

# newsletter

*The pace of change and new technologies create particular challenges for the practice of law. Our lawyers and para legal staff consistently update their knowledge and practices.*

**Maryanne Ofner**, accredited Family Law specialist, is focusing her additional energies into her role as President of NSW Collaborative Professionals;

**Edyta Zurawski**, a zealous litigator continues her involvement in various committees and her role as Chair of NSW Young Lawyers Animal Law Committee;

**Warwick Dunn**, keen on research, draws our attention to updates and changes in practice and procedure;

**Julie Koerner** has thoroughly enjoyed the challenge of several days of intensive updating on property transactions;

**Matthew Paull**, having completed his accounting Certificate, is commencing a part-time law degree;

**Eleanor Tolman** achieved a High Distinction in her legal support training program;

**Ellen O'Brien** is testing our knowledge of comparative legal systems as she focuses on her penultimate year at law school.

The areas of law continue to evolve consistent with shifting demographics and the possibilities that evolve with medical progress. We touch on a few of these contemporary issues in this newsletter.

## FAMILY MATTERS

There is no definition of "family" within the Family Law Act. The Act is designed to deal not just with the traditional notion of family but the many varying forms of families that are emerging including blended families, adoptive families and same sex families.

## SURROGACY

With adoption being a lengthy and uncertain process, surrogacy is increasingly becoming an alternative option for creating a family.

The distinction between the forms of surrogacy has important implications in the area of family law. In traditional surrogacy arrangements, where the surrogate mother undergoes donor insemination treatment using her own ovum, the surrogate mother is genetically related to the child. However, in gestational surrogacy, where the ovum is harvested from a third party or one of the intending parents and fertilised using a sperm donation from one of the intending parents, the surrogate mother does not contribute an egg and merely plays the role of the "carrier". This can create uncertainty when attempting to determine the child's parentage or nationality.

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## thank you

Thank you to those who have sought our services, helped provide them, and to those who have referred others. We appreciate all your various forms of support.



...surrogacy continued.

Commercial surrogacy arrangements (whereby the intending parents provide a monetary benefit to the surrogate mother for her services) are prohibited in New South Wales under the Assisted Reproductive Technology Act 2007. While altruistic surrogacy arrangements are not prohibited, any agreement made to enter into such arrangements are void, and cannot be enforced. This means that if the surrogate mother decides not to surrender the child, she cannot be compelled to do so. The only possible remedy for the intending parents is to apply to the Family Court or Federal Magistrates Court for parenting orders that the child live with them.

## INTERNATIONAL KIDNAPPING

No doubt many of you saw the news footage and media reports about the Full Court of the Family Court of Australia ordering the return of Italian sisters to their father in Italy that was played out throughout 2012. The media coverage focused squarely on the distressing scenes of the children resisting their forceful removal by Australian Federal Police and a grieving mother. Indeed the media even went so far as to follow the children to their home in Italy. So, why was this decision made with

apparently little, if any, regard for the wishes of the children and the mother at the centre of the debate?

Australia is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction (generally referred to as "the Hague Convention"). Along with 86 other countries, Australia has ratified the international legislation within its own domestic legislation to provide a framework for the "illegal" international abduction of children. The Convention operates so as to provide mechanisms for the return of children abducted or illegally removed from the country in which they are habitually resident (i.e. the country in which they usually live) to be returned, provided that both the country of origin and the country into which the child has been taken are signatories to the Convention.

In the situation of the young Italian girls, the facts made available in the published decisions (of which there were several), together with information provided to the media indicated that the children had all been born in Italy, had lived there their whole lives, spoke Italian and were schooled there. Their father was Italian born and their mother, who had separated from the father, was also living in Italy and had done so throughout the duration of the marriage and for

the years following separation (although she was an Australian citizen). In addition, following the parties' separation, the Italian courts had approved a contact regime (agreed to by consent) which provided for the children to spend time with the father each alternate weekend and one afternoon per week. The children were brought to Australia on a holiday (which the father had consented to) to visit the mother's family in 2010. However, they were never returned to Italy which prompted the father to bring proceedings under the Hague Convention for their return. In all of the circumstances, the Australian courts were effectively bound by the legislation to return the children to Italy where parenting proceedings could be properly litigated.

This decision also had ramifications in relation to the prohibition under the Family Law Act, against publishing the faces, names or otherwise identifying the parties in Family Law Proceedings (which was repeatedly done by various media agencies). A breach of section 121 of the Act can carry imprisonment.

Family Law matters require care, diplomacy and sensitivity as well as technical knowledge.

**Maryanne Ofner** and **Edyta Zurwaski** are dedicated to easing you through the process to achieve just and dignified outcomes.



# me welcome welcome

We want to meet your needs and welcome any suggestions or feedback. Just send a quick email at any time to [lawyers@biddsal.com.au](mailto:lawyers@biddsal.com.au)

*L to R: Warwick Dunn, Eleanor Tolman, Julie Koerner, Edyta Zurawski, Ellen O'Brien, Matthew Paull, and Maryanne Ofner.*

## BINDING FINANCIAL AGREEMENTS

On 31 December 2012 news broke that Grant Hackett was suing his lawyer as a result of what he alleged to be a faulty Binding Financial Agreement. This Agreement was entered into prior to his marriage and was the type of Agreement often colloquially known as a "Pre-nup" (from the American terminology). Under the Family Law Act, such agreements can also be entered into during marriage, after separation, or after divorce.

Recent amendments (introduced in 2009) have also allowed agreements to be entered into before, during and after de facto relationships. While the news reports are silent on exactly what the defect was in the Binding Financial Agreement, it was reported that it did not comply with legislative requirements, again raising the importance of having such a

document drafted and executed correctly. The advent of the ability to permit parties to enter into Binding Financial Agreements has not really seen greater certainty in property proceedings following separation and instead such agreements are the source of increasing litigation.

To be binding, the agreement must comply with the provisions of s90G of the Family Law Act. Each party must receive independent advice about the advantages and disadvantages of entering into the agreement. Agreements can be set aside if they are determined to be unfair by a court, particularly in circumstances where children are born, parties fall ill or cannot work. The simpler and more precise the agreement, the greater are its chances of surviving a challenge.

## REMINDER

A proper and correctly drafted will is important in ensuring your wishes are carried out with simplicity and administration of your estate is done with ease. A Power of Attorney can also be put in place to appoint persons whom you trust to act on your behalf when you are absent or unable to look after your affairs. It is always a good idea to appoint an Attorney before travelling overseas as this will alleviate any difficulties that may arise in your absence.

Please call us if you would like us to prepare these documents. We can take instructions from you by telephone or email.  
Tel: (02) 9929 8777  
lawyers@biddsal.com.au

## PROPERTY LAW AND LORD HOWE ISLAND

At Biddulph and Salenger we hold many title deeds. If you have a mortgage, the mortgagee holds your title deed. Your title deed is indisputable evidence of your ownership of your land, house or unit. You are the registered proprietor under the Torrens System.

Buried in an obscure English county churchyard is Robert Torrens, who in 1858, pioneered our simplified system of land ownership, which was subsequently adopted in South Australia, other Australian states, New Zealand and parts of Canada, Ireland, and the United States. But there still remain some pockets of old system

titles, Western Lands leases and other complex forms of land ownership.

A quite unique form of land ownership operates on Lord Howe Island, the holiday destination of **Warwick Dunn** for the last 40 years. Ownership of land on Lord Howe is closely regulated. The Lord Howe Island Local Environmental Plan restricts the creation of new dwellings to no more than 25 for the period 2005 to 2025.

All land owned on the island is owned by the Crown. The Lord Howe Island Board provides perpetual leases for residential purposes, but they are only available to Islanders and can only be transferred to Islanders unless no islander wishes to



purchase from the existing lessee. Transfers by Will are also limited to lineal descendants who are residents on the island. Much sways on the definition of an Islander. This is contentious and can give rise to claims of conflict of interest at the board level.

An appropriate Constitution for the Lord Howe Island Board is vital in finding a balance between the maintenance of a world heritage site, and the day-to-day interests of the islanders.

## INTERESTING DISCOVERIES IN INDONESIA



Does it concern us that 240,000,000 people reside to the north west of Australia with a vastly different expectation of what the law should provide them? It concerned our employee Ellen O'Brien who immersed herself in legal studies for a semester in Indonesia and made some interesting discoveries.

As part of her Bachelor of Arts degree, she studied Indonesian language and culture, and also chose to undertake an introductory Indonesian law subject at Universitas Gadjah Mada. Indonesian law is made up of three different systems of law – *adat* or customary law, Dutch colonial law and national law – making it quite complex. To add to the confusion, the categorisation

of Indonesian legislation is shambolic and often difficult to access. Corruption at state and national level impinges on due process, while more conservative provinces such as Aceh also enforce Islamic law, influenced by Shari'ah. For those unaccustomed to Indonesia, its legal system appears illogical and chaotic. But, as Indonesia is predicted to become a worldwide power by 2030, it is vital for Australians to understand not only Indonesian culture, but Indonesian law.

Ellen is working with us whilst completing her law studies at the University of Sydney.



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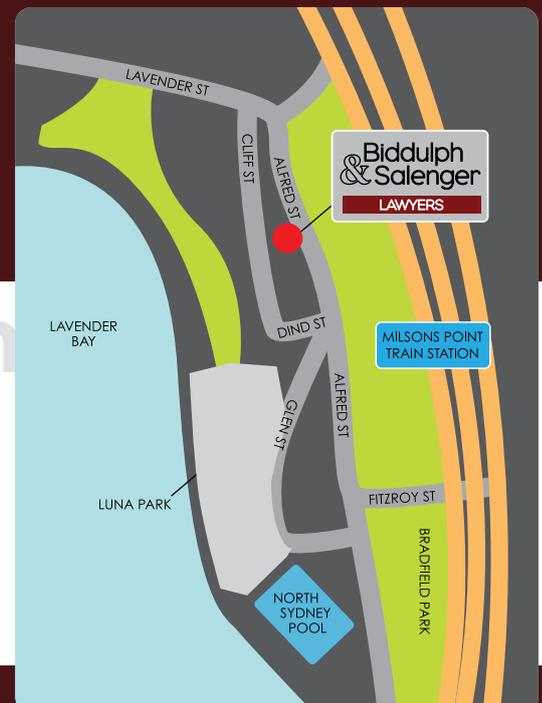
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## FAMILY BLISS



Not discouraged by many years involvement in Family Law, Edyta Zurawski recently married and included the Biddulph and Salenger team in the celebrations.

[www.biddsal.com.au](http://www.biddsal.com.au)



## DOCUMENT REVIEW

We are carrying out a systematic audit of our documents held in safe custody. Some of you may receive a letter reminding you to update your will and prepare a power of attorney. If you do not have a deed packet with us, does that mean you do not have a will and power of attorney? If so, please consider giving us your instructions so as to avoid complications if you are incapacitated or die.

**4** Don't hesitate to call with a query. If we can't answer it or solve your problem we can refer you to someone who can.