

Identity theft now an offence in Qld

Queensland has become only the second state in Australia to introduce an offence specifically targeting identity theft.

Currently law enforcement agencies cannot act against identity-theft offences, such as credit card skimming, until a further offence such as fraud is committed.

Premier Peter Beattie said the new law would allow police to act sooner, without waiting for further crimes to occur.

"The idea that a person could have their identity stolen is now a frightening reality with globalisation and rapid international information flows," Mr Beattie said. "Identity theft is a real and growing problem, with recent media stories showing the harm done to victims."

Mr Beattie said the offence would be broadly defined to ensure it withstood rapid

technological advances and evolving criminal practices.

A maximum penalty of three years' jail will apply for identity theft.

A 2003 study by the Australian Transaction Reports and Analysis Centre found identity fraud costs around \$1.1 billion each year in Australia.

Types of identity theft include taking identification documents from garbage bins or letter boxes, credit card skimming, hacking into computers and forging documents such as drivers' licences.

Stolen identities can then be used for further criminal acts such as financial fraud, drug trafficking, terrorism, tax avoidance or to gain access to citizenship or medical services.

Attorney-General Linda Lavarch said

identity theft had disastrous practical and emotional effects on victims.

"Identity thieves can leave their victims with negative credit ratings, bankrupt, or even facing criminal charges," she said.

Mrs Lavarch said a separate offence of identity theft avoided the problem that police could not act against problems such as credit card skimming until a further offence, such as fraud, was committed.

"Sometimes an identity is stolen in Queensland to commit fraud interstate or overseas, so a further offence is never committed here," she said.

Mrs Lavarch said the new offence of identity theft would be contained in the Criminal Code and Other Acts Amendment Bill 2006.

Family law changes

The Federal Government has introduced a series of changes to the family law system, effective from 1 July 2006.

The changes represent the most significant reforms to family law in 30 years and focus on the way family separations are managed.

The legislative reforms aim to promote three principles:

- **Shared parental responsibility** – Except where there are issues of violence or abuse, the law presumes that it is in the best interest of a child for the parents to have equal shared parental responsibility in making decisions about important issues that affect their children.
- **The right of children to know both parents and be protected from harm**
- **Resolving disputes co-operatively** – Starting in mid-2007, the changes to the law phase in a requirement for parents to attend family dispute resolution sessions and make a genuine effort to resolve the issues in dispute, before taking a parenting matter to court.

This requirement does not apply where there is family violence or child abuse.

Twelve pieces of federal family law legislation have been amended, including:

- 1 *Family Law Act 1975*
- 2 *Family Law (Child Abduction Convention) Regulations 1986*
- 3 *Family Law Regulations 1984*
- 4 *Family Law Rules 2004*
- 5 *Child Support (Assessment) Act 1989*
- 6 *Child Support (Assessment) Regulations 1989*
- 7 *Child Support (Registration and Collection) Act 1988*
- 8 *Child Support (Registration and Collection) Regulations 1988*
- 9 *Federal Magistrates Act 1999*
- 10 *Federal Magistrates Regulations 2000*
- 11 *Marriage Act 1961*
- 12 *Marriage Regulations 1963*

The legislative changes apply to parenting orders made on or after 1 July 2006.

For more information and comprehensive advice on these changes, contact your local solicitor.

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a case in point . . .

40-year-old compensation case denied

A Newcastle man who tried to sue over injuries suffered in an car accident more than 40 years ago could not proceed as a fair trial was not possible, the High Court has ruled.

Background

Andrew Batistatos, 74, was returning from a party when his van overturned on Fullerton Street, Stockton, in August 1965. He spent the next 14 years in hospital and a nursing home.

Mr Batistatos alleged that council and road authorities were responsible for the accident, which left him a quadriplegic.

The accident was allegedly caused by the negligence of Newcastle City Council and Roads and Traffic Authority of New South Wales (RTA) in the design, construction and maintenance of the road.

The dog leg-shaped road lacked warning signs, lighting and reflector posts. Vegetation also allegedly obscured vision where the crash occurred. The road has since been straightened.

The case

Mr Batistatos began an action for damages against the RTA and the council in the NSW Supreme Court in December 1994.

He claimed that, even though the accident

had occurred 29 years previously, he was not prevented from bringing his action under the *Limitation Act* because he was a person under disability within s11(3) of the Act, and the ultimate bar of 30 years as outlined in s51(1) therefore applied.

The RTA and Newcastle City Council sought summary dismissal or permanent stay of the action, claiming the lapse of time meant a fair trial was no longer possible and constituted an abuse of process.

Police and medical records, road design and construction documentation, the identity of the insurer and people involved in road maintenance before 1965 could not be located. The physical state of the road had also changed since the accident.

Under Supreme Court rules, where it appears no reasonable cause of action is disclosed, the proceedings are frivolous or vexatious, or the proceedings are an abuse of process of the court, the court

can order the proceedings to be stayed or dismissed.

Justice Clifton Hoeben rejected the application to dismiss or stay the action. He also rejected the argument that Mr Batistatos' claim was untenable and found that the RTA and council had failed to show they could not have a fair trial.

The NSW Court of Appeal allowed an appeal by the RTA and the council and found that, due to the long period of time since the accident, the action could not be fairly tried.

Mr Batistatos appealed to the High Court, which upheld the Court of Appeal decision and dismissed the appeals.

This case raises the issue of abuse of process and delay in commencing proceedings. Even though Mr Batistatos' action was within the 30-year limit under the *Limitation Act*, it was dismissed due to the long period of time since the accident, which meant the action could not be fairly tried.

Artwork on trial

The New South Wales Supreme Court has dismissed a claim that the 2004 Archibald Prize winner was not a valid entry because it was a drawing rather than a painting.

Sydney artist Craig Ruddy took out the prestigious \$35,000 portrait prize and the Archibald People's Choice Award in 2004 with his striking portrait of actor David Gulpilil.

Fellow competition entrant Tony Johansen took legal action against the Art Gallery of New South Wales Trust over the decision, claiming the work was a drawing and not a painting and was therefore ineligible for the prize.

The rules of entry for the competition specify the prize should be awarded to "the best portrait, preferentially of some man or woman distinguished in art, letters, science or politics, painted by any artist resident in Australasia during the 12 months preceding the date fixed by the trustees".

Mr Johansen argued Mr Ruddy predominantly used charcoal and graphite to create his portrait, which displayed all the characteristics of a drawing and was not "painted" as specified in the rules.

The court heard evidence over two days on the definitions of the terms 'drawing' and 'painting' and the methods and materials Mr

Ruddy used to create the portrait.

Expert evidence was also heard from art consultant and valuer Michael Sourghes and the former curator of the National Gallery of Australia, Betty Churcher.

Both Mr Sourghes and Ms Churcher offered contending views on whether the portrait was a drawing or a painting.

In delivering his decision, Justice John Hamilton said there was a clear difference of opinion as to whether Mr Ruddy's portrait should be classified as a drawing or a painting.

Justice Hamilton dismissed Mr Johansen's claim and found in favour of the defendant, stating he found it impossible to exclude the portrait from the category of work which has been 'painted'.

"Because of my conclusion... it cannot be said that the trustee's exercise of judgment or opinion was wrong," he said.

Justice Hamilton refused to make a finding on whether the portrait was in fact painted and ruled that the matter should be left to the discretion of the NSW Art Gallery Trust.

"There is a certain appearance of strangeness in courts making determinations concerning the qualities of works of art," he said. "That matter is best left to those involved in the art world."

Male lawyer dresses up for court

A high-profile New Zealand lawyer has started wearing a skirt and blouse to court to protest what he claims is a male-dominated judiciary.

Rob Moodie, 67, arrived at Wellington's High Court wearing a navy blue woman's suit along with a handbag, diamond brooch and lace-topped stockings, *The Dominion Post* reported.

Mr Moodie said his attire was to highlight the insensitive 'old boys' network' of New Zealand's judiciary.

"I will now, as a lawyer, be wearing women's clothing," Mr Moodie said. "The deeper the cover-up, the prettier the frocks."

Mr Moodie is married with three children, but said he was born with an understanding of the female gender.

"I prefer and relate to the gender which is involved in the creation and nurturing of life: giving, sharing and also, I believe, fairness," he said.

Mr Moodie was in court fighting contempt charges brought against him by the Solicitor-General, over the posting of a suppressed report on the Internet.

Legal rights of franchisees

Joining a franchise is a popular option for people seeking a career change or trying their hand at running a business. But it is important that prospective franchisees fully understand their legal rights and obligations before entering into a franchising agreement.

The Commissioner of the Australian Competition and Consumer Commission (ACCC), John Martin, said the ACCC was targeting the franchising sector as part of a focus on fighting fraudulent behaviour in the marketplace.

“The main message the ACCC aims to promote is for people who are choosing to

join a franchise business to be diligent and make informed decisions before signing on the dotted line,” Mr Martin said.

“Buying into a franchise generally involves large sums of money and potentially lifetimes of savings, so it makes sense that prospective franchisees have as much information about the business and seek professional advice before making their investment”.

The ACCC has issued a franchisee start-up checklist to assist prospective franchisees make informed decisions about purchasing a franchise.

The checklist is a practical guide to

requirements under the Franchising Code of Conduct and important franchising issues such as:

- disclosure documentation
- cooling-off periods, and
- warning signs to watch out for.

To obtain a copy of the checklist contact the ACCC on 1300 302 021 or download it from www.accc.gov.au.

Never consider taking on a franchise without consulting with your solicitor, who can provide comprehensive legal advice on the rights and obligations of franchisees under the law.

Jail sentence for breaching PAYG obligations

A Queensland employer who failed to withhold more than \$600,000 in tax from workers' wages has been sentenced to three and a half years jail in the Cairns District Court.

John Voyka, 58, of Cairns, was found guilty on five counts of defrauding the Commonwealth, for failing to deduct tax from the wages of 44 employees and remit it to the Tax Office.

The court heard that between September 1995 and June 2000 Mr Voyka made cash-in-hand payments to 44 employees, claiming they were sub-contractors and he was therefore not required to withhold tax on their behalf.

However, Mr Voyka had received a letter from the Tax Office in July 1995 notifying him that the workers were employees and that tax must be withheld and remitted to the Tax Office.

A joint investigation with the Australian

Federal Police, Centrelink and Immigration in 1999 revealed Mr Voyka failed to comply with this direction.

The court also heard he had breached worker's compensation, superannuation and Centrelink requirements.

Tax Commissioner Michael D'Ascenzo said the Tax Office took instances where employers failed to comply with their PAYG obligations very seriously, particularly where those obligations have been made clear to them.

“This year we will look at PAYG withholding, superannuation and fringe benefits tax relating to more than 4,000 employers so we can help them meet their obligations,” he said.

Employers who are unsure if someone is an employee or a contractor can read the information on the Tax Office website at www.ato.gov.au or alternatively contact their solicitor for advice.

New bankruptcy laws to close superannuation loophole

Attorney-General Philip Ruddock and Assistant Treasurer Peter Dutton have announced new laws to prevent 'out-of-character' super contributions made prior to bankruptcy to defeat creditors.

The amendments follow a High Court decision in *Cook v Benson*, which cast doubt on a trustee's ability to recover superannuation contributions under the *Bankruptcy Act*.

“The amendments will prevent unscrupulous debtors from transferring assets into superannuation when bankruptcy is looming,” Mr Ruddock and Mr Dutton said in a joint statement. “However, genuine contributions to superannuation for retirement income purposes will be protected from recovery.”

In determining whether contributions were made to defeat creditors, courts will be able to take into account the person's history of contributions and whether the contributions in question are 'out of character'.

The Government has decided not to proceed with earlier proposals to allow for recovery of 'excessive' superannuation contributions as these would have unduly complicated both the bankruptcy and superannuation systems.

The amendments apply to superannuation contributions made after 27 July 2006. Further details of the changes can be found at www.itsa.gov.au.

If you have any concerns in relation to bankruptcy or the *Bankruptcy Act*, seek legal advice.

Kazaa to pay up

The operators of online file-sharing website Kazaa will pay substantial compensation to Australian and international record labels after a settlement was reached in its long-running lawsuit with the global music industry.

Under the settlement, Kazaa has also agreed to convert to a legal business model and to implement sophisticated filtering technologies to block illegal content.

The deal is believed to be worth between A\$26 million and A\$65 million and signals the end of legal proceedings against Kazaa in Australia and the United States.

Legal action against Kazaa began in Australia in February 2004 when the record labels secured court orders to raid 12 premises in three states, alleging copyright infringement and other breaches against the owners and operators of Kazaa.

In September last year, the Federal Court of Australia found the Kazaa operators were liable for authorising widespread copyright infringement.

Orders to cease copyright infringement were made against Kazaa companies and executives including Sharman Networks Ltd, LEF Interactive Ltd, Sharman CEO Nikki Hemming, Altnet Inc, Brilliant Digital Entertainment Inc, and Altnet CEO Kevin Bermeister.

The settlement follows a ruling last year by the US Supreme Court against file-sharing site Grokster, where the court held Grokster could be held responsible for copyright violations by users.

State seizes \$11 million in proceeds of crime

More than \$11 million worth of boats, cars and other illegally obtained assets were taken from drug dealers, money launderers and other criminals in 2005/06 under laws enabling authorities to seize the profits of crime.

Queensland Attorney-General Linda Lavarch said that the Crime and Misconduct Commission, in conjunction with the Office of the Director of Public Prosecutions (ODPP), had frozen a total of \$36.6 million since 2003, when the *Criminal Proceeds Confiscation Act* came into effect.

The proceeds include:

- real estate – \$17.88 million
- cash/bank accounts – \$7.86 million
- motor vehicles and vessels – \$5.25 million
- loans – receivable – \$2.25 million
- shares – \$1.15 million
- livestock – \$420,000
- plant and equipment – \$360,000
- gold/jewellery – \$210,000

Of the \$11 million civilly restrained by 38 orders in 2005/06, \$2 million in 25 matters has been permanently forfeited.

Of the total \$36.6 million civilly restrained since 2003, \$4.4 million has

been forfeited.

The *Criminal Proceeds Confiscation Act* 2002 (Qld) established a civil confiscation scheme that allows assets to be frozen or restrained, regardless of whether the person has been charged or convicted of an offence.

It allows confiscation of the suspected proceeds of crime if it can be shown a person has been involved in serious criminal activity in the past six years.

After freezing assets, the ODPP then takes court action to apply for permanent forfeiture of the assets.

Take care when seeking financial advice

The Tax Office has warned consumers to be wary of individuals who claim to be working on behalf of the Tax Office, offering retirement income or other financial or taxation advice.

Tax Commissioner Michael D'Ascenzo said that the Tax Office had become aware of people wrongly claiming to do so on its behalf.

"Anyone who fraudulently claims they are authorised by the Tax Office to provide such advice is breaking the law," Mr D'Ascenzo said.

"We have already received a number of reports that suggest this activity is not confined to any one area within Australia and we are working with state and federal police to stop it."

Mr D'Ascenzo said individuals should be wary about providing their personal or financial details to others, given the increase of identity crime.

Anyone who has been approached by an individual claiming to act on behalf of the Tax Office should phone 13 28 61 without delay.

New legislation to increase access to building records

Queenslanders will be able to check whether building work such as house extensions, sheds or pool fences have the proper approvals, under amendments to the *Integrated Planning Act* 1997.

Local Government and Planning Minister Desley Boyle said people who were looking to buy a house or who were adversely affected by their neighbour's building work often had difficulty in finding out whether the right approvals were in place.

"People have complained, for example that their neighbour's extension looks right into their bedroom or a new shed built right against the fence blocks the sunlight," Ms Boyle said. "Up until now, local governments have had the discretion to decide who could and could not access building approval and inspection documents.

"This has led to different councils allowing different levels of access, which has caused problems for people trying to prove their neighbour's shed or extensions shouldn't be there.

From 1 September, councils will be required to allow people to inspect building approval documents, subject to privacy and security restrictions. Councils will be able to charge a fee equal to the cost of providing this service.

Some councils, such as Logan City Council, already provide full public access to building approval documents. Other councils including Cairns, Redcliffe and Caboolture provide full access with the owners' consent or on contract of sale.

Ms Boyle said another change under the new legislation was the requirement for councils to keep building records for houses and pool fences for the life of the structure, as is the case for commercial or industrial buildings. Currently they are only kept for ten years. Records for sheds will still be kept for ten years.

"Councils and owners will be able to check compliance requirements and this will help investigations of complaints about illegal building work," Ms Boyle said.

Online trader fined

A Brisbane online trader has been fined \$45,000 after he and his company were convicted of taking customers' money without delivering the goods.

Troy Raymond Ellis and his company Cyber Village Pty Ltd were fined for breaching the *Fair Trading Act* and were ordered to pay costs after a Brisbane magistrate found they had blatantly disregarded the law and frustrated fair trading investigators.

Fair Trading Minister Margaret Keech said Ellis, of Spring Hill, and his business I-Central – an online retailer of computers, software and mobile telephones – first came to the attention of the Office of Fair Trading (OFT) in 2001.

"Since then, OFT has received almost 120 complaints from Queensland and interstate about Ellis and his company, most from people alleging he had not delivered goods they paid for," Mrs Keech said. "When Fair Trading first received complaints, we investigated and attempted conciliation. Further complaints were received and it was obvious Ellis had chosen not to modify his behaviour.

"In 2005, after further discussions and meetings with the Office of Fair Trading, Ellis and 'I-Central' were publicly named to warn consumers.

"Shortly after, Ellis closed his doors and left the country. When he returned, Fair Trading was there to ensure he faced the consequences of his actions."

Mrs Keech said Ellis had ignored 32 requests from Fair Trading for information relating to his business dealings.

"Magistrate James Gordon said although it was rare for a court to impose the maximum penalty for a first time offender, Ellis repeatedly ignored requests made by the Office of Fair Trading," she said.

"The magistrate said the conduct was ongoing and those who frustrated the investigation process should pay an appropriate price."

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