

Jan-March  
2010

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.

## Making Wills and leaving bequests

Charities are attempting to stay engaged with people throughout their lives in order to maintain one of their major sources of funding – bequests (leaving money to charity in a Will).

The website, [Include a Charity \(at www.includeacharity.com.au\)](http://www.includeacharity.com.au), estimates that more than 10,000 bequests are left to Australian charities each year and says that bequests are often responsible for keeping charities operating.

Research group Givewell found that bequest fundraising accounted for 18 percent of charity income in Australia last year.

However, it is estimated that around 40 percent of Australians have not even made a Will.



No matter how simple you think your affairs are, it is important to have a Will to ensure that your estate is distributed according to your wishes.

However, a Will forms only one part of a Succession Plan. A complete Succession Plan should deal with not just the assets you hold personally, but also with the succession of any other assets held in life and superannuation policies, trusts, companies and other business entities.

A Succession Plan is implemented by preparing several documents (such as Wills, Trust Deeds, Powers of Attorney and Advance Health Directives) to make sure your personal and financial affairs are managed the way you want in the event of your death or incapacity.

It is also important when making gifts to charities to ensure the charity is properly identified and that the executors have power to direct the bequest to a similar charity if the charity ceases to operate.

If you would like to conduct a review of your Succession Planning needs, please contact Harris Law. The Principal, Zinta Harris, is an accredited specialist in both Succession Law and Business Law, and has extensive experience in tailoring Succession Plans to meet individual needs.

## Review of family laws

An evaluation of Australia's family laws could lead to an improvement in the Family Court's response to domestic violence after the Federal Attorney-General Robert McClelland released three key reports on 28 January.

The 'Evaluation of the 2006 Family Law Reforms' by the Australian Institute of Family Studies highlighted the impact of these changes across many areas, including the introduction of a presumption of shared parental responsibility into the *Family Law Act 1975*, the requirement of separating parents to attend family dispute resolution before going to court, and the establishment of Family Relationship Centres to provide information and assistance to families with relationship difficulties.

The 'Family Courts Violence Review', by Professor Richard Chisholm AM, and 'Improving Responses to Family Violence in the Family Law System', by the Family Law Council, examined the effectiveness of legislation as well as court practices in cases involving family violence.

The reports emphasise the importance of screening as well as legislative provisions that could deter the disclosure of allegations.

## OHS breach allegations to be more specific

The High Court recently overturned a ruling by the New South Wales Industrial Relations Commission to convict an employer of occupational health and safety (OHS) offences.

The charges against the employer did not identify what he had done or failed to do to cause the employee's accident.

The employer was an owner of a farm who was prosecuted after his farm manager died in an all-terrain vehicle crash on the farm. The vehicle had been purchased on the farm manager's recommendation, and the crash occurred after he left a formed road.

The overturning of this decision has resulted in speculation that employers who might have been prosecuted in the past may not be in the future if it is not made clear what the employer should have done to eliminate risks and uphold their OHS responsibilities.



There have also been calls made for a Royal Commission inquiry into all convictions under the NSW legislation over the last 15 years.

### What's inside ...

#### Case in point: Internet service providers off the hook?

A landmark decision may have potentially absolved Internet service providers of any responsibility to stop illegal file-sharing amongst their users, but media companies are still looking for a solution.

#### Contract considerations - buying a used car

The Office of Fair Trading has warned consumers to beware of discrepancies between what they are promised by salespeople and what is stipulated in the contract.

#### Pattern in pedestrian injuries

An increase in pedestrian injuries at zebra and traffic light crossings in Queensland has been connected to drink driving and people not paying enough attention to the road.

#### New victim assistance scheme

Queensland victims of crime now have access to a compensation and recovery scheme with the introduction of the *Victims of Crime Assistance Act (2009)*.

#### G-Star Raw takes on counterfeiting

Clothing company G-Star Raw has been awarded significant damages after it sought an injunction against another clothing company selling counterfeit products.

#### Refund and warranty obligations

A recent study has found that less than 20 percent of Australians know their legal rights when they buy a good or service.

#### Real estate fined for sham contracting

A Sydney real estate company and its director have been fined for sham contracting.

#### Protection of privacy

Misunderstandings over the obligation to protect people's privacy can often lead to legal action when businesses make the wrong decision about their use of people's personal information.

#### Shared parenting laws

Recent reviews of the family law reforms have revealed a misinterpretation of the laws.

#### Compensation for delivery driver

A Melbourne food company has been fined for underpaying a delivery truck driver.

#### No copyright in Yellow and White Pages

An important decision in the Federal Court has implications for other data compilations.

#### New social networking laws dangerous for bosses

New workplace legislation has made online social networking more dangerous for employers.

This newsletter is a free service from your solicitor. If there is any issue you would like us to cover in a future newsletter please call us. Also, if there is anyone you know who would like to receive this newsletter please let us know and we'll add their name to our distribution list.

However, if you do not wish to continue receiving it please let this firm know and we will not send it to you again.



## Case in point: *Internet service providers off the hook?*

*A landmark decision may have potentially absolved Internet service providers of any responsibility to stop illegal file-sharing amongst their users, but media companies are still looking for a solution.*

Perth-based Internet service provider (ISP) iiNet, the third largest ISP in Australia, has defended proceedings brought against it by 34 media companies, including Village Roadshow, Universal Studios, Paramount Pictures, and Warner Bros.

### The applicants' claim

The applicants claimed that iiNet was liable for copyright infringement because it authorised its customers to access the Internet to use file-sharing programs to download movies and other media illegally.

The applicants attempted to prove that iiNet had failed to take the appropriate steps to stop illegal file-sharing by its customers and also breached copyright itself by storing and transmitting the data through its system.

The Australian Federation Against Copyright Theft assisted the applicants in their claim by employing a company known as DtecNet to investigate copyright infringement occurring by means of a peer-to-peer system, the BitTorrent protocol, by iiNet users.

"As far as I am aware, this trial, involving suit against an ISP claiming copyright infringement on its part due to alleged authorisation of the copyright infringement of its users or subscribers, is the first trial of its kind in the world to proceed to hearing and judgement," said

Federal Court Justice Dennis Cowdroy in his summary.

### Did the iiNet users infringe copyright?

Justice Cowdroy found that some certain iiNet users had infringed copyright by making a film available online through the BitTorrent system and electronically transmitting the film through that system, a form of illegal file-sharing.



### Did iiNet authorise the copyright infringement?

Although the judge found that iiNet had knowledge of the copyright infringements by their users occurring and did not act to stop them, the judge did not find that it authorised the infringements.

Justice Cowdroy said in his summary:

"Did iiNet authorise copyright infringement? The Court answers such question in the negative for three reasons: first because the copyright infringements occurred directly as a result of the use of the BitTorrent system, not the use of the Internet, and the

respondent did not create and does not control the BitTorrent system; second because the respondent did not have a relevant power to prevent those infringements occurring; and third because the respondent did not sanction, approve or countenance copyright infringement."

### The judge's decision

Justice Cowdroy found that it was "impossible" to hold iiNet responsible for what its users did and highlighted that iiNet merely provided its users with access to the Internet.

The application was dismissed and the applicants were ordered to pay the costs of the respondent.

### Implications of the decision

Anti-piracy advocates have said that the iiNet decision is a setback for the entertainment industry as the decision creates a precedent for ISPs to be viewed as conduits rather than as gatekeepers.

Chief executive of the Internet Industry Association, Peter Coroneos, said the main focus should be to provide legal media content to users online to create a "digital economy".

Contact Harris Law for advice on copyright infringement laws and how they might affect you.

## Contract considerations - buying a used car

The Office of Fair Trading has warned consumers to beware of discrepancies between what they are promised by salespeople and what is stipulated in the contract.



A story was reported by a man who decided to buy a second-hand car at a dealership and was told by the salesman that a new car stereo would be installed at no extra cost.

The buyer signed the contract, which did not list the stereo as an extra, but was assured by the salesman that the stereo

would be added to the contract later.

When he went to collect the car a few days later, he found that the stereo had not been installed as promised. He was told that the salesman he had dealt with was unavailable and the dealership manager told him that there were no extras listed in the contract and so he was not entitled to the free installation of the car stereo.

Verbal agreements can form part of a contract but are often impossible to prove.

There are other considerations to take into account when signing a contract to buy a motor vehicle.

If you buy a car privately, you are not entitled to the normal protection of the cooling-off period, you will not get a statutory warranty, the seller is not obliged to give you a REVS certificate or Vcheck nor are they bound by the same laws and Code of Conduct as licensed dealers, and you cannot access the compensation claim fund if anything goes wrong.

Buying from a licensed motor dealer can

be more expensive than a private sale, but it is often safer.

All motor dealers selling used cars in Queensland must be licensed. Licensed motor dealers who sell cars privately may actually be breaking the law, and they must disclose to all intending buyers that they are licensed and provide a cooling-off period and statutory warranty.

When you buy a used car from a licensed dealer, you are entitled to:

- a one business day cooling-off period,
- a statutory warranty,
- a guarantee of clear title on the vehicle,
- protection by the motor dealer's Code of Conduct,
- access a claim fund which may compensate you if you have suffered a financial loss because of the motor dealer's actions.

For more information about contracts to purchase and advice to get them right to ensure that you are safe and not sorry, contact Harris Law.

## Real estate fined for sham contracting

A Sydney real estate company and its director have been fined almost \$30,000 for underpaying a salesperson more than \$20,000 as a result of sham contracting.

The penalty was handed down in the Federal Magistrates Court. Federal Magistrate Shenagh Barnes found the company had treated the female salesperson "recklessly" by appointing her as an independent contractor instead of an employee.

The woman had recently moved from Singapore and subsequently had no experience in the Australian real estate industry.

The Court heard that the woman received just one payment of \$1414.20 for working an average of 40 hours per week from 23 March 2007 until her employment was terminated on 27 September 2007. She was underpaid more than \$20,000 of which the company had only backpaid \$5,000 in October 2009.

Federal Magistrate Barnes ordered the employer to repay the outstanding \$15,119 plus interest of \$3,104.

In handing down her 44-page decision, Federal Magistrate Barnes said it had been submitted that the real estate industry in New South Wales often paid individuals on a commission basis, but accepted that a message should be sent to the community that employees should be correctly identified and appropriately remunerated. Real estate salespeople should not be paid on a commission-only basis if not licensed.

For more information about employment contracts and independent contractors, contact Harris Law.

## New victim assistance scheme

Queensland victims of violent crime now have access to a compensation and recovery scheme after the Victims of Crime Assistance Bill 2009 was introduced into Parliament on 18 August 2009.

The Victim Assist Queensland scheme commenced on 1 December 2009, ending the right of victims to claim under the current criminal compensation schemes of the *Criminal Offence Victims Act 1995* and the *Criminal Code 1899*.

The new scheme focuses on victim recovery by paying for, or reimbursing, the costs of goods and services that the victim requires to help them recover from the physical and psychological effects of the crime. It marks a significant change of focus from criminal compensation to financial assistance and support for victims.

The Act provides for victims to receive a grant of up to \$500 for legal costs incurred in applying for assistance under the Act. Other goods and services costs may also be recoverable.

For more information about Victim Assist Queensland and victim compensation, visit the Department of Justice and the Attorney-General website at [www.justice.qld.gov.au](http://www.justice.qld.gov.au) or contact Harris Law.

## Refund and warranty obligations

A recent study found less than 20 percent of Australians know their legal rights when they buy goods or services.

The study, by the National Education and Investigation Advisory Taskforce, also found that consumers are spending, on average, almost six hours trying to resolve problems with purchased goods and services.

Many businesses are also unsure as to when their customers are entitled to refunds and warranties. Customers have a right to a repair, replacement or refund if the goods supplied to them have a fault that the customer could not have known about at the time of purchase, the goods do not do what the customer was told they would, do not match the sample they were shown or are different than described in the advertisement or by the business' staff.

Businesses do not have to display refund signs, but if they do, the signs must not be misleading. Signs that say "No refund" are illegal.

A business also cannot limit its liability by excluding, modifying or restricting the legal rights and remedies available to customers. If a business attempts to alter these legal rights, it can be prosecuted for making false or misleading statements.

The Australian Consumer Law will outline a new nationally consistent approach which will come into force on 1 January 2011.

For more information about your legal rights and responsibilities, please contact Harris Law.

## G-Star Raw takes on counterfeiting



Well-known clothing company G-Star Raw has been awarded significant damages after it sought an injunction against another clothing company selling counterfeit G-Star Raw-branded products.

The international company, based in the Netherlands, discovered that the counterfeit items were being sold in a chain of retail stores in New South Wales.

G-Star Raw issued proceedings in the Federal Magistrate Court against the company and its director, alleging acts of trade mark infringement, copyright infringement, misleading and deceptive conduct and the tort of passing off.

The case was heard by Federal Magistrate O'Dwyer on 9 December 2009. Federal Magistrate O'Dwyer granted the injunctive and declaratory relief sought by G-Star Raw and awarded general damages for lost sales in the sum of \$5,727, the loss G-Star Raw suffered to its reputation, its exclusivity in the marketplace and to its brand in the sum of \$35,000. G-Star Raw also awarded additional damages of \$50,000, based on the conduct of the respondents and the need to deter similar conduct in the marketplace. The company was also awarded legal costs.

For more information about copyright law and trade mark infringement, contact Harris Law.

## Pattern in pedestrian injuries

An increase in pedestrian injuries at zebra and traffic light crossings in Queensland has been connected to drink driving and drivers not paying attention to the road.

A 30-year-old man was recently struck by a vehicle when he was waiting to cross at pedestrian lights during his lunch break in Brisbane's west.

The vehicle was speeding and when the driver swerved to miss another vehicle, it mounted the footpath and collided with the man waiting at the lights.

The man suffered injuries to his neck, hip and ankle, forcing him to take time off work.

Another similar incident occurred at Annerley in Brisbane's south when an 80-year-old woman was hit by a vehicle. The driver left the scene and police are still investigating.

A man in Townsville was also struck at a zebra crossing by a driver who was found to be more than two times over the legal blood alcohol limit.

More injured pedestrians have lodged personal injury claims leading to a call for pedestrians to be more alert and not to just assume it is safe to cross a road.

## Protection of privacy

Misunderstandings over the obligation to protect people's privacy can often lead to legal action when businesses make the wrong decision about their use of people's personal information.

The *Privacy Act 1988* (Cth) establishes National Privacy Principles that apply to all private sector organisations with an annual turnover of more than \$3 million, health service providers, traders in personal information and contractors to the Australian Government.

The standards established in the National Privacy Principles include the restriction of collecting personal information only if it is necessary for the function or activity of the organisation, taking reasonable steps to protect the personal information via appropriate computer hardware and software systems for protection of data, and taking reasonable steps to ensure that personal information collected is accurate, complete and up-to-date.

The importance of these principles is illustrated in the case of *T v Commonwealth Agency* [2009], where a Commonwealth agency investigated the conduct of one of its employees via an examination of their use of work emails to send and receive inappropriate material and a report on their attendance. Upon an investigation by the Privacy Commissioner, it was found that, although the use of the employee's emails was not a breach of privacy, the employee's attendance record contained incorrect information. The agency had to amend the inaccuracy and compensate the employee.

## Compensation for delivery driver

The operators of a Melbourne food company have been fined \$54,000 for underpaying a delivery truck driver more than \$32,000.

Magistrate Franz Holzer imposed a fine of \$37,000 against one of the operating companies involved, \$2000 against another company and \$15,000 against the mutual director of both companies for his involvement.

The two companies were involved in the business which imported and distributed specialist foods.

The first company admitted underpaying the driver a total of \$30,462 when it employed him between 2003 and 2008. The driver was paid a flat rate of \$11.17 when he should have been paid between \$12.63 and \$15.03 an hour.

The second company said that they had underpaid the driver a total of \$1,798 when it employed him between June and October 2008. It paid the driver a flat rate of \$11.25 when he should have received \$15.60.

The companies back-paid the driver after being contacted by inspectors who were investigating the matter.

Fair Work Ombudsman Victorian director Paul Werner has said the case shows that businesses and employers need to ensure they are meeting their legal obligations to staff.

"We take significant underpayments of low-paid workers particularly seriously and so too do the courts," Mr Werner said.

For more information about your legal rights and obligations, contact Harris Law

## No copyright in Yellow and White Pages

In a landmark decision handed down in the Federal Court, Justice Gordon held that Telstra had failed to establish that copyright subsists in the contents of the Yellow Pages and White Pages telephone directories.

Telstra and Sensis had alleged the publishers of 'Local Directories', which had been distributed in Queensland, Northern Territory and New South Wales, had infringed on their copyright by reproducing the Yellow and White Pages telephone directory entries.



Justice Gordon held that Telstra's claim failed because it was unable to identify a human author of the contents of the directories.

"You must identify authors, and those authors must direct their contribution... to the particular form of expression," said Justice Gordon.

"Start with the work. Find its authors. They must have done something, howsoever defined, that can be considered original. The Applicants have failed to satisfy these conditions. Whether originality be the product of some 'independent intellectual effort' and/or the exercise of 'sufficient effort of a literary nature' or involve a 'creative spark' or the exercise of 'skill and judgement', it is not evident in the claim made by the Applicant," said Justice Gordon.

It has been asserted that the implications of this decision could include the finding of no copyright in other data compilations that cost a lot to compile on the grounds that these are computer-generated.

## Shared parenting laws

Recent reviews of the Federal Government's family law reforms in 2006 have revealed a misinterpretation of the laws in practice.

Professor Alan Hayes, director of the Institute of Family Studies, said that the developmental implications of the new laws were problematic, particularly in relation to the equal shared parent responsibility.



"For about four to five percent of children who are in care arrangements with shared care, there is concern for violence and safety," Professor Hayes said.

"There's misunderstanding of the difference between shared parental responsibility and shared care time – those two things are often rolled together," he said.

Family lawyer Andrew McCormack has said that the recent criticisms of shared parenting laws in the media do not take into account the many factors that have to be considered when making parenting orders.

"Despite some assertions in the media that equal time arrangements should be mandatory, courts need to consider the facts and circumstances of each case, and not have their independence interfered with in an attempt to treat every case the same," Mr McCormack said.

Federal Attorney-General Robert McClelland has said that the wording of the legislation could be improved but is instead looking at launching an education campaign about the legislation to clear up any misunderstandings.

To find out more about shared parenting arrangements, contact Harris Law.

## New social networking laws dangerous for bosses

New workplace legislation has made online social networking communication between work colleagues more dangerous for employers.

An "adverse action" clause in the new *Fair Work Act* means that employer/employee social interaction on websites such as Facebook and Twitter could have wider implications.

A comment made by an employer to an employee via social networking websites could lead to the employer being sued for damages for harassment, bullying or discrimination.

It has been claimed that allowing employees to access an employer's Facebook or MySpace account could open the employer to having defamatory material being placed on the sites or the risk that the perception of the employer's engagement with some employees is more favourable than to others.

Under the *Fair Work Act's* adverse action clause, workers can sue for unlimited damages over actions that adversely affect their job, injures or discriminates, or threatens such actions.