for which a care recipient is asked to leave, though the legal obligations underpinning those issues are separate.

That is, Issue (1) deals with the terms of the contract under which an approved provider provides care to a care recipient and asks whether there are grounds to terminate that agreement and bring the approved provider's contractual liability to an end. By contrast,

Issue (2) relates to actually asking the care recipient to leave (i.e. giving notice of termination).

Both issues must resolve in the approved provider's favour if it is required to ask a care recipient to leave. Practically, this means that the reason that the resident is asked to leave is listed in clause 6(2) of the Principles, which sets out the **only** circumstances in which an approved provider may ask a resident to leave the care service. In summary, these are:

- the service is closing;
- the service no longer provides accommodation and care suitable for the care recipient, having regard to the care recipient's long-term needs (which must be assessed by an aged care assessment team or 2 health practitioners, 1 of whom must be independent and selected by the recipient);
- the care recipient no longer requires the care provided through the service, as assessed by an aged care assessment team;
- the care recipient is receiving care under a specialist dementia care agreement and a clinical advisory committee under that agreement has determined that the recipient is not suitable to continue receiving that care;
- the care recipient has failed to pay agreed fees for 42 days;



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- the care recipient has **intentionally** caused:
 - serious damage to the service; or
 - serious injury to staff or other care recipients;
- the care recipient is absent for more than 7 days except in an emergency or where otherwise permitted by the AC Act.

There are very few reported cases dealing with these provisions and so their scope has not been settled. This can lead to some interesting questions. For example, does an approved provider need to wait for an intentionally caused serious injury to occur before a recipient who is known to pose a risk can be asked to leave? Does a serious injury include a serious psychological injury?

Whatever ground is relied on, it is always necessary to ensure that careful consideration is given to the circumstances of each case and the relevant requirements of the Principles and residency agreement.

Finally, it is possible that the Principles might provide their own authority to terminate an agreement. Though this argument has not been tested in court, and, in any event, a well-drafted residency agreement should ensure that termination of the agreement is permitted where permitted by the Principles.

Issue (3): Procedural requirements

Assuming that there are grounds for asking a care recipient to leave, then the approved provider must comply with the Principles' procedural obligations in giving the care recipient notice to vacate. These requirements include obligations that the approved provider:

- refrain from taking any steps to ask the care recipient to leave, or even imply that they must leave until suitable alternative accommodation that meets the care recipient's long-term needs as assessed by an aged care assessment team or 2 health practitioners (1 of whom must be independent and selected by the recipient) is available (see clause 6(3) of the Principles). It is implicit that the needs of the care recipient are to be assessed at or about the time the notice asking them to leave is given, meaning that earlier assessments would not be suitable for this purpose; and

- give notice in the form required by clause 7 of the Principles (which requires the notice to contain the reasons for asking the recipient to leave, as well as specific information relating to the aged care complaints process).

Importantly, the notice must be given at least 14 days before the care recipient is to leave (see Principles cl 7(2)).

What if the Principles are not complied with?

If the requirements of the Principles are not followed, then the notice asking the care recipient to leave may be invalid and of no effect. This is what occurred in the case *Willoughby Retirement Community Association v Frey* [2007] NSWSC 613. There, an approved provider failed to have the care recipient's long-term needs assessed for the purposes of determining whether suitable (and affordable) alternative accommodation was available to the recipient before sending her a notice requiring her to leave the residential care service. As such, the New South Wales Supreme Court held that the approved provider (which had commenced repossession proceedings) was not entitled to evict her.

What if the Principles are complied with, but the resident refuses to leave?

In this case, it may be necessary to commence repossession proceedings, though this should only occur after seeking legal advice and with a keen appreciation for the potential reputational implications of that course of action.

Conclusion

Managing a difficult resident in an aged care facility can be a complex and challenging experience (clinically and legally) and approved providers should have adequate documentation and systems in place to ensure that they are compliant for the rare event in which they may need to ask a resident to leave. In particular, approved providers should ensure that:

- contractual documentation can operate consistently with the security of tenure provisions; and
- that processes and procedures for managing difficult care recipients do not delay or prejudice a possible future attempt to ask a care recipient to leave. In particular, attention should be given to

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ensuring that any assessments of a care recipient for the purposes of managing challenging behaviours or increases in care needs address the care recipient's long-term accommodation needs to avoid having to obtain further assessments at a later stage in order to comply with clause 6(3) of the Principles.

These steps are important from a risk management perspective (particularly to guard against complaints being made to the Aged Care Complaints

Commissioner), but also from a compliance perspective, as this will assist in demonstrating regulatory compliance against Accreditation Standard 3.10 of the *Quality of Care Principles 2014* (Cth). Though we note that these are to be replaced on 1 July 2019 with the new Aged Care Quality Standards, which do not include security of tenure as an express standard but do expect approved providers to demonstrate regulatory compliance.

*If you have any questions arising out of this article, please contact **Chris Chosich** on (03) 9865 1329.*

Medicare items 132 and 133—billing exclusion no longer applied

Victorian public health care providers will be aware of the 2011 Department of Health publication "Specialist clinics in Victorian public hospitals: A resource kit for MBS-billed Services".

Page 11 of that publication suggests that items 132 and 133 of the MBS (which relate to management plans for complex conditions) cannot be billed unless the practitioner billing those items is the one specifically named in the referral.

Given the angst that this apparent restriction has caused we sought clarification from DHHS on this aspect of the 2011 publication. DHHS has confirmed that the Department is reviewing the 2011 publication to provide greater clarity on MBS billing in Victorian public hospitals – and importantly, the comment in the Resource Kit about items 132 and 133 is no longer current.

As a consequence, named referrals can be accepted by another specialist or consultant physician in the same speciality as the practitioner named in the referral for all referred consultations. DHHS has also confirmed that any change of specialist must occur before the commencement of the single course of treatment (and all other referral and billing requirements must be met).

We have been informed that the new DHHS publication will incorporate this advice.

Voluntary Assisted Dying Legislation—Victoria

We have prepared a detailed summary of the Victorian Voluntary Assisted Dying Scheme which will come into force on 19 June this year.

To access a copy of this summary please visit the current news section of our website at www.healthlegal.com.au



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Mandatory Data Notification

By Giovanni Marino, Senior Associate

Introduction

On 7 February 2019 the Federal Office of the Australian Information Commissioner (OAIC) published its quarterly statistics report about the notifications received under the Notifiable Data Breaches (**NDB**) scheme.

The NDB scheme is contained in the *Privacy Act 1988* (Cth). Organisations subject to the NDB scheme include businesses and not-for-profit organisations with an annual turnover of \$3 million or more, private health service providers, tax file number recipients (which includes public health service providers and other public sector bodies), Australian Government agencies and credit reporting bodies. These organisations are required to notify the OAIC and affected individuals when a data breach is likely to result in serious harm to individuals whose personal information is involved in the breach (an 'eligible data breach').

The quarterly report related to the period between 1 October and 31 December 2018.

262 data breaches were notified between in the December quarter, compared to 245 the previous quarter. The causes of the data breaches in the December quarter were malicious or criminal attack (168 notifications), human error (85 notifications) and system error (9 notifications).

The key statistical information provided by the report was as follows:

- 262 data breaches were notified to the OAIC and affected individuals;
- 64% were attributed to malicious or criminal attacks, compared to 57% the previous quarter;

- 33% were attributed to human error, compared to 37% the previous quarter;
- 3% were attributed to system faults, compared to 6% the previous quarter;
- 60% involved the personal information of 100 or fewer individuals, compared to 63% the previous quarter; and
- the top five industry sectors to report breaches were:
 - private health service providers: 54 notifications;
 - finance: 40 notifications;
 - legal, accounting and management services: 23 notifications;
 - private education providers: 21 notifications; and
 - mining and manufacturing: 12.



To read the full report visit:

<https://www.oaic.gov.au/privacy-law/privacy-act/notifiable-data-breaches-scheme/quarterly-statistics-reports/notifiable-data-breaches-quarterly-statistics-report-1-october-31-december-2018>

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Useful information links

At Health Legal we regularly access a broad range of information to ensure we keep up to date on what is happening in our areas of interest, both here in Australia and overseas.

In each publication we will share some of our regularly accessed sources of information, which we believe our clients will find useful. The links we would like to share this time are:

- **<https://agedcare.royalcommission.gov.au>**
The official website for the Royal Commission into Aged Care Quality and Safety provides extensive resources and information about the Commission's work and hearings (as well as the option for signing up for an alert service).
- **<https://www2.health.vic.gov.au/hospitals-and-health-services/patient-care/end-of-life-care/voluntary-assisted-dying/community-and-consumers>**
The Department's website contains detailed and extensive information about Victoria's voluntary assisted dying law.
- **<https://www.dataversity.net/category/data-topics/big-data>**
Dataversity is a US information portal for articles, blogs and news related to data management.



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Staff Profile – Giovanni Marino, Senior Associate



Giovanni is a professional and pragmatic Senior Associate at Health Legal.

Clients admire Giovanni's conscientious nature.

Giovanni was admitted as a solicitor in 2013, following his traineeship with Health Legal in 2012.

Prior to joining Health Legal, Giovanni was a physiotherapist in private practice and research areas.

Giovanni's health background brings practical experience to his work as a lawyer.

Giovanni's areas of practice include commercial legal services (clinical service agreements, equipment and goods supply, and government funding agreements), public and regulatory law (advice concerning the Health Insurance Act and Medicare), and privacy and freedom of information law.

Law Compliance Update

Law compliance is a legislative compliance business of Health Legal.

Whilst initially focussed on health care organisations Law Compliance now provides compliance services to over 230 organisations across Australia and this number grows each month. Our clients range from small rural community service organisations to government related entities to some of Australia's largest health care organisations, airlines, universities, charities, community service organisations, aged care providers and child care organisations.

Our aim is to make compliance easy.

The project to transform our current compliance information management system is on track to be completed by mid-2019.

In the new system subscribers will be able to:

- assign topics to individuals within your organization
- produce compliance dashboard reports
- upload documents, such as internal policies
- search key words
- "hide" and "switch off" topics you don't wish to focus on.

For more information about the new system, please contact **Ksandra Palinic** on (03) 9865 1320 or ksandra.palinic@lawcompliance.com.au.

In January, we published our inaugural report on key regulatory compliance trends from 2018 and for 2019.

The Report was written based on our analysis of legislation which is already in force or will take effect late in 2019. Law Compliance is in a unique position to provide this commentary given our team had to consider the relevance and compliance impact of over 2,080 Bills and Regulations in 2018.

To download a copy of the report, please visit <http://www.lawcompliance.com.au/latest news>.

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Some of the Legislative Changes being tracked

Western Australia

- Animal Welfare Amendment Bill 2017 (WA)
- Consumer Protection Legislation Amendment Bill 2018 (WA)
- Criminal Law Amendment (Intimate Images) Bill 2018 (WA)
- Environmental Protection Amendment (Banning Plastic Bags and Other Things) Bill 2018 (WA)
- Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 (WA)
- Industrial Relations (Equal Remuneration) Amendment Bill 2018 (WA)
- Litter Amendment (Balloons) Bill 2018 (WA)
- Public and Health Sector Legislation Amendment (Right of Return) Bill 2018 (WA)
- Residential Tenancies Legislation Amendment (Family Violence) Bill 2018 (WA)
- Taxation Administration Amendment Bill 2018 (WA)

Northern Territory

- Medical Services Amendment Bill 2018 (NT)

Queensland

- Civil Liability (Institutional child Abuse) Amendment Bill 2018 (Qld)
- Guardianship and Administration and Other Legislation Amendment Bill 2018 (Qld)
- Health and Other Legislation Amendment Bill 2018 (Qld)
- Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2018 (Qld)
- Human Rights Bill 2018 (Qld)
- Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2018 (Qld)

Commonwealth

- Aged Care Amendment (Ratio of Skilled Staff to Care Recipients) Bill 2017 (Cth)
- Aged Care Amendment (Staffing Ratio Disclosure) Bill 2018 (Cth)
- Combating Child Sexual Exploitation Legislation Amendment Bill 2019 (Cth)
- Competition and Consumer Amendment (Competition Policy Review) Act 2017 No. 114 (Cth)
- Corporations Amendment (Modernisation of Members Registration) Bill 2017 (Cth)
- Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017 (Cth)
- Export Control Bill 2017 (Cth)
- Fair Work Amendment (A Living Wage) Bill 2018 (Cth)
- Fair Work Amendment (Better Work/Life Balance) Bill 2018 (Cth)
- Fair Work Amendment (Pay Protection) Bill 2017 (Cth)
- Fair Work Amendment (Protecting Australian Workers) Bill 2016 (Cth)
- Fair Work Amendment (Protecting Take-Home Pay) Bill 2017 (Cth)
- Fair Work Amendment (Tackling Job Insecurity) Bill 2018 (Cth)
- Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (Cth)
- Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth)
- Fringe Benefits Tax Amendment (National Disability Insurance Scheme Funding) Bill 2017 (Cth)
- Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017 (Cth)
- Industrial Chemicals (Notification and Assessment) Amendment Bill 2017 (Cth)
- Industrial Chemicals Bill 2017 (Cth)
- National Health Amendment (Pharmaceutical Benefits) Bill 2019 (Cth)
- Privacy Amendment (Re-identification Offence) Bill 2016 (Cth)
- Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (Cth)
- Tertiary Education Quality and Standards Agency Amendment Bill 2018 (Cth)
- The Industrial Chemicals (Consequential Amendments and Transitional Provisions) Bill 2017 (Cth)
- Treasury Laws Amendment (2018 Measures No. 4) Bill 2018 (Cth)
- Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018 (Cth)
- Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Cth)
- Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017 (Cth)

South Australia

- Assisted Reproductive Treatment (Review Recommendations) Amendment Bill 2018 (SA)
- Criminal Law Consolidation (Foster Parents and Other Positions of Authority) Amendment Bill 2018 (SA)
- Education and Children Services Bill 2018 (SA)
- Labour Hire Licensing Repeal Bill 2018 (SA)
- Retail Trading Bill 2018 (SA)
- Single Use and Other Plastics (Waste Avoidance) Bill 2018 (SA)
- Social Workers Registration Bill 2018 (SA)
- Statutes Amendment (Abortion Law Reform) Bill 2018 (SA)
- Statutes Amendment (Mandatory Reporting) Bill 2018 (SA)
- Supported Residential Facilities (Aged Care Facilities) Amendment Bill 2018 (SA)
- Statutes Amendment (Decriminalisation of Sex Work) Bill 2018 (SA)
- Tobacco Products Regulation (E-Cigarette Regulation) Amendment Bill 2018 (SA)

Victoria

- Guardianship and Administration Bill 2018 (Vic)
- Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Bill 2018 (Vic)
- Public Administration Amendment (Public Sector Redundancies and Other Matters) Bill 2018 (Vic)
- Transparency in Government Bill 2015 (Vic)
- Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Amendment Bill 2018 (Vic)
- Water and Catchment Legislation Amendment Bill 2017 (Vic)

Tasmania

- Animal Welfare Amendment (Reformation) Bill 2018 (Tas)
- Community, Health, Human Services and Related Legislation (Miscellaneous Amendments) Bill 2018 (Tas)
- Criminal Code and Related Legislation Amendment (Child Abuse) Bill 2018 (Tas)
- Health Complaints Amendment (Code of Conduct) Bill 2018 (Tas)
- Litter Amendment Bill 2018 (Tas)
- Registration to Work with Vulnerable People Amendment Bill 2018 (Tas)

Australian Capital Territory

- Anti-corruption and Integrity Commission Bill 2018 (ACT)
- Justice and Community Safety Legislation Amendment Act 2017 No. 5 (ACT)
- Residential Tenancies Amendment Bill 2018 (No. 2) (ACT)

New South Wales

- Animal Research Amendment (Reduction in Deaths of Dogs and Cats Used for Research) Bill 2018 (NSW)
- Anti-Discrimination Amendment (Religious Freedoms) Bill 2018 (NSW)
- Crimes Amendment (Misconduct in Public Office and Other Matters) Bill 2018 (NSW)
- Environmental Planning and Assessment Amendment (Short-term Rental Accommodation) Bill 2018 (NSW)
- Gambling and Advertising Prohibition Bill 2018 (NSW)
- Human Tissue Amendment (Trafficking in Human Organs) Bill 2016 (NSW)
- Protection of the Environment Operations Amendment (Clean Air) Bill 2018 (NSW)
- Public Finance and Audit Amendment (State-funded Private Entities) Bill 2018 (NSW)
- Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017 (NSW)

If you would like details of these new Bills please contact **Teresa Racovalis** on **(03) 9865 1337** or teresa.racovalis@lawcompliance.com.au.

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