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newsletterofthelaw

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This edition contains topical stories in our areas of practice, and brings you up to date with important additional services we can provide you.

Avoiding Off the Plan Purchase Contracts

With the collapse in asset values around the world and property values declining with them, we are often asked by clients, to advise if they can avoid 'off the plan' purchase contracts which may have been signed months or years before.

Mr Peter Lee of our office has advised many clients recently on just this issue. In one recent case a contract was avoided for a strata title purchase, where the asset value was many tens of thousands of dollars less than the purchase price on the contract. That client has now secured the same property by way of a lease on favourable terms, saving themselves a great deal of money and financial problems into the future.

Recent changes to the Property Agents & Motor Dealers Act and the Body Corporate and Community Management Act combined to make it really quite difficult for sellers to have an enforceable contract. These Acts are very prescriptive in requiring a Warning Statement under both Acts to be attached as the first and second sheet respectively in the contract.

'The Act even prescribes the size of the font, the wording of the warnings and other relatively petty issues. However non-compliance is anything but petty and gives the buyer a right to terminate the contracts.' Mr Lee said.

'Further these Acts even prescribe what must be said by the seller or its agent when handing the contract to the buyer in draft form for execution. They must bring the warning statement, the disclosure statement and the contract to the buyer's attention. If the contracts are sent by post then a letter doing this must be enclosed. If the contracts are sent by email or fax there are different

prescriptive rules as to what must be said, the order of documents and how they can be sent.' Mr Lee said.

'To make compliance even more difficult the Government changes these forms regularly, often without warning. We are now up to version 5. Use of an old version of the Warning Statement is fatal.' Mr Lee said.

'As if that is not difficult enough, once the contracts are signed by the seller and sent to the buyer or their lawyers another different set of prescriptive rules apply. These cover the wording of delivery, the wording of letters, the order of documents by fax and email and other prescriptive rules. Once again even technical non-compliance is fatal.

'When you add to that, the many issues of general contract law, such as, proper execution, delivery, notice, proper authority, uncertainty and breach of the various conditions, there are a wealth of opportunities whereby purchase contracts can be avoided.' Mr Lee said.

'To further help reluctant purchasers, there have been a number of court cases enforcing the strict wording of the law. In some cases the interpretations have gone against popular practice of their time, so contracts which pre-date those court decisions, or contracts prepared by agents who are unaware of them, will be vulnerable to termination.' Mr Lee said.

If you have an off the plan purchase contract or a long term contract with which you would rather not proceed, please contact us urgently. We can advise you on these issues for a fixed cost, which is usually less than 1% of the purchase price on the contract. Please call Peter Lee or Jon Vuong for advice on this topic on 3435 4200.

What's inside...

Donut King fined over breaches

A Donut King outlet has been fined after significantly underpaying its staff, serving as a warning to the rest of the retail industry.

Landmark decision for the franchising industry

A High Court decision helps to clarify the enforceability of franchise agreements.

Trademark Prosecution. Lack of Knowledge no defence

Not knowing the law was no excuse for a company caught importing counterfeit products.

Truckies win historic case

A recent Federal Magistrates Court decision favours three independent contractors who were treated unfairly.

Filmmakers scare neighbours with gun scene

Melbourne filmmakers are likely to be charged after staging a gun scene which prompted a neighbour to alert the police.

Flight crew sacked over Facebook slur

Virgin Atlantic has sacked 13 of its cabin crew after they criticised passengers on Facebook.

Ombudsman appeals decision

The Workplace Ombudsman has appealed against a Federal Court decision on a company that allegedly evaded its redundancy obligations.

De facto relationships re-defined

New amendments to the *Family Law Act* could affect married people having affairs, polygamists and anyone who has had a series of de facto relationships.

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Vietnamese

P.M. Lee & Co NOW boasts Jonathan Duc Vuong a lawyer fluent in Vietnamese. Please call if this service be of use to you or your colleagues.

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.

Landmark decision for the franchising industry

A recent highly anticipated High Court decision sends a clear message to the franchise industry that a minor breach of the *Franchising Code of Conduct* by a franchisor does not automatically render a franchise agreement unenforceable.

In *Ketchell v Master of Education Services*, the High Court overturned a 2007 NSW Court of Appeal decision which held that a franchise agreement was illegal and unenforceable if a franchisor did not obtain a written statement from its prospective franchisee stating they had read and understood the proposed franchise agreement and the Code in accordance with the requirements of Section 11 of the Code.

The High Court's decision has been welcomed by the industry as it provided much needed clarification for both parties.

The original decision would have had far reaching ramifications, allowing any disgruntled franchisor or franchisee to rely on a technical breach of the Code to dodge their contractual obligations.

Importantly, the decision does not mean either party can blatantly disregard their obligations under the Code, but rather provides security for both parties that an inadvertent or technical breach of an agreement may not render it null and void.

If there has been a breach of the Code, the aggrieved party will still be able to seek an appropriate remedy, in accordance with its rights to do so under the *Trade Practices Act*. Remedies would include variation of the terms of the relevant franchise agreement, termination of the agreement or compensation for loss and damage suffered as a result of the breach of the Code.

The Ketchell case had added significant pressure to the pre-agreement phase for franchisors and could have led to an influx of franchisee claims over their agreements.

The message to franchisors remains the same, make sure you are compliant and for franchisees, carefully consider any agreement and seek legal advice to make sure your franchisor is compliant.

Flight crew sacked over Facebook slur

Virgin Atlantic has sacked 13 cabin crew staff after they criticised some of the British airline's passengers on the social networking website Facebook.

The airline opened an investigation on October 23 following complaints from passengers and other Virgin staff members over the crew's Facebook discussion.

"It was found that all 13 staff participated in a discussion on the networking site Facebook, which brought the company into disrepute and insulted some of our passengers," Virgin Atlantic spokesman Paul Charles said.

"There's a time and a place for Facebook. But there's no justification for it to be used as a sounding board for staff of any company to criticise the very passengers who ultimately pay their salaries."

Mr Charles said the web discussion had been removed from Facebook, though he was unable to say whether that had been done by Facebook or a cabin crew member.

Shine warns of treadmill danger

Attorney-General Kerry Shine has warned Queensland parents to keep their children away from treadmills after some 50 children have been treated in hospital over the last five years for injuries sustained on the exercise machines.

This represents a significant increase, compared to only six injuries during the previous five-year period.

"Over a third of the injured children were so severely burnt they required skin grafts," Mr Shine said. He said the increase in severe friction burn injuries in small children could be attributed to the recent gain in popularity of in-home treadmills.

"Children under four years of age are most vulnerable. A typical injury is sustained from reaching under the treadmill while someone else is operating it.

"The injuries are exacerbated if the child gets trapped under the treadmill, which has happened in 67 percent of cases."

Mr Shine said Queensland would support any recommendations from an investigation into the increase in injuries to small children using domestic treadmills being undertaken by the NSW Products Safety Committee.

PM Lee & Co Services

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Trademark Prosecution. Lack of Knowledge no Defence

Selling and importing counterfeit products can bring strong criminal penalties

Overview

A recent decision of the Court of Appeal of the Supreme Court of Victoria is good news for owners and licensees of trade marks in Australia, particularly trade marks that are well-known and often targeted by counterfeiters.

The decision has clarified the tests to be applied in determining whether there has been a contravention of the criminal offence provisions of the *Trade Marks Act 1995* (Cth). The decision confirms that it is not necessary to prove that the accused knew that his or her conduct was unlawful or wrong. Instead, it must be proven only that the accused committed the relevant acts either intentionally or recklessly.

As a result, it should now be easier to successfully prosecute persons involved in the importation and sale of commercial-scale quantities of counterfeit products.

The criminal offence Provisions of the Act

Counterfeit products are those to which a trade mark has been applied without the permission of the owner or licensee of the trade mark. Counterfeit products typically involve well-known brand names applied to "look-alike" fashion or luxury goods.

Part 14 of the Act sets out a number of criminal offences which are aimed at those engaged in the production, importation or supply of counterfeit products, and related activities. The penalty for each of these offences can include a substantial fine (up to \$55,000) and imprisonment (for up to two years).

These penalties should provide a greater deterrent to dealing in counterfeit goods than the trade mark infringement provisions in the Act – the remedies for which are limited to injunctions and damages or account of profits. However, the effectiveness of these provisions has been called into question in recent years following several unsuccessful attempts to

prosecute people for these offences.

A particularly problematic issue in these cases has been that courts have interpreted the provisions as requiring that the accused person knew that, or at least was reckless about whether, his or her conduct was a criminal act or contravened the law. The difficulty of establishing this beyond reasonable doubt has limited the effectiveness of these provisions.

Facts of this case

In 2004, the Australian Customs Service intercepted three shipping containers imported into Australia from China and found thousands of suspected counterfeit goods. Following investigations conducted by the Australian Federal Police, the directors of the company that had imported the goods were charged under section 148 of the Act with importing goods and exposing them for sale knowing that, or reckless of whether or not, a registered trade mark was falsely applied to them or in relation to them.

During the trial in the County Court of Victoria, the judge ruled that, in order to make out the offences charged, it was necessary for the Crown to prove that the accused knew that what they were doing was wrong. For example, the judge directed the jury as follows:

"The Crown would need to prove beyond reasonable doubt that assuming those matters (i.e., that the accused had imported and exposed the goods for sale and that the goods were counterfeit) were proved, that each accused individual was aware that it was wrong. That is, unlawful in a criminal sense. If you like, as opposed to a potential for a civil liability. They have to know it is a criminal offence."

The jury returned verdicts of not guilty on each count.

The Commonwealth Director of Public Prosecutions (DPP) appealed to

the Court of Appeal of the Supreme Court of Victoria, seeking clarification as to the elements of an offence under section 148 of the Act and, in particular, whether those elements included that the accused had knowledge, awareness or a belief that the conduct was unlawful in a criminal sense or wrong according to the ordinary standards of men.

Decision by the Court of Appeal

The Court of Appeal found in favour of the DPP. It held that the offences under section 148 of the Act, with which the accused had been charged, did not require proof that the accused knew his or her conduct was unlawful or wrong.

The Court of Appeal stated the elements of the offences as follows:

- the accused must have intentionally exposed the goods for sale or imported the goods (as the case may be), and
- the accused must have known that, or been reckless about whether, a registered trade mark had been falsely applied to the goods, or in other words that the goods were counterfeit.

The Court of Appeal cited longstanding High Court authority in support of its conclusion that it was not an element of "criminal responsibility" that the accused person knew that what he or she was doing was unlawful.

The decision should pave the way for more straightforward prosecutions of those dealing in counterfeit products and hence restore the full deterrent effect of the provisions in Part 14 of the Act.

Endnotes

- *Commonwealth Director of Public Prosecutions Reference No 1 of 2008* [2008] [VSCA] 214.
- *The relevant provisions are sections 145, 146, 147, 148 and 150 of the Act.*

Donut King fined over breaches

A Donut King outlet which deliberately underpaid ten of its casual staff has been fined \$30,000.

Federal Magistrate Philip Burchardt said a proper penalty was important as a deterrent, noting that breaches of workplace laws were "regrettably rife in the retail industry".

The Workplace Ombudsman alleged the company and director Kenneth Lui had failed to pay weekend, public holiday and night-shift penalties, overtime rates, annual leave and did not provide meal breaks to some staff.

The Workplace Ombudsman claimed that, after the contraventions were identified, the company further breached the *Workplace Relations Act* by lodging Australian Workplace Agreements (AWAs) which employees had not seen, signed or agreed to.

If you're unsure of your rights and responsibilities in the workplace, contact your local solicitor.

De facto relationships re-defined

Philandering husbands could soon be ordered to pay their mistresses "maintenance" after an affair ends thanks to a new shake-up of Australia's family law.

Under the *Family Law Act* reforms, de facto partners together for two years will get the same rights as married couples to seek "spousal maintenance" claims. Maintenance, as distinct from child support, may be ordered when the other party is "unable to support herself or himself adequately" following separation.

But legal experts warn the amended Act opens the definition of a de facto couple to wide interpretation.

It prescribes a de facto relationship as an opposite-sex or same-sex couple "living together on a genuine domestic basis." Yet it also stipulates that a de facto alliance can exist even if one of the partners is legally married to somebody else or in another de facto relationship.

In another twist, the laws shape as a threat to polygamist husbands. Queensland Law Society family law chair Julie Harrington said: "In polygamy, you have only one marriage that's recognised, so you have wives two, three and four as the de factos. At least those women will now have some rights which they otherwise didn't (have) under the *Family Law Act*."

Ms Harrington said the new laws could also create a debt nightmare for others, who now face the possibility of ongoing spousal support to a string of previous de facto partners.

With married couples, maintenance orders generally end when the ex-partner receiving the money remarries. De factos will come under the same rules if they marry a new partner. But no explicit provision exists in the legislation for maintenance payments to stop should a recipient enter a new de facto relationship.

"Young people might have a series of short de facto relationships - and they're potentially up for paying spouse maintenance for several," Ms Harrington said.

However, a spokesman for federal Attorney-General Robert McClelland said that in this situation the payer would be entitled to head back to the family courts to show "just cause" for discharging or varying the order.

To learn how the family law changes could affect you, contact your local solicitor.

Truckies win case

A recent Federal Magistrates Court decision that found in favour of three truckies sends a stern warning to businesses that treat independent contractors unfairly.

The court found in favour of three owner-drivers (Keldote Pty Ltd, L&D Lowe Transportation Pty Ltd and Tambo Walters Pty Ltd) in an action against Riteway Transport Pty Ltd.

In early 2007, Riteway told the three owner-drivers, central to the company's Sydney-to-Melbourne operations, that they would have to replace their single trailers with new b-doubles.

The company offered each of the three drivers compensation that was less per round trip than the additional costs associated with running the new trailers and less than the amount requested by the drivers to cover their costs.

Section 12(1) of the *Independent Contractors Act* allows an

application to be made to the court to review a services contract on the grounds that it is unfair or harsh.

In his judgment, Federal Magistrate Cameron concluded that the contracts were unfair.

The reason was that the contracts entitled Riteway to impose unilaterally, and without making financial compensation to the applicants, a significant change to the equipment required to service the contracts.

This is a historic judgment - the first substantive action brought for an unfair contract under the *Independent Contractors Act*.

Federal Magistrate Cameron has amended the contract with the truckies to limit Riteway's power to require the owner-drivers to provide new vehicles.

Damage costs are still under consideration.

Filmmakers scare neighbours

Four filmmakers were arrested after neighbours mistook an armed confrontation for the real thing.

Police cordoned off an apartment building and blocked streets in Carlton in Melbourne's north at 10.40pm after a woman told police she'd seen a man with a gun, the Herald Sun reported.

"Police went to the apartment block on Canning St and saw a man pointing a firearm at the head of another," police spokesman Wayne Wilson said.

"The area was cordoned off and even the critical incident response team was called in to arrest those involved."

Senior Constable Wilson said it was only when officers found the filming equipment that they realised it had all been an act.

The men were arrested and are likely to be charged with firearms offences and creating a public nuisance.

"Under the Act, if you think it's a firearm, it's a firearm," Senior Constable Wilson said.

"They hadn't notified any persons what they were doing down here today, there were no permits," Senior Sergeant Stephen Cooper said.

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