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SMOOTH TRANSITIONS INTO COMPANY LIMITED BY GUARANTEE

DAVID CALLAGHAN

The *Associations Incorporation Act 1981 (Qld)* has been amended with effect from 6 December 2011 to provide for a smoother transition from an Incorporated Association (**IA**) to a Company Limited by Guarantee (**CLG**) under the *Corporations Act 2001*.

The Queensland Government realised that such a transfer in Queensland was extremely cumbersome for the IA and there was a need to amend the current law to make it easier and more manageable for a larger IA to transition into a CLG.

This amendment can assist sporting clubs, associations, not-for-profit and other organisations from transitioning into a CLG when an IA is no longer the most appropriate structure due to growth in membership and commercial activities.

The main benefit of the new process is that the old incorporated association simply ceases to exist eliminating the administrative nightmare of cancelling the ABN, winding up the incorporated association, transferring assets, employees, funding arrangements etc. Everything automatically transfers over to the new Company from the date of Registration.

An IA must apply for the authorisation of the chief executive officer at the Office of Fair Trading in Queensland. The contents of this application must contain the following elements:

1 A written application in the approved form as signed by three members of the association's management committee, one of whom must be the president;

2 The association's certificate of incorporation under the Act;

3 A copy of the special resolution passed by the association approving the application, which the parties signing the application have authority to do so and containing the proposed name under which the association is to be registered under the *Corporations Act 2001*; and

4 A statutory declaration by the association's president stating that all matters in the application are true, the Act and the association's rules have been complied with in respect of the calling and holding of the meeting to obtain the special resolution and any consents required by the association have been obtained before passing the special resolution.

The Chief Executive Officer then either grants or refuses to grant authorisation of the transfer by giving written notice to the IA.

Before undertaking this process, it provides a good opportunity for an IA to reassess its present structure and governance documents in order to ascertain what structure is most appropriate and where their governance can improve.

Importantly, an IA will need to scrutinise its Constitution to ensure it is compliant with the provisions of the *Corporations Act 2001* rather than the state regime prior to making the application.

If you require more information or wish to see how we can help you in this regard, please contact John Mullins on (07) 3224 0210 or jmullins@mullinslaw.com.au.

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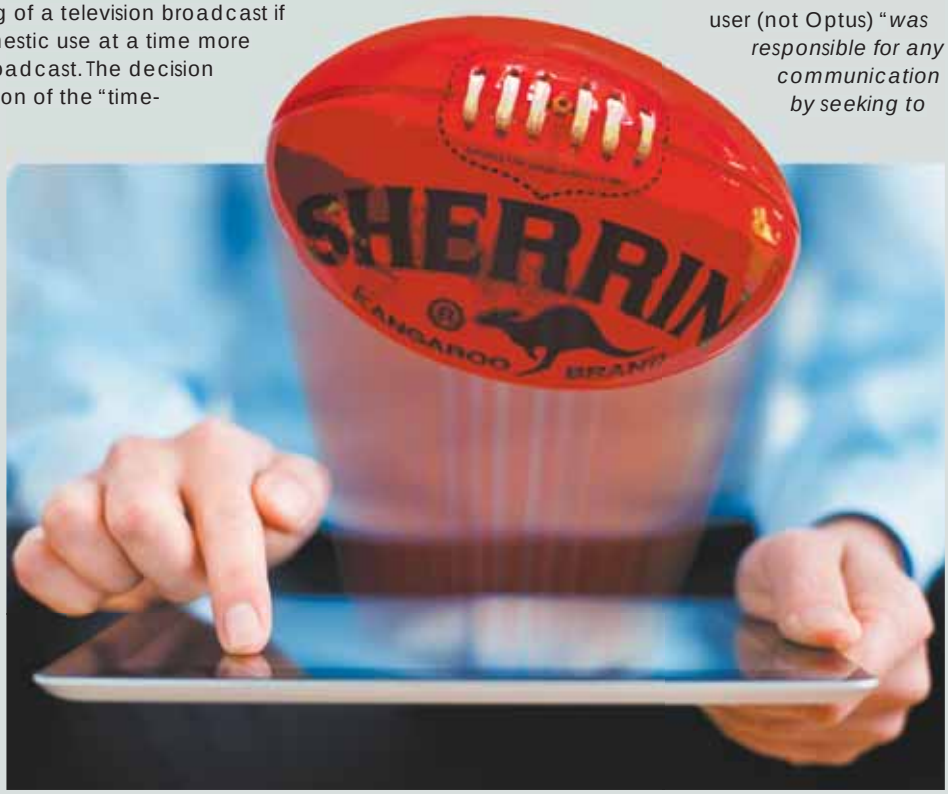
TO THE CLOUD FOR THE AFL AND NRL

ADAM HAMREY

In the recent decision of *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd* (No 2) [2012] FCA 34, the Federal Court of Australia found that Optus' "TV Now" technology did not infringe certain copyright interests in various television broadcasts of Australian Football League (**AFL**) and National Rugby League (**NRL**) games. The Court ruled that the use of the "TV Now" technology fell within the scope of the "time-shifting" defence contained in section 111 of the *Copyright Act 1968* (Cth) which allows for the recording of a television broadcast if it is solely for private and domestic use at a time more convenient to the original broadcast. The decision represents a wide interpretation of the "time-shifting" defence.

"TV Now" is a subscription service that allows Optus users to record free-to-air television programs and replay them on PCs, Apple devices, Android devices and other 3G devices. The recorded programs are remotely stored by Optus and then "streamed" to the respective user. With the exception of Apple devices, the user cannot view the recording until the original broadcast is complete. Apple devices offer a "near live" functionality that allows the user to begin viewing the recording approximately two minutes after the original broadcast has commenced. Users can then replay the recording for a period of 30-days.



The AFL and NRL partnership own the copyright in free-to-air television broadcasts of their respective sports. Telstra has the exclusive right to exploit these broadcasts through its internet and mobile services under licence. During September and October 2011, a combined total of five games broadcast on free-to-air television were recorded and replayed by "TV Now" users. These recordings formed the factual basis of this matter.

In order to obtain a measure of certainty prior to the commencement of the 2012 AFL and NRL seasons, the parties agreed to have, in summary, the following preliminary issues determined:

1. Who did the acts involved in recording the broadcasts? The Court found that the "TV Now" user (as opposed to Optus) made the recordings when they clicked the 'record' button. After considering the advances in technology over the past 20 years, the Court regarded this as being no different from recording on a VCR or DVR device;
2. Did section 111 of the *Copyright Act 1968* (Cth) operate as a defence for the user? The Court found that because the evidence indicated that the respective users had made the recordings solely for private and domestic use for the purposes of viewing the recordings at a more convenient time, the defence operated. This remained the case even in relation to the Apple "near live" functionality;
3. When the user clicked the "play" button, did Optus (or the user) infringe certain copyright interests when the recording was "streamed"? Key issues that needed to be considered here where whether Optus (or the user) electronically transmitted the "recording", or made it available online, to the public by "streaming" it to the user. The Court found that the user (not Optus) "*was responsible for any communication by seeking to play the program that he or she had earlier selected for recording*." The content was individually recorded at the user's instruction and the user was responsible for determining the content of the stream when they selected "play". In coming to this conclusion, the Court distinguished the situation where a person clicks on an internet link in circumstances where they are "*unaware or uncertain of what content may be delivered*". It followed that there was no communication "to the public" as the recording was only streamed to a particular individual user.

There is no doubt the decision of the Federal Court signifies a novel and wide interpretation of the "time-shifting" defence contained in section 111 of the *Copyright Act 1968* (Cth). The decision involves "*significant legal issues and commercial importance*" which have potential wide-reaching effects through the television broadcast industry. Due to these potential ramifications, the parties agreed that leave should automatically be granted for any unsuccessful party to appeal to the Full Federal Court. An appeal has been instituted and is due to be heard on March 14 and 15, 2012.

UPDATE ON GILLARD–WILKIE GAMING REFORM BACKFLIP

MATTHEW BRADFORD

Prime Minister Gillard has announced revised proposals to help address problem gambling, which effectively postpones the core measures previously proposed by Andrew Wilkie MP. The Federal Government has confirmed that it will not impose mandatory pre-commitment by 2014, as previously proposed, but instead will commence an evidence-building process to inform the best way forward with gambling reforms.

This evidence-building process will include a trial of pre-commitment technology, which will probably occur in the Australian Capital Territory.

Other measures that the Federal Government proposes to introduce are:

- Ensuring any new Electronic Gaming Machines (EGMs) manufactured from 2013 are developed to support pre-commitment technology in the future – an indicative timeframe is that most EGMs need to be pre-commitment ready by 31 December 2016;
- Federal Government working with the State Governments to develop improved responsible gambling measures;
- Introducing a daily withdrawal limit of $250 from ATMs in gaming venues from 1 February 2013;
- Warnings and cost of play displays on EGMs by 2016; and
- Unspecified crack downs on online gambling and sports betting.

This is just the current proposal and is subject to ongoing negotiation between the Federal Government and gaming industry stakeholders. For the time being at least, the threat of mandatory pre-commitment and other restrictive measures being imposed without any supporting evidence or research indicating that such measures will reduce problem gambling seems to have been averted.

Framework legislation to codify the above measures is still being drafted and industry should be invited for a briefing and discussion on it when drafts are ready.

At this stage, the hotel and club industries have temporarily suspended their public campaign against the Wilkie proposals, but most venues have left their "*It's Un-Australian*" and "*Won't work, will hurt*" posters and other material in place. Three key issues of concern still remain for the industries, which are the ATM withdrawal limits, the 2016 deadline for all EGMs to have pre-commitment functionality and the issue of Federal intervention in gaming laws and gaming business.

Clearly this is still a live issue that threatens to have a significant impact on the hotel and club industries. Whilst it appears that the Federal Government is now prepared to take a more sensible and evidence based approach to gambling reform, this process is far from complete and the industries do not have certainty regarding future reform.

WHEN A RACING DECISION CAN BE REVIEWED

ANTHONY MESSINA

In certain circumstances, an owner, trainer and jockey may apply to review a decision made by Racing Queensland Limited (RQL)(being the racing industry control body) or the racing stewards.

Chapter 5 of the Racing Act 2002 (Qld) provides that the Queensland Civil and Administrative Tribunal (QCAT) may review the following decisions:

(a) RQL decisions relating to:
  (i) licences;
  (ii) disciplinary actions;
  (iii) exclusion actions; or
  (iv) monetary penalties.

(b) A decision of an appeal committee or steward made in relation to monetary penalties;

(c) RQL decisions prescribed under regulation.

The following decisions cannot be reviewed by QCAT:

(a) Relating to the eligibility of an animal to race, or the conditions under which an animal can race;

(b) Cancelling or suspending the licence for an animal, unless the cancellation or suspension relates to:
  (i) disciplinary action relating to the licence of a licence holder; or
  (ii) exclusion action under the rules of racing;

(c) About a protest or objection against placed animals relating to an incident that happened during a race or trial;

(d) Imposing a penalty of not more than $250;

(e) Relating to a dispute between a racing bookmaker and a punter; or

(f) To stop, restart, re-run, postpone or abandone a race.

QCAT has 28 days after the application is made to start the review, unless special circumstances exist.

A decision under review continues to operate unless QCAT orders that it be stayed pending the outcome of the review.

Following a hearing the review, QCAT may:

(a) Confirm or amend the decision;

(b) Set aside the decision and substitute its own decision; or

(c) Set aside the decision and refer the matter for reconsideration to the decision maker with directions to the decision maker QCAT considers appropriate.

NATIONAL WORK HEALTH AND SAFETY LAWS APPLY TO SPORT

JONATHAN MAMARIL

On 1 January 2012 Queensland passed the *Work Health and Safety Act 2011* and the *Work Health and Safety Regulations 2011*. Queensland is the first state to adopt the National Model Work Health and Safety Laws.

For Queensland employers, in a practical sense, the changes between the previous legislation and the current Act and Regulations are relatively minor. However, there are some conceptual changes that employers, officers of employers and workers will need to reflect upon.

The Act and Regulations apply to the following:

1 A Person Conducting a Business or Undertaking (otherwise known as a PCBU) – including employers, companies, unincorporated associations, incorporated associations, sole traders, some volunteer associations and other "persons" conducting a business or undertaking. A PCBU is the primary duty holder.

2 Officers – including directors, executives, managers and persons who make decisions that affect the whole, or substantial part of the PCBU, or have the capacity to significantly affect the PCBU's financial standing. Officers have positive duties and obligations.

3 Workers – including employees, contractors and volunteers. Workers have personal obligations.

A PCBU has the primary duty to ensure, as far as is **reasonably practicable**, that workers are not exposed to the risk of work related harm. The duty extends to non-workers and in particular the duty will now extend to contractors.

An Officer has a positive duty of due diligence to workers and must take reasonable steps, amongst other things, to:

- Keep up to date knowledge of WHS matters that concern the PCBU;
- Gain an understanding of hazards and risks associated with PCBU operations;
- Ensure there are appropriate resources, policies and processes in place to minimise any risk to health and safety.

Workers will also have their own duties and obligations under the Act, which are based around a worker taking reasonable care of their own and others' health and safety in the workplace.

In Queensland, Workplace Health and Safety Queensland is the regulator of the Act. Actions that may be taken against a PCBU, Officer or worker for a breach of the Act include:

- Improvement notices;
- Adverse publicity orders;
- Criminal charges seeking imprisonment of up to five years against an Officer or Worker;
- Civil proceedings seeking penalties of up to $3 million against a PCBU and/or $600,000 against an Officer or Worker.

To avoid or mitigate the risk of prosecution PCBUs and Officers should ensure there are appropriate workplace health and safety policies, procedures and reporting structures in place.

All steps to show compliance with the Act and Regulations should be documented. In addition, training should be conducted for workers to ensure risks and hazards in the workplace are identified.

Mullins Lawyers can assist in the development of workplace health and safety policies and provide advice on practical steps to avoid or mitigate the risk of prosecution.

Contact: Jonathan Mamaril, Solicitor on 07 3224 0323 or jmamaril@mullinslaw.com.au

JOHN MULLINS
EDITORIAL

Welcome to the first Mullins Sports Newsletter for 2012. This is the 35th edition of this publication. Congratulations to the Gold Coast on being announced as the host city for the 2018 Commonwealth Games. I am confident the games on the Gold Coast will do great things for Sport in the region and in Queensland.

In this edition we deal with a range of topical matters including two significant changes to legislation in relation to Workplace Health and Safety and the Corporate Model.

The changes to the *Workplace Health and Safety Act* (**the Act**) have attracted a lot of attention and generated some concern. Where volunteer/unpaid Directors face prosecution, this is obviously a matter for concern. The changes however to the Act, as they apply in Queensland, are not as significant as they are in other states.

The Act puts a fundamental obligation on officers of sporting organisations to act responsibly and to do things that are reasonably practicable not to expose workers and volunteers to work related harm. This legislation does not change any of the common law rights to compensation for injury. It simply creates a right to prosecute where people have failed to act appropriately.

It may be that within your organisation you need to review your procedures, policies and processes to ensure you are acting appropriately and meeting the high expectations of the Act.

The other significant legislative change detailed in this newsletter relates to converting an Incorporated Association to a Company Limited by Guarantee. The most significant aspects of this change is that it does not require the Incorporated Association to wind up and the entity simply converts from an Incorporated Association to a Company retaining the same legal entity through the process.

Mullins Lawyers has also dealt with the two matters that have received significant headlines - being the current situation with respect to gaming reform and the Optus win in relation to the right to broadcast certain sport. The appeal of the Optus matter is due to be heard in the Federal Court in March, so we certainly haven't heard the last of these matters.

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