

## Can implementation of an Act change without the legislation being amended by Government? The answer is “YES”; and Animal Management Officers must be prepared for these changes when administering legislation!

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### Abstract

Authorised Officers from both State and Local Governments work in a highly legislative environment. The administration of legislation changes often due to legislative amendment; but other influences such as advancements in technology, decisions handed down by the Courts and advice from legal practitioners mean that legislation amendments are not the only way the implementation of an Act can change.

Whilst legislation amendments may not occur in Parliament it is clear that events can change the implementation of the legislation without an amendment to an Act. This paper discusses events that have changed how the *Domestic Animals Act 1994*, formally known as the *Domestic (Feral and Nuisance) Animals Act 1994* (the DFNA Act), is interpreted and implemented affecting the daily duties of both Officers mentioned above.

Many recent events in Victoria highlight how a legal case or even legal opinion can change the implementation of legislation. A recent case in the Supreme Court in relation to the operations of the Government's Restricted Breed Dog Review Panel and the wide spread differing opinion relating to dog attack offences in the DFNA Act offer some examples how legal findings and opinion can affect the administration of one provision within our legislation.

### Background

How are laws made in Victoria? Laws are a system of rules provided to assist society function harmoniously and efficiently. Acts of Parliament are created from ideas or expectations from society that are put forward to the elected members of Parliament to discuss, review and amend to ultimately become law in Victoria.

The first stage is 'Policy Development' with one or many stakeholders, including political parties, pressure groups, media or individuals forming an opinion or coming up with an idea which results in the Governor in Council, being the Government of the day, the opposition party or an independent preparing a draft legislation.

Draft legislation can be proposed by a Minister of the Government, opposition member or independent and is presented in Parliament either in the Lower House (Legislative Assembly) or Upper House (Legislative Council) as a draft Bill.

The Bill is presented at the 'first reading' stage for approval to proceed and then is debated in principle in the Lower and Upper Houses of Parliament. Once the Bill is passed by both houses of Parliament, the Bill is certified by the Clerk of Parliaments and passed onto the Governor for Royal Assent. Once the Bill is given the Governor's assent, the Bill becomes an Act of Parliament.

Enactment, meaning the date the Act comes into operation as law in Victoria, can occur on a specific day or within 28 days after Royal Assent unless otherwise stated in the Bill.

In Victoria the primary legislation governing companion animals is the *Domestic Animals Act 1994*, formally known as the *Domestic (Feral and Nuisance) Animals Act 1994* (the DFNA Act).

The DFNA Act has been amended 18 times since coming into operation on 9 April 1996. The DFNA Act has been amended ten times by omnibus Bills for the purpose of amending legislation names in the Act and eight times specifically for the purpose of amending the DFNA Act itself in relation to companion animal management in Victoria.

While the DFNA Act has been amended 18 times since coming into operation, the amendments are not the only way this Act's administration, implementation and enforcement by the State and Local Government have changed. Many of the changes in administration have come from interpretative decisions handed down by Magistrates and Judges, as well as legal advice received from legal practitioners employed by both State and Local Government to give some direction for legislation implementation.

The following case studies attempt to explain how the legislative horizon can change with an interpretative view provided by a Council prosecutor to a ruling handed down by a Supreme Court Judge.

### Case studies

#### 1. Code of Practice for the Operation of Boarding Establishments - Revision 1 (the Code) - acceptable vaccination regimes for dogs before entry into Boarding Establishments

##### Issue

Legislation cannot always keep up with advancements in technology or veterinary medicine. The first review of Victoria's mandatory Dog and Cat Boarding Code of Practice was completed in 2004, resulting in a new Code being approved by the Minister for Agriculture that came into operation on 21<sup>st</sup> October 2004.

Boarding Establishment proprietors raised concerns with the Bureau mid 2006 as some veterinarians had begun to use a three-year vaccination program for dogs and under the Code of Practice the requirement for vaccinations stated:

"For dogs, pre-vaccination against distemper, hepatitis, kennel cough (parainfluenza (Type II) virus and *Bordetella bronchiseptica*) and parvovirus is required [also known as C5 vaccination]. A current vaccination certificate (ie certifying that vaccination was done within the preceding 12 months and that the

“due date” for the next vaccination has not been passed) must be produced for each dog before admission.”

The strict interpretation of this section of the Code suggests that a dog vaccinated with the three-year serum would not meet the requirement of a “vaccination done within the preceding 12 months” and therefore the dog could not be admitted into the Boarding Establishment.

By way of explanation a C5 vaccination includes the vaccination for distemper, hepatitis and parvovirus which is the C3 component, the vaccination against parainfluenza and *Bordetella* forms the C4 and C5 components. The parainfluenza and *Bordetella* antibodies in a C5 vaccination currently last for 12 months and therefore a booster vaccination is still required annually. The three-year vaccination only contains the C3 component to protect against distemper, hepatitis and parvovirus.

#### Result

The Bureau of Animal Welfare has advised Authorised Officers of Council that if an owner of a dog can prove to the proprietor of a Boarding Establishment that their dog is vaccinated under a three-year treatment for C3 and can prove that the annual booster vaccination of C4 and C5 is up to date at the time of admission for boarding, the proprietor can admit the dog.

This is an example of a common sense interpretation of a mandatory Code of Practice without a legislative amendment by the State Government.

## 2. DFNA Act s.29(9) – person in apparent control

#### Issue

With the provisions of the *Animals Legislation Amendment (Animal Care) Act 2007* coming into operation on 11 December 2007 saw an amendment to the DFNA Act regarding the provisions associated with the liability for people in apparent control over a dog immediately before a dog attack event.

At the time Section 29(9) was amended to include a definition of owner within the dog attack offence provisions. Section 29(9) stated:

“In this section [being s.29 relating to dog attack events], an **owner**, in relation to a dog, means the person who apparently has control of the dog at the time the dog conducts itself in the manner specified in subsection (1), (2), (3) or (4).”

The amendment was made to give Council Officers the power to issue infringements to a person in apparent control of a dog which attacks a person or animal resulting in minor injury or if the dog rushes at or chases a person (only).

This amendment was interpreted by some Officers meaning that an owner holds no liability for owning a dog which has attacked if that owner was not present if the dog was not securely confined to their owner's premises and found attacking a person or animal in front of the dog's home.

#### Case and decision

The Government received many differing legal opinions from qualified legal practitioners stating the provision was ‘sound’, ‘lacks clarity’ and ‘would be successfully challenged’ in Court.

The Department is aware of two cases in the Magistrates Court which resulted in different findings being handed down in very similar dog attack cases during the time Section 29(9) had been incorporated within the DFNA Act. In the first case the Magistrate considered the dog's owner was in apparent control of their dog even though they were not present with their dog at the time of the alleged offence. Although, the Council in the second case in the Magistrates Court lost the case as the dog's owner successfully stated that they were not in apparent control due to the dog being at large and the dog's owner not being present at the time of the alleged attack.

#### Result

While the provision was tested successfully as the Government intended in the first case, even before the second Court case the Government decided to amend the section relating to liability and offences for dogs attacking due to concerns of a case being successfully argued in Court.

The entire Section 29 associated with offences and liability relating to dog attacks was amended in June 2009 to provide the same offences for both an owner of a dog and a person in apparent control of a dog at the time of an alleged attack. This amendment gives power to Council to file charges to the appropriate alleged offender as well as maintaining the power to issue infringements for offences that result in minor injury to a person or animal.

## 3. Gubbins v Wyndham City Council [2004] VSC 238

#### Issue

An American Pit Bull Terrier known as “Jock” escaped from his owner's premises. While at large, Jock chased and attacked horses being ridden by teenage girls. The owner was charged with offences of owning a dog that attacked and the owner plead guilty to the offences in the Magistrates Court.

The Council advised the Magistrate during proceedings that if the owner was found guilty of the offence associated with the attack, that the Council would exercise its discretion to destroy the dog under the provisions of the DFNA Act. Mr Gubbins was found guilty of owning a dog that had attacked.

Mr Gubbins provided written submissions to the Council's Appeals Panel to overturn the Council's decision to destroy; the Panel considered these submissions and determined that the Council would precede with the destruction of Jock.

#### Case and decision

Mr Gubbins applied to the Supreme Court of Victoria that Jock's destruction was unlawful and void due to breaching rules of natural justice.

In the Supreme Court, Mr Gubbins challenged that the Council's decision to destroy Jock was made before the discretionary power to destroy was triggered by the DFNA Act and that the Appeals Panel decision was made with no power under the DFNA Act.

The Judge in the case determined that it was appropriate for the Council to state their intention to destroy the dog during the Magistrates Court case and rejected the claim that Council could not make this determination prior to the verdict being handed down by the Magistrate.

In the second matter regarding the Appeals Panel, the Judge rejected the submission that the Council had no power to hear an appeal from Mr Gubbins, but did find the Panel breached the rules of natural justice as the decision was made with new evidence provided that Mr Gubbins was unaware of and should have been given the opportunity to respond.

#### *Result*

Jock was destroyed and as a result of the Supreme Court's decision, Councils must now develop a standard appeals process that should consider all written or oral evidence provided by the dog's owner in its decision making process before exercising their power to destroy a dog found guilty of attacking. The legislation was not amended as a result of this Court's decision.

#### **4. *Nicholson v Mornington Peninsula Shire Council [2007] VSC***

##### *Issue*

A dog was found at large within the Mornington Peninsula Shire's municipal district. The Authorised Officer of Council seized the dog and formed the opinion that the dog was of a restricted breed and served the owner, Ms Paula Nicholson, with a declaration that her dog was an American Pit Bull Terrier (restricted breed dog in Victoria).

The Shire maintained custody of the dog as under the provisions of the DFNA Act the Shire was prohibited from registering the dog and therefore could not allow Ms Nicholson to recover her dog. Ms Nicholson applied to the Minister for Agriculture to have his Review Panel look at her dog, known as "Capone", in accord with the provisions of the DFNA Act and determine whether to affirm (uphold) or set aside (revoke) the declaration made by the Officer of Council.

Three Review Panel members were called to review Capone and Ms Nicholson attended with a veterinarian to provide support to her application. The three Panel members heard from Ms Nicholson, who was very upset about her dog being held in custody and the fact that if the declaration was affirmed that under current legislation the dog was to be destroyed as the Shire had no power to register the dog intun giving her no right to recover her dog.

The Review Panel determined to affirm the Officer's declaration and as a result Ms Nicholson took the Shire and the Minister's Review Panel to the Supreme Court on the grounds that the decision making process was flawed and denied her natural justice.

##### *Case and decision*

In the Supreme Court, the actual decision of the Review Panel was not up for consideration as the Court has no power to hear submissions about the Panel's decision; it was the process of the Review Panel that was up for judicial review. The Shire was implicated in this process as they still had Capone in custody as the Review Panel's decision resulted in the Shire not being able to register the dog and therefore could not release the dog back to Ms Nicholson.

Ms Nicholson could not challenge the Shire's decision, so she challenged the Review Panel's process that she had been denied natural justice on grounds that the Review Panel did not afford her a proper hearing; the Panel dismissed her photographic evidence of Capone's parentage; that a non-Panel member did not allow her veterinarian to fully address the Panel; and that the Panel had conducted a 'secret ballot' without appropriate discussion of the Panel as a group.

##### *Result*

Justice John Forrest determined that Ms Nicholson had been denied natural justice in that the Panel's hearing process was flawed. Justice Forrest ordered that a new hearing be conducted and that this Review must be performed by different members from the Minister's pool of Panel members.

Justice Forrest stated that the DFNA Act provides that the Panel "must consider the application for review of the declaration which is before it" meaning that the Review Panel members should discuss their decisions as a group prior to making their final determination. Justice Forrest also stated that the DFNA Act provides that "a review panel may regulate its own procedure" meaning that non-members cannot provide directions during a hearing and that it is up to the Panel members on the day to determine their process.

The Minister called for three new Panel members to re-hear Ms Nicholson's application, which resulted in the Officer's declaration being set aside and Capone being released from the Shire's Animal Shelter 10 months after being seized for being at large.

The legislation has not been amended since this decision was handed down, but the Review Panel process has been overhauled resulting in Review Panel members conducting Panels as they see fit and giving them the power to amend their process on the day of the Panel.

Whilst restricted breed legislation in Victoria remains topical in light of the above and recent events; this policy has bipartisan agreement from most State Governments due to the high risk placed on Governments in providing legislation to tackle attacks by dogs, no matter which breed is involved.

### Conclusion

As can be seen from the above case studies, the companion animal industry in Victoria faces changes in legislation from many directions. These changes are not always as a result of the Government changing the state of operation through passing legislation amendments in Parliament.

With the expectations from the community and the community's increased awareness of animal management issues; Animal Management Officers in Victoria are faced with new challenges on such a regular basis that the term 'change management' must be one that they embrace with the many other attributes they possess in the toolbox to meet their obligations under the DFN Act to promote animal welfare, responsible pet ownership and to protect the environment from nuisance dogs and cats.

### References

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Steven has worked to establish minimum standards and best practice in domestic animal management in Victoria and assisted in the development of the Domestic Animal Management Planning and DAMIC's Animal Control Benchmarking Exercises. Steven worked for two municipal Councils in Victoria as an Animal Management Officer from 1996 through to 2003 before starting his role with the Bureau.