

# ANIMAL LAW Guide

New South Wales



THE LAW SOCIETY OF NEW SOUTH WALES  
**youngLAWYERS**

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ANIMAL LAW COMMITTEE

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## THE LEGAL FRAMEWORK IN NEW SOUTH WALES

Within New South Wales there are a number of legislative tools which aid in the regulation and management of animals and animal welfare. The two most important and comprehensive regulatory frameworks are the *Prevention of Cruelty to Animals Act*<sup>1</sup> and the *Companion Animals Act*.<sup>2</sup>

The *Prevention of Cruelty to Animals Act* provides for the protection of animals and deems certain acts as offences which are punishable by fines and imprisonment. This Act covers a vast majority of animals within New South Wales although there are a number of exceptions, particularly relating to various procedures carried out on livestock, animals used for human consumption and animals used in research,<sup>3</sup> none of which has been included in this Guide. On the other hand, the *Companion Animals Act* regulates the management and welfare of companion animals such as domestic pets.

There are also a number of other Acts that concern animals. For example, the *Animal Research Act*<sup>4</sup> governs the use of animals in research and teaching and establishes independent bodies to oversee and regulate the use of animals for such purposes. The *Exhibited Animals Protection Act*<sup>5</sup> governs the exhibition of vertebrate animals in establishments such as zoos, aquariums and circuses.<sup>6</sup>

References to animals can also be found both directly and indirectly in other miscellaneous legislation, for example traffic legislation, which provides for the safe transportation of animals within vehicles.

A full list of the legislation referenced in this book is found on page 31.

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- 1 *Prevention of Cruelty to Animals Act 1979* (NSW) herein referred to as POCTA.
  - 2 *Companion Animals Act 1998* (NSW) herein referred to as CAA.
  - 3 CAA s 24. This section lists a number of defences such as castrating certain livestock at specified ages, ear-marking stock animals and mulesing sheep under 12 months of age.
  - 4 *Animal Research Act 1995* (NSW) (which incorporates the National Health and Medical Research Council's *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes* 7th Edition, 2004).
  - 5 *Exhibited Animals Protection Act 1986* (NSW) herein referred to as EAPA.
  - 6 EAPA s 5.
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# ANIMALS AND CRUELTY

## What is cruelty?

The *Prevention of Cruelty to Animals Act* defines an “animal” as a member of a vertebrate species including any amphibian, bird, fish, mammal (apart from humans), reptile and crustacean (but only when being used for food preparation or when offered for consumption).<sup>1</sup>

The Act specifically states that it aims to:

- (a) prevent cruelty to animals, and
- (b) promote the welfare of animals by requiring a person in charge of an animal to:
  - (i) provide care for the animal,
  - (ii) treat the animal in a humane manner, and
  - (iii) ensure the welfare of the animal.<sup>2</sup>

The Act states that a person shall not commit an act of cruelty, authorise such an act or fail to take reasonable care to prevent an act of cruelty, fail to take steps to alleviate pain where cruelty is being inflicted and, where necessary, provide veterinary treatment.<sup>3</sup> An “act of cruelty” is defined as an act or omission as a consequence of which an animal is unnecessarily or unjustifiably:

- (a) beaten, kicked, killed, wounded, pinioned, mutilated, maimed, abused, tormented, tortured, terrified or infuriated;
- (b) overloaded, over driven, or over used;
- (c) exposed to excessive heat or cold; or
- (d) inflicted with pain.<sup>4</sup>

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1 *POCTA* s 4.

2 *POCTA* s 3.

3 *POCTA* s 5.

4 *POCTA* s 4(2).

It is clear that under the Act a number of acts or omissions are prohibited due to their nature, including:

- abandoning an animal,<sup>5</sup>
- poisoning an animal,<sup>6</sup>
- animal baiting,<sup>7</sup>
- bull-fighting and trap-shooting,<sup>8</sup> and
- docking tails and cropping ears, de-barking dogs, de-clawing cats or branding the face of an animal.<sup>9</sup>

The Act also requires certain things to be done including:

- providing animals with food and water,<sup>10</sup>
- exercising confined animals (although there are significant exceptions including stock animals),<sup>11</sup> and
- reporting injuries to animals caused whilst driving.<sup>12</sup>

An act of “aggravated cruelty” is defined as an act of cruelty, the authorisation of such an act, or the failure to take reasonable care to prevent an act of cruelty, take steps to alleviate pain where cruelty is being inflicted and, where necessary, provide veterinary treatment, which results in the death, deformity or serious disablement of the animal, or the animal being so severely injured, so diseased or in such a physical condition that it is cruel to keep it alive.<sup>13</sup>

The Act is criminal in nature and sets penalties including fines and imprisonment for its contravention. For example, the offence of abandoning an animal can carry a penalty of up to 50 penalty units (to a maximum fine of \$5,500)<sup>14</sup> and/or 6 months’ imprisonment for an individual;<sup>15</sup> poisoning an animal can carry a penalty of up to 200 penalty units (to a maximum fine of \$22,500) and/or 2 years’

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5 POCTA s 11.

6 POCTA s 15.

7 POCTA s 18.

8 POCTA s 18A.

9 POCTA s 12(1).

10 POCTA s 8.

11 POCTA s 9.

12 POCTA s 14.

13 POCTA s 4(3).

14 The *Crimes (Sentencing Procedure) Act 1999* (NSW) currently sets the rate at \$110 per penalty unit.

15 POCTA s 11.



imprisonment.<sup>16</sup> RSPCA Inspectors charged with the duty of investigating alleged breaches of, and enforcement of, the Act have wide powers to search, enter premises, examine and seize animals.<sup>17</sup>

It should be noted that the way in which an animal is transported may cause significant concerns about its welfare. In New South Wales, for example, the Act contains an offence relating to driving with an unrestrained animal (including carrying dogs on open utes without a restraint) as this may unreasonably, unnecessarily or unjustifiably inflict pain upon the animal.<sup>18</sup> Such an act is punishable by a penalty of up to 50 penalty units, calculated at \$110 per penalty unit (to a maximum fine of \$5,500) under the Act and/or 6 months' imprisonment.<sup>19</sup> Additionally, due to concerns for both animal and human safety, it is a traffic offence to drive with an animal on your lap or to ride a motorcycle with an animal on the petrol tank. These offences are punishable by hefty fines and carry a 3 or 4 demerit point penalty, with a higher penalty if the offence occurs in a school zone.<sup>20</sup>

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16 *POCTA* s 15.

17 *POCTA* Pt 2A, Div 2.

18 *POCTA* s 7.

19 *POCTA* s 7.

20 *Road Rules 2008* (NSW) r 297(1A), (3); see also *Road Transport (Driver Licensing) Regulation 2008* (NSW) Sch 2, r 297(1A), (3).

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# GENERAL REQUIREMENTS FOR ANIMAL OWNERSHIP

## I would like a pet. What laws should I be aware of?

Australia has one of the highest rates of pet ownership in the world.<sup>1</sup> To ensure the safety and wellbeing of the whole community, the *Companion Animals Act* regulates the responsible ownership of companion animals in New South Wales.

The Act sets down the following main requirements for pet owners:

- Dogs and cats must be implanted with a microchip from the time they are 12 weeks of age, at the point of sale or change of ownership (whichever occurs first)<sup>2</sup> and must be registered with the local Council by 6 months of age.<sup>3</sup>
- Dog owners must take all reasonable precautions to prevent the dog from escaping from the property in which it is being kept.<sup>4</sup> For the purposes of this requirement, “owner” includes any person who is for the time being in charge of the dog.<sup>5</sup>
- Cats are prohibited from food preparation and consumption areas, and from all wildlife protection areas.<sup>6</sup>
- Dogs, with the exception of assistance animals,<sup>7</sup> are prohibited from the following areas (whether or not they are leashed or otherwise controlled):<sup>8</sup>
  - (a) children’s play areas;
  - (b) food preparation/consumption areas, although it should be noted that recent amendments to the Act now permit pet

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1 NSW Government - Department of Local Government: Companion Animals home page <[http://www.dlg.nsw.gov.au/dlg/dlghome/dlg\\_InformationIndex.asp?areaindex=CA&index=301&mi=9](http://www.dlg.nsw.gov.au/dlg/dlghome/dlg_InformationIndex.asp?areaindex=CA&index=301&mi=9)> (herein referred to as *Companion Animals* home page)

2 CAA s 8.

3 CAA s 9.

4 CAA s 12A.

5 CAA s 12A.

6 CAA s 30(1).

7 CAA s 8(8).

8 CAA s 14.

owners to take their pets to outdoor cafés provided that the café owner allows this, the animal is restrained (unless it is a designated off leash area), remains on the ground in the outdoor area at all times and is not fed;<sup>9</sup>

- (c) recreation areas where dogs are expressly prohibited;
  - (d) public bathing areas where dogs are expressly prohibited;
  - (e) school grounds, child care centres;
  - (f) shopping areas where dogs are expressly prohibited; and
  - (g) wildlife protection areas where dogs are expressly prohibited.
- When in public places, dogs must wear collars identifying the dog's name and address or phone number of the dog's owner.<sup>10</sup> The animal must also be attached to an adequate chain, cord or leash but is exempt if being exhibited at a show, engaging in obedience trials, secured in a cage or vehicle, or is in an approved off-leash area.<sup>11</sup>
  - Greyhounds must at all times have a muzzle securely fixed when in a public place.<sup>12</sup> There are also specific requirements regarding dangerous and restricted dogs in public (see page 11).
  - Dog owners must pick up and dispose of the dog's faeces immediately.<sup>13</sup>
  - No person may have more than four dogs under his/her control at any one time in any public area.<sup>14</sup>

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9 CAA s 14A.

10 CAA s 12(1).

11 CAA s 13(1).

12 CAA s 15.

13 CAA s 20.

14 CAA s 13(4), (5)(a).

## What happens if my animal goes to the pound?

Any animal that is found must be either returned to the owner or taken to the local council pound or any approved premises as soon as possible and the owner must be notified as soon as possible.<sup>15</sup> A stray or injured animal can be taken to an approved premises such as the local vet. However, if the animal is not claimed within 72 hours, that premises is obliged to hand the animal to the local pound.<sup>16</sup>

Unclaimed or surrendered animals can be sold or destroyed by the pound after 14 days but if there is no owner or the owner cannot be identified, then the number of days is reduced to 7.<sup>17</sup> Councils can determine any fees and charges that they wish to charge in relation to the seizure and sale of an animal. Councils cannot sell dangerous or restricted breed dogs.<sup>18</sup>

If an animal is surrendered by the owners then the animal can be sold or destroyed at any time.<sup>19</sup> The Council, however, has a duty under the Act to consider whether there is an alternative action and, if practicable, to adopt such an alternative in relation to animals that have been both surrendered and those that are unclaimed by owners.<sup>20</sup>

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15 CAA ss 62, 63.

16 CAA s 63A.

17 CAA s 64.

18 CAA s 14.

19 CAA s 64A.

20 CAA ss 64(5), 64A(2).

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## NUISANCE ANIMALS

### My neighbour has complained about my barking dog. What should I do?

Councils often receive complaints regarding persistently barking dogs.<sup>1</sup> Each Council has an established procedure for investigating barking dog complaints. Although this procedure is likely to vary between Councils, it is common practice for Councils in urban areas to require complaints from more than one resident before taking action.

Under the *Companion Animals Act*,<sup>2</sup> persistent barking is regarded as similar to straying or other anti-social behaviour. If a Council officer identifies a serious or ongoing problem, a Nuisance Dog Order may be issued.

Before issuing a Nuisance Dog Order, a Council officer normally requests evidence from the owner that steps have been or are being taken to address and prevent barking. In circumstances where no preventative action is being undertaken, Councils may issue a Nuisance Dog Order.

A Nuisance Dog Order requires the owner to stop the dog from continually barking. If the problem continues, the owner may be liable for a maximum penalty of \$880 for a first offence and \$1,650 for any further offences.<sup>3</sup>

Nuisance Dog Orders can also be issued for the following behaviours:

- (a) continuously running away;
- (b) repeatedly defecating on property other than on which the dog is kept;
- (c) repeatedly running at or chasing any person, animal (other than vermin) or vehicle;
- (d) endangering the health of any person or animal (other than vermin); or

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1 *Companion Animals Frequently Asked Questions, Companion Animals home page.*

2 CAA s 21.

3 *Companion Animals Frequently Asked Questions, Companion Animals home page.*

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- (e) repeatedly causing substantial damage to anything outside the property on which the dog is kept.<sup>4</sup>

### My neighbour has complained about my cat. What can happen?

A cat can be declared a nuisance under the *Companion Animals Act* if it:

- repeatedly damages anything outside the owner's property; or
- repeatedly interferes with the peace, comfort or convenience of a person for example, by being continuously noisy.<sup>5</sup>

In these circumstances, Council Officers may issue an Order to the owner to prevent the nuisance behaviour. Such Orders are in force for 6 months, and cannot be appealed or reviewed.<sup>6</sup> Owners must comply with an Order or face a penalty.

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<sup>4</sup> CAA s 21. This section exempts working dogs herding stock.

<sup>5</sup> CAA s 31(1).

<sup>6</sup> CAA s 31.

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## DANGEROUS AND RESTRICTED DOGS

### The Council or Local Court wants to declare my dog “dangerous”. What does this mean?

Under the *Companion Animals Act*, a Council Officer,<sup>1</sup> or the Local Court,<sup>2</sup> can make a Declaration that a dog is “dangerous” if the dog has:

- without provocation, attacked or killed a person or animal (other than vermin – defined as small pest animals);
- repeatedly threatened to attack or repeatedly chased a person or animal (other than vermin) without provocation; or
- displayed unreasonable aggression towards a person or animal (other than vermin).<sup>3</sup>

These Declarations impose certain control requirements on owners to take the following measures:

- de-sex the dog within 28 days of the Declaration;
- ensure only adults are in charge of the dog;
- build a specified enclosure in which the dog must be contained at all times unless it is muzzled and on a leash. A certificate confirming that the enclosure complies with the relevant Regulations must be obtained. The Regulations provide that, amongst other requirements, the enclosure must:
  - be fully enclosed,
  - be constructed so a person under 18 cannot access it,
  - be not less than 10 metres square in area (per dog),
  - have walls fixed to the floor,
  - be built of brick, timber or iron, and
  - have a floor constructed of sealed concrete;<sup>4</sup>
- clearly display a “Warning Dangerous Dog” sign on the property where the dog is kept;<sup>5</sup>
- ensure the dog wears a distinctive collar, marked with red and yellow stripes, at all times;<sup>6</sup> and

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1 CAA s 34.

2 CAA s 44.

3 CAA s 33.

4 *Companion Animals Regulation 2008* (NSW) r 24 herein referred to as CAR.

5 CAR r 26.

6 CAR r 27.

- ensure the dog is kept on lead and muzzled whenever it is out of the enclosure.<sup>7</sup>

Hefty penalties apply for breaches of the Act and the associated Regulations. An authorised Council Officer may also seize the dog for detention at an approved premise until the owner can demonstrate an ability to comply with all of the above requirements.

If the Council intends to proceed with a Declaration, it must provide the owners with a Notice of Intention<sup>8</sup> which clearly sets out the requirements that will be imposed if the final Declaration is eventually made,<sup>9</sup> together with the interim requirements that must be complied with. The interim requirements include ensuring the dog is on a lead and muzzled when in public, and registering the dog within 7 days of receiving the Notice of Intention,<sup>10</sup> until the Council issues its decision.

### Can I challenge a dangerous dog declaration?

Objections to a proposed Declaration must be made to Council in writing within 7 days of the Notice of Intention being issued and must clearly list the reasons for the objection.<sup>11</sup> The Council must consider any such objections in deciding whether or not to make the final Declaration.

An application to revoke a Declaration may be made by the owner to Council only after 12 months from the date of the Declaration being made. A Declaration or refusal to revoke a Declaration can, however, be appealed in the Local Court within 28 days of the decision although the Declaration remains in force (and therefore the requirements must be complied with) until the appeal has been heard.<sup>12</sup>

The Local Court can revoke or enforce a Declaration. If a Declaration is revoked, the Court can still make other control orders as it sees fit, including behavioural training or de-sexing of the dog.<sup>13</sup> If the Court

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7 CAA s 51.

8 CAA s 35(1).

9 CAA s 35(2)(a).

10 CAA s 36.

11 CAA s 35(2)(b).

12 CAA s 41.

13 CAA s 47.



decides to enforce the Declaration it cannot change the control requirements imposed by Council and these must be obeyed until further notice from Council.

### What is a “restricted” dog?

The *Companion Animals Act* provides that the following dogs are “restricted” by virtue of their breed, namely:

- (a) American pit bull terrier or pit bull terrier;
- (b) Japanese tosa;
- (c) Dogo Argentio; and
- (d) Fila Brasileiro.<sup>14</sup>

A dog that is a cross-breed of the above dog breeds can also be declared restricted.<sup>15</sup>

The requirements imposed upon owners of restricted dogs are very similar to those of dangerous dogs including the control requirements such a muzzling, enclosures and warning signs.<sup>16</sup> It is a serious offence not to comply with these requirements. Dogs can be seized where requirements are not complied with on two occasions within 12 months<sup>17</sup> and can be destroyed as a result.<sup>18</sup> Animals may be reclaimed if Council can be satisfied that all of the control requirements can be met.<sup>19</sup>

A restricted dog that has attacked any person or animal (other than vermin) without provocation can also be seized and destroyed by Council Officers.<sup>20</sup>

Restricted breed dogs cannot be bred or sold and the mere acceptance of one as a pet is an offence. Abandoning restricted breeds is also an

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14 CAA s 55(1). This section also extends to any dog breed prohibited from importation under Commonwealth law, and allows Council Officers to deem dogs to be restricted dogs.

15 CAA s 58A.

16 CAA s 56.

17 CAA s 57.

18 CAA s 58G.

19 CAA s 64.

20 CAA Div 7.

offence although such dogs can be surrendered to the local pound or an approved welfare organisation such as the RSPCA.<sup>21</sup>

A Council that is considering declaring a dog as restricted must issue a Notice of Intention<sup>22</sup> which requires the owner to comply with interim control requirements (namely having the dog on a lead and muzzled in public, and registering the dog within 7 days of receiving the Notice of Intention).<sup>23</sup> Importantly an owner who has received a Notice of Intention to declare the dog restricted has 28 days from the date of that Notice to obtain a certificate from an approved breed assessor certifying the breed and temperament of the dog. If such a certificate is received by a Council Officer within this time stating that the dog is not a restricted breed or, if it is a cross-breed of a restricted breed, passes a temperament assessment, the Council must not declare the dog to be restricted and must withdraw the Notice of Intention.<sup>24</sup>

The Council must inform the owner of its decision and the consequences of its decision to declare or not declare a dog as restricted within 7 days of making its decision.<sup>25</sup>

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21 CAA ss 57A, B and C.

22 CAA Div 6.

23 CAA s 58B.

24 CAA s 58C(2).

25 CAA s 58(D).

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## ANIMALS AND INJURY

### I think the vet has been negligent. What can I do?

Under the *Veterinary Practice Act*,<sup>1</sup> vets must meet specific standards and exercise a certain level of care in relation to the medical treatment of animals.

If a vet fails to meet the standards, complaints can be made to the Veterinary Practitioners Board (“The Board”). The Board will investigate the claim and if it believes that the vet was either guilty of professional misconduct or unsatisfactory professional conduct it can seek a disciplinary finding from the Administrative Decisions Tribunal (“The Tribunal”). A finding of unsatisfactory professional conduct can be based on actions that would, if repeated or continued, be likely to cause unnecessary suffering to an animal, or if the vet was incompetent or his or her actions demonstrated lack of knowledge, skill, judgment or care in treating the pet.

If the complaint is referred to the Tribunal, the Tribunal is able to take action against the vet. Actions range from reprimanding the vet or imposing fines to cancelling his or her registration.

In addition, vets must maintain professional indemnity insurance. If loss or damage is suffered as a result of the vet’s negligence, compensation can be sought by commencing proceedings against the vet or vet practice for negligence and/or breach of contract. In such cases specific legal advice should be obtained.

### What responsibilities does my pet’s boarding house owe to my pet?

The *Prevention of Cruelty to Animals Act* imposes a duty on all persons in charge of animals, including those who run animal boarding houses, to ensure animals are provided with adequate food, water and shelter. If confined, the animal must also be adequately exercised, at least every 24 hours. The boarding house is not permitted to tie pets up for an unreasonable period of time.

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<sup>1</sup> *Veterinary Practice Act 2003* (NSW) herein referred to as *VPA*.

RSPCA Officers have powers under the Act to enter and inspect the boarding house premises, and any animal on the premises, to ensure that these obligations are being met. If an RSPCA Officer is concerned that the requirements are not being met, he or she can issue notices in relation to the care of the animal. If it appears that the boarding house has committed an offence, the RSPCA Officer can issue a penalty notice. In serious cases, criminal proceedings can be brought before the Local or Supreme Courts.

### My pet has been injured by another animal. What can I do?

Under the *Companion Animals Act* compensation can be sought if an animal is injured by a dog.<sup>2</sup> This could include compensation for any veterinary bills and medications that have been required because of the injury by another animal. Specific legal advice on such matters should be obtained.

Owners of dogs that have attacked or injured another animal can be found guilty of a criminal offence if the local Council decides to prosecute. Owners may, however, argue that their animal was provoked or not solely responsible for the injury.<sup>3</sup>

Dogs may be seized if it is reasonable and necessary to protect any person or animal from injury.<sup>4</sup> Dogs responsible for attacking or injuring can be seized by any person if the dog is on property owned or occupied by that person.<sup>5</sup>

Nuisance Orders can also be issued for cats that cause damage or interfere with the peace, comfort or convenience of a person<sup>6</sup> (see page 9).

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2 CAA s 27.

3 CAA s 28.

4 CAA s 22.

5 CAA s 18.

6 CAA s 31.

## My dog has injured or killed another person or animal. What are my rights and responsibilities?

When a dog has attacked and injured a person or animal, an owner may be liable to pay damages for veterinary bills, medical bills and possibly the replacement of the victim animal.<sup>7</sup> An owner can also be open to criminal prosecution under the *Companion Animals Act* and can be disqualified from owning a dog for up to 5 years if found guilty.<sup>8</sup> A person in control of a dog who causes the dog to inflict grievous or actual bodily harm on another person can also be open to prosecution under the *Crimes Act*.<sup>9</sup>

If a person dies as a result of the injury caused by a dog, the ability to make a claim for damages will be extended to the deceased's family members.<sup>10</sup>

In some circumstances, home and contents insurance policies may cover damages associated with injury or death caused to a person or animal, even if the injuries occurred away from the insured premises.

Where a dog has injured or killed a person or animal, it is possible for the Council to make an order declaring the dog dangerous (see page 10 and following).

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7 CAA s 25.

8 CAA s 16, s 23.

9 *Crimes Act 1900* (NSW) s 35A.

10 CAA s 26.

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## PETS AND PROPERTY

### I want to bring a pet into my strata title property. What should I do?

The by-laws of each strata scheme usually contain provisions regarding the keeping of animals and can be obtained from the property strata manager.

In most cases, prior written approval of the owners corporation will be required before keeping any animal (other than fish in a secure aquarium) will be permitted. Prior written approval from the owners corporation is advisable even when by-laws are silent on the subject. A letter providing accurate descriptions of the animal, including its breed, size, age, appearance and temperament, should be provided together with details of any obedience training the pet has undergone, as well as confirmation that the pet is registered, micro-chipped, de-sexed, vaccinated, and flea and worm treated. It is advisable that strata records are searched to determine whether there are any other lot owners or occupiers (past or present) who have kept pets in the property.

A response to a written request should be received from the owners corporation within a reasonable time. Once approval has been granted, a copy of the resolution passed in favour of keeping the pet should be obtained together with a letter from the owners corporation confirming the approval.

If approval is not given, and seemingly unreasonably withheld, the *Strata Schemes Management Act*<sup>1</sup> sets out avenues of mediation, adjudication and appeal to the Consumer, Trader and Tenancy Tribunal (CTTT) so as to resolve the dispute.

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1 *Strata Schemes Management Act 1996* (NSW).

## What are the responsibilities of pet owners in strata properties?

Some strata schemes prohibit pets altogether. Pet owners or prospective owners must therefore, at first instance, find out whether they are permitted to keep pets at all, and if so, ensure they have correctly obtained such approval. However, strata schemes must ensure that assistance animals are permitted to be kept at all times<sup>2</sup> (see page 21).

Owners must ensure pets do not become a nuisance to other lot owners. If they do, any lot owner/occupier within the strata scheme can apply for an order to have the pet removed. Owners should ensure pets are:

- adequately house trained,
- socialised around other animals, and
- restrained appropriately when on common property.

Some strata schemes even require pet owners to carry their pets while they are on common property.

Issues which must be immediately addressed include:

- excessive barking,
- defecating on common property, and
- anti-social behaviour.

## I signed a lease agreement allowing pets. My landlord has now changed his mind. What do I do?

The *Residential Tenancies Act*<sup>3</sup> sets out the legal rights and responsibilities of landlords and tenants but is silent on keeping pets in rental properties. Before entering into a lease it is therefore important to check that pets are permitted. Under the standard form agreement<sup>4</sup> it is clear that pets may be kept, however if the lease agreement is one printed by

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2 See the disability provisions under the *Anti-Discrimination Act 1977* (NSW) (herein referred to as the *ADA*).

3 *Residential Tenancies Act 1987* (NSW) herein referred to as *RTA*. It is important to note that the *RTA* has been updated and was assented to in June 2010 and will come into force in late 2010 (see <<http://www.legislation.nsw.gov.au/maintop/view/inforce/act+42+2010+cd+0+N>>)

4 Prescribed by the *Residential Tenancies Regulations 2006* (NSW).

an industry group then it may have an additional clause that requires the landlord's consent before pets may be kept.<sup>5</sup> Landlords cannot prevent tenants from keeping assistance animals such as a guide dog<sup>6</sup> (see page 21).

Once the landlord agrees to the keeping of a pet, they cannot change their mind and any dispute can be referred to the Tenancy Commissioner for mediation.<sup>7</sup> If the dispute cannot be resolved then an application can be made to the CTTT for a final determination.<sup>8</sup>

Serious consequences can arise if pets become a nuisance or damage the rental property. Tenants are prohibited from damaging or allowing damage to be caused to the rental property<sup>9</sup> or causing a nuisance,<sup>10</sup> which is an unlawful interference with a person's use or enjoyment of land. For example, tenants must ensure the pet is not barking or emitting unpleasant smells. In such instances, the lease agreement may be deemed to have been breached and the landlord can issue a Notice of Termination<sup>11</sup> requiring the vacation of the premises within 14 days.<sup>12</sup> If the tenant has resolved the issues associated with the animal by the time of the CTTT hearing, the CTTT may not order the eviction.<sup>13</sup> However, if steps have not been taken to rectify the issues then the CTTT can order the tenant to pay an amount of money as damages<sup>14</sup> and to take steps to remedy the breach,<sup>15</sup> order compensation<sup>16</sup> or order the tenant's eviction.<sup>17</sup>

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5 Bellemore, P, *Tenants' Rights Manual NSW: A Practical Guide to Renting* 3rd ed (Federation Press, Sydney 2007).

6 CAA ss 59-61.

7 RTA ss 16(1A), (1B).

8 RTA s 16(1C).

9 RTA s 26(1)(c).

10 RTA s 23(1)(b).

11 RTA s 57(1).

12 RTA s 57(2).

13 RTA s 65(2)(b).

14 RTA s 16(2)(b).

15 RTA s 16(2)(c).

16 RTA s 16(2)(d)(iii).

17 RTA s 64(2).



## I would like to keep livestock in my backyard. Do I need Council's approval?

Generally the most common livestock held in suburban yards are chickens. Council approval is generally not required to keep chickens, however, certain standard requirements are usually imposed including that:

- animals are not kept under circumstances which will create a nuisance or be a health hazard;
- poultry yards are kept clean and free of offensive odours at all times;
- chickens are kept at least 4.5 metres away from any dwelling;
- chickens are kept at least 30 metres away from any dwelling if they are a species other than *gallus gallus* or guinea fowls;
- the floor of a poultry house is paved with concrete or mineral asphalt underneath the roosts or perches (unless the poultry house is situated on clean sand and more than 15.2 metres from any dwelling); and
- the poultry yard is enclosed so as to prevent chickens from escaping.

Most local Councils recommend that you do not keep more than 6 chickens at any one time, unless there are appropriate facilities to cater for them, namely a roofed poultry house with a concrete floor which is properly drained to the public sewerage system and is regularly cleaned.

Other common suburban livestock animals, such as ducks, geese, ponies and goats, can also be kept depending on the policies of the local council. It must be remembered that local Councils vary in their livestock policies and have the power to enact their own by-laws regarding the keeping of livestock. It is imperative, therefore, that Council be specifically consulted before any livestock animals are brought into the yard. The keeping of certain species or sexes may also be restricted or at least discouraged in residential areas due to noise and pest management concerns.<sup>18</sup>

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18 See generally the information (relating to care, welfare and husbandry) contained on the Department of Industry and Investment website <<http://www.dpi.nsw.gov.au/agriculture/livestock>>.

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## ASSISTANCE ANIMALS

### What are my rights if I have an Assistance Animal?

An assistance animal<sup>1</sup> is a dog or any other animal that is accredited to provide assistance to a person with a disability. Under section 4 of the *Disability Discrimination Act 1992* (Cth) (*DDA*) “disability” means:

- (a) total or partial loss of the person’s bodily or mental functions;
- (b) total or partial loss of a part of the body;
- (c) the presence in the body of organisms causing disease or illness;
- (d) the presence in the body of organisms capable of causing disease or illness;
- (e) the malfunction, malformation or disfigurement of a part of the person’s body;
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes a disability that:

- (h) presently exists;
- (i) previously existed but no longer exists;
- (j) may exist in the future (including because of a genetic predisposition to that disability); or
- (k) is imputed to a person.

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<sup>1</sup> *DDA* s 9(2) defines an “assistance animal” as a dog or other animal:

- (a) accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a person with a disability to alleviate the effect of the disability; or
- (b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or
- (c) trained:
  - (i) to assist a person with a disability to alleviate the effect of the disability; and
  - (ii) to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

Any person with a disability has the right to be accompanied by an assistance animal into any public building or public place and onto any form of public transport. In doing so, the person cannot be charged with an offence and in fact, a person who refuses entry without reasonable cause can be prosecuted. An entry fee must not be charged for an animal that is an assistance animal.<sup>2</sup>

There are other provisions under the respective State and Commonwealth anti-discrimination Acts which may also be of assistance for persons with assistance animals.<sup>3</sup>

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<sup>2</sup> CAA ss 59-61.

<sup>3</sup> *Anti Discrimination Act 1977* (NSW) and *Disability Discrimination Act 1992* (Cth).

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## PETS AND WILLS

### What is the legal status of pets and can they be included in my Will?

Pets are legally the property of their owner and therefore can be gifted or provided for under a person's Will in the same fashion as any other property. Inclusion of pets in Wills is a good way of ensuring provision is made for the animals should a person die. If pets are not specifically mentioned in a Will, such as made a gift to a relative, friend or animal charity, then technically it could be said that the pet forms part of what is referred to as the "residuary estate", that is, all that is left of the deceased's estate after legacies and other specific gifts are dealt with, and it will be the residuary beneficiaries who are entitled to the pet.

### What provision can be made for my pet in my Will?

As pets do not have the same status in the law as humans, namely they are considered to be property themselves and are therefore incapable of legally owning or being gifted property, making provision for them does require thought and planning ahead. There are several ways of ensuring provision for a pet.

#### Informal arrangements made outside a testator's Will

Informal arrangements for the care of pets, such as arranging for family or friends to care for the animals, are often made and may work if the person nominated is dependable and outlives the pet owner. However, more people are increasingly making the decision to give clear directions for the inclusion of their pet in their Will.

#### Formal arrangements made within the testator's Will

##### *1. Gift of Pet and Legacy to a Family/Friend*

- Involves leaving the pet together with a sum of money for its care and maintenance to a friend or family member.
- May work well where there is a trusted family member or friend who outlives the testator. However, there is a risk that the nominated

person either may not be able to care for the pet due to some unforeseen circumstance or has died.

- A substitute carer could be included.
- A gift of money to help care for and maintain the pet is always appreciated and usually accompanies such a gift.

### 2. *Legacy to an Animal Charity*

- The Animal Welfare League and RSPCA have “legacy programmes” so that if a person leaves them a legacy (a specific gift, usually of money) they will place the pet in the legacy accommodation facilities.
- There are a number of other animal charities that may also be able to re-home animals. The charities should be contacted beforehand as some, including the RSPCA for example, have strict guidelines for their pet legacy programmes.

### 3. *Testamentary Trust*

- Such trusts which are established for the care and maintenance of the pet are becoming more popular but there are a few important things to note:
  - (a) Under Australian law, domestic pets are classified as personal property.
  - (b) There is a principle of law that says a trust which is not a charitable purpose trust must have specified humans as beneficiaries as there must be someone who can enforce the trust; otherwise, if the trustee is not prepared to carry it out, the Courts will not force the trustee to do so.<sup>1</sup>
  - (c) However the courts have allowed some leniency of this principle in relation to what is referred to as non-charitable purpose trusts limited to trusts for the erection and maintenance of monuments and graves, trusts for the saying of masses and trusts for the maintenance of particular animals.<sup>2</sup>

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1 *Morice v Bishop of Durham* (1804) 32 ER 656.

2 *Re Dean* (1889) 41 Ch.D. 552 involving a trust for the maintenance of certain animals for 50 years and *Pettingall v Pettingall* (1842) 11L.J.Ch. 176 which involved a trust for a favourite black mare.

- (d) The courts have held that if the trustees of such a trust are willing to carry out their obligations they are free to do so and the courts will recognise the trust. It has been said that such a trust is no more than a non-binding direction, a request, made to the executor of the Will and there is a potential risk that the residual beneficiaries under the Will may challenge the direction.<sup>3</sup>
  - (e) As a result of the problems and debate about the exceptions to the beneficiary principle those who wish to set up a trust for individual animals must find a trustworthy and dependable executor/trustee who is prepared to uphold its terms. This is where a professional executor/trustee such as NSW Trustee and Guardian can assist. The NSW Trustee and Guardian is prepared to uphold the terms of a trust for the maintenance of a pet and administers a number of such trusts. It has well established guidelines and procedures in place to manage these trusts.
- If people wish to use the mechanism of a trust there are a few rules to follow and basic measures to consider:

*(a) Duration of the trust*

The trust must be finalised within 80 years of the date of the death of the person who makes the Will (ie the pet owner).

While most mammals, amphibians, insects and fish live for less than 80 years, there are some birds and reptiles that live for over 100 years and therefore a trust for 80 years may not meet their lifelong needs.

*(b) Appointment of a carer/guardian*

A carer or guardian, whether a private individual or organisation, must be appointed in the Will to provide the physical day-to-day care and maintenance of the pet. It is not advisable that the carer also be appointed as the trustee, so as to avoid conflicts of interest - the trustee has the duty to administer the

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<sup>3</sup> *Perpetual Trustee Company Ltd. v John Fairfax & Sons Pty. Ltd.* (1959) 76 WN(NSW) 226.

trust assets and to ensure they are properly invested and must not benefit from the trust.

It may also help to make provision for a substitute carer if the person nominated dies before the pet owner or dies during the lifetime of the pet.

The trustee will manage the trust assets and pay over the income and/or capital of the trust to the carer who provides the daily care needs of the pet.

The terms of the Will should spell out how the pet is to be cared for and provide guidance on the use of the trust funds. For example, the Will may direct that the pet be taken to a vet on a regular basis for checkups. This might be once a year or more frequently depending on need and circumstances. The Will may also direct that the vet write a report to the trustee confirming the pet is the pet named in the Will and it is being properly cared for. (There have been many instances where the nominated pet carer has substituted another animal so he or she may continue to receive distributions from a trust and use the distributions for their own benefit.)

Before making the Will, the consent of the person or persons to be appointed as carer should be obtained.

*(c) Provide information about the pet*

So that the executor has all the necessary information about the pet's needs it is a good idea to leave written details about the pet and veterinary documents with the Will.

*(d) How much money should go into the trust?*

It is important to ensure the trust is left with sufficient funds that will last the pet's lifetime. Care costs need to cover: food, including special dietary needs; veterinary expenses including special veterinary care if the pet develops an illness or age-related disorder; grooming; toys; travel expenses; boarding costs and any other items normally provided for the pet.

Sadly there are cases where people have not made available sufficient funds for their trusts.

*(e) Provision for carer of pet*

Some people have been known to establish testamentary trusts that provide the carer of the pet with an interest in their home for the life of the pet as well as a fund for the pet's care and maintenance. By making the carer of the pet the beneficiary of the trust any problems associated with the beneficiary principle may be eliminated. The carer may be given a right of residence in the property or a life interest on the condition that they care for the pet. A fund may be also established that may be used for the maintenance of the pet.

Pet owners should also consider what would happen to their pets if the person died suddenly or met with an accident and was absent from home for any length of time. Arrangements for the care of pets in such circumstances should also be discussed within a person's lifetime.



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## PETS AND FAMILY LAW

### I am getting divorced - who gets the dog?

Unlike the emerging field of “pet custody” cases in North America,<sup>1</sup> Australian family law does not expressly acknowledge the existence and role of pets within family breakdowns. There is no reference to animals within the *Family Law Act*<sup>2</sup> and therefore pets are treated as part of the property pool that can be adjusted between ex-spouses pursuant to section 79 of the Act. In effect, this means that parties can transfer the ownership (and registration) of a pet to one another in much the same fashion that a car might be transferred to a party upon the breakdown of a relationship.

If the parties to a relationship breakdown are in dispute in relation to the ownership of the pet or as to who should receive the pet as part of the property settlement, courts are empowered to consider the merits of each party’s application in much the same way that a court could, for example, determine which party would benefit more from receiving the family business. This can involve the court looking at factors such as who the pet is registered to, who cared for the pet and spent more time with the pet and took on responsibilities such as feeding, walking and training the pet. It must be stressed, however, that this examination is based purely on an assessment of which party should receive ownership of an item of “property” in dispute rather than on concept of what is in the “best interests” of the pet or who should obtain custody of the pet, as is the case with children.

As pets are property under Australian law, pursuant to the *Family Law Act* courts can order injunctions forcing a person to do or not do something in relation to a pet. For example, if one spouse took away

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1 See for example the *Family Code Section 6320 (2008)* (California) which permits courts to grant orders to parties in family law cases for the care, possession or control of an animal owned by either party to the dispute and for orders which expressly permit the courts to make orders that a party stay away from an animal and forbidding a party to take, conceal, strike, threaten or dispose of animal. In 2007, a Connecticut judge ordered for an ex-spouse to stay away from her golden retriever after she was proved to have kicked it. For an example of a case where the Court ordered a contact visitation schedule between the parties to see the pet, see the case of *Gigi* (San Diego).

2 *Family Law Act 1975* (Cth).

a pet from another spouse upon separation, an application could be made to the court for an injunction forcing the return of the pet (the “restoration” of the property) to the other spouse because it is an item of matrimonial property.

Despite these theoretical possibilities, the reality under Australian family law is that the welfare of the family pet upon relationship breakdown is not an issue that has been thoroughly or conclusively investigated within the courts. Rather, it is an issue which tends to be resolved by way of an informal agreement between parties or, less often, by way of consent orders filed with the courts upon conclusion of the matter. However, the enforceability of such arrangements can present serious difficulty as Australian courts have very little precedent to follow in relation to arrangements for the care of pets, particularly an arrangement for shared care between the parties.<sup>3</sup>

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3 Csapo, T, “*What About Rover? Pets in Family Law Settlements*” The Kells Family Law Report <[http://kellsfam.clientcomm.com.au/source/KELLSFAM/std\\_article](http://kellsfam.clientcomm.com.au/source/KELLSFAM/std_article)>.

## What services are available to pet owners that are victims of domestic and family violence?

Recent studies reveal that a large number of victims delay or avoid leaving an abusive relationship because they are unable to find accommodation for their pets and fear that their pets will be harmed.<sup>4</sup>

A number of programs around Australia have been recently instituted to specifically address this issue. In New South Wales the RSPCA "Safe Beds for Pets" program, for example, provides a safe haven for pets (for as long as necessary) so as to allow victims to leave relationships more easily. Referrals to such programs can be made via domestic violence counselling services.

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4 One in three women will delay leaving the relationship and in more than half of the cases where woman are abused, pets are also subjected to violence: see Marcus, C "Victims of Domestic Violence" *Brisbane Times* 3 March 2008 <<http://www.brisbanetimes.com.au/news/pets/victims-of-domestic-violence>> (accessed 12 August 2009). Between January to June 2004, DV Connect in Queensland responded to 13,965 calls from Queensland victims of domestic violence, many of whom stated that they were still in the home as they did not have a safe place to take their pets: see "The Relationship Between Family Violence and Animal Abuse", an Australian Study 2008, "Pets and Domestic Violence" <[http://petrescue.com.au/information\\_library/rescue\\_news/rescueinthemedia147](http://petrescue.com.au/information_library/rescue_news/rescueinthemedia147)>.

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## LEGISLATION

- ADA *Anti-Discrimination Act 1977* (NSW)
- ARA *Animal Research Act 1995* (NSW)  
*Australian Code of Practice for the Care and Use of Animals for Scientific Purposes*, 7th Edition, 2004 (National Health and Medical Research Council)
- CAA *Companion Animals Act 1998* (NSW)
- CAR *Companion Animals Regulation 2008* (NSW)  
*Crimes Act 1900* (NSW)  
*Crimes (Sentencing Procedure) Act 1999* (NSW)
- DDA *Disability Discrimination Act 1992* (Cth)
- EAPA *Exhibited Animals Protection Act 1986* (NSW)  
*Family Law Act 1975* (Cth)
- POCTA *Prevention of Cruelty to Animals Act 1979* (NSW)  
*Road Rules 2008* (NSW)  
*Road Transport (Driver Licensing) Regulation 2008* (NSW)
- RTA *Residential Tenancies Act 1987* (NSW) (see also the *Residential Tenancies Act 2010* (NSW) which is not yet in force)  
*Residential Tenancies Regulations 2006* (NSW)
- VPA *Veterinary Practice Act 2003* (NSW)  
*Strata Schemes Management Act 1996* (NSW)

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## USEFUL CONTACTS AND RESOURCES

Animal Welfare League (NSW)

<[www.awlnsw.com.au/animal-search.html](http://www.awlnsw.com.au/animal-search.html)>

Consumer, Trader and Tenancy Tribunal <[www.cttt.nsw.gov.au](http://www.cttt.nsw.gov.au)>

Department of Industry and Investment (Livestock and Agriculture)

<[www.dpi.nsw.gov.au/agriculture/livestock](http://www.dpi.nsw.gov.au/agriculture/livestock)>

NSW Disability Discrimination Legal Centre Inc

<[www.ddlcnsw.org.au](http://www.ddlcnsw.org.au)>

NSW Law Society Pro Bono Referral Service

NSW Government, Division of Local Government, Companion Animals

<[www.dlg.nsw.gov.au/dlg/dlghome/dlg\\_InformationIndex.asp?areaindex=CA&index=301](http://www.dlg.nsw.gov.au/dlg/dlghome/dlg_InformationIndex.asp?areaindex=CA&index=301)>

Pro Bono Animal Law Service, Public Interest Law Clearing House (PALS@PILCH) Public Interest Law Clearing House (PILCH NSW), GPO Box 863 Sydney NSW 2001 Ph: 9114 1793 (for businesses and organisations only)

Royal Society for the Protection of Animals NSW (RSPCA)

General Contact <[www.rspcansw.org.au](http://www.rspcansw.org.au)>

Reporting cruelty, ph: 9770 7555

<[www.rspcansw.org.au/services/inspectorate/report\\_a\\_cruelty\\_case](http://www.rspcansw.org.au/services/inspectorate/report_a_cruelty_case)>

Safe Beds Domestic Violence Program

[safebeds@rspcansw.org.au](mailto:safebeds@rspcansw.org.au)

Tenants NSW <[www.tenants.org.au](http://www.tenants.org.au)>

Voiceless <[www.voiceless.org.au](http://www.voiceless.org.au)>

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## GLOSSARY

- “Approved breed assessor”* A person or body approved for the time being by the Director-General to carry out breed identification assessments for the purposes of declaration as restricted dogs (under the CAA).
- “By-laws”* The rules that govern the general maintenance of a strata scheme, the interrelations of its occupants and how the common property is to be used. Every lot owner and occupier must comply with the by-laws. Also refers to the regulations established by Local Councils in relation to the management of specific issues within the Council.
- “Damages”* A monetary amount paid by one person/corporation to another by way of compensation for an injury, breach of contract or other civil wrong.
- “Executor”* Person named in a will whom the testator wishes to administer the estate. The executor may bring actions against persons who are indebted to the testator, or are in possession of property belonging to the estate.
- “Liability”* Liability is civil or criminal wrong-doing. A person who commits a wrong or breaks a contract or trust is said to be liable or responsible for it.
- “Negligence”* As a tort, negligence is the breach of a legal duty to take care, which results in damages to the claimant. Negligence may also signify a state of mind, such as a person’s inadvertence to the consequence of their conduct or deliberate taking of a risk without intending the consequences attendant upon that risk.
- “Owners corporation”* The collective term for all the lot owners in a strata scheme (known previously as ‘Body Corporate’ in old strata titles legislation). The owners corporation is a legal entity and is responsible for maintenance and management of the strata scheme as a whole.

## Glossary

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- “Regulation”* An Act of Parliament to allow some other person or body to make a law on matters of detail under an Act.
- “Strata scheme”* The individual units and common areas that comprise an apartment complex.
- “Testator”* The person who writes a Will.
- “Trust”* A trust exists when a person (trustee) has a duty to administer property for the benefit of another (beneficiary).
- “Trustee”* A person who has a duty to administer property for the benefit of others, or for a purpose recognised as creating a valid trust.



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