

IN THE MATTER OF:

**SECURI-CAP PTY LTD (ACN 123 396 510)**

**- and -**

**A PRODUCT KNOWN AS 'THORNY DEVIL'**

**MEMORANDUM OF ADVICE**

***Introduction:***

1. Securi-Cap Pty Ltd (ACN 123 396 510) ('*Securi-Cap*') manufactures and distributes a product known as Thorny-Devil™. Thorny-Devil™ is designed as a series of plastic (PVC) strips that contain conical spikes along two sides with a flat side beneath the cones. The advertised and intended use of Thorny-Devil™ is as a fence capping device that is useful to, *inter alia*, deter people and animals from climbing the particular fence capped with Thorny-Devil™ (see attached website printout for further detail).
2. My instructors seek advice on whether or not the installation of Thorny-Devil™ would comprise the setting of what is colloquially called a 'man trap' which may be contrary to Victorian or interstate legislation.

***The law:***

3. There is no reference in Victorian legislation to 'man traps'. However, the Crimes Act 1958 (Vic) ('*Crimes Act*') states at section 25:

**25. *Setting traps etc. to kill***

*A person who sets a trap or device with the intention of killing another person (whether a trespasser or not) or being reckless as to whether or not another person (whether a trespasser or not) is killed is guilty of an indictable offence.*

*Penalty: Level 4 imprisonment (15 years maximum).*

NEILL HUTTON  
BARRISTER-AT-LAW  
OF FOLEY'S LIST  
205 WILLIAM STREET  
MELBOURNE VIC 3000

4. The Crimes Act also states at section 26:

**26. *Setting traps etc. to cause serious injury***

*A person who sets a trap or device with the intention of causing, or being reckless as to whether or not there is caused, serious injury to another person (whether a trespasser or not) is guilty of an indictable offence.*

*Penalty: Level 5 imprisonment (10 years maximum).*

5. I note that the Crimes Act does not contain a definition of what a 'trap' is. I also note that no other Victorian legislation deals with setting traps to kill or cause serious injury.
6. Commonwealth legislation does use the term 'man traps' and prohibits their use. The Western Australia Criminal Code states at section 305:

**CRIMINAL CODE - SECT 305**

***Setting mantraps***

**305 . *Setting mantraps***

*Any person who sets or places any spring-gun, mantrap, or other engine calculated to destroy human life or to inflict grievous bodily harm, or causes any such thing to be set or placed in any place with the intent that it may kill or inflict grievous bodily harm upon a trespasser or other person coming in contact with it, or sets or places any such thing in any such place and in any such manner that it is likely to cause any such result, is guilty of a misdemeanour, and is liable to imprisonment for 3 years.*

*Any person who knowingly permits any such spring-gun, mantrap, or other engine, which has been set or placed by another person in any such place and in any such manner that it is likely to cause any such result, to continue so set or placed in any place which is then in or afterwards comes into his possession or occupation, is deemed to have set and placed the gun, trap, or engine with the intent aforesaid.*

*This section does not make it unlawful to set any gin or trap such as is usually set for the purpose of destroying vermin; or to set any spring-gun, mantrap, or engine, at night in a dwelling for the protection of the dwelling.*

7. Several other states have legislation identical with the Western Australia Legislation (in particular Tasmania, Queensland and the Northern Territory).
8. I note that the term 'man trap' is not defined in any of that legislation (ie: not defined in the Criminal Code of any of the States nor is it defined in the Victorian legislation).
9. Without specifically checking the specific legislation of every state of Australia I am confident that the relevant legislation would reflect the legislation of either Victoria or the Criminal Code.

***Dictionary definitions:***

10. Where legislation fails to define a term or phrase or word that is used in legislation it becomes necessary to revert to dictionary or common usage to understand exactly to what a particular piece of legislation is referring when that legislation uses a particular term or phrase or word.
11. The term 'mantrap' is defined by the Oxford English Dictionary as simply 'a trap for catching people'. The term 'trap' is defined as, relevantly, 'a device or enclosure designed to catch and retain animals'.
12. The term 'device' is defined by the Oxford English Dictionary as (relevantly) 'a thing made or adapted for a particular purpose, especially a mechanical or electronic contrivance'.

13. Similarly, the online dictionary available at [www.dictionary.com](http://www.dictionary.com) defines 'mantrap' as 'an outdoor trap set for humans, as to snare poachers or trespassers'. The term 'trap' is defined as, relevantly, 'a contrivance used for catching game or other animals, as a mechanical device that springs shut suddenly'.
14. The online dictionary also defines 'device' as 'a thing made for a particular purpose; an invention or contrivance, esp. a mechanical or electrical one'.

***Application of the law to Thorny-Devil™:***

15. Specifically, the Victorian legislation does not refer to 'mantrap' but prohibits a person from setting '*... a trap or device with the intention of killing another person*' (section 25) or '*... a trap or device with the intention of causing, or being reckless as to whether or not there is caused, serious injury to another person*' (section 26). I note without discussing in further detail that the Criminal Code states (mentioned above) that do refer to '*mantraps*' also contain the requirement that the trap or device be set or placed '*...with the intent that it may kill or inflict grievous bodily harm upon a trespasser or other person coming in contact with it*
16. With the legislation being silent on the definition of 'trap' and 'device' it is necessary to refer to the dictionary definitions (above). A plain reading of either definition of 'trap' (as detailed above) reveals that a thing or object is more like a trap if it has the ability to 'catch, retain or ensnare' a person. Clearly, Thorny-Devil™ does not have the ability to do this.

17. Further, a closer reading of both definitions above reveals that in order for an item to constitute a mantrap it must be a trap or device. The clear implication from both definitions ('trap' and 'device') is that the subject item must have some inbuilt ability to move or react to some method of trigger (such as pressure or trip switches). In other words, the subject item must be or contain a dynamic element.
18. Clearly, Thorny-Devil™ does not have or contain any dynamic movement elements. Thorny-Devil™ is simply an architectural design element that creates on a fence line an edge that would be uncomfortable for a person to climb upon. There is neither triggering element nor any portion of a response from Thorny-Devil™.
19. I am therefore of the opinion that Thorny-Devil™ is neither a trap nor a mantrap.
20. Further analysis confirms that the relevant legislation discussed above is inapplicable to Thorny-Devil™.
21. The relevant Crimes Act prohibits a person from setting '*... a trap or device with the intention of killing another person*' (section 25) or '*... a trap or device with the intention of causing, or being reckless as to whether or not there is caused, serious injury to another*' (section 26).
22. Thorny-Devil™ contains only a short series of PVC spikes or cones approximately 13 to 15 mm in height and therefore does not have the potential to kill a person. Accordingly, section 25 of the Crimes Act has no application.
23. The question is therefore whether or not Thorny-Devil™ has the ability to cause a serious injury.

24. Section 15 of the Crimes Act defines 'injury'. It '*includes unconsciousness, hysteria, pain and any substantial impairment of bodily function*'. Section 15 also provides that a serious injury '*includes a combination of injuries*'.
25. Thorny-Devil™ is a static device. It seems impossible to argue that such a static device is actually capable of *causing* an injury. The Thorny-Devil™ is incapable of movement and cannot therefore *cause* any injury.
26. The only damage that can be done via the Thorny-Devil™ is when a person or part of a person *comes into contact* with the Thorny-Devil™. In circumstances of ordinary usage or placement (where the Thorny-Devil™ is placed upon the top edge of a fence for example) this would require the person or part of a person to be resting on the top of the relevant fence with considerable force – as if climbing that fence. In these circumstances it may be that a person who has come into contact with Thorny-Devil™ may sustain an injury – but that is an entirely different thing than saying that Thorny-Devil™ *caused* the injury.
27. Even if one were to consider that it was the Thorny- Devil™ that had *caused* the relevant injury, it seems highly likely that the only result of contact with Thorny- Devil™ would be pain – or, with the application of substantial force, a number of small puncture wounds similar to those arising from a thorn bush – not a deep puncture wound or laceration.
28. Should such a puncture wound (or series of wounds) occur from high pressure contact with Thorny- Devil™ - in my view this would still not comprise a '*serious injury*' as defined by section 15 of the Crimes Act.

29. Finally, in my view, this issue can be disposed of by referring to the relevant 'intent' that must be in the mind of the person placing the item for it to bring into play the use of either the Crimes Act or the Criminal Code. For a person to contravene the relevant legislation it must be contemplated in their mind and intended by that person that the setting of the device (in this case Thorny-Devil™) is done '*...with the intention of killing (or causing serious injury to) another person*' (Sections 25 and 26 Crimes Act) or '*...calculated to destroy human life or to inflict grievous bodily harm*'. Clearly, this is not so.

**Conclusion:**

30. In my opinion, the placement of a Thorny-Devil™ cannot in any way ever be shown to have been done with the relevant intention to bring into play the operation of the criminal legislation of Victoria or any of the States of Australia.



Mr. N. Hutton

## Barrister Details



Neill A Hutton

**Phone:** 9225 7994  
**Mobile:** 0411 823 583  
**Email:** nhutton@vicbar.com.au  
**Chambers:** Room 0422  
Owen Dixon Chambers East



**Qualifications:** LL.B. (Hons), Dip. Mgt.

**Admitted to Practice:** 23 Feb 2004

**Signed Victorian Bar Roll:** 29 Apr 2004

**Also entitled to Practise in:** Federal Court of Australia High Court of Australia

**Previous Occupation:** Australian Securities and Investments Commission

**Areas of Practice:**

- \* Administrative Law (Judicial Review)
- \* Administrative Law (Merits Review)
- \* Admiralty/Maritime
- \* Corporations and Securities
- \* Criminal Law (Appellate)
- \* Inquests
- \* Superannuation
- \* Trade Practices

**Profile: Profile**

Prior to signing the Bar Roll in April 2004, Neill worked at the Australian Securities and Investment Commission (ASIC) for three years in Financial Services - Enforcement. He also spent fifteen years in the Victoria Police Force, as a detective and police prosecutor. During that time he conducted various contested and uncontested prosecution, committals and bail hearings.

Neill has a broad knowledge of the criminal law and its processes, particularly fraud and white collar crime, as well as Corporations Act and ASIC Act matters. He has experience in insurance and superannuation law, managed investments, administrative hearings and appeals, injunction applications and restraining orders.

Neill also volunteers at the Western Suburbs Legal Service and is completing a Masters of Law at Melbourne University. His honours thesis, on maritime law, was published in the Tulane Maritime Law Journal in February 2004.

Neill is available 24 hours on his mobile telephone.