MULLINS business

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Sharing **Live Earth**

ANDREW NICHOLSON

A recent case has again highlighted the need for business (no matter what size) to do their homework when developing a name, brand, logo or image to ensure that it does not clash with others.

The Live Earth concert series generated both a massive amount of worldwide publicity for the environment and a small amount of litigation. The latter was in the form of an action commenced by Live Earth Resource Management Pty Ltd ("LERM"), a small Western Australian business which advertises that its "primary aim is to provide innovative, environmentally focused products and services … with particular emphasis on pollution management, safety and structural enhancement".

LERM had registered a trademark containing the words "Live Earth" on either side of a globe. It alleged that the mark being used by the organisers of the concert series (which also prominently featured the words "Live Earth"), infringed that registered mark. LERM sought to prevent the use of the mark by obtaining injunctions. Of course, having registered its trademark, LERM is entitled to prevent the unauthorised use of a mark which is either identical or deceptively similar to its own.

The case highlights some of the difficulties which may be faced when seeking injunctive relief, particularly in relation to intellectual property matters. It is settled law that an Applicant for an interlocutory injunction must show that:

1. the Applicant has a prima facie case. Often that is expressed, as the Applicant must show that there is a sufficient likelihood of success at trial;
2. damages is not a sufficient remedy;
3. the balance of convenience favours the granting of an injunction. That was expressed by the Court as whether "there will be a hardship on one side or the other".

In applying each limb of the test, the Court found that, the Applicant had established a prima facie (albeit not a strong) case. Although there were differences between the parties' respective marks the prominent use of the words "Live Earth" was sufficient to satisfy the Court that the Applicant might succeed in its claim for infringement of its trademark.

The second limb has often been expressed to be an element of the third. That is, in assessing whether the balance of convenience favours granting an injunction, the Court should consider whether damages alone is adequate compensation. If so, then the balance of convenience is unlikely to favour the grant of an injunction. The Court found that the orders sought by the Applicant would "detract from the effectiveness of the Respondent's activities in a way that would be difficult to quantify and probably impossible to compensate by any monetary relief". Accordingly, the Court declined to grant the injunction on the balance of convenience, taking into account the remedies sought.

It should not be assumed that the organisers of the concert series succeeded just because they had more corporate muscle. The Court gave serious consideration as to whether the injunction ought to have been granted.

Interestingly, the Respondents argued that the Live Earth concert series and the immense publicity that has surrounded it would benefit the Applicant as, once the one-off concert series was over, the ongoing recognition of the name would raise the Applicant's business profile. That may yet prove to be correct. Only time will tell.

There are two morals:

1. Choose your name/brand carefully and undertake all necessary searches and inquiries before spending valuable time and money on marketing your brand, irrespective of the size of the organisation; and
2. Think carefully and make a considered assessment of all aspects of your case in deciding whether to apply for injunctive relief.

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AWA's Out the Back Door

NIGEL INGLIS

The Rudd Labor Government has released further details about its proposed new workplace relations system for Australia as part of its Forwards with Fairness reforms.

Key features include:

- A new no disadvantage test to replace the current fairness test
- The abolishment of AWAs
- Provision for the AIRC to commence the award-modernisation process
- The removal of the need for employers to provide new employees with the Fact Sheet and
- The introduction of an enforceable safety net that the Government claims will protect fair minimum wages and conditions for all employees.

This article focuses on the Government's safety net, which it says will be in two parts:

- 10 National Employment Standards (NES) in legislation - which will apply to all employees and
- Modern awards, which may provide industry-relevant detail and build on the NES (to ensure a fair minimum safety net for the employees covered by the modern award) and may contain up to a further 10 minimum standards which can be tailored to the industries and occupations to which they apply.

The Government says the NES represent key minimum entitlements for all employees in the new system, and they will be guaranteed in legislation so that they cannot be excluded or modified in a way that undermines the safety net.

The matters dealt with by the NES are:

- Maximum weekly hours of work
- Requests for flexible working arrangements
- Parental leave (and related entitlements)
- Annual leave
- Personal/carer's leave and compassionate leave
- Community service leave
- Long service leave
- Public holidays
- Notice of termination and redundancy pay
- Fair Work Information Statement.

The NES do not deal with minimum wages, as these will be protected by modern awards and in a manner that ensures that all employees have the benefit of a minimum wage.

Interaction rules

It is proposed that the NES will be legislated minimum entitlements that cannot be excluded or modified to the detriment of an employee by a contract of employment or another industrial instrument (such as a modern award or workplace agreement).

It will always be open to an employer to offer an employee, by way of contract or agreement, entitlements that are more generous than those contained in the NES. This is consistent with the NES being a minimum entitlement.

How do the NES interact with modern awards?

It is proposed that modern awards will be created by the Australian Industrial Relatives Commission (AIRC) over the period leading up to 1 January 2010, to commence on that date.

It is intended that modern awards will complement the NES to guarantee a safety net of fair minimum wages and conditions for employees who are covered by the award system and will contain minimum terms and conditions of employment for particular industries and occupations in relation to 10 matters including minimum wages, penalty rates, overtime and allowances.

The proposed NES entitlements are different from award entitlements and will be separately enforceable. It is not intended that NES entitlements will be included in modern awards as a matter of routine, although the AIRC will have discretion to replicate a provision of the proposed NES where it considers this essential for the effective operation of a particular provision in a modern award. A modern award may of course cross-reference the provisions of the NES.

Although the NES cannot be modified or excluded in a workplace agreement, terms and conditions of employment contained in modern awards may be varied or excluded in a workplace agreement subject to the workplace agreement meeting the "Better Off Overall Test" that will be conducted by the new independent umpire, Fair Work Australia.

The Government has sent a clean message that a shift back towards enterprise level bargaining focused on collective-agreement making, with these proposed changes.

Saving Super

NIGEL INGLIS

Long overdue changes to the Corporations Law will now see employees of companies that go "belly up" having a greater chance of securing their superannuation entitlements.

For any companies that go into administration, receivership or administration from 31 December 2007, the superannuation of employees will rank equally with other employee entitlements such as wages and annual leave.

This is a significant step forward for employees that fall victim of circumstances that are often outside their control.

Nigel is a Workplace Relations solicitor in our Business Services Team. He can be contact on (07) 3224 0364 or by email.

Does Your Policy **Bite?**

NIGEL INGLIS

Workplace polices and employees: when will workplace policies be incorporated into an employee's employment contract?

Although the answer to this question invariably turns on the specific circumstances of the case, a recent decision of the New South Wales Court of Appeal (NSWCA) provides some guidance for employers.

In Willis v Health Communications Network Ltd (HCN), Willis was employed as the CFO of HCN in 1999. In 2005 HCN was taken over by Primary Health Care Limited. Willis was dismissed after a management review had been completed post acquisition. Willis claimed that he was entitled to a redundancy payment.

The Court noted that as a matter of fact Willis probably was made "redundant" and that HCN had a redundancy policy. However, because the redundancy policy was not a term of his employment, HCN could not be compelled to make a payment for the "redundancy".

Specifically, the NSWCA held that:

a HCNs redundancy policy was not expressly incorporated into Willis' contract of employment because it was not mentioned or referred to in his employment contract;

b The policy could not be implied into Willis' employment contract as a matter of law. The NSWCA held that this because, at the present time at least, there is no general right to an entitlement to redundancy for all employees;

c The policy could not be implied into Willis' employment contract as a matter of fact because it could not be said that an assumed intention existed between Willis and HCN that the policy was incorporated into Willis' employment contract, nor was it necessary such that without the policy Willis' employment contract would be drastically devalued or deprived of its substance; and

d The fact that the redundancy policy was not a published policy (and was not well known), meant that, as a matter of custom and practice, Willis could not rely upon the policy.

Even though this case provides some guidance as to how to avoid having a redundancy policy incorporated into employment contracts, invariably there are some policies that an employer may wish to have incorporated, such as workplace health and safety policies or policies about bullying or what happens when an employee misbehaves.

Some practical measures that employers should consider if they want to argue their policies should be incorporated into their employees' contracts of employment, include:

- Providing a new employee with a copy of the policy or policies when the employee commences their employment
- Requiring an employee to read the policy or policies, and get the employee to sign an acknowledgement that he or she has read and understood the policy or policies
- Expressly incorporating the policy or policies in employment contracts by using clear words in a letter of offer and employment contract
- Publishing the policies on the employer's intranet, and regularly alerting employees to the existence of the policy or policies on the website
- Alert employees to changes in policies as they are made from time to time to ensure that such changes are brought to the attention of all employees.

If an employer wishes to be able to apply a particular policy at their discretion, such as in a case like Willis, then the measures described above should be avoided in relation to a particular policy.

DAVID WILLIAMS

EDITORIAL

Welcome to our first newsletter of the calendar year 2008. The 2007 year ended with a change in the Federal government which will have significant impact upon business once the Rudd government gets down to implementing it agenda. With change come opportunities, which business owners need to react to quickly.

You will see from this month's newsletter significant emphasis has been given to changes in Workplace Relations Law. These changes will have a significant impact not necessarily in the short term but in the medium to long term in relation to employer/employee relationships. Any good employer will always seek to put in place workplace practices of the highest integrity to assist greatly in the enhancement of commercial outcomes for business owners.

Additionally, the other major area of change will be amendments to the Trade Practices Act. Changes to the franchising code of conduct (which was implemented by the previous Howard government) have now taken effect as at the 1st of March 2008. There are already a number of state based enquiries into franchising and it will be interesting to see the outcomes from those inquiries.

The higher interest rates will impact upon business decisions including ensuring that debtors are paid within a timely fashion. There could well be circumstances where credit may become less and less available this year and the level of insolvency could very much rise. We are not at this point seeing any drastic impact, as Queensland appears to be insulated with both the infrastructure boom and mineral boom still bubbling away.

Our business services group has now grown to 8 lawyers and we are looking forward to your continued patronage and your feedback in relation to how we can provide better assistance to you, the business owners.

Regards

David Williams

Fast Franchise Facts

GREG SHAW

The Franchising Code of Conduct ("the Code") has been amended with effect from 1 March 2008. There are significant changes to the obligations of franchisors under the Code and at law including in relation to disclosure and as to prior representations.

What is the Code?

The Code is an industry Code of Conduct between franchisors and potential and current franchisees that:

- aims to ensure that potential franchisees have sufficient information about the Franchise;
- includes a dispute resolution mechanism by which franchisees and franchisors can resolve any disputes between themselves or through a Mediation Advisor.

What happens if a Franchisor fails to comply with the Code?

The Code obtains its force from the Trade Practices Act 1974 (Cth) ("the Act") and a franchisor who is in breach of the Code will also be in breach of the Act.

Where a franchisor is a corporation, a breach of the Code may extend to office holders such as directors, company secretaries, board members or even employees of the franchisor.

The sanctions that may be imposed by a court for a breach of the Code include injunctions, damages, and corrective advertising.

In addition to the above sanctions, adverse publicity may flow from a breach the Code and have a detrimental commercial effect on the franchisor and its reputation along with the reputations of its officeholders.

As the law currently stands, if a franchisor does not comply with the Code then any franchise agreement entered into as a result of that breach will be void.

The franchise agreement will be unenforceable, leaving a franchisor in an unenviable position.

More Significant changes to the Code.

Franchisors who are familiar with the Code as it stood prior to 1 March 2008 may be surprised at some of the changes that have been made.

Whilst franchisors must familiarise themselves with each and every amendment made to the Code, the more significant changes are:

- the 'warning statement' on the first page has been reworded;
- all parties from whom a Franchisor may receive a rebate or other financial benefit must be identified (although the amount of the rebate or benefit need not be provided);
- a franchise agreement may no longer contain a clause by which a franchisee agrees that any no representation was made by a franchisor before the franchise agreement was entered into. Such clauses were previously permitted and could be found in most franchise agreements. If such a clause appears in a franchise agreement entered into after 1 October 1998 (more than 9 years ago!) that clause is of no effect. This change appears to be a recognition by the legislature of the High Court's decision in the Landlord's case in 2005.

In addition to providing a copy of the Code and a disclosure document that complies with the Code, the franchisor must now provide a franchisee with:

- a copy of the franchise agreement in the same form as is to be executed at least 14 days before the franchisee enters into that agreement, an agreement to enter into a franchise agreement or pays any non-refundable monies;
- copies of all other agreements that a franchisee is required to enter into such as leases and financial facilities;

A 'pro-forma' disclosure document with variables such as names, locations and so on to be completed is insufficient as many matters to be disclosed relate to the particular proposed site or territory.

What should a Franchisor do?

All franchisors must comply with the amended Code from 1 March 2008 – there is no transitional period.

To avoid being in breach of the Code a franchisor must immediately:

- ensure that they develop appropriate procedures for the execution of franchise agreements, to comply with the Code.
- review and update their disclosure documents; and
- review and update their "pro-forma" franchise agreement to provide for more site specific 'variables' to be inserted or completed.

Franchisors would also be well advised to ensure that all employees receive appropriate training, have access to and are familiar with the Code and a compliance manual that should, at the very least, include a checklist of steps to be taken.

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