

Newsletter of the Law

A B K J LAWYERS

ADAMSON BERNAYS KYLE & JONES

Limited liability by a scheme approved under professional standards legislation

Southport & Sydney

Ph: 1300 848 698

www.abkj.com.au

The information in this newsletter is merely a guide and is not a full explanation of the law. This firm cannot take responsibility for any action readers take based on this information. When making decisions that could affect your legal rights, please contact us for professional advice.

Summer 2010

New pool fencing laws effective December 2010

New laws for pool safety, including spas, will come into effect in December for Queensland pool owners in the aim of reducing incidents of drowning and serious immersion injuries among young children in swimming pools.

Pool owners are currently required to ensure a pool is enclosed with compliant fencing regardless of when the pool was built, with changes to the Building Act now requiring owners of a premises with a pool to obtain safety and compliance certificates from their local council or privately certified pool inspector.

The new laws will require pool owners to undertake compulsory pool inspections and obtain safety certificates, with new fines of up to \$16,500.00 for instances of non-compliance.

The laws will also provide provision for the compliance of pool fencing for indoor pools, hotel, motel and caravan park pools, as well as requiring fencing for portable pools deeper than 300mm.

Through the compliance and certificate program the government will work to establish the State's first swimming pool register with greater powers of entry for local government organisations to undertake compliance inspections.



A spokesman for Stirling Hinchliffe, Minister for Planning and Infrastructure said pools would be inspected by

councils and privately certified pool inspectors, with inspections costing the resident approximately \$90. Since Queensland first introduced pool safety laws in 1991, the number of child drownings in the state has halved. The new legislation aims to reduce this number even further.

What the laws mean to you...

If you are buying a property with a pool, ensure the seller has a valid compliance certificate – ARE – compliant pools can cost much more than the price of an inspection when not deemed up-to-standard.

An owner must provide a prospective buyer or tenant with a copy of the pool safety certificate.

Bodies Corporate must ensure that they have a valid compliance certificate in their records that is updated on an annual basis.

Magistrates' retirement age increases to 70

The compulsory retirement age for Queensland magistrates has been increased from 65 to 70, bringing it into line with the retirement age for Supreme and District Court judges.

The Attorney-General, Cameron Dick said the change more closely aligned Queensland magistrates with those in other states such as Victoria, where the retirement age is 70, and New South Wales and Tasmania where the compulsory retirement age is 72.

"...Lifting the retirement age is a mark of confidence in the professionalism and capacity of the modern magistracy," he said.

The changes were adopted following the introduction of the Justice and Other Legislation Bill 2010 by State Parliament on October 6.

Mr Dick said passage of the Bill also enshrined the role of judicial registrars in

Queensland courts and fine-tuned more than 30 existing statutes.

For example the reforms give workers who enter into legal surrogacy arrangements, and who are covered by the state's industrial relations laws, access to parental leave.

Mr Dick said the new provisions were based on the existing entitlements for an employee whose spouse gave birth, with paid parental leave of up to one week and further unpaid parental leave of up to 51 weeks.

The Bill also gave greater powers to target chronic fine dodgers.

"SPER can now register an interest in a debtor's motor vehicle where they owed \$500 in fines, half the previous \$1000 minimum," Mr Dick said.

What's inside ...

- Changes to pool fencing laws
- Increase in retirement age for Magistrates
- Case-in-point: A lady's got my dingo!
- Neighbourhood Disputes Resolution Bill 2010
- Social Networking: To 'Tweet' or not to 'Tweet'?
- E-Divorce: Quick and easy?
- Proposed changes to the Body Corporate and Community Management Act 1997
- Voluntary administration: What about the employee?

Case in point: A lady's got my dingo

A landmark case highlights the importance of legislated regulations that protects Australian fauna and flora.

Under the *Nature Conservation Act 1992*, the dingo is declared an indigenous Australian species, with sections 17 and 62 instructing that dingoes cannot be interfered with in a protected area unless specific permissions have been granted.

Jennifer Louise Parkhurst, 43, of Rainbow Beach was found guilty of 46 charges in relation to violations of the *Nature Conservation Act* and the *Recreation Areas Management Act* where provision is made for the protection of the dingo as a natural resource.

Ms Parkhurst appeared in the Maryborough Court where she pleaded guilty to the interference of a natural resource by luring, feeding, photographing and filming the animals. Ms Parkhurst was fined \$40,000 and received a three year suspended jail sentence.

Why a 'natural resource'?

The Fraser Island dingo is believed to be the purest genetic strain of dingo in Australia, freely roaming the bush, beaches and rainforest of the island.

Dingoes in the wild are a natural part of Fraser Island and its World Heritage value. Protective regulations help to ensure that humans do not have a detrimental impact to the species.

It is estimated that there are between 100 and 200 dingoes on Fraser Island.

The argument

Dingoes are notable scavengers and will readily steal food that may be unguarded.

Media reports over the last few years have claimed Fraser Island dingoes are suffering from starvation including suggestions the earlier removal of brumbys from the island had taken a food source for the animals and added to the decline in their health.



The claims have been refuted by the State Government

Ms Parkhurst claimed she had undertaken a campaign to photograph and document the dingoes on the island in an attempt to illustrate the "mismanagement" of dingoes on the island.

Video and photographic evidence showed Parkhurst had been interacting with the animal for some time, having previously been threatened with a \$300 on-the-spot fine for venturing onto the island.

The judgement

In court, Ms Parkhurst admitted to feeding and photographing seven dingoes from the time they were pups.

The magistrate said Ms Parkhurst's

actions were to be condemned because of the scale and "deliberate nature" of her offences.

In video evidence submitted to the court, Parkhurst could be seen feeding the dingoes while saying: "Three roast chickens – one of which is free-range and cost a fortune – disappeared in seconds – but gee-wizz they loved it!"

Ms Parkhurst said: "I'm extremely remorseful because those dingoes were inadvertently killed because of my involvement." (Six of the seven dingoes were later humanely destroyed for showing aggressive behaviour towards humans.)

Sustainability Minister, Kate Jones said: "The case has sent a clear message to the public. This is a significant sentence and should act as a warning to others to respect the laws in place to protect Fraser Island."

"What has been most distressing is these same dingoes were responsible for a later number of serious attacks on two children."

Consequences

Dingoes which have had interference with their natural behaviours grow up scavenging and lose their natural wariness of humans.

The Queensland Parks and Wildlife Service warns that feeding dingoes can change their behaviour and have severe consequences – "if pups learn to associate humans with food they do not learn to hunt."

Tips when around dingoes:

- Don't feed them
- Always keep an eye on your children
- Always walk in groups
- Lock away all food and rubbish
- If threatened, don't run. Instead call for help!

Neighbourhood Disputes Resolution Bill 2010

In October, a man from Morayfield, north of Brisbane, was charged with the assault of his neighbour, telling police '...he wouldn't trim the hedges.'

In Queensland, issues relating to trees and fences are the most common form of neighbourhood dispute – there is currently no statutory law in Queensland that provides for disputes relating to nuisance trees, and laws relating to fencing date back to 1953.

As our population grows we find that we are living in closer spaces than ever

before, prompting the Queensland Government to release a draft consultation paper on how neighbourhood disputes can be resolved.

The consultation materials provide for clearer guidance in the instance of a dispute through better definitions for trees and retaining walls, confirmation of the ownership of a tree and the appointment of the Queensland Civil and Administrative Tribunal to assist in the resolution of neighbourhood disputes.

These changes are not yet law and are

still being considered.

What does this mean for you?

- As a tree owner ('tree keeper') you are responsible for the cutting and removing of overhanging branches, ensuring a tree does not cause damage or injury to a person or a persons property.
- Ownership of a fence on a property boundary is shared between neighbours.
- Before cutting down a tree it is best to contact your local government
- An edging hedge is recognised as a fence.

To 'tweet' or not to 'tweet'?

Should a teacher 'friend' a student on Facebook? Your boss adds you as a friend: confirm or ignore?

Social-networking has indeed become part of "everyday life" with new uses and applications continuing to emerge.

This article takes a glance at the emerging issue of social-networking in the legal space.

The use of social networking continues to grow with Facebook and MySpace boasting more than 350 million members between them. But the list of issues governing appropriate use of social networking and freedom of speech is growing too.

Historically, legal papers were served in person or via the post, and jurors kept their deliberations in strict confidence, but in 2010 things are a little different. The following are recent examples in which the world of social networking has played a part in the legal process:

- **October 2010** – Australian police undertake a national first when they serve court papers to a cyber-bully via social networking site, Facebook. Having previously tried to serve the papers in-person, via post and over the phone, police seek the court's permission to serve the papers via the social networking platform. A written and video copy of the order was sent to the man's inbox where he accepts the order and vows to delete his profile page.

- **October 2010** – A mother in a custody dispute discusses "...ripping her husband off for another \$20,000" The judge grants custody of the children to their father then orders the mother to pay \$15,000 of his approximate \$35,000 legal bill.
- **October 2010** – A British schoolboy is charged after killing a cat and later discussing the incident on his Facebook page.
- **October 2010** – A Brisbane man charged with murder may appeal to have his case permanently stayed after prejudicial information is published on the internet.
- **March 2009** – A juror in Florida, US, admits to the judge that he conducted internet research into the case. On questioning other jurors it became evident that eight others also researched the case. The judge declared a mistrial.
- **February 2009** – A juror in Arkansas, US posts eight "tweets" on Twitter during court proceedings. The defence counsel seeks a motion for a mistrial when one discovered tweet reads, "I just gave away TWELVE MILLION DOLLARS of someone else's money."

- **2008** – A juror takes a picture of a murder weapon and posts it to his social networking page. The photo of a 15-inch double edged, saw-tooth knife sees the juror charged with contempt of court.
- **2006** – The New Hampshire Supreme Court, US hears a motion to overturn a murder conviction based on pre-trial comments by a juror on his blog. The juror wrote, "...now I get to listen to all the local riff-raff tv to

Tips For Social Networking Use:

- Remember: You put it out there – forever!
- Getting divorced? Stay off Facebook!
- Be aware of privacy tools available to you, and how to use them.
- Know who is in your friend network, and who you are adding.
- Don't drink and type – everyone in your network can see it!
- Always be vigilant about the information you post online.

Where there's a will, there's a way

Creating a Will is one of the most important responsibilities of anyone who has assets or a spouse. Without a correctly worded Will, the chances of your estate being distributed exactly the way you want it are greatly diminished. It is also important for Wills to be reviewed as circumstances change.

Contesting the validity of a Will or requesting the Court to intervene and make better provision for someone out of an Estate is a complex process. It is costly for both the claimant and the estate. If a Will is written clearly and without ambiguity, a Court would be reluctant to override the wishes of the deceased unless there were exceptional circumstances.

Various "Will Kits" can be purchased from Newsagents and other outlets. These Kits are designed to assist people to make their own Will without what is perceived to be the

"expense" of legal advice. Preparing a Will in this manner frequently turns out to be a false economy. There are many examples of quite costly litigation being undertaken between potential beneficiaries and the deceased's estate as a consequence of ambiguous wording, improper execution, or other omissions and oversights appearing in homemade Wills.



You should seek legal advice and assistance to ensure that you have a valid and binding Will in place. That Will should be reviewed periodically, and when you:

- Get married or divorced
- Have children
- Buy or sell real estate
- Encounter a change in your personal circumstances.

In the event that you wish to exclude a partner, child or other dependant from provision out of your estate, it is essential that the circumstances be fully considered by your Lawyer and appropriate provisions be inserted in your Will.

Having a valid and effective Will in place provides you with peace of mind and ensures that the prospect of costly litigation consuming the assets of your estate after you are gone is minimized.

Proposed Changes to the Body Corporate and Community Management Act 1997

The Body Corporate & Community Management Act 1997 calls for equal contributions to the running costs of a building through Contribution Schedule Lot Entitlements except to the extent that it is just and equitable for them to be otherwise.

Effectively, if a Unit Owner does not believe that they are being charged Body Corporate fees fairly, they can apply to the Queensland Commercial & Consumer Tribunal for a fee reduction. In some instances, this has seen the levies payable by a single bedroom unit owner increased by up to 70% when a penthouse owner has successfully been granted a reduction in his levies.

The merits of the Act have long been debated and in the instance of Callard -v- Body Corporate for Centrepoint Community Title Scheme, the circumstances in which levies can be varied was extensively analysed.

The Queensland Government proposes to change the way Body Corporate and Community Management Laws affect Queensland's Unit Owners in an effort to make Body Corporate fees fairer.

A series of Community Sessions were held in December 2008 to investigate how the existing Lot Entitlements Scheme operated. Court findings were examined. Proposed changes have the potential to overturn a number of previous decisions relating to the manner in which levies are imposed.

The consultation led to the proposal that buildings and complexes where Lot Entitlement Adjustments have been made can revert to the original method of calculating Body Corporate fees as it existed at the registration of the Plan.

These changes mean that future adjustments to Body Corporate levies can only occur if accepted by all Lot Owners in an Agreement to redistribute the Lot Entitlements among themselves.

Levies and charges can only be reassessed after a three year period has passed and the owner must demonstrate the equality principle for the manner in which levies are imposed.

For more details on the changes to the Body Corporate & Community Management Act, contact ABKJ Lawyers.

Voluntary Administration: What about the employee?



Donut retailer Krispy Kreme Australia have gone into voluntary administration in an attempt to save the company amid declining sales, high rent and the high cost of distribution.

While the company admits it may include redundancies of some of the 600 staff in its restructure effort, it stated all employee entitlements have been protected and will be paid.

Meanwhile, the Australian franchise of the Ed Hardy fashion label has collapsed leaving millions of dollars worth of creditor debt and allegedly owes employees in excess of \$500,000 in entitlements. Ed Hardy Australia stated "...all the team- they shouldn't be moaning. They got paid and treated incredibly well".

In the instance of a company going bankrupt, insolvent or into receivership, what are the rights of an employee?

The Australian Government protects employees through the implementation of regulation and legislation such as the *Corporations Act 2001*, as well as through schemes such as the General Employee Entitlements and Redundancy Scheme (GEERS). GEERS is a basic payment scheme established to assist employees who have lost employment due to the insolvency, and are owed employee entitlements. Under the GEERS scheme, assistance may be available for employees with claims including wages, leave, long service entitlements and redundancy payments.

Presently, employee entitlements for unpaid wages and superannuation contributions, long service leave and retrenchment payments are treated with priority, except for debts that are secured by a fixed charge. Employee rights are given special protections that are governed by the *Corporations Act 2001*. The Act directs appropriate actions to maximise the chances of a company continuing in existence or guiding action that would promote greater outcomes for creditors and members than just

'winding up a company'.

The advantages of a business entering into voluntary administration are:

- allows immediate action to be taken and sets a fixed time frame for dealing with the issues,
- control of the company is given to an independent person,
- prevents unsecured creditors, owners and lessors of property from taking action which may adversely affect the value of the business and assets,
- allows a company and its creditors to consider the merits of a compromise arrangement which may maximise the return to creditors, and
- enables directors in certain circumstances to avoid personal liability for company debts except for debts that have been personally guaranteed.

When a Voluntary Administrator takes control of a company, a report is prepared for creditors with insight into the company's business, property and financial circumstances, including an outline of possible measures to be taken. These are typically the options of returning the company to usual trade, arrangements for business debts to be paid in full or in part to alleviate future debt claims, or the winding up of a business through the appointment of a liquidator.

If action to wind up a business is adopted, priority is then given to company creditors including employees. Employee benefits are paid in the order of :

- 1) outstanding wages and superannuation,
- 2) outstanding leave of absence
- 3) retrenchment pay. Each entitlement category is paid in full before the next is addressed.

What to do if your employer enters into voluntary administration?

As an employee, it is important to know that you have rights, and you are provided for under law.

Your best option is to always seek advice from your lawyer and be fully informed!

This newsletter is a free service from your solicitor. If there is any issue you would like us to cover in a future newsletter please call us. Also, if there is anyone you know who would like to receive this newsletter please let us know and we'll add their name to our distribution list.

However, if you do not wish to continue receiving it please let this firm know and we will not send it to you again.