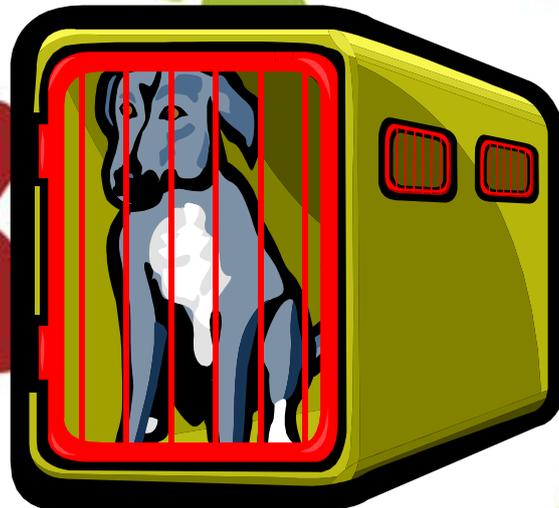


# The Dog and the Law



A summary of the legal obligations imposed  
upon dog owners in New South Wales  
being law applying at 1<sup>st</sup> March 2014

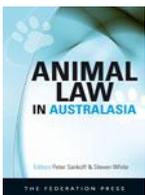
Malcolm McDonald

March 2014

# Table of Contents

Brief Chronology of Statute Law Applicable to Dogs in NSW .....	2
Basic Concepts .....	3
The Companion Animals Act .....	4
Amendments to Companion Animals Act - November 2013 .....	4
Registration .....	5
Dangerous or Restricted Dogs .....	6
Menacing Breed or Kind of Dog .....	7
Dangerous Dogs .....	7
Restricted Dogs.....	8
Greyhounds.....	8
Dealing in Dogs .....	8
Boarding of Dogs .....	12
Cruelty .....	12
Liability for Injury and Damages .....	13
Power of Entry and Seizure .....	14

*Owners of dogs are obliged to observe the law as it applies generally and also observe those laws which apply specifically to those who own, breed and sell dogs.*



Interested members who wish to research Dog Law should consult a text book such as 'Animal Law in Australasia' by Sankoff & White (Federation Press) 2009 it being a basic textbook designed to assist students of Animal Law to know something of what the law relating to animals is about.

## Brief Chronology of Statute Law Applicable to Dogs in New South Wales

A brief but concise detailed history of Statute Law in New South Wales is to be found in the New South Wales Law Reform Commission report of 1988. The first New South Wales legislation regulating the ownership and control of dogs was the *Dog Nuisance Act 1830*. There were various statutory amendments to this Act in the period between 1830 and 1875 when the *Dog Nuisance Act* was amended to impose strict civil liability for owners for injury caused by their dogs. Things remained largely in conformity with this Act until the *Dog Act* was passed in 1966 and continued until the imposition of absolute civil liability by way of an amendment to the *Dog Act* in 1977. Little was done to deal with identification and continued until 1990.

Whilst the Parliament and those involved in Animal Law in the later part of the 20<sup>th</sup> Century agreed that the legislative framework relating to dogs was inadequate the recommendations of the New South Wales Law Reform Commission report of 1988 and other submissions did not bear fruit until the late 1990's. A wholesale overhaul of dog control law taking into account "identification" and "responsibility" issues arose from the introduction of the *Companion Animals Act* in 1998. It is this act that burdens dog owners presently.

In it's report on Civil Liability for animals in 1970 the Law Reform Commission of New South Wales said

"The law as to liability for damage done by animals is a potpourri of special rules of mediaeval origin. These special rules, for the most part, are such as to give rights of action which are additional to the rights of action which, in modern times, lie in respect of damage generally (that is, whether or not the damage was caused by an animal). A person who has suffered damage caused by an animal can frame his action for redress on modern principles – for example, in negligence; or he can frame it under the special rules which are peculiar to liability for damage done by animals; or he can, by including separate causes of action in the one proceeding, get the better of both worlds – modern and mediaeval."

The modern approach prevailed and the civil rules of liability imposed on Dog Owners are now entrenched in the *Companion Animals Act 1998* being particularly onerous as discussed below.



## Basic Concepts

'Common Law'. Common Law is not recorded as legislation is. It is the law of common usage or a practice which is usually followed and it is comprised of decisions of the Courts in particular cases based upon a technical regime called 'precedent'. Common Law is only recorded in the form of judgments of the Court and are applied by Courts according to strict rules of use called precedent. 'Precedent Law' as a general rule is made by the New South Wales Supreme Court or High Court.

'Precedent Law' relates mostly to the rights and restrictions on conduct and the punishment of persons where decisions of Courts have been made and recorded.

'Statute Law' is the law written out as specific acts of Parliament dealing with topics which must be applied by Courts. In relation to dogs the most important statute and one that regulates the bulk of the law dealing with dogs is the *Companion Animals Act 1998*.

The law relating to dogs in New South Wales is predominantly found in "legislation" passed by the New South Wales Parliament. The Commonwealth of Australia plays only a small part in animal regulation a circumstance arising from "Constitutional Law", that is if the Commonwealth Constitution does not give the Commonwealth power to deal with something, it cannot, unless power is vested in the Commonwealth by the States by specific agreement.

'Common Law' as defined above applies outside present legislation particularly in relation to what is described as 'property'. Dogs are considered in law to be just like any other property or moveable chattel such as a table or a chair and are the subject of what is known as 'absolute property'. Legislation overrides Common Law.

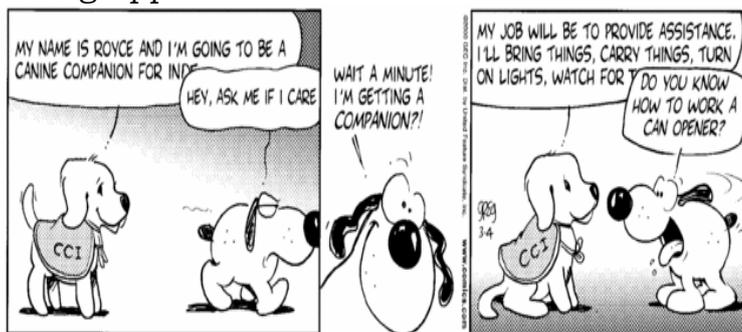
The killing or injuring of an animal can be a "crime" and subject to criminal sanctions. The killing or injuring of an animal owned by another gives rise to an action against the person in civil courts unless circumstances exist which render the injury or destruction justifiable. We do not deal with criminal law relating to dogs in this paper.

Dogs present a particular difficulty in civil law, ie other than criminal law, upon the point of assessing the value of the animal. The Courts in New South Wales have adopted the market value approach and to date in New South Wales Courts have applied a relatively low value to dogs except in relation to greyhounds although even then plaintiffs have generally been disappointed with the value determined by Courts.

## The Companion Animals Act

The *Companion Animals Act* 1998 ('the Act') deals with the definition of a companion animal in the definitions section of the Act.

A dog is defined as a companion animal. There is usually no difficulty arising from defining what is a dog. Ordinarily this is decided as a matter of fact. No doubt there are experts in science that could assist if necessary and of course DNA testing would be definitive to prove that a particular mammal is a dog or not but it does not assist to prove what breed of dog a particular dog is as demonstrated in the recent QLD Supreme Court decision in *Chivers v Gold Coast City Council* [2010] QSC 98 (6 April 2010). This case grappled with the definition of "American Pit Bull Terrier" and whether or not Tango the dog in question was an American Pit Bull or not and if so was therefore a prohibited breed who should be destroyed. Regrettably the case was decided against the owner and gave serious concern to the owners of American Staffordshire Terriers as the Court found that all American



Staffordshire Terriers were in fact American Pit Bull Terriers and therefore prohibited in Queensland. Subsequently a regulation was passed to deem American Staffordshire Terriers not to be American Pit Bull Terriers so as to overcome the concerns of the owners of American Staffordshire Terriers in Queensland.

The Act provides for the compulsory identification and registration of dogs.

## Amendments to Companion Animals Act – November 2013

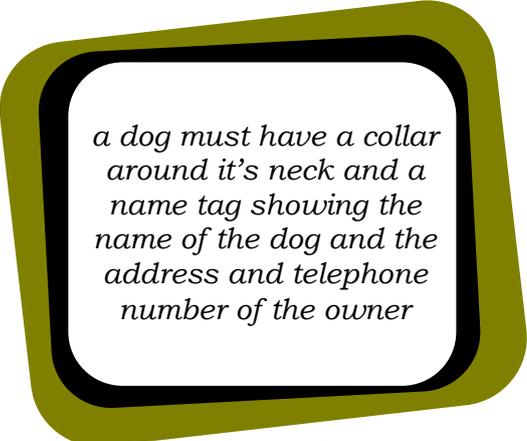
In addition to the enactment of law providing for an additional class of dog (menacing and/or menacing breed or kind of dog) the Act was amended to provide for the following:

- 1 Significantly greater penalties particularly in relation to dangerous, restricted and menacing dogs.
- 2 Increased penalties in relation to unregistered dogs.
- 3 Stricter provisions in relation to enforcement of the requirement to register dogs.
- 4 Provision for the obligation on the owners to notify changes in relation to events relevant to companion animals such as moving dogs between addresses or even States and Territories.
- 5 Imposing fines of up to \$40,000 for attacks by dangerous menacing or restricted dogs.
- 6 Legislating (s.17) that a person who sets upon or urges a dog (other than a dangerous, menacing or restricted dog) to attack, bite, harass or chase any person or animal irrespective of whether or not actual injury is caused providing for a fine of \$20,000 increasing to \$70,000 where the conduct relates to a dangerous, menacing or restricted dog. Potentially this section could be applied to Schuzhund training.

- 7 The tightening of powers in relation to declaring dogs dangerous or menacing by local councils and empowering councils to seize and to obtain orders for destruction of dogs including dangerous, menacing or restricted dogs.
- 8 Empowering Councils to seize and destroy dangerous, menacing or restricted dogs where there has been failure to comply with control orders for those dogs on at least two separate occasions over any period of 12 months whether or not each occasion relates to the same requirement.

## Registration

In New South Wales a dog must be registered with the relevant local council from the time that the animal is six (6) months old. The owner of an animal is guilty of an offence under the Act if it is not registered. The maximum penalty is 8 penalty units (a penalty unit presently equals \$110) except in the case of a dangerous or restricted dog) or 50 penalty units in the case of a dangerous or restricted dog.



*a dog must have a collar around it's neck and a name tag showing the name of the dog and the address and telephone number of the owner*

A dog can be registered at any age but an owner does not have to wait until it reaches six (6) months.

A dog must be identified by microchip from the time that the animal is twelve (12) weeks of age and must not be sold unless it has been identified even if less than twelve (12) weeks old.

The owner of an unregistered dog that is required to be registered is guilty of an offence under the Act on each occasion that the animal is in a place other than where it is ordinarily kept. The maximum penalty is 3 penalty units (except in the case of a dangerous or restricted dog) and 13 penalty units in the case of a dangerous or restricted dog.

The Act requires that the owner of companion animals notify the Director General of the Department of Local Government by notifying the relevant local council of any of the following:

- 1 Change in registration information or identification information within fourteen (14) days of such change;
- 2 Death of the animal (this must be within twenty eight (28) days of death);
- 3 The animal is missing for more than seventy two (72) hours (notification must be given within ninety six (96) hours of when the animal went missing);
- 4 That the animal has been found after being reported missing;
- 5 Certain matters relevant to the making or revocation of declarations by the Court in relation to dangerous dogs. In practice the local council will make its own record of these changes and so it obviates the necessity for the owner to file any document.

In New South Wales a person is the owner of a dog for the purposes of the *Companion Animal Act* if he or she is the owner of the dog, ordinarily keeps the dog at their place of residence or is a registered owner of the dog with the local council. There is an exception to these rules in relation to employees who keep dogs on behalf of their employers.

In New South Wales a 'working dog' as defined under the Act includes dogs for the purposes of working with cattle and sheep and not subject to the rules of registration if kept in certain rural locations.

When outside the normal place of residence a dog must have a collar around its neck and a name tag showing the name of the dog and the address and telephone number of the owner of the dog although this requirement does not apply to a dog when it's on the property of the owner of the dog or to working dogs.



The owner of a dog must take precautions to prevent the dog from escaping from the property upon which it is kept by the erection of suitable fences. Furthermore a dog in a public place must be kept under effective control by a competent person by way of an adequate chain, chord or leash. An additional offence arises if the owner of

the dog is not present at the time that a dog commits an offence in a public place unless there is another person who is over the age of sixteen (16) years in charge of the dog at that time. In other words it is not permissible to allow a person under the age of sixteen (16) years to walk your dog in a public place. A council officer or a police officer may seize a dog that is being walked by a person under the age of sixteen (16) years in a public place unless the owner is present.

The Act provides for various prohibitions and exceptions as to the prohibitions imposed in relation to dogs in public places and it is outside the scope of this paper to set out each and every prohibition or restriction.

## Dangerous or Restricted Dogs

In New South Wales a Council or Local Court may declare a dog to be dangerous if it has without provocation attacked a person or animal. The owner of a dog which is declared to be dangerous must comply with the requirements of the *Companion Animals Act* which in essence dictates that the dogs must be housed in pens designed to prevent the dogs from coming into contact with persons, particularly children, dictates the wearing of muzzles in public places and the placing of warning signs to put the public on notice that a dog declared to be dangerous is kept upon the property. A dangerous dog cannot be moved from one local council area to the other without the local council to where the dog is intended to be relocated is made aware of the intention to move and at that time the council would then put in place appropriate requirements in relation to the pens necessary and the signage to be placed upon the property to warn the public.



Additionally a dog that is declared dangerous must be desexed unless a local court relieves the owner of this burden and it is this item that gives rise to significant consternation on the part of owners of dogs declared to be dangerous.

Dogs must not be encouraged to attack people or other animals other than vermin and the owner of such a dog or the person who is urging the dog to attack is guilty of an offence which can in relation to a dangerous or restricted dog expose the

owner to a gaol sentence of a maximum of six (6) months and a fine of 100 penalty units (a penalty point equals \$110 presently, ie \$11,000) otherwise in the case of a dog that has not been declared dangerous or a restricted dog the maximum penalty is 20 penalty units (ie, \$2,200). Section 17 of the *Companion Animal Act* deals with and imposes the offence of encouraging a dog to attack, bite, harass or chase a person or animal other than vermin and applies even if no actual injury is caused. The section does not apply:

- (1) in the reasonable defence of a person or property;
- (2) a police dog;
- (3) a correctional officer's dog;
- (4) working dog
- (5) a dog used for lawful hunting, eg a gun dog.

Generally a Local Council when faced with the allegation of an attack by a companion dog on a person or another dog takes the step of declaring a dog dangerous and exposes the owner to the cost and inconvenience of appealing that decision to the Local Court seeking to either have the declaration set aside or to ask the court to impose certain lesser terms and conditions of control. Under the *Companion Animals Act* an authorised officer of a Local Council may, if that person is satisfied that a dog is dangerous, declare a dog to be dangerous even if the dog is ordinarily kept in another council area with such a declaration effective throughout New South Wales.

## Menacing Breed or Kind of Dog

The Act was amended in 2013 to include a further category of dog in the Act described as 'a menacing or menacing breed or kind of dog'. Section 33A of the Act defines 'menacing' if the dog:

- (a) has displayed unreasonable aggression towards a person or animal (other than vermin); or
- (b) has, without provocation, attacked a person or animal (other than vermin) but without causing serious injury or death.

Section 33A(2) provides that the Regulations may declare a breed or kind of dog to be a menacing breed or kind of dog. By this means the Minister can recommend the making of a Regulation in circumstances where the Minister is satisfied that the breed or kind of dog displays characteristics associated with menacing behaviour. Whilst there is presently no Regulations dealing with any one breed or kind of dog it is open at any time for the relevant Minister now or in any future Government to simply without any notice or warning regulate so as to make a breed or kind of dog a menacing breed or kind of dog. In other words, there is potentially breed specific legislation in force in New South Wales.

## Dangerous Dogs

Under the Act a dog is dangerous "if it has without provocation attacked or killed a person or other animal other than vermin or repeatedly chased a person or animal other than vermin or has displayed unreasonable aggression towards a person or animal other than vermin or is a dog kept or used for hunting". A local court may also declare a dog be dangerous simply by basing



such a determination on evidence given as to the dog's behaviour which it considers that it has displayed unreasonable discretion towards a person or animal other than vermin.

## Restricted Dogs

In New South Wales there are certain breeds that have been determined by Parliament which they prescribe by regulation to be dangerous or undesirable which they designate as 'restricted dogs' for the purposes of the *Companion Animals Act*. It is an offence in New South Wales to sell, acquire or breed dogs on the restricted dog list.

Restricted dogs in NSW are the same as those currently on the prohibited list of importations into Australia. However changes to the legislation now include offspring of restricted dogs on that list, as follows:

- (a) American Pitbull terrier or Pitbull Terrier
- (b) Japanese tosa
- (c) Dogo Argentino (Argentinean fighting dog)
- (d) Fila Brasileiro (Brazilian fighting dog)
- (e) Any dog declared by a council under Division 6 of the Act to be a restricted dog (This means any dog where the council is of the opinion that a dog is of a breed or kind of dog on the restricted dog list or a cross-breed of any such breed or kind of dog.)
- (f) Any other dog of a breed kind, or description prescribed by the Regulation for the purposes of this section.



American Pitbull



Japanese tosa



Dogo Argentino



Fila Brasileiro

If a council issues a dog owner with a 'Notice of Intention to Declare a Dog to be a Restricted Dog' under Division 6, the owner has 28 days in which to complete the process where they may elect to have the dog's breed and temperament assessed. If you receive such a notice you can contact your local council for further information.

Additional control requirements similar to those as imposed on dangerous dogs are imposed on restricted dogs. An examination of the Act discloses that penalties for failure to correctly identify, register and control are significantly higher when they apply to dangerous or restricted dogs.

## Greyhounds

In relation to greyhounds there is some relaxation in relation to the identification requirements presently for greyhounds and has been relieved of microchipping these dogs but burdening the owners with the requirement of ensuring that the greyhounds are muzzled when in public.

## Dealing in Dogs

Under the requirements of the Animal Welfare Codes of Practice imposed by virtue of the *Companion Animal Act* which are codes that are mandated by the Department of Primary Industries upon conduct or activity caught by each relevant code. If you carry out the Activity defined by each code then you are burdened by the relevant code. The animal trades codes are as follows:

- 1 Animal Welfare Code of Practice – Animals in Pet Shops
- 2 Animal Welfare Code of Practice – Breeding Dogs and Cats
- 3 NSW Animal Welfare Code of Practice No 1 – Companion Animal Transport Agency
- 4 NSW Animal Welfare Code of Practice No 5 – Dogs and Cats in Animal Boarding Establishments
- 6 NSW Animal Welfare Code of Practice No 8 – Animals in Pet Grooming Establishments
- 7 NSW Animal Welfare Code of Practice No 9 – Security Dogs



The most important of the Animal Welfare Codes of Practice of members of Dogs NSW is entitled 'Breeding Dogs and Cats', being 2 above, and it is a document that should be read closely and implemented as a bare minimum.

The Standards have legal effect in that failure to meet the Standards may result in a fine or prosecution by the RSPCA. Responsibility falls upon the owner or person who has responsibility for the care. In respect of each of the following the Code sets out seven groups of Standards and Guidelines.

Guidelines are a range of methods or strategies or conditions which should be considered and imposed if applicable and necessary.

The seven groups of Standards and Guidelines are:

- 1 Responsibilities and Competency
- 2 Quality Management Systems
- 3 Animal Housing
- 4 Animal Management
- 5 Animal Health
- 6 Transfer of ownership
- 7 Breeding and rearing

The Standards are mandatory and represent the requirements or steps or conduct required for compliance. Compliance is mandatory and if there is compliance with the standard then in the majority of circumstances such compliance will be accepted by the Court as an answer to a relevant prosecution or penalty notice although compliance is not strictly a defence.

The guidelines are not mandatory but are advisable and non compliance may be evidence of cruelty in appropriate circumstances.

An examination of the standards for Animal Housing in Part 6 reveals a standard which is rarely met by puppy farmers and frequently not by many dog breeders except of course members of Dogs NSW who either are aware of the requirements or meet it by reason of being extremely caring and welfare minded without actually being aware of the strict standards.

The size of animal enclosures and the amount of exercise out of crates are strictly defined as standards. In all relevant respects the rules and regulations of Dogs NSW either mirror or dovetail into the Code.

In New South Wales animal trades are not registrable but are controlled by regulation codes of practice being one or more of the seven codes of practice referred to above. Each type of animal trade has an approved code of practice relating to its conduct. The code provides for offences in relation to conduct not conforming with the codes and in essence deal with the care and treatment of animals in relation to a particular type of trade. The application of the Code to pet shops and boarding establishments is discussed below.

Under the code a pet shop is defined as a place used for the conduct of a business in the course of which an animal is kept for the purposes of sale. If you are registered as a business for taxation purposes you will be deemed to be a pet shop under the Animal Welfare Code for pet shops if you sell a dog. If you breed and sell as a hobby without an ABN and not claiming business deductions from the Australian Tax Office then you will not ordinarily be classified as a pet shop. Whether you conduct a business or not will of course be a matter of fact to be determined in each individual instance.

Your attention is drawn specifically to point 10 of the Animal Code of Practice – Pet Shops, specifically:

- 1 10.1.5 states that if within three (3) days an animal is not acceptable to a purchaser for any reason the proprietor is required to take that animal back and refund 50% of the purchase price of the animal.
- 2 The guarantee required by clause 10.1.5 must be displayed in a prominent position on the wall of the business.
- 3 10.2.3 states that the information required by 10.1.4 as to written information on the care of the animal purchased must be provided at the time of the transaction.
- 4 10.2.5 – all advertisements for dogs should include the microchip number and vaccination status of an animal. Failure to correctly identify an animal at the point of sale by its correct microchip number and age for example, including provision of the transfer of the microchip to the purchaser, would be a breach of the consumer guarantee.

If you operate a business such as a boarding kennel or a breeding establishment, the codes are supportive of the obligations of traders under the *Trade Practices Act* and in addition to the requirements under the *Prevention of Cruelty to Animals Act 1979* and the *Local Government Act*. In practice the Courts have tended to accept compliance as being a defence except in the most exceptional circumstances.



*There is little opportunity at a Federal level for bodies such as Dogs NSW to lobby for the interests of dog owners.*

In New South Wales it is not a defence to a cruelty prosecution to give evidence of compliance with a relevant Code of Practice but non-compliance is admissible in evidence of alleged cruelty (See Section 34A POCTA). It is a matter for the Court to determine if the evidence provided in totality constitutes cruelty and in most instances this question will turn on veterinary evidence. If the defence can either point to expert veterinary evidence

that the prosecution's conclusions are wrong or that there is doubt arising from the prosecution's evidence, then the Court may be convinced to give the defence the benefit of that doubt. The link between the Codes of Practice and prosecutions for cruelty is discussed below.

The Commonwealth Government, through the Australian Animal Welfare Strategy which is influenced heavily by Animal Welfare lobby groups is attempting to move towards a uniform approach across Australia where the Codes will be expressed to be mandatory and not merely guidelines.

There is significant academic criticism of the code development process not to mention complaint by Animal Welfare lobby groups. Central to the process of Code development is the role of the Animal Welfare Working Groups composed of the Commonwealth Department of Agriculture, Fisheries and Forestry and each State and Territory counterpart together with the CSIRO, Animal Health Australia and the Vertebrate Pest Committee. There is little opportunity at a Federal level for bodies such as Dogs NSW to lobby for the interests of dog owners. Prior to November 2007 little was done by Dogs NSW to put its members position to the New South Wales Department of Primary Industry and the Department of Local Government. As and from November 2007 the Board of Dogs NSW constantly and actively liaised with Officers from both the Department of Primary Industry and

the Department of Local Government encouraging and facilitating an exchange of information and in particular appraising both departments in relation to what Dogs NSW was doing and its position on relevant welfare and legal issues. The President of Dogs NSW (Nov 2007 to Nov 2010), Frank Pieterse,

was the architect of the policy to raise the profile of Dogs NSW with relevant government bodies and to develop lines of communication with those departments with a view to ensuring that information relevant to Dogs NSW was before those departments when any legislation or regulation was being discussed or imminent and impacting upon the interests of the members of Dogs NSW.



During the tenure of Mr Pieterse as President of Dogs NSW it is understood that amongst his other efforts in this area he consulted on the preparation of the 2009 Animal Welfare Code of Practice – Breeding Dogs and Cats, this Code being most relevant to the activities of members of Dogs NSW who have the desire to breed pedigreed dogs.

The present Board has involved itself in consulting with the present Liberal Government in relation to wide sweeping changes to the Act which will likely involve a comprehensive mandatory breeder licensing regime.

The complaint of the Animal Welfare lobby groups is that the development process is constipated by industry lobby groups who have a significant input in relation to legislation and its amendment.

By virtue of the amendments to the *Trade Practices Act* effective from 1 January 2011 called the Australian Consumer Law and Unfair Contract Terms Law it is now more likely that in proceedings before the Consumer Claims and Tenancy Tribunal that the various codes of conduct will be applied strictly against those involved in the selling, boarding and breeding of dogs. Australian Courts and the

Consumer Claims and Tenancy Tribunal can apply the Australian Consumer Law and Unfair Contract Terms Law to the sale of a dog. You are a 'supplier' if you sell a dog in circumstances where you are selling it as a household pet even if it is to be used also for the purpose of exhibition. A supplier is bound by the Trade Practices Act including the Australian Consumer Law and Unfair Contract Terms Law. It does not matter that the supplier of the dog does not have an Australian Business Number ('ABN') and does not pay income tax and that the kennel is treated as a hobby. Dogs sold with genetic problems that are known to afflict a particular breed will likely be found to breach the implied guarantees under the *Trade Practices Act* if the pup sold develops the genetic fault within six (6) years of supply. The new Consumer Law and Unfair Contract Terms Law applies to dogs valued at less than \$40,000.00 if the animal is sold as a household pet. The \$40,000.00 limitation may not apply under the exception that it is a chattel of the kind ordinarily acquired by persons for domestic or household use or consumption. It is not likely that a household pet costing more than \$40,000 would be found by a Court to be a 'good' caught by the Australian Consumer Law.

The consumer guarantees that are now applicable under the new law includes that the buyer receives:

- 1 good title;
- 2 undisturbed possession;
- 3 acceptable quality and fitness for a disclosed purpose that the dog corresponds with the description or sample which is easily demonstrated by reference to advertisements, particularly on the web;
- 4 the warranties are available and enforceable for a reasonable period and are in addition to any express warranty offered.

Any attempt to have a buyer agree to restrict, exclude or modify the consumer guarantees provided under the Australian Consumer Law are void.

The Consumer Law deals with false and misleading representations. In the past breeders have been able, for example, to sell animals to purchasers without providing full papers so that the buyer will not be able to breed. Under the new Consumer Law there must be a clear statement that the purchaser is not acquiring breeding rights and that they acknowledge that they are receiving a limited registration.

## **Boarding of Dogs**

In New South Wales boarding kennels are not the subject of registration but are controlled by regulation through local council and pursuant to the Code of Practice relevant strictly to dogs and cats in animal boarding establishments.

## **Cruelty**

New South Wales, as with all States and Territories has enacted legislation in relation to being cruel to animals and to safeguard the welfare of all animals. In general terms the protection of dogs and other animals arises from The Prevention of Cruelty to Animals legislation which defines certain specific acts or omissions which constitute cruelty, the breach of which gives rise to punishment by way of fines or imprisonment. All animal cruelty is repugnant but there is recognition of degrees of cruelty extending to aggravated cruelty which is where a person commits an act of cruelty which results in the death, deformity or disablement of an animal or where the animal is severely injured, diseased, or rendered in such a

physical condition that it is considered by veterinary advice cruel to keep the animal alive. Aggravated cruelty can be dealt with as a crime.



Curiously 'cruelty' is not specifically defined under the Prevention of Cruelty to animals Act 1979 ('POCTA'). Ordinarily prosecutions will be for specific acts such as failure to provide food, drink or shelter or the infliction of pain or failing to provide veterinary care. It is far easier to prove a breach of a specific obligation than it is to prove the general charge of cruelty. The POCTA legislation sets out a vast number of offences in relation to the keeping of animals which are acts of cruelty.

Cruelty can be comprised of simply failing to comply with the relevant codes of practice the requirements for which can be onerous and depend largely upon the interpretation of the same by the RSPCA, Animal Welfare League or Police. The nature and effect of the Codes of Practice are discussed above. You should be familiar with the Code applicable to keeping of animals' welfare under the Animal Welfare Codes or the requirements of Dogs NSW to be found in Part XIV of the Regulations. A higher standard applies to persons keeping dogs for the purpose of breeding from that imposed on an individual keeping a domestic pet by virtue of the Code of Animal Welfare Conduct ('the Codes') not applying to mere domestic pets. The Codes apply to activity which is more than the keeping of a pet dog and relate to dealing in dogs such as breeding, boarding and alike.

## Liability for Injury and Damages

In New South Wales there is strict liability for injuries and damage done by dogs arising from the *Companion Animal Act*:

- 1 Section 16 provides for the offence if a dog attacks a person or animal.
- 2 Section 25 provides that the owner is liable for bodily injury and damage to personal property caused by a dog.
- 3 Section 26 is a continuation of liability when a person dies from the attack of a dog.
- 4 Section 27 deals with liability arising from damage to an animal.

If a dog rushes at, attacks, bites, harasses or chases any person or animal whether or not an injury is caused to that person or animal the owner or person in charge of the dog is guilty of an offence except where the dog is provoked.

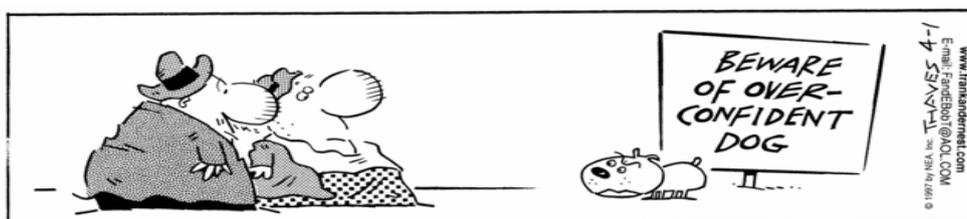
Both the owner of the dog and any person in control of the dog may be sued for the actions of the dog. Liability for actions of any animal firstly lies with the keeper or the person who harbours or controls the animal, not the owner. However the *Companion Animal Act* has significantly intruded into the issue of who may be sued providing for statutory liability. In New South Wales where injury to a person or damage to property is occasioned, such as clothing, is caused by a dog the owner of the dog is not liable if the attack occurred on the owner's property or in the owner's vehicle and if the person attacked was not lawfully on the property or in the vehicle or if the attack was an immediate response to and wholly induced by intentional provocation of the dog by a person other than the owner. The owner is not liable to compensate another person for loss or injury to an animal if the injury occurs on the property of the owner of the dog. Section 27(2) of the *Companion Animal Act*.

If an owner is liable under the *Companion Animal Act* the Act nevertheless preserves the issue of contributory negligence which can serve to reduce the amount of damages payable. In other words the contributory conduct of the person who has been the subject of an attack is taken into account when determining the measure of damage so as to reduce it.

If a person is attacked by a dog on the owner's land a mere technical trespass does not affect the liability of the owner if the person attacked was lawfully on the property or vehicle and the dog was not a dangerous or restricted dog. However, the plaintiff's trespass can in certain circumstances reduce damages or even excuse a defendant from liability. Where an injured person attacked by a dog was a trespasser without any legal basis whatsoever for entry upon the property the owner of the dog may raise that as a defence.



"I see you bought a new dog."



Generally no liability exists where the damage arising from an attack on the owner's property by a dog was due wholly and solely through the fault of the person attacked or where that person was aware that the dog had a vicious propensity and voluntarily assumed that risk.

It should become clear by reason of the strict liability arising from attacks by dogs that it is most prudent to have in place appropriate insurance which usually forms part of the home contents policy and public liability policy. Some insurance companies offer extremely comprehensive packages in relation to the risks arising from the keeping of a companion animal. An attack at a dog show can give rise to a claim under the Act and can lead to an award of significant damages against the owner.

## Powers of Entry and Seizure

Council officers under the *Local Government Act* have the power of entry upon property to investigate matters relevant to the keeping of animals without a search warrant. RSPCA and Animal Welfare League inspectors may enter land for the purpose of exercising any function under POCTA. Police officers have the power to enter land to investigate suspected cruelty.

Inspectors under POCTA and the Police may apply to a Court for a search warrant under the *Law Enforcement (Powers and Responsibilities) Act 2002*.

Evidence can be seized including animals and documents under search warrants. A limited power of seizure exists under POCTA if animals are deemed to require urgent and immediate attention. See Section 24J of POCTA.

*“Legal proceedings may be commenced by both the Local Council and the RSPCA if breaches are discovered”*

For example, where puppies are found who have had their tails shortened and there is no evidence given to inspectors that the tails were shortened legally, then frequently such puppies are seized pursuant to the power to seize evidence in support of breaches of POCTA.

Police have powers of search and seizure but rarely exercise those powers preferring to leave that to the RSPCA.

Local Council Officers have power of entry upon land and to seize dogs in public places. This power relates to exercising power within POCTA and the *Companion Animals Act*.

When complaints are made to a Local Council frequently dog owners are faced with a visit from the following:

- 1 A planning officer to see if dogs are being housed appropriately and kept according to planning laws.
- 2 A Health & Building officer to confirm that the dogs are being kept in a fashion not giving rise to offensive noise or odours.
- 3 The RSPCA to ensure no acts of cruelty or breaches of POCTA are displayed.
- 4 The Police if the RSPCA apprehends resistance to their visit.

Legal proceedings may be commenced by both the Local Council and the RSPCA if breaches are discovered and frequently it is the Local Council that precipitates the interest of the RSPCA.

Police may seize dogs under the *Impounding Act 1993* if it is wandering in a National Park, historic site or a reserve but otherwise Police seize dogs under the *Companion Animals Act* if the RSPCA is not involved or in an emergency.

Local councils have the power to regulate the keeping of dogs and do so by various means which are beyond the scope of this paper. The intensive keeping of dogs for breeding or boarding is not considered to be ‘agriculture’ and hence such a use can be regulated even if on rural/agricultural land.

Any dog owner intending to keep dogs particularly for breeding purposes should carefully identify the planning rules and restrictions that will be imposed by the Local Council on the land that is intended to be the site of the proposed activity.

