

Newsletter of the Law

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December 2010

New pool fencing laws effective December 2010

New laws for pool safety, including spas, came into effect on 1 December for Queensland pool owners in the aim of reducing incidents of drowning and serious immersion injuries among young children in swimming pools.

Previously, pool owners were required to ensure a pool was enclosed with compliant fencing regardless of when the pool was built. However, changes to the Building Act now require 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 require pool owners to undertake compulsory pool inspections and obtain safety certificates, with fines of up to \$16,500 for instances of non-compliance.

The laws also have 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 is working 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 Minister for Planning and Infrastructure Stirling Hinchliffe 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 deemed not 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.

Justice and Other Legislation Bill 2010

In October, the Queensland State Parliament adopted the *Justice and Other Legislation Bill 2010* where minor and technical amendments were made to more than 30 previous Acts.

The amendments to the Acts included a range of laws and legal issues:

- *Industrial Relations Act 1999* - amendment to allow a person to apply for parental leave in the instance of altruistic surrogacy
- *Justice of the Peace and Commissioners for Declarations Act 1991* - changes to allow the registrar to withhold the contact details of a JP if necessary to protect the individual
- *Magistrates Act 1991* - change to increase the magistrate retirement age from 65 to 70
- *Penalties and Sentences Act 1992* - changes to allow offenders charged for offences relating to drug use to be referred to drug diversion

- *State Penalties Enforcement Act 1999* - allows SPER to extend the period a debtor can apply for a cancellation of an enforcement order
- *State Penalties Enforcement Act 1999* - allow SPER to lower the amount owed by a debtor from \$1,000 to \$500 before they can register an interest in the debtor's motor vehicle to cover costs owed
- *Electoral Roll Act 1992* - changes ensuring that electoral roll details are no longer available for sale to any person and may only be used for electoral and other specific reasons.

These are just a few of the changes implemented through the Justice and Other Legislation Bill 2010.

The full list of amendments is available for viewing on the Queensland Legislation site at www.legislation.qld.gov.au.

What's inside ...

- Changes to pool fencing laws
- Amendments to current Acts
- Case-in-point: Don't feed the animals!
- Neighbourhood Disputes Resolution Bill 2010
- Social Networking: To 'Tweet' or not to 'Tweet'
- Where there's a will, there's a way
- Proposed changes to *the Body Corporate and Community Management Act 1997*
- Voluntary administration: What about the employee?

Case in point: Don't feed the animals!

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 add to 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 brumbies 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 stating Fraser Island dingoes are "naturally lean and fit".

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

Video and photographic evidence showed Parkhurst had been interacting with the animals 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 she was extremely remorseful because those dingoes were inadvertently killed because of her involvement. (Six of the seven dingoes were later humanely destroyed for showing aggressive behaviour towards humans.)

Sustainability Minister Kate Jones said the significant sentence handed down to Ms Parkhurst should act as a warning to others to respect the laws in place to protect Fraser Island.

"What is most distressing is these same dingoes were later responsible for serious attacks on two children," Ms Jones said.

Consequences

Dingoes that 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.

Law leverages social networking

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

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

The use of social networking continues to grow with Facebook, MySpace and Twitter boasting a combined membership of 730 million people. At the same time, the list of issues governing appropriate use of social networking and freedom of speech is also increasing.

Historically, legal papers were served in person or via the post, and jurors kept their deliberations in strict confidence, but nowadays 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 sought 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 accepted the order and vowed 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, admitted 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 posted eight "tweets" on Twitter during court proceedings. The defence counsel sought a motion for a mistrial when one discovered tweet read, "I just gave away TWELVE MILLION DOLLARS of someone else's money."
- **2008** – A juror took a picture of a murder weapon and posted it to his social networking page. The photo of a 15-inch double edged, saw-tooth knife saw the juror charged with contempt of court.

- **2006** – The New Hampshire Supreme Court, US heard 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 try to convince me of their innocence".

TIPS FOR SOCIAL NETWORKING USE:

- **Remember: Once on the internet, it may as well be written in ink.**
- **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

"Where there is a will there is a relative, where there isn't a will there is chaos." (Anonymous)

In Queensland there are certain laws allowing people to apply for a share in an estate. Increasingly bequests are being challenged in the courts by family members, dependents and other parties who have not been adequately provided for in the will.

A will doesn't just provide for the testator (the person who has written the will) in death, it can also apply in the instance that the person has suffered illness or injury leaving them unable to manage their affairs.

There are certain things that you should consider to ensure you have a valid will in place and your wishes will be accommodated.



The most important thing to remember is to **make** and **update** your will when your life changes, for example:

- getting married or divorced
- having children
- buying or selling real estate
- encountering a change to your personal circumstances.

When writing your will it is important to get legal advice to ensure the best succession planning for your circumstances. Succession planning is the law relating to wills and estates.

Having a will, and having it prepared by a solicitor ensures that your wishes will be adequately provided for, without the risk of a partial or full appeal of your estate.

Estate appeals can result in significant cost implications. Essentially, there is no point in writing a will that will not be deemed valid and upheld.

For more details about succession planning, and to ensure your plan is lawful and adequately supplies for your loved ones, speak to your solicitor.

Proposed Changes to the Body Corporate and Community Management Act 1997

The *Body Corporate and Community Management Act 1997* calls for equal contributions to the running costs of a building through lot entitlements unless it is 'just and equitable'.

Effectively, if a unit owner does not believe they are being charged body corporate fees fairly they can apply to the Queensland Commercial and Consumer Tribunal for a fee reduction. In some instances this has seen the fees of a single bedroom unit owner increase up to 70% when a penthouse owner has successfully been granted a fee reduction.

The merits of the Act have long been debated, and in the instance of *Callard v Body Corporate for Centrepoint Community Title Scheme* an ensuing investigation into an argument and weapons instance followed.

The Queensland Government proposes to change the way body corporate and community management laws affect Queensland's more than 350,000 unit owners in an effort to make body corporate fees fairer.

As part of a consultation process, the government conducted a series of community sessions in December 2008. These sessions investigated how the existing lot entitlements scheme operated and examined court findings – the proposed changes can potentially overturn previous court decisions, affecting up to 1.5 million Queenslanders who live under body corporate regulations.

The consultation lead 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 at the registration of the building plan, as well as provision for developers to more easily incorporate affordable housing opportunity with high-end development.

These changes mean that future adjustments to body corporate fees and levies must be accepted by all lot owners in an agreement to redistribute the lot entitlements among themselves.

Redefined levies and charges can only be reassessed after a three year period has passed, and the owner must demonstrate the equity principle for the distribution of body corporate charges.

For more details on the changes to the *Body Corporate and Community Management Act 1997*, see your solicitor.

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 owing employees in excess of \$500,000 in entitlements. Company head Gary Berman 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, 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,
- 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!

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