

Scooby Doo – Why Are You Barking?

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1. Introduction

The purpose of this paper is to provide examples of barking dog complaints within South Australia. I will provide a case study of recent proceedings and discuss the legislation which not only empowers, but also constrains, dog management officers. In addition, I will outline both civil and criminal proceedings that are available to the authorities and discuss the recent amendments to the legislation.

2. Dog and Cat Management Act 1995

2.1 Criminal Proceedings

Section 45A of the Dog and Cat Management Act 1995 ("the Act") under the heading Miscellaneous Duties provides at sub-section 5 that any person who owns or is responsible for the control of a dog is guilty of an offence if the dog (either alone or together with other dogs, whether or not in the same ownership) creates a noise, by barking or otherwise, which persistently occurs or continues to such a degree or extent that it unreasonably interferes with the peace, comfort or convenience of a person. This attracts a maximum penalty of \$750.00 or an expiation fee of \$105.00.

Ownership is defined at Section 5 of the Act to include (if the dog was previously registered) the person in whose name the dog was last registered unless it is proved that the dog was subsequently registered in the name of another person. Therefore, this is the removal of the onus of proof on the prosecution to prove ownership in certain circumstances. In addition, if a dog (whether registered or not) is shown to have been habitually in the apparent ownership of a person, that person will, in the absence of proof to the contrary, be taken to have owned and to continue to own the dog.

2.2 Civil Orders

Council officers may also issue civil control orders pursuant to Division 3 of the Act. Section 50(1) provides that a Council may make a Control (Barking Dog) Order ordering the person to take all reasonable steps to prevent the dog repeating the behaviour that gave rise to the order i.e. creating noise.

In any criminal proceedings brought against an individual for a nuisance caused by a barking dog the complaint should also include, if relevant, the inclusion of a contravention of a Control (Barking Dog) Order pursuant to Section 55(a) of the Act.

Section 55(2) of the Act creates a defence to a charge against Section 55 if it is proved that the defendant was not aware that the Order was in force.

The recipient of a Control (Barking Dog) Order may appeal to the Administrative and Disciplinary Division of the District Court of South Australia against a decision of a council to make an order or to refuse to revoke an order. The appeal must be instituted with 14 days of the making of the decision appealed against and the operation of the decision will continue (unless the Court or the council suspends the operation of a decision) pending the determination of the appeal.

The Court may affirm or rescind the decision or substitute a new decision as it considers appropriate or make any other order as the case requires (including an order for costs).

2.3 Seizure of Barking Dogs

Council officers are under immense pressure when initiating criminal proceedings or civil orders as they must deal with complainants that are being unreasonably disturbed by a barking dog and therefore must deal with the matter as expeditiously as possible but also much provide the defendant or recipient with procedural fairness and natural justice. Council officers must also deal with lengthy waiting times within the court system which may also exacerbate the complainants. The best method of dealing with this problem is to have the dog remove from the offending property until the determination of the process. Unfortunately, the Act does not provide for this to occur without the completion of the particular process.

Section 60 of the Act provides that the Dog Management Officer has the power to seize and detain dogs in certain circumstances. That Section provides that a Dog Management Officer may seize and detain a dog:

- (a) if it is wandering at large;
- (b) if the officer reasonably believes it is necessary to seize the dog in order to prevent or stop the dog attacking, harassing or chasing a person or an animal or bird owned by or in charge of a person (whether or not actual injury has been or may be caused);
- (c) if the officer reasonably believes that it is unduly dangerous;
- (e) if the officer reasonably believes it is necessary to detain the dog in order to ensure that an order under this Act for the destruction or disposal of the dog is carried out.

As can be seen from the above circumstances the Council officer does not have an ability to seize the dog in situations whereby a Control (Barking Dog) Order has been contravened. Section 55(3) of the Act it provides that if an order under this division is contravened a Dog Management Officer may take reasonable steps to give effect to the order. The best method of giving effect to the Control (Barking Dog) Order is to seize the dog from the property and impound it until the matter can be determined. As the specific circumstances contained within Section 60 of the Act does not provide that the dog may be seized to give effect to a Control (Barking Dog) Order it is my view that the Council officer cannot seize the dog to give effect to the Order pursuant to Section 55 of the Act.

2.4 Orders

Section 47 of the Act provides that if a person is found guilty of an offence against Division 1 or 1A the Court may, in addition to, or instead of, imposing a penalty, make one or more of the following orders:

- (a) that the dog be destroyed or disposed of in a specified manner within a specified period;
- (b) that the order for destruction or disposal be remitted in specified circumstances;
- (c) that the dog be registered under this Act;
- (ca) that the dog be identified in a specified manner;
- (cb) that the dog be seized and detained for a specified period in the order or until further order of the Court;

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- (d) that the dog be controlled in the specified manner;
- (e) that specified action be taken within a specified period to abate any danger or nuisance imposed by the dog;
- (ea) that the dog be de-sexed;
- (eb) that any other dog owned by the person, or for the control of which the person is responsible, be destroyed or disposed of in a specified manner within a specified period;
- (f) that the person not acquire another dog for a specified period or until further order of the Court;
- (g) that the person pay compensation for injury, damage or loss suffered by a person as a result of the actions of the dog;
- (h) any other order that the case requires.

When prosecuting an individual for breaches of Section 45A(5) for owning a dog that creates a noise which interferes with the peace of a person, then that Section is contained within Division 1 and therefore the Council officers can seek orders pursuant to Section 47 to effectively control the dog. If the Council officer chooses to only charge the individual concerned with a breach of Section 55 for contravening a Control (Barking Dog) Order then the orders contained within Section 47 are not available to the Council officer as Section 55 is not contained with Division 1 or 1 A of the Act. Therefore, in my view, a Complaint and Summons should always include a charge against Section 45A and Section 55 in these types of cases.

As previously mentioned in an appeal against a Control (Barking Dog) Order the Court may make any order in relation to the dog that a court could have made if the proceeding had been criminal proceedings i.e. Section 47 Orders.

2.5 Prohibition Orders

South Australia authorities have recently received the powers to prohibit individuals from owning a dog. This also includes the power to remove a dog from the property. Section 59A(3) of the Act provides that the Council may, on its own initiative or on application, make a Prohibition Order against a person if satisfied that the dog has:

- attacked or harassed a person or animal; and
- the dog was already subject to a Destruction Order or a Control (Dangerous Dog) Order.

There is no provision contained within the Act for a Prohibition Order to be placed on an individual when they are the subject of a Control (Barking Dog) Order.

3. Local Government Act 1999

Pursuant to section 254, a council may order a person to do or refrain from doing things specified in column 1 of the following table if in the opinion of the council the circumstances specified opposite it in column 2 of the table exists and the person comes within the description opposite it in column 3 of the table.

Column 1	Column 2	Column 3
To do or to refrain from doing what?	In what circumstances?	To whom?
<p>3. Animals that may cause a nuisance or hazard</p> <p>To do or to refrain from doing the thing specified in the order in order to abate a nuisance or a hazard to health or safety associated with a live or dead animal or animals, or otherwise to deal with an animal or animals.</p>	<p>A person is the owner or occupier of land where an animal or animals are located which may cause, or be likely to cause, a nuisance or hazard to health or safety, or otherwise to become a pest.</p> <p>Examples (2) Keeping an excessive number of insects, birds or other animals.</p>	<p>The owner or occupier of land or any person apparently engaged in promoting or conducting an activity.</p>

The basis for an order made by the Council should be that the Council is of the opinion that the number of dogs on the property is excessive and constitutes a situation that is causing, or is likely to cause, a nuisance.

The council must, pursuant to section 255(1) of the Act, give the person to whom the Order is issued a notice in writing stating:

- (a) the proposed action, including the terms of the proposed order and the period within which compliance with the order will be required; and
- (b) the reasons for the proposed action; and
- (c) inviting the person to show, within a specified time (of a reasonable period), why the proposed action should not be taken (by making representations to the Council or a person nominated to act on behalf of the Council).

Under subsection (3), the Council may, after considering representations made within the time specified under subsection (1)-

- (a) make an order in accordance with the terms of the original proposal; or
- (b) make an order with modifications from the terms of the original proposal; or
- (c) determine not to proceed with an order.

4. Cotton Case

This matter relates to the City of Port Adelaide Enfield Council placing a Control (Barking Dog) Order on the owner of a three year old German shepherd named Emilie which, in their opinion, was creating a noise by barking so persistently that they were of the opinion that it was unreasonable. The particulars were that this noise had gone on regularly during the period of August 2002 to November 2002 and the obligation on the owner of the dog at the time was to prevent the dog from repeating the behaviour.

The owner of the dog accepted that he was in control of the dog and advised that he accepted that the dog did bark. He accepted that there was evidence to support that and the noise was a nuisance to the neighbours. In any event, the owner appealed the Order.

On appeal, Mr Cotton produced a bundle of documents which he called "bark logger summaries" that stretched from the period 20 September 2002 until 21 October 2002 which he wished to compare with the barking dog diaries supplied by different complainants.

The "bark logger summaries" was effectively a summary of electronic data recorded by the appellant, with the use of a computer system and microphones situated at three different points of the premises to which the dog had access. Mr Cotton suggested that the computer system was able to accurately record the barking of the dog 24 hours a day seven days a week. The Court did not test the accuracy of the system and did not generally make comments in relation to its accuracy. It was however admitted by the appellant that other noise (whether made by nature or humans) could be recorded in the computer system as a bark. Notwithstanding this, the bark logger summaries aligned themselves generally with the barking dog diaries supplied by the complainants.

Therefore, the bark logger summaries basically proved the Council's case and justified the placing of the order on Mr Cotton. For this reason the appeal was dismissed and the Court said that the Council's approach to this matter was governed by extreme patience. His Honour stated that unfortunately the barking log system probably causes neighbours to become so wound up by the necessity to record the times when the barking starts and stops that that must exacerbate the stress and tension they experience. He stated that unfortunately there was no other solution and indeed the Cotton's bark logger system may well be another solution for the Council to record noises created by dogs.

His Honour made orders that the appeal be dismissed and that the Control (Barking Dog) Order was to continue. He stated that the order imposes a relatively low threshold on the appellant to ensure that the dog does not repeat the behaviour that gave rise to the order.

Section 58(10) of the Act entitles a person who is the owner to appeal against the Council's order. The Court can, on hearing of the appeal, make further orders that define the obligations on the dog owner. His Honour made the following further orders:

- that the appellant is required to engage a firm named Bark Busters so that they can take steps to ensure that the dog's behaviour is not repeated;
- the dog is to be exercised daily under the control of an adult;
- if the appellant moves to alternative premises, they are to be premises suitable for a dog of this size, including fencing;
- they are to place a petition between the house that the dog currently resides and the next door neighbour's to prevent the dog from gaining access to the side gate on the eastern side of the appellant's home. That is to be attended to within seven days.

His Honour did not make an order for a citronella collar to be worn by the dog or that the dog to be kept indoors. However, he reminded the appellants that they were very

much at risk if the dog continued to bark and that the Council would ultimately make application for the seizure and destruction of the dog.

5. Overton Case

This was an appeal brought by Ms Overton, the owner of land at Peterborough (350kms north of Adelaide), against an order made by the District Council of Peterborough. The order was made pursuant to Section 254 of the Local Government Act 1999 for her to remove all dogs from the land except for four dogs of her choosing.

The grounds of appeal were that the dogs were neither excessive nor a nuisance in the sense required by the Local Government Act 1999 and the Council therefore exceeded its authority in making the order. In addition, that in making its decision the Council gave weight to erroneous considerations and failed to have regard to relevant considerations in various submissions tendered by the appellant to it.

The basis for the order made by the Council was that the Council was of the opinion that the number of dogs on the property was excessive and constituted a situation that was causing, or was likely to cause, a nuisance.

A notice of the proposed order was given to the appellant and she was invited to show within seven days why the proposed action of issuing the order should not be taken by making representation to the Chief Executive Officer.

The District Council by-law made under the Dog and Cat Management Act 1995 and the Local Government Act 1999 provided that the limit on the number of dogs kept in a township in a small dwelling is one dog, and, in premises other than a small dwelling, two dogs. The by-law provided that no person shall keep more than the prescribed number of dogs on premises unless it is with Council permission or the premises are an approved kennel establishment.

The Director of Corporate Services of the Council wrote a letter to Ms Overton, drawing attention to a complaint received relating to dogs kept at her premises continually barking and causing a disturbance in the neighbourhood. The letter further raised a question regarding the number of dogs on the premises being greater than two, none of which were registered.

Ms Overton wrote to the Council applying for a breeder's licence as she had more than two dogs. She listed eleven dogs kept on the premises and stated they wished to keep all of the dogs as they generated some income for the family. She believed that false complaints were being made to the Council.

The Council received formal complaints from four residents of Peterborough regarding the dogs kept at the appellant's premises creating a nuisance by persistent barking or otherwise making a noise.

The Chief Executive Officer of the Council wrote to Ms Overton requesting certain information which might clarify and support her request for permission to keep more than two dogs at the premises including details of housing for the dogs, breed of dog and letters of support from adjacent owners.

Shortly after solicitors for the Council wrote on its behalf to Ms Overton advising her that she was required to comply with the Council by-law and reduce the number of dogs on the premises to two. An expiation notice was subsequently issued for contravention of the by-law.

Council then resolved to provide a notice of the proposed order to Ms Overton to limit the dogs on her premises to four, following which the Council would determine how to proceed in accordance with the Act.

The property was described as being 2018 square metres or about three times the size of a suburban block. Taking into account the ratio of the number of dogs to area of land, it was submitted that the number of dogs at the property was not excessive. The letter stated that the dogs could not be separated and were significant in maintaining the mental health of Ms Overton.

Ms Overton instituted an appeal to the Court, pursuant to section 256(3) of the Act.

The proceedings on appeal were governed by section 42E of the District Court Act 1991, as follows:

- (1) The Court must, on an appeal, examine the decision of the original decision-maker on the evidence or material before the original decision-maker but the Court may, as it thinks fit, allow further evidence or material to be presented to it.
- (2) The Court, on an appeal—
 - (a) is not bound by the rules of evidence but may inform itself as it thinks fit; and
 - (b) must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.
- (3) The Court must, on an appeal, give due weight to the decision being appealed against and the reasons for it and not depart from the decision except for cogent reasons.

The appellant submitted documents setting out the material on which she relied on the appeal and referred to the same matters on the hearing. The submissions were a mixture of facts and argument, including the following:

- The appellant said that when she moved to Peterborough a fence was erected to keep the dogs. They escaped when the gate was broken. After replacement of the gate, there has been no further problem with the dogs escaping.
- One of the neighbours had made false complaints and encouraged others to make false complaints about the dogs. The same neighbour had harassed the appellant.
- The neighbours caused the dogs to bark by hitting the fence and then complained to the Council. The Council fined the appellant without asking what the problem was. The neighbours treated the appellant as outsiders. The Council had taken the side of the neighbours.
- Complaints made by the appellant about other dogs barking went unheeded. The appellant had been the subject of threats from neighbours because of the dogs. She tried to control the barking. Some of them are getting old and will not be replaced. The appellant makes no money from keeping the dogs.
- The appellant has not had trouble with the dogs in other places of habitation. A letter from Playford Council supports this. There is ample room for the dogs on the property. The dogs are inside most of the time and they help the appellant deal with stress levels. The dogs have replaced children and grand children in her life and are like family to her.

Pursuant to section 246 of the Act, the Council has the power to make by-laws-

- (a) that are within the contemplation of the Act or another Act; or
- (b) that relate to a matter in relation to which the making of by-laws is authorised by the regulations under the Act or another Act.

Section 248 relevantly provides that a by-law made by a Council must not-

- (a) exceed the power conferred by the Act under which the by-law purports to be made; or
- (b) be inconsistent with this or another Act, or with the general law of the State.

Section 26 of the Dog and Cat Management Act 1995 provides for Council responsibility in administering and enforcing provisions relating to management of dogs including their registration. Pursuant to section 90, a district or municipal Council may make by-laws for the control or management of dogs or cats within its area, including limiting the number of dogs or cats that may be kept on any premises.

By by-law the Council limited the number of dogs to be kept on premises, other than a small dwelling, in the township of Peterborough to two.

The dogs had been the subject of a number of complaints from residents in the vicinity. In accordance with the provisions of the Act, the Council gave notice to the appellant of the proposed order limiting the number of dogs on the premises to four.

The basis for the order made by the Council was that the Council was of the opinion that the number of dogs on the property was excessive and was causing, or was likely to cause, a nuisance. In the Judges opinion, there was ample evidence to support the opinion of the Council. The number of dogs was over five times the number allowed. The Council had information that they had caused problems after escaping from the premises and with consistent barking.

There was no evidence to suggest that the Council favoured other residents. On the contrary, it appears that the Council made every effort to try to resolve the matter in an appropriate way, giving consideration to the appellant. The appellant was asked to limit the number of dogs kept on her premises to four, not to two in accordance with the by-law.

No basis had been established by the appellant for an assertion that the Council exceeded its authority in making the order. The appellant had not demonstrated that the Council gave weight to erroneous considerations or failed to have regard to relevant considerations in various submissions tendered by the appellant to it.

The Court on the appeal gave due weight to the decision of the Council and the reasons for it and found there were no grounds to depart from the order made by the Council.

Paul Kelly

Paul Kelly is an Associate in the firm of Norman Waterhouse as specialist Local Government Group. Paul's experience includes governance, policy advice, administrative law issues and statutory interpretation. Representing client councils in contested matters in the Magistrates Court, the District Court and the Environment, Resources and Development Court, is a principal area of Paul's practice. Paul assists local government authorities in a wide range of matters including by-law preparation and advice, prosecution and enforcement matters and road traffic issues as they relate to local government. He also prepares and delivers workshops, briefings and seminars on behalf of Norman Waterhouse to councils on civil enforcement and prosecution proceedings dealing with the following legislation: