SIMON
PARSONS
&CO
LAWYERS

CLIENT NEWSLETTER
3rd Quarter 2007

A FREE QUARTERLY LEGAL UPDATE FOR OUR CLIENTS

Injured at work or on the road?

TELEPHONE: 5133 7788

SIMON PARSONS &CO LAWYERS

Morwell
165 Princes Highway
Phone: (03) 5133 7788

Sale
134 Raymond Street
Phone: (03) 5144 7788

IN THIS ISSUE

- Privacy laws under surveillance
- Redefining families
- Not black or white
- Law to fit the crime
- Callers beware
- No more butts
- Website reviews
- Legal Assistance offered to Gippsland flood victims

PRIVACY LAWS UNDER SURVEILLANCE

When the Victorian Law Reform Commission (VLRC) released its "Workplace Privacy Final Report" in October 2005, the Victorian government welcomed the proposal of workplace privacy reform. Among the VLRC recommendations was a regulatory system, with advisory codes for overt surveillance and email and internet monitoring, and mandatory codes for covert surveillance and on-site drug and alcohol testing.

While most of the recommendations have yet to be fulfilled, the recently introduced Surveillance Devices (Workplace Privacy) Act 2006 (Vic) – which prohibits surveillance in workplace toilets, washrooms, change rooms and lactation rooms – is the first stage of what the Victorian government has indicated will be a "more comprehensive regime to protect privacy in the workplace". The new Act applies to all employers, which includes corporations, unincorporated bodies and partnerships, and even covers volunteers and contractors. Fines of up to $128,916 apply for each breach of the legislation. Since the rapid advancement of our technological environment, workplace surveillance has become a significant issue in the protection of workplace privacy. Current and emerging international law and obligations in this area have prompted legislative reviews by state and federal governments, which are at the same time trying to minimise the regulatory burden on business.

Despite this, there are still significant gaps that exist in the protection of workers' privacy in Australia. Even in Victoria, with the new surveillance laws in operation, the broader privacy issues relating to drug and alcohol testing of workers, handling of personal information, searching of workers and their possessions and carrying out physical and psychological tests still remain.

The Privacy Act 1988 (Cth), which regulates the management of personal information by federal government departments and agencies, only deals with information privacy and even then features an "employee records" exemption. Recognising the shortfalls in national workplace privacy law, the Australian Law Reform Commission (ALRC) is conducting an inquiry into the Privacy Act. A series of issues papers have recognised proposals that promote: clearer provisions regarding employee records at a national level; the removal of the employee records exemption; renaming the Privacy Act to more accurately reflect the content; and replacing the Information Privacy Principles and the National Privacy Principles with a single set of principles covering the public and private sector.Ideally all aspects of workplace privacy, including information privacy, should be regulated in a single piece of Commonwealth legislation. Until this happens, workers must be proactive in getting their employers to implement comprehensive privacy policies or assure them protection through federal workplace agreements.

Useful web links: Privacy Victoria offers protection advice at www.privacy.vic.gov.au

REDEFINING FAMILIES

When Victorian Labor senator Stephen Conroy and his wife were forced to go interstate last year to have a child by surrogacy arrangement, it highlighted the disparity of state laws regarding Assisted Reproduction Technology (ART). It also reignited the debate on access to ART and adoption and the recognition of non-traditional family rights in Victoria.

This year the Victorian Law Reform Commission (VLRC) has reviewed the current laws and practices in an effort to respond to changing community values and redress discrimination. Victoria is one of only three states to regulate ART activity, which it does through the Infertility Treatment Act 1995 (Vic) (ITA). Central to the discussion of access to ART through licensed clinics and adoption is the issue of eligibility. The rights and best interests of children born into "alternative" family types is at the forefront of the debate, flanked by the social, legal and ethical issues existing now and into the future if amendments to the ITA expand eligibility criteria. Rising from the discussion are the voices of particular community groups, who have been challenging the traditional definition of family both in Victoria and across the country for years.

The surrogacy debate in particular has put pressure on the federal government to review its position on the recognition of rights for same-sex couples and to consider a national approach to family law reform. Wider issues, such as access to maintenance and superannuation for same-sex couples, have added another dimension to the discussion.

Following Tasmania's initiative to allow same-sex couples to formally register their relationship with the Office of Births, Deaths and Marriages, Victoria is currently considering establishing a same-sex register, which will give gay and lesbian couples access to the same legal rights as heterosexual couples. The Marriage Amendment Act 2004 (Cth) has prohibited same-sex couples who have married overseas from having their union recognised in Australia. Although the register will not be able to recognise the marriage as a marriage under the Marriage Act, the proposed register will make it easier for same-sex partners to exercise "relationship rights" in such matters as wills, property, health care, adoption and state superannuation and pension schemes.

The idea of the same-sex register is not new in Victoria, with several local councils having already set up registers in their municipalities. The preferred option however is a state register, which would enable a clear and uniform system to effectively support the rights of same-sex couples across the state.

Despite Victoria's moves on the recognition of same-sex relationships, there appears to be no intention of allowing gay marriages or any official civil union between same-sex couples. The Australian Capital Territory tried to introduce legislation to that effect, but was over-ruled by the federal government. That leaves the states to settle disputes on same-sex rights without provision for things like spousal maintenance or shared life insurance and superannuation arrangements, which are controlled by the Commonwealth. But as legislative reform continues in the states and the momentum among community groups grows, the federal government may be forced to reconsider its position.

Useful web links: Visit www.lawreform.vic.gov.au to download the Assisted Reproduction report, launched 7 June.

NOT BLACK OR WHITE

Substantive issues regarding the trade mark registration process have resurfaced after the Full Court of the Federal Court recently awarded confectionery giant Cadbury Schweppes Pty Ltd (Cadbury) another chance to establish ownership of the colour purple (see Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd [2007] FCAFC 70 (21 May 2007).Last year Client News reported on Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 4) [2006] FCA 446, in which the Federal Court denied Cadbury exclusive rights over the colour purple and vetoed its attempt to sue Australian-based confectioner Darrell Lea Chocolates Pty Ltd (Darrell Lea) for using similar colours in their staff uniforms, product packaging and livery. Cadbury alleged that this was a breach of sections 52 and 53 of the Trade Practices Act 1974 (Cth) (TPA), claiming that Darrell Lea misled and deceived consumers by passing off its goods as Cadbury products.In 2002 Cadbury made an unsuccessful application to the Trade Marks Office (TMO) to register the colour purple as a trade mark of its chocolates and chocolate confectionery. Having used purple packaging for its products since the 1920s, it assumed an exclusive reputation and goodwill within the Australian market through its use of this colour.Despite the Trade Marks Act (Cth) having broadened the definition of trade mark to include such non-traditional forms as shapes, sounds and colours, Cadbury was not able to show that its use of purple clearly distinguished its products. The Federal Court ruled that Cadbury and Darrell Lea had distinct identities in the market place and that Cadbury did not have an exclusive reputation in the colour purple regarding chocolate. The Full Court's recent reversal of this decision follows an appeal by Cadbury, which found that the trial judge had incorrectly dismissed disputed expert evidence called by Cadbury. Subsequently, a new trial has been ordered and the debate over the ability of traders to claim ownership of a colour for use as a trade mark continues.Facing a similar challenge is petrol giant British Petroleum (BP), which has applied to the High Court to overturn a Federal Court decision denying the company registration of the colour green as a trade mark.BP had previously convinced the Federal Court that the colour "Pantone 348C" was a distinctive aspect of its product, thereby gaining permission to register it as a trade mark for its service station buildings and facilities. But supermarket and petrol retailer Woolworths, which also uses green in its marketing, opposed the registration. In Woolworths Limited v BP plc [2006] FCACF 132 the court held that: "Taking all evidence into account, including the absence of evidence as to the frequency of specific print or television advertising, we are unable to conclude that any trade mark use of colour by BP at the relevant times has been other than green as the dominant colour in conjunction with yellow as the subsidiary colour." Both BP's and Cadbury's cases highlight the difficulties involved in establishing trade mark protection in the Australian market place. Until these further hearings on appeal are determined, the issues of trading in colour remain contentious.

Useful web links: Visit the Trade Marks Office at www.ipaustralia.gov.au

LAW TO FIT THE CRIME

A review of criminal legislation including the Bail Act 1977 (Vic), the Crimes Act 1958 (Vic) and the Uniform Evidence Act are the latest initiatives to come out of the Victorian government's "Justice Statement", launched in 2004. The 10-year law reform program is intended to "modernise the justice system and ensure it remains flexible and responsive to change". It comes amid criticisms of the state criminal justice system, more recently aimed at the bail system and the apparent leniency in criminal sentencing.

A recent report from the Australian Bureau of Statistics (ABS) on Prisoners in Australia 2006 has done little to improve the picture. Victoria drew with South Australia in recording the country's highest proportional increase in prisoner populations. Furthermore, ABS sentencing figures revealed that suspended jail and non-custodial sentences are applied to more than 44 per cent of County Court and Supreme Court convictions. Early this year the Sentencing Advisory Council (SAC) released several discussion papers, one of which proposed introducing a scheme of sentence indications and sentence discounts. The paper examined the possible merit of a formalised sentencing indication scheme in Victorian courts and the role of specified sentence discounts. Both measures aim to encourage early guilty pleas by ensuring that defendants better understand the different consequences of pleading guilty and being convicted. In turn, the measures should help reduce the delay in the justice system and reduce victim trauma. The proposal has attracted its fair share of criticism and support, all of which will be considered by the Council before it announces its formal assessment later in the year. At around the same time the SAC paper was released the Victorian Law Reform Commission (VLRC) was completing the first stage of its evidence reference.The Uniform Evidence Law Report and Implementing the Uniform Evidence Act proposed modifications to current legislation, which are expected to be seen later this year. In the meantime, information about the new legislation is being formulated, while an educational resource for lawyers and judges is developed.

The VLRC has also been busy preparing its final report on the Bail Act 1977 (Vic). Among its considerations has been the maximum sentence for failures to meet surety; an issue recently highlighted by remarks from the Honourable Justice Gillard in R v Mokbel and Mokbel [2006 VSC 158] concerning the adequacy of the current penalty of two years. The Law Institute of Victoria made a submission to the VLRC supporting the current penalty and suggesting that imprisonment be available only where all other avenues have been exhausted or the conduct of the person providing surety warrants sanction. Among other submissions, the Victorian Criminal Bar Association suggested that reverse onus provisions should be removed, explaining that the current burden on the accused to establish their entitlement to bail contravenes basic principles of criminal justice.

With so many legislative changes imminent, including reforms to the Crimes Act to simplify and rationalise offences, the government certainly has its work cut out for it. The recently announced State Budget helps. It has committed $272.8 million to increasing and improving police resources over the next four years and made financial pledges to: modernise the court system, maximise access to justice, upgrade coronial services, increase victim compensation payments and support Victoria's homeless and disadvantaged. These budgetary measures provide a good start towards addressing the current controversies surrounding criminal law procedure.

Useful web links: Visit the "Current Projects" page of the Victorian Law Reform Commission website at www.lawreform.vic.gov.au

CALLERS BEWARE

A collective sigh of relief sounded out across Australia on 31 May, when the Australian Communications and Media Authority (ACMA) began full enforcement of the federal government's "Do Not Call Register".The initiative, which was launched on 3 May by the Minister for Communications, Information Technology and the Arts, Senator Helen Coonan, allows consumers to register their phone numbers to opt-out of receiving unsolicited telemarketing and research calls. Telemarketers found to be defying the register will face escalating penalties of up to $1 million.The Do Not Call Register Act 2006 (Cth) and the Do Not Call Register (Consequential Amendments) Act 2006 (Cth) follow growing public concern over the increasing level of telemarketing activity, which is now governed by a new industry standard. Perhaps public reception to this legislation, particularly in Victoria and New South Wales, would not have been so enthusiastic if people had been more aware of the consumer protection measures that already exist in the area of telemarketing through the operation of the Fair Trading Act 1999 (Vic) (FTA).

Protection of consumers in the telemarketing environment was first prioritised in the Victorian government's Fair Trading (Further Amendment) Act 2003 (Vic) (the Act), which amended the Fair Trading Act 1999. It made clear definitions for an industry standard in a number of matters now further supported by the Do Not Call Register. They include:

- Permitted hours – the Act prohibits suppliers and their representatives from contacting a person before 9am, after 8pm on weekdays, after 5pm on weekends and on public holidays;
- Duty to cease telephone marketing – the Act requires suppliers and their representatives to "cease negotiations" immediately on request and refrain from calling that person for 30 days (exemptions to this standard apply).Despite the fine-tuning of regulations, there are still issues that exist for suppliers and call centre operators, particularly those operating nationally. Problems are likely to arise in the event of: concurrent telemarketing campaigns for different products from one supplier; call repetition from separate operators representing the same supplier or call centre; and confusion with customer information that differs between product lines. The onus is clearly on suppliers to develop comprehensive non-duplication techniques. In addition, clear operational policies, open communication channels between business areas, regular training for operators and maintenance of IT systems are encouraged. Just as important to the regulation of telemarketing activity is the customer's awareness of the action they can take when a breach occurs. Consumer Affairs Victoria has been the traditional point of contact for disgruntled customers under the FTA. The Do Not Call Register now provides a clear preventative measure. As teething issues of the system are dealt with and the effectiveness of the register is assessed, protection for consumers will remain at the top of the agenda. The only remaining issue is one of industry compliance, best managed by harmonising legislation with industry self-regulation.

Useful web links: To register visit www.donotcall.gov.au

NO MORE BUTTS

On 1 July, Victorian smokers took their last gasp as the latest and perhaps most radical of the legislative reforms delivered by the Tobacco (Amendment) Act 2005 (Vic) came into effect. The social custom of having a cigarette with a beer or wine has been heavily restricted, with the new laws prohibiting smoking in all enclosed licensed pubs and clubs, as well as outdoor dining or drinking areas that have a roof and walls which enclose more than 75 per cent of the total area. The move follows existing bans on smoking in restaurants and cafes, shopping centres, gaming venues, underage music and dance events and covered areas of train, tram and bus shelters. The penalties for contravening the smoking bans include a fine of $110.12 and up to $550.60 if prosecuted. These figures apply to the financial year commencing 1 July 2007 and ending 30 June 2008.

Research conducted by the Department of Human Services in 2004 revealed that more than 80 per cent of Victorians supported smoking bans on licensed premises; a sentiment which has continued to grow within the community according to more recent surveys from the Centre for Behavioural Research in Cancer.

As well as protecting the patrons of licensed premises, the new laws also concentrate on those working in hospitality by providing them with a healthier and safer workplace. According to Health Minister Bronwyn Pike, tobacco smoke is responsible for almost 4000 deaths in Victoria each year. The cost to tax-payers is more than $5 billion annually in health care and social welfare; 31.6 per cent of this amount includes tangible costs of absenteeism, health care and fires. The remaining 68.4 per cent represents the serious intangible costs associated with smoking, including health decline and, ultimately, the loss of life.The economic benefit of reducing smoking rates has been a clear catalyst for the government's intensive anti-smoking initiatives introduced over the last six years. Leading up to the implementation of the latest reforms, approximately $1.4 million was spent on an eight-week advertising campaign, which infiltrated TV, print and online media channels across the state.The impact of the reforms on the hospitality industry itself is another issue. Whether the smoking bans will affect trade in licensed premises remains to be seen. In Tasmania however, where the same laws were introduced last year, the community and hoteliers have widely accepted the change. Furthermore, Minister Pike has cited research in which 26 per cent of respondents who regularly visit licensed premises expressed their intention to visit those premises more often when they became smoke free and 70 per cent said that the reforms will make no difference.The only losers in the anti-smoking campaign appear to be the tobacco companies and, perhaps, the tobacco farmers. But the warning signs have been in place for some time now. Tighter legislative controls, combined with the continuing success of anti-smoking advocates such as Quit Victoria (a joint initiative of the Cancer Council Victoria, VicHealth, Department of Human Services and the National Heart Foundation) are certain to turn smoking into a dying habit.

Useful web links: For more information about the reforms visit www.health.vic.gov.au/tobaccoreforms/new.thm

SIMON PARSONS &CO LAWYERS

Simon Parsons & Co
165 Princes Highway, Morwell
(03) 5133 7788
134 Raymond Street, Sale
(03) 5144 7788
enquiries@simonparsons.com.au

Legal Assistance offered to Gippsland flood victims

Gippsland Law firm Simon Parsons & Co. are offering free legal advice & assistance to the victims as a result of the recent floods across the region. The advice will be for those residents where flood damage could have been prevented or minimised, and will be in the local area on a community basis.

Mr. Simon Parsons, Principal of Simon Parsons & Co. said, "People affected by the recent flooding are now being further challenged by difficulties with getting compensation and insurance processes. In particular the people affected by the release of flood waters (and lack of warning) from Glenmaggie Weir are concerned that the damage could and ought to have been minimised."

"People affected, who just want some assistance with insurers, or to discuss their options in relation to other compensation methods, and consider their position, are welcome to make use of the free advice without obligation," Mr. Parsons added.

Simon Parsons and Co. Law Firm are offering residents who believe they have a legal claim or would like to investigate a claim the opportunity to access some free legal advice to explore and consider their legal options.

"The floods have affected communities both emotionally and financially and as such we believe it fitting that a local law firm with the capacity to properly represent these people provide a level of free assistance and support to the local community," Mr. Parsons said.

Initial assistance will be in the form of open days whereby bookings can be made to speak to one of the legal team at Simon Parsons and Co. Lawyers. Bookings are essential and can be made contacting Simon Parsons & Co Lawyers on (03) 51 33 7788 or (03) 5144 7788 during business hours.

WEBSITE REVIEWS

Working with Children

www.justice.vic.gov.au/ workingwithchildren

A new, more user-friendly Working with Children (WWC) Check website was launched recently, featuring an online Check Status facility for employers, volunteer organisations and agencies to confirm an individual's WWC Check. There is advice on who needs to apply, the application process and the outcomes, as well as website links to revelant publications and legislation. An initiative of the Victorian Government, and administered by the Department of Justice, the website provides a mandatory minimum checking standard across Victoria for adults to engage in child-related work as defined in the Working with Children Act 2005.

Victorian Criminal Charge Book

www.judicialcollege.vic.edu.au

The Victorian Criminal Charge Book is an online guide to model charges relating to various offences such as drug offences, sexual offences and stalking. It is accessible only online through the Judicial College website (select Publications and go to Victorian Criminal Charge Book). It also includes bench notes, jury checklists, extracts of legislation and a comprehensive index of cases.

For more information, please contact:
Simon Parsons & Co
165 Princes Drive Morwell
enquiries@simonparsons.com.au
Telephone 03 5133 7788 Facsimile 03 5133 9335

This newsletter is not intended to be the definitive analysis of legislation. Professional advice should be taken before any course of action is pursued.

DISCLAIMER:
The information in this newsletter is not intended to be a complete statement of the law relating to the issues raised. Accordingly, no person should rely on this information without first obtaining specific advice from our office.