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THE COMMONWEALTH IS KING OF THE CASTLE IN PLAIN PACKAGING

ANDREW NICHOLSON

A little bit of "The Castle" recently came to the High Court. However, unlike the classic Australian comedy film, this was not a case of little Aussie battler making good. Rather, it involved multi-national tobacco companies taking on the Commonwealth in relation to their intellectual property rights on the packaging of products following recent amendments to the plain packaging legislation (*Tobacco Plain Packaging Act* 2001).

Similar to The Castle, the central issue in the case was whether there had been an "acquisition of property on just terms" (under section 51(xxxi) of the Constitution). In the end, the High Court, in the words of Darryl Kerrigan, told them "they're dreamin" and dismissed the appeal.

The Tobacco companies argued that the Commonwealth had acquired the space on their packaging, on which they are now largely prohibited from advertising. Some of that space is now required to be used for health warnings, including graphic images of health conditions.

They also asserted that they had various other rights which were affected by the legislation, including:

- Registered and unregistered trademarks;
- Copyright (artistic and literary works on the packaging);
- Get-up (trade dress);
- Reputation and goodwill;
- Registered design (ribbed cigarette packet);
- Patent rights (printing on and sealing packets).

In reaching its decision, the High Court confirmed that the rights claimed (including goodwill) amounted to proprietary rights or property which were capable of acquisition.

However, the Court held that the effect of the legislation was more properly regarded as the extinguishment of a right (to advertise on the packaging) rather than an acquisition by the Commonwealth of the space on the packaging. As there was no acquisition, it did not matter whether it had occurred "on just terms".

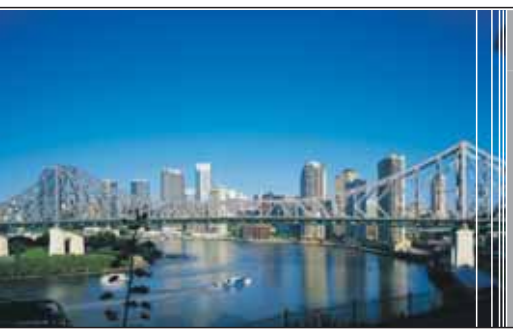
Although most businesses do not aspire to be a multi-national, the case serves as a useful reminder of the types of intellectual property which may exist within a business no matter what the size. The Court recognised the various claims for intellectual property rights. Even though the Tobacco companies were ultimately unsuccessful, that was largely due to the unique nature of the legislative regime.

Prudent businesses should regularly review or audit the IP which they are creating or have generated. Once the IP has been identified, steps should be taken to protect its commercial value, where necessary.

We are also seeing a number of instances where businesses need to review their structure to ensure that it is consistent with their IP (asset protection) strategy.

If you don't fix those matters, the Court will not do it for you. If left to chance, you may have no better argument (ala Dennis Denuto – apologies to those who have not see the movie) than "it's the vibe of the thing, your Honour".

Regular audits should be conducted to ensure that your rights do not go up in smoke.



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NEW GOVERNANCE STANDARDS FOR CHARITIES

AMBER NIPPERESS

On 1 March 2013 the Governor General endorsed the Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No. 1) (Cth) (**the Regulation**). The Regulation amends the Australian Charities and Not-for-profits Commission Regulation 2013 (Cth) to specify governance standards, which entities registered with the Australian Charities and Not-for-profits Commission (**ACNC**) must comply with to remain registered. The Regulation provides a minimum level of requirements designed to assure the public that registered entities meet community expectations in relation to how a registered entity should be governed and to operate in an effective and transparent manner.

What do the new governance standards provide?

The standards are "principle-based" rather than prescriptive. They do not specify what a registered entity must do or how to comply. The steps a registered entity will need to take to comply with the governance standards will vary according to its particular circumstances, such as its size, the sources of its funding, the nature of its activities and the needs of the public, including members, donors, employees, volunteers and benefit recipients of the registered entity. The ACNC intends to publish detailed guides to assist entities in complying with the standards. The standards deal with five (5) key areas, as follows:

1. Purpose and not-for-profit nature of registered entities;
2. Accountability to members;
3. Compliance with Australian laws;
4. Suitability of directors; and
5. Directors' duties.

When will the governance standards commence?

The Regulation commenced on 1 July 2013, having been approved by the Senate on 25 June 2013. The late approval was due to notice of a motion to disallow the Regulation, given by Senator Fifield on 21 March 2013. The notice was subsequently withdrawn on 27 June 2013. While a 1 July commencement date does not provide much notice for registered entities, the Regulation provides a sufficient transitional period for compliance with the new governance standards.

Registered entities must comply with the governance standards as far as possible without breaching their own governance rules. Where an entity's rules prevent it from complying, it will have an exemption from having to comply until 1 July 2017, thus giving the entity time to amend its rules accordingly.

FRAUDULENT BEHAVIOUR IN THE WORKPLACE

TRACEY JESSIE

In the workplace "fraud" may be defined as dishonestly obtaining a tangible or intangible benefit, or causing a loss, by deception or other means.

Workplace fraud includes:

- misappropriating money;
- changing or falsifying documents;
- falsifying signatures;
- deliberately providing false information to the employer; and
- mis-using the employer's assets.

We have recently seen an increase in allegations of fraud relating to employees' expense claims, timesheets and hours of work. We have also noticed an increase in allegations of fraud where employees have taken steps to attempt to cover substandard performance or conduct, perhaps to avoid disciplinary action.

While fraud in any workplace is unacceptable, an employer must not dismiss an employee on a mere suspicion that the employee has engaged in fraudulent behaviour. Before making a determination an employer must conduct a fair, thorough and impartial investigation and give the employee a reasonable opportunity to respond to the allegations. If an investigation is not undertaken, or if it is not undertaken properly, an employer may be exposed to an unfair dismissal claim by a former employee.

The *Fair Work Act 2009* (Cth) lists a number of factors that the Fair Work Commission must consider when determining whether a termination was harsh, unjust or unreasonable. The Commission must consider, for example, whether an employee was given an opportunity to respond to issues relating to their capacity or conduct before the employer terminates the employee's employment because of those issues.

In *Mourilyan v James Hardie Australia Pty Ltd* [2010] FWA 9672 an employee was dismissed for "fraudulent conduct" following an unplanned absence which the employee described as a "sickie" although the employee was not ill.

During the hearing the employee presented evidence that he was caring for his sick wife on the day and had used the phrase "sickie" to describe this personal leave. The employee forgot to file the appropriate leave form with the employer.

The Fair Work Commission determined that there was no valid reason for the dismissal. The Commission found the employer had not thoroughly investigated the "fraudulent conduct". It was determined that a proper investigation would have concluded that an employee of 61 years of age with no previous warnings should have been given the benefit of the doubt. The Commission concluded that:

- an employee may make honest mistakes; and
- before an employer concludes that an employee has engaged in fraud or dishonesty the employer must have evidence to support that determination.

By undertaking a fair, thorough and impartial investigation before reaching any conclusions an employer may significantly minimise risk and liability.

BOB JANE'S FAMILY DISPUTE

MICHAEL KLATT

As an advisor member of Family Business Australia I attended the State Conference held at Norwell Driving Centre in May of this year. Family Business Australia was formed to support the family business sector, the backbone of Australia's economy and has over 2,500 family businesses associated with it.

It was appropriate, given the location of the State Conference, that the case study, the theme of the State Conference, was Bob Jane's family story. Delegates to the conference viewed snippets of the "Family Confidential" television series featuring interviews with Bob Jane, his son Rodney Jane and other family members. The message from the day was that it is important to properly plan and document family business arrangements. Blended families, in particular, introduce further complexities to the planning process.

Bob Jane's legal battles have been widely reported. The ABC broadcast the Family Confidential episode on 22 November 2010. At the time, Bob had just gone through a messy divorce with his ex-wife, Laree. Bob Jane had, through his companies, reportedly invested $100 million in the redevelopment of the Calder Park Motor Raceway into an American style motoring thunderdome in Melbourne Victoria. It was reported that his companies were on the brink of bankruptcy as a result of this investment and that he transferred the business to his son, Rodney, who is now the face of Bob Jane T Marts. Many have suggested that Rodney saved Bob Jane Corporation and the associated companies.

Unfortunately, Bob accused Rodney of taking advantage of him after he had suffered a stroke in 2006 and using his illness to force Bob out of the company and "wipe out his $100 million empire". Bob sued his son for almost $2.9 million which he said he loaned Rodney. Rodney alleges that $520,000 of a payment to him was a gift and a further $2.4 million used to buy corporate office space in Melbourne was repaid in full.

Blended families, in particular, introduce further complexities to the planning process.

It is good practise for families in business to ensure they have appropriate documentation in place to protect them, including family constitutions, shareholders agreements, employment agreements and that they bring some structure to their business relationships.

Many families leave it until a dispute arises to document their arrangements. This leads to costly disputes played out in Court and in public, which is not in the best interests of the business or the family.

FRANCHISING – TIME FOR A REVIEW

ANDREW NICHOLSON AND REBECCA ROACH

The latest review of the Franchising Code of Conduct (**the Code**) has been released by the Minister for Small Business, Gary Gray (**review**).

The review addresses three key issues and considers the success of reforms that followed previous reviews of the Code in 2008 and 2010.

1. Good Faith

The review recommends that all parties be registered to act in good faith in negotiation, performance and resolution of disputes. Parties would have to act in good faith and not be able to contract out of this obligation. The review gives examples of behaviour which may not be in good faith such as unfairly competing with franchisees in online environments; and forcing the franchisee to buy (overpriced) goods from the franchisor, which brings the Code more into line with the general law.

Disclosure

There are a number of recommendations to improve and strengthen the current disclosure regime, including:

- removing short form disclosure;
- franchisees right to conduct and benefit from online sales; and
- requirement for franchisor to provide a short summary of key risks when entering into a franchise.

2. Franchisee's rights at end of Agreement and Termination

The review suggests that franchisees and franchisors should have the right to terminate the franchise agreement if the other party goes into administration and does not turn the business around or find a buyer within a reasonable time. The review also recommends a prohibition of franchisors from enforcing restraint of trade clauses after the expiry of a franchise term except in certain circumstances.

3. The Operation of the Competition and Consumer Act in enforcement of the Code

It is proposed that the ACCC be given the ability to enforce civil pecuniary penalties up to $50,000 for breaches of the Code. Presently, enforcement of the Code is largely limited to court proceedings, which has been criticised as being slow and ineffective. The review also recommends that the ACCC have its random audit powers expanded to enable it to obtain and inspect documents from franchisors to ensure compliance with the Code.

Further Recommendations

A number of other recommendations were made including:

- franchisors not requiring unforeseen capital expenditure;
- further regulation on the use and management of marketing funds; and
- prohibition on franchisors requiring franchisees to pay legal costs of disputes, unless under court order.

If implemented, the recommendations would introduce the most significant amendments to the Code to date. Most franchisors will need to review their relationships with franchisees to ensure compliance with the revised Code.

The Federal Government has released a consultation paper on the review. However, it appears that the proposal is a further significant advancement of the Code, which is generally supported by both major parties.

CATHOLIC CHURCH RESPONSE **TO ROYAL COMMISSION**

PAT MULLINS

In response to the Royal Commission into Institutional Sexual Abuse, the Roman Catholic Church has established a body called the Truth Justice and Healing Council, (**TJHC**). This is quite a unique body in the history of the Catholic Church. The Council will coordinate the response the Church makes to the Royal Commission, which will be a "whole of Church response". For those outside the Catholic Church, such a body might seem unremarkable. From where I sit within the Church, it is quite remarkable indeed.

The Catholic Church is far from a monolithic organisation. In Canon Law each of its Dioceses is considered a separate legal entity; what the Code of Canon Law describes as a "Juridical Person". It is akin to a company or corporation in civil law terms. A Bishop has the power of governance of his own Diocese. This is consistent with a principle of territoriality. The majority of its clergy are attached ("incardinated") to a Diocese.

Some clergy are members of Religious Orders, Congregations or Institutes. These are incardinated within their Order, Congregation or Institute. Religious Brothers and Sisters are not clerics, but profess vows within their Order, Congregation or Institute. Each Order, Congregation and Institute is also a Juridical Person in Canon Law. They are (generally) independent of any Diocese or Bishop. They are really self-governed. This is an exception to the territoriality principle.

... such a body might seem unremarkable. From where I sit within the Church, it is quite remarkable indeed.

That each Australian Diocese through its Bishop and the vast majority of Religious Orders, Congregations and Institutes have agreed to be part of this one "whole of Church response" is itself an achievement for the Australian Church. In dealing with the Royal Commission, TJHC will (apparently) exercise a limited power of governance (for the Juridical Persons within the Church which it will represent before the Royal Commission).

There are two Diocesan Bishops on the 13 person TJHC. There is one Religious Sister. The remaining members are lay persons. There is a good gender balance within the lay members. It is unprecedented in Canon Law for lay persons to share the power of governance in this way. However Canon 228 of the Code of Canon Law says that "Lay persons who excel in necessary knowledge, prudence and integrity are qualified to assist the pastors of the Church as experts and advisors". It is sensible for the Church to include expert lay people on the TJHC in such numbers.

DAVID WILLIAMS
EDITORIAL

The financial year 2013 has now come to an end and for most of us it has been a continual challenge made more difficult by our political masters not confirming the election date. It is evident from our firm's involvement in Queensland Leaders that business owners and operators we are speaking to are becoming more confident in regards to improved business climate but the uncertainty at the Federal Government level is the sole factor restraining the implementation of any growth strategies.

Political parties of whatever persuasion must come now to the realisation that if the recovery of confidence post the GFC and the mining boom has any chance of blossoming, governments need to stop overregulating and suffocating business decisions.

We all now realise we live in a totally different economic environment to the environment we operated in prior to the GFC. The life cycle to do business with financial institutions is also lengthening and if you are contemplating taking up new financial facilities you need to move earlier. This means you need to telegraph your intention much earlier to ensure that those facilities are available when you need them

Until certainty is returned to the political arena, the 2014 financial year will again be challenging. What business owners and operators are seeking from governments of all persuasions is less interference which allows business to get on with business. If this is the touchstone of government post the election, then I am confident the light at the end of the tunnel is not another train coming but genuine sunshine. Let us all pray. Best of luck.

mullins LAWYERS

Level 21, Riverside Centre
123 Eagle Street
Brisbane Qld 4000

GPO Box 2026
Brisbane Qld 4001

Telephone 07 3224 0222
Facsimile 07 3224 0333
email: contactus@mullinslaw.com.au
www.mullinslaw.com.au