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# newsletterofthelaw

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The information in this newsletter is merely a guide and is not a full explanation of the law. This firm cannot take responsibility for any action readers take based on this information. When making decisions that could affect your legal rights, please contact us for professional advice.

## Violence and child custody

Single parents have called for changes to the *Family Law Act* in cases where domestic violence and abuse is a problem.

An Australian Institute of Family Studies review is due in December, as is the Attorney-General's Family Courts Violence Review. According to the National Council for Children Post-Separation (NCCPS), any legislative changes will probably not happen until the Australian Law Reform Commission review is complete in mid-2010.

The Family Court Violence Review originated after the death of Darcey Freeman, a four-year-old child who was allegedly thrown by her father from Melbourne's West Gate Bridge earlier this year.

Darcey's family claimed the Family Court had failed them. But Justice Diana Bryant says the court orders were made by consent.

"The parties did not present to the judicial officer concerned as part of their case that this child was at risk of harm in the father's care," she said.

She says the court process is one of many stressful factors that occur during a family break-up. "Legal aid is essential."

There are many other family law issues that are being investigated as part of the reviews, including some parents seeking access with their child to avoid child support payments or continuing to harass their former partners, as shown in a study conducted by Dr Lesley Laing of Sydney University.

"There's a lot you have to think about when you separate – practical considerations about where you'll live, finances, child support, legal matters, as well as how your children are coping and your own wellbeing," the Minister for Human Services, Chris Bowen MP, said.

Legal Aid Queensland advises that a parenting plan be drafted, setting out parenting arrangements of children after a separation:

"The court can find that a parenting plan is not legal if it was made using threats or pressure ... A parenting plan can be changed if both parents agree to this, by making a new one."

Legal Aid advises that a parent who does not agree on the changes should get help from a family dispute resolution practitioner.

## Asbestos fund could run out in 2010

The Asbestos Injuries Compensation Fund (AICF) set up by James Hardie in 2006 to compensate victims of asbestos-related illness could run out of funds by mid-2010.

The funding agreement caps James Hardie's contributions at 35 percent of its annual cashflow. James Hardie did not make its annual contribution at the end of its 2009 fiscal year due to negative cashflow caused by the US housing downturn.

Suspensions of a funding shortfall have increased during 2009, particularly after the New South Wales Supreme Court found that former James Hardie board members made misleading statements about its ability to pay asbestos compensation. It was found that the compensation foundation was underfunded by more than one billion dollars.

The New South Wales Government and the AICF are discussing the shortfall. James Hardie chief executive Louis Gries said a contribution may be made to the fund in July 2010, depending on the company's cashflow on March 31, the end of its fiscal year.

## Call for national disability scheme

The Australian Federation of Disability Organisations (AFDO) has called for the government to introduce a National Disability Insurance Scheme.

The National People with Disabilities and Carer Council presented the report, 'Shut Out: The Experience of People with Disabilities and their Families in Australia'.

"The 'Shut Out' report shows that, for a long time, people with disability have had their choices limited," AFDO chief executive Lesley Hall said.

"They've been limited because their incomes are limited through lack of work and inadequate income supports."

The proposed insurance scheme aims to cover a variety of Australians who have profound and severe disabilities and would be funded by all taxpayers.

However, Australian Lawyers Alliance president Mark Blumer has expressed concerns: "The issue is: 'Who pays?' If such a scheme is to be at the expense of fair and adequate compensation and care for those injured by someone else's negligence, we say it is neither equitable nor just."

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##### Next of kin can access emails when you die

Web email services owned by Google and Microsoft have a policy of keeping your data after you die and letting your next of kin or the executor of your estate access it.

##### Recycling water in your backyard

A study has considered how a new system of water recycling can work with strata-titled properties.

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## Case in point: Academics win freedom to own inventions

A landmark decision in intellectual property law highlights the need for more clarity in employment contracts.

Universities should examine their existing contracts with research staff after the Full Federal Court confirmed a decision that intellectual property (IP) rights in inventions made by a university professor were not owned by the university that employed him.

Without this stipulation in an employment contract, academic research staff are able to own IP free of any entitlement from their employer.

### Case background

In *University of Western Australia v Gray*, Dr Bruce Gray was appointed at the University of Western Australia.

His duties included a duty to conduct research. In the course of this research, Dr Gray developed a number of cancer treatment technologies.

After ceasing full-time employment at the university in 1997, Dr Gray assigned the IP rights in these inventions to a third party for commercial purposes.

### Grounds of the claim

The principle ground of the university's claim was that the law should imply into Dr Gray's contract of employment that the university owned the Microsphere patents. The general principle is that an invention developed by an employee as a result of research carried out by that employee in the course of employment

belongs to the employer. The employee is seen to be a trustee of the invention for the employer. The university submitted that this type of term should be implied into any employment contract where the employee was engaged to solve technical problems, improve the employer's technology or undertake research.

### The decision

The long-awaited decision of the Full Federal Court of Australia in *University of Western Australia v Gray* was handed down on September 4. The decision dismissed the university's claim that it owned a number of liver cancer treatment inventions in the field of targeted microsphere technology.

### The principles that informed the ruling

Dr Gray did not have any duty to invent under his contract. A duty to research and stimulate research was not tantamount to a duty to invent. This was notwithstanding that the research carried with it the possibility of inventions capable of patent protection.

Dr Gray had complete freedom to publish his research outcomes, regardless of the possibility that publication could destroy patentability of the inventions.

Dr Gray and his researchers were expected to solicit independent research funding, and they did with the devotion of

great time and effort.

The collaborative nature of the research, involving external organisations and researchers, told against any agreed exclusive appropriation of the fruits of the research to one institution only.

### The implications of the case

"Most universities in Australia have comprehensive IP policies which are measured and fair," IP expert Jane Owen said. "However, the decision flags the potential that claims could be made to challenge policies which are not fair and reasonable and can be considered as appropriation of property."

"The typecasting of academics who invent as a special class of employee could be extended to other research institutions, especially those funded by the public purse. Freedoms on publication and collaboration are key indicators of this potential.

"Third parties engaging in collaborative research with university academics and other public institutions should conduct due diligence to ensure that clear title to research outcomes can be achieved and seek appropriate warranties to cover this type of situation," Ms Owen said.

Contact your local solicitor for advice on intellectual property law and how it might affect you.

## New Sustainable Planning Act

The new *Sustainable Planning Act* due to come into effect in late 2009 is expected to have a significant effect on developers and local governments.

The *Sustainable Planning Act 2009* was passed by Parliament on September 16 and was created to improve Queensland's efforts in achieving ecological sustainability.

The Queensland Government has made more than 200 process changes in the development application assessment process, including reducing the timeframe for making an application under a superseded planning scheme from two years to one year.

The proposed changes document from the Queensland Government explains this change:

"This change is intended to give the new planning instrument, which reflects current planning standards, its full effect more quickly. It also means that compensation is

limited to those persons with an immediate intention to realise their development rights."

The Government has increased its involvement in land use planning through the use of state and regional planning documents, which many hope will streamline the planning and development process, benefitting the property industry.

The Act also introduces deemed approvals, which means that if an assessment manager has taken in excess of the relevant legislated timeframe to decide on the code assessable application, it is deemed to be approved.

Another benefit of the new Act is that it is expected to improve the quality of development applications from developers, which should hopefully reduce delays in assessment by local governments.

The Government's original proposed changes document says: "The Bill 'raises the bar' on the quality of applications that can be accepted by an assessment manager.

"This ensures a better quality of appli-

cation upfront, thus reducing time spent on information requests."

The Logan and Albert Conservation Association's website states: "The government claims it will 'Focus on sustainable outcomes'. The new legislation requires a shift away from focusing on planning processes to the delivery of sustainable outcomes – encouraging active community participation in the planning and development assessment system.

"It remains for the community to be active in all available processes and ensuring all levels of government hear what it is that the community wants."

The Government also claims that the new Act "introduces a broader range of opportunities for people to reach agreement and resolve disputes."

For more information about the *Sustainable Planning Act* and what the changes might mean for you, your business or your local government, contact your local solicitor.

## Teachers in trouble on Facebook

A revised Code of Conduct for teachers has been released following growing concern over inappropriate relationships with students. Under the Code, teachers will no longer be able to contact students using social networking sites such as Facebook, MySpace and YouTube, and are being instructed to keep personal sites "private and appropriate" or face loss of pay, demotion or sacking.

In an article in *The Courier-Mail* on Friday, October 23, it was reported that, over the last year, the Queensland College of Teachers heard eight cases involving inappropriate behaviour of a teacher contacting students via electronic equipment, and more than 30 Queensland teachers in the last three years have had their registration cancelled for unprofessional relationships with pupils.

The Code of Conduct states that teachers using social networking sites in their personal time must ensure that content is appropriate and private, restricting access to specific people who are not students. Obscene language, jokes containing sexual references and sexual exhibitionism would be considered inappropriate content according to Education Queensland.

Many education stakeholders and civil libertarians support the ban on social website contact, but do not agree with the crackdown on private content on personal sites. As it is, social networking sites cannot really be considered "private" in their nature.

For more information about your legal rights, please contact your local solicitor.

## Seniors and the law: accommodation changes

There are many legal issues that seniors often run into and, without the proper legal advice, they can make a decision that may have negative consequences for themselves and their loved ones. It is important for seniors to know all the relevant information to ensure they and their families are protected under different circumstances.

For example, a person may decide to transfer the title in their property to a family member, or to contribute financially to the extension or improvement of their property, on the understanding that they will be able to live there for life. This is commonly known as a "granny flat arrangement".

Centrelink has special rules for these arrangements and tests to ensure that the arrangement is not being used to give away large sums of money or assets for the purpose of increasing pension entitlements.

If a person has to move out of home to go into residential aged care on a permanent basis, their home is no longer their principal place of residence and Centrelink will give them a "two-year exemption period" before counting their former home as an asset. They will have an indefinite exemption from having their former home treated as an asset if their home is rented and they are paying off the capital of an accommodation bond by periodic instalments, or if they are paying or accumulating a debt for an accommodation charge.

Legal advice should be sought to ensure that your best interests are protected.

## Warnings against criminal organisation laws

Presidents of the Bar Association of Queensland and the Queensland Law Society have spoken out in opposition of the Queensland Government's introduction of a Criminal Organisation Bill, stating that such laws will lead to abuses of rights and opens the door to police corruption.

Bar Association of Queensland president Michael Stewart QC said the Government's new legislation targeting criminal organisations would allow information which would not stand up in a criminal trial and would not have to be true to obtain a court order.

"This is a watershed moment for the Queensland justice system, and looks like a return to the days before the Fitzgerald Inquiry," Mr Stewart QC said.

His concern was echoed by Queensland Law Society President Ian Berry, who said: "The big problem with this legislation [Criminal Organisation Bill] is that the court can be forced to make decisions on applications based only on 'criminal intelligence' from police informants."

Mr Berry said that, under the Criminal Organisation Bill, the police could request the Supreme Court to declare an organisation as criminal and place "control orders" on individuals, preventing them from associating with others, patronising certain places and holding particular jobs.

"The Government's proposed safeguards do not allow for intelligence to be confirmed, or for the police informant to be identified in any way," Mr Berry said.

He said that hearings involving "intelligence" were to be conducted in secret, and accused persons would not be permitted to hear the evidence against them.

The discussion in Queensland also came after the South Australian Supreme Court's decision to remove its laws affecting freedom of association.

## Federal privacy laws introduced

The Federal Government announced on October 14 that it will implement a large portion of the recommendations made in the Australian Law Reform Commission's (ALRC) review of Australian privacy laws.

The first stage of the Government's response to 'For Your Information: Australian Privacy Law and Practice' considers 197 of the 295 recommendations made by the ALRC.

Cabinet Secretary and Special Minister of State Senator Joe Ludwig said the implementation of the ALRC's recommendations would be the most significant reform of privacy laws since the inception of the Commonwealth *Privacy Act* more than 20 years ago.

Senator Ludwig said that the first-stage response looks at a clear framework for privacy rights and obligations, including a set of privacy principles; a redrafting of the *Privacy Act* to make it more accessible; a new credit reporting framework; changes in health sector information flows; and enhanced powers for the Privacy Commissioner.

Professor David Weisbrot AM said, "These days, information privacy touches almost every aspect of our daily lives, including our medical records and health status, our finances and creditworthiness, the personal details collected and stored on a multiplicity of public and corporate databases."

## Injuries rising in hospitality

Workers in the hospitality sector are increasingly suffering serious injuries in the course of their duties.

Almost half of Queensland firms work-related injury claims received this year involved people working in hotels or bars, and a majority of those affected were women.

The workers most often affected are food and beverage attendants, bar staff, waitresses, cleaners and kitchen hands, and their injuries are often a result of being asked by their employers to lift heavy items.

Recent cases have included a young woman at a resort who damaged a disc in her back, requiring her to have surgery after being asked to carry boxes of alcohol up flights of stairs, and a 50-year-old woman at a hotel in Brisbane who suffered an elbow injury and had to resign from her job after being asked to carry 25kg bags of potatoes.

There have been other causes of injuries caused by a lack of awareness and consideration for workplace health and safety regulations. At another hotel, a woman slipped on ice and food that had been spilled on the kitchen floor and injured her back.

For more information about your rights and obligations regarding workplace injuries, contact your local solicitor.

## Child car seat rule changes

Car crash victim Isabelle Broadhead's legacy will live on, with the introduction of new car seat regulations.

Isabelle Broadhead, 3, died after an accident in April 2006 that occurred while she was using a booster seat and an adult seatbelt in a car travelling just 40km/h. Since then, her parents, Danielle and Noel Broadhead, have been campaigning for better regulations to keep children safe.

On November 4, the New South Wales Government announced new safety rules, dubbed 'Isabelle's regulations', that mean children aged up to seven will have to be strapped into car restraints.

The couple have long been researching safe ways for children to travel and hope the new rules will be easy for parents to understand.

The regulations, which are part of national reforms, mean children younger than six months must be placed in a rearward-facing restraint.

Those aged six months to four years must be secured in a rear or forward-facing restraint, while children between four and seven must use a forward-facing restraint or a booster seat.

Until now it has only been compulsory for children up to the age of one to travel in baby capsules or seats that contain their own restraints.

## Greenhouse liability

Changing community attitudes to climate change are being seen in decisions now being made by the courts. The emerging concept of intergenerational liability could place thousands of Australian businesses at risk of damages claims over the future harm caused by greenhouse gas emissions.

Intergenerational liability claims are a growing international trend that could open the floodgates to a raft of class actions against mining, infrastructure and transport companies.

"Until recently, companies could only be held liable for a direct negative impact they may have had on an individual or organisation," Equator Alliance representative Simon Harrison said.

"However, under intergenerational liability claims, potential class actions that do not involve immediate injuries being suffered, but instead relate to future injuries by someone who has not even been born yet, could now, in theory, be brought against companies."

Mr Harrison said court cases involving intergenerational liability had been appearing in Australia's planning and environment courts and land tribunals for the past three years.

The New South Wales Land and Environment Court handed down a landmark decision in *Gray v The Minister for Planning and Ors* (2006) finding that the environmental assessment of a new coalmine was required to assess the future impacts of climate change in terms of the burning of the mined coal.

The court found that principles such as intergenerational equity were required to be considered under the *Environmental Planning and Assessment Act 1979* when assessing the new mine.

## Next of kin can access emails when you die

Web email services owned by internet giants Google and Microsoft have a policy of keeping your data after you die and letting your next of kin or the executor of your estate access it.

There is no way for users to flag that they don't want this to happen and no recourse under Australia's existing privacy laws.

More than one in four Australians use webmail, with around six and a half million people logging on to one or more of the top three providers, Hotmail, Gmail or Yahoo!, in September, according to Nielsen Online NetView.

These services can hold tens of thousands of messages.

Accounts with Google's Gmail can hold up to 7GB – or roughly 70,000 emails with a small to medium picture attached to each.

They archive both the messages a person has written as well as received.

When it comes to deleting the data, Microsoft's Hotmail will remove an account if it is inactive for 270 days, while Gmail leaves the responsibility to the next of kin.

Of the top three providers, only Yahoo! refuses to supply emails to anyone after a user has died. The user's next of kin can ask for the account to be closed, but cannot gain access to it.

A Yahoo! spokesperson said the only exception to this rule would be if the user specified otherwise in their will.

Australian privacy laws do not cover the emerging problem of what happens to your web-based data when you die. The *Privacy Act* only refers to people who are alive.

Contact your local solicitor to discuss your options in creating a will.

## Dealing with mortgage problems

If you're worried about a money or debt issue, getting legal advice as early as possible can help you get the best outcome for your situation. You should get legal advice immediately if you are having problems with debt as strict time limits apply for some matters.

If you owe someone money, Legal Aid Queensland says they can't:

- send you to jail,
- take and sell any property unless they have a mortgage, or other form of security, or an order from the court,
- threaten, intimidate or harass you or your family and friends,
- have your children taken from you,
- turn up at your home unless it is at a reasonable time (usually between 7.30am and 9pm),
- chase you for money after a certain amount of time has passed. There are time limits for debt recovery.

However, they can:

- write to you or call you to demand payment,
- take you to court to recover their money,
- take and sell any property they have a mortgage or other form of security over.

To find out what your rights and obligations are in relation to money and debt problems, contact your local solicitor.

## Recycling water in your backyard

Unit blocks, gated communities and other strata-titled properties could collect, manage and recycle water on site to take pressure off mains water, a Griffith University report has found.

Strata titled property schemes have significant potential to develop and manage water collection and wastewater recycling plants, the report, commissioned by the National Water Commission, found.

It highlights how individual unit owners can communally own their water and wastewater supply infrastructure in order to service their water needs and sell oversupply to neighbouring properties.

The key findings of the study were that body corporates should retain ownership of all infrastructure and employ a resident or facility manager to monitor and maintain the system.

Properties with 50 or more units should have a water technology company operate their facility and the lots should be individually metered to provide water-saving incentives.

Liability insurance, long-term financial costs, and recommendations on legislative changes are also covered in the report.