

Licence agreements

ANDREW NICHOLSON



Businesses must be vigilant when entering into supply (or purchase) arrangements, otherwise there is a real and ongoing risk that you could

find yourself at the pointy end of court proceedings.

Many proprietors will be aware of the recent hard fought Federal Court dispute between Jupiters Limited and Neurizon¹, which has now been settled between those parties on confidential terms. At the same time as that action was on foot, a number of hotels and clubs were sued by Neurizon's successor (Sakura), who alleged that they were entitled to damages for the infringement of their registered patent.

The case involved an online jackpot method of payment which was used by Jupiters in poker machines in hotels and clubs across Queensland. Neurizon/Sakura alleged that Jupiters had infringed its patented jackpot method. It subsequently claimed that the hotels and clubs who took the product on licence from Jupiters had also infringed the patent.

The problem in this type of supply arrangement is that proprietors may not be aware of a potential dispute (between other parties) when entering into an agreement to use a product. However, prudent businesses can protect themselves against this possibility.

It again proves that the devil is in the detail when negotiating agreements. Properly negotiated agreements (particularly for products which are of a highly technical or innovative nature) will either minimise the risk of disputes or assist in resolving them. The creator, licensor or supplier of those products will generally seek to waive all liability for a breach of any earlier intellectual

property rights. A licensee who wants to acquire the product for use will generally attempt to protect its rights by seeking an indemnity from the creator or licensor against any subsequent allegation of infringement relating to the use of the product. Parties who fail to take those matters into account or who fail to seek advice when entering into agreements

supply of goods or services which are of a technical or innovative nature. If in doubt, you should consider that the amount which you spend on obtaining advice about the terms of the agreement is likely to seem like pocket change compared to what you might spend in defending court action if problems arise.



are leaving themselves exposed to these risks.

Intellectual property rights is a complex and developing area of the law. It is also one in which parties are more and more starting to recognise the value of the assets which they hold and to vigorously maintain and pursue their rights.

The moral is to think twice before signing on the dotted line for the

**beware
of the
hidden IP**

¹ See *Neurizon Pty Ltd v Jupiters Ltd* (2005) FCA 1177

DBS LEASES WHAT YOU SHOULD KNOW

ANDREW CVETKOVIC



Most hotels have detached bottle shops or are considering attaching a detached bottle shop to their General Liquor Licence.

In light of the recent amendments to the

Retail Shop Leases Act, there are several areas that are important to be aware of when negotiating the lease for a detached bottle shop regardless of whether you are the Tenant or the Landlord.

The lease of a detached bottle shop is prohibited from containing any "exclusive use" provisions unless it has been inserted at the request of the Landlord. If an exclusive use provision has been included in the lease, the Tenant must satisfy the Liquor Licensing Division that the Tenant did not request it.

If the detached bottle shop is a "retail business", the Tenant must ensure that there is only one basis for reviewing rent. A rent review provision will be void if it allows the Landlord discretion to apply one of two methods of rent calculation or provides for the rent to be increased by whichever of the two methods would result in a higher rent. For example, if there is a provision in the rent review that states that the rent cannot fall below the rent payable

in the previous year – i.e. a ratchet clause, the rent review provision will be void to the extent of that ratchet provision.

These restrictions on reviewing rent may now, however, be waived by the Tenant if that Tenant is a 'major lessee', (i.e. a Tenant with five or more retail shops in Australia). In this case, it is permissible for retail shop leases (entered into as from 3 April 2006) to provide for caps on rental increases.

If the lease contains a clause relocating the bottle shop to another location within the centre, the Tenant will have the right to terminate the lease within one (1) month after receiving the relocation notice from the Landlord. Unless the parties otherwise agree, the lease for the relocated premises must be on the same terms and conditions as the existing lease but with rent adjusted to reflect the different location or value of the new premises. It must also be noted that the relocation notice provided by the Landlord must contain details of the redevelopment, information about the alternative premises and the relocation date.

Where the lease contains a redevelopment clause allowing the redevelopment or demolition of the centre, the Landlord must now

give the Tenant at least six months notice before such a termination. The notice must contain sufficient details of the proposed demolition to indicate a genuine proposal to demolish the building within a reasonably practical time after the lease is terminated. The Tenant will have the right to terminate the lease earlier than the determination date.

If the lease contains an option to renew, the Landlord must give the Tenant notice of the deadline date for exercise of that option between 6 months and 2 months before the last date by which the Tenant must exercise the option. Failure by the Landlord to give the Tenant notice will expose the Landlord to a possible penalty of up to \$3,000.00.

If the lease does not contain an option to renew, the Landlord must still give the Tenant notice between 6 months and 12 months before the expiry date (if the lease is longer than one year) whether the Landlord intends to offer the Tenant a new lease or not. If the Landlord fails to give notice, the lease is extended until six months after the Landlord gives the requisite notification. The Tenant may terminate the lease before the extended period ends by giving the Landlord one months notice.

Operating Authority Tender Results

COMPARISON TABLE OF TENDER RESULTS

TENDER DATE	JULY-04	NOV-04	MAY-05	NOV-05	MAY-06
South East					
Number Sold	177	83	114	92	24
Average Price	\$99,453	\$116,238	\$123,955	\$146,800	\$226,783
Coastal					
Number Sold	76	70	48	28	34
Average Price	\$70,755	\$71,900	\$77,659	\$88,543	\$120,382
Western					
Number Sold	36	15	4	3	8
Average Price	\$15,260	\$13,054	\$30,002	\$48,355	\$68,500

mullins
LAWYERS

Level 22, Central Plaza One,
345 Queen Street,
Brisbane, Q 4000

GPO Box 2026,
Brisbane, Q 4001 DX 306

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

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