

Judgement of image rights for new technology

ANDREW NICHOLSON



Electronic communication, including sending messages via text or SMS, has become a social norm. Well over a billion messages are sent per day worldwide. The rise of that form of communication has also seen the development of other social phenomena including cyber bullying and 'sex-ting'. Sex-ting (the

exchange of explicit text messages, potentially containing photographs or video) takes only the click of a button as a result of advances in technology.

Surveys indicate that up to 33% of young adults (20-26 years) have sent nude or semi-nude photographs of themselves electronically. A 2009 UK survey of over 2000 children (11-18) revealed that 38% had received a 'sext'.

In March of this year the practice was given wide media exposure when Woman's Day magazine published a photograph of Lara Bingle, allegedly taken some years earlier. It was reported that the photograph was "doing the rounds" for some time prior to its publication in the magazine. Ms Bingle indicated her upset at having the image published and (through her agent) that she proposes to take legal action.

The question then arises as to what rights exist in relation to the use or misuse of an image and whether there are any grounds for a claim.

As a starting point Australian Law does not generally recognise image rights, particularly where the image is not being used in a commercial context. However, the Courts also recognise that there may be special circumstances that change the context of the relationship. Those include:

1. Where the image conveys a defamatory imputation - Andrew Ettingshausen was successful in his 1993 claim that a nude photograph of him taken in the shower after a rugby league game carried a defamatory imputation.

2. Breach of Privacy - this area of law is still a work in progress in Australia. The High Court recognised as much in *ABC v Lenah Game Meats Pty Ltd* (2001) in which it failed to recognise a cause of action based on breach of privacy.

3. Breach of Confidence - Australian Courts have recognised a claim for breach of confidence where firstly a confidential relationship exists, secondly a person acquires information of a confidential nature, thirdly there is an unauthorised use of that information and fourthly, the other party suffers injury as a result. A confidential relationship may be recognised by law (such as marriage) or may arise by express or implied agreement. The Victorian Supreme Court in *Giller v Procopets* found that persons engaging in sexual activity (possibly including sex-ting) may be able to rely on the confidentiality of their relationship.

Even if a claim is successful, the Courts have often found that there is no legal entitlement to damages. It can also be a difficult matter to prove that any loss has been suffered as a result of publication.

It will be interesting to watch the development of the Law in this area. No doubt it will struggle to keep pace with technology. If the practise of sex-ting is adopted in popular culture it is difficult to imagine that those types of complaints will not increase in the future.



Contents

BIDDING FOR EVENTS	2
COMMENTS ON CONSTITUTIONS	2
THE DIFFICULTY IN DISCHARGING THE DUTY OF CARE	3
WILL THE LIQUIDATOR COME KNOCKING	4
EDITORIAL - JOHN MULLINS	4



Bidding for Events

ANTHONY O'DWYER



The Queensland Government recently announced that it would be lodging a bid for the Commonwealth Games in 2018 on the Gold Coast. The concept of bidding for an event is an interesting one raising a range of questions.

The starting point is the party to whom the bid is made. Does it hold the rights to the event?

It probably goes without saying that the party to whom the bid is made should actually have the ability to grant the right to conduct the event to the successful party. It might be a safe assumption that the International Olympic Committee can grant the rights to hold the Olympics, however the safety of assumptions made in most other circumstances requires examination. Winning the rights to conduct an event will be a hollow victory when some time down the track it is discovered that the event cannot take place because the awarding party has sunk without trace.

On the other side of the equation the party making the bid obviously needs to have the ability to carry out the event if it is successful. A nation might bid for the Soccer World Cup and a state might bid for a national sporting championship, yet a city bids for the Olympics (with a good deal of support from both state and country). Regardless of who makes the bid, the bidder needs to establish that it can undertake the event. There might be a qualifying round in the bidding process during which potential bidders advise of their interest and the awarding body undertakes an assessment of their capacity and suitability before ruling some out and inviting others to lodge a bid. Occasionally, the awarding body enters into a closed bidding process where it selects the bidders and invites bids from them. Physical capacity to hold the event is obviously key but equally having the ability to deliver that capacity is important. Venues might exist but

availability for the event is an issue particularly if clean venues are required. Existing arrangements for venues such as hire and sponsorship must allow flexibility to cater for the event.

Each party has to consider the composition of the event. The concept of an event is rarely one set in concrete. Each time the event is held, it will undergo some change - parts will be deleted, others added and changed. Defining the event for the purposes of the bid is critical to both parties as the awarding body needs to spell out what its expectations are and the bidder needs to understand and ultimately demonstrate whether it can meet those expectations. It also needs to be understood what might be excluded from the conduct of an event. A bidder who wishes to run its own series of functions hanging off an event might be very disappointed to find that its ability to do so will be curtailed by the rules that come with the event.

A bid for an event will usually be justified by the direct or indirect commercial return from the event. Cities, states and countries ordinarily measure the economic impact of an event by the spend per person involved in the event. Whether there will be direct return from the event to the bidder will depend upon the particular circumstances of the event - the awarding body might reserve certain rights to itself or allow the successful bidder to collect the income from, for example, the sale of television rights, sponsorships, merchandise and the like. The bid needs to clarify where the opportunities for direct commercial gain lie in the conduct of the event.

The bidding process is a multi-faceted one sometimes relying upon hard and fast deliverables but often based on lots of promises that the parties genuinely hope can be delivered upon. The world watches with interest to see how India will deliver this years Commonwealth Games.

Comments on Constitutions

JOHN MULLINS



I am regularly asked to be involved in assisting sporting organisations with interpreting or rewriting their Constitutions and Disciplinary Policies.

One of the things that is becoming increasingly apparent to me in undertaking this work, is the Management Committee/Board of sporting organisations need to take very seriously their responsibility to ensure the organisation has adequate and appropriate Constitution, By Laws and Rules.

Compared with the imperatives of running state or national sporting organisations, it is easy to understand why this exercise is regarded as a low priority and thereby falls behind more pressing matters. That is of course until something blows up.

The following points are some examples of where a lack of attention on Constitutions can impact a sporting organisation:

- Finding out you do not actually have the authority to impose a disciplinary action on an individual, or there is no authority to impose a penalty.
- The disciplinary hearing heard against a person fails the tests of natural justice and is inherently flawed.

- The nomination processes for the Board are in doubt because it is not clear whether the person nominating has the authority or standing to do so.
- The rules simply do not say what you thought they did.
- The way you have been operating the Club for the last few years is not in accordance with your Constitution.
- The Constitution that was thought to be amended years ago was never lodged with the Department of Fair Trading and therefore does not apply. Consequently the Management Committee is not in accordance with the Constitution either.

I can see why spending time and money on your Constitution does not appear justified, but the time and cost of fixing these issues and potentially having to redo things all over makes it a small price to pay. This does not even take into account how embarrassing this situation can be.

We have prepared a quick health check questionnaire for your Constitution. Please email contactus@mullinslaw.com.au if you would like a copy. This health check should not be sent back to us, its purpose is simply to assist you in asserting where you are with your Constitution and whether you need to give some time to reviewing, reconsidering or rewriting it. This is not intended to be an exhaustive document, but a starting point for your consideration.

The Difficulty in Discharging the Duty of Care

JOHN MULLINS

The tragedy that occurred at the recent National Surf Life Saving Championships has received much publicity. This tragedy has highlighted the difficulty in discharging duty of care in sport.

Many sports have an inherent danger. These dangers are different. Some are due to the nature of it being a body contact sport such as Rugby and AFL. Some dangers come from it not intending to be a body contact sport, but the body contact occurs such as Netball and Basketball. Some dangers come from the fact that body contact is at the essence of the sport such as Boxing and Martial Arts. Some dangers come from the environment such as Surf Life Saving, and some dangers come from the elements of the sport such as Horse Racing and Equestrian events.

Everyone involved in sport has heard the expression "duty of care" a million times. As can be seen from these

What has to be remembered is that people burdened with making these decisions have the fundamental duty of care for the participants. It is understood that the participants themselves, especially in amateur events where they have dedicated much of their lives to succeeding in their chosen sport, will not, at their own volition, pull out of the event irrespective of the circumstances. Such is the nature of sport.

The responsibility therefore on the group of people burdened with the decision making is extremely high. They need to ask themselves the question "Is it foreseeable if we conduct the event in these circumstances and conditions that someone will be hurt? Is the prospect that someone could be hurt higher than would normally be the case in this type of event? Is that prospect low, medium or high? Having regard to the nature of the sport



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examples, different sports make decisions to protect participants in different ways in different circumstances.

The starting point is that the people making decisions must either have significant experience and understanding of the risk management characteristics of the sport, or should be taking recommendations from those that have that experience.

There is great anticipation for annual events. In some cases the logistical arrangements for these annual events are massive. The people burdened with the responsibility for running these events, and the continuation of these events, are going to be influenced and pressured to continue or may be concerned about the consequences of cancelling for any reason.

It is notable that the GPS Rowing was cancelled a few weeks after the National Surf Life Saving Championship because of concerns in relation to safety. There were a lot of people very unhappy about either the decision, or the timing of the decision, and the inability to reschedule many of the events.

The job of making such a decision is an extraordinarily unenviable one. Inevitably there will be many observers who will say at the time or subsequently that they would have made a different decision either to cancel or hold the event. Whatever decision is made, those who disagree with the decision will criticise the decision makers.

and our duty of care to protect the participants from injury, should this event proceed?"

If the event proceeds, someone is injured or killed and legal action for negligence ensues, the Court will if necessary determine whether or not that risk was foreseeable. The question will then be whether the persons making that decision acted reasonably in all of the circumstances, and whether they discharged their duty of care. If necessary all witnesses and experts will give their evidence and then a Court will ultimately decide.

It's a very tough decision, but maybe if it is so difficult a call as to whether or not the organisers are discharging their duty of care to the participants, that maybe the bravest decision of all to cancel or postpone the event is the right decision. Maybe as inconvenient as it is to the sport and to the participants, the lesson to be learnt from the Surf Life Saving tragedy is, if in any doubt, cancel.

That is what GPS Rowing did. We will never know whether that event could have been safely run on that day. We do know that many competitors, parents and coaches were unhappy. And, we do know that a difficult call was made because those responsible for the event determined that the risk of a competitor being injured or killed was too high to proceed.

Will the liquidator come knocking?

MARK MADSEN



There is currently a push at the federal level for reforms to be made to insolvent trading laws and the corresponding duties of corporate directors. It is important those responsible for the operation of sporting clubs are aware of their obligations and potential exposure on a personal level.

For sporting clubs carried on by companies limited by guarantee, the *Corporations Act* places a clear duty squarely upon the directors to ensure that the company does not trade whilst insolvent. In the event that a club is wound up, the *Corporations Act* permits a liquidator or a creditor to claim compensation against the directors personally if there are reasonable grounds for suspecting the company was insolvent when the debt was incurred. Of more concern, ASIC can prosecute directors for civil penalty orders and for criminal sanctions.

There is some debate about whether members of a management committee in an incorporated association

can be held liable for trading whilst insolvent.

Some of the *Associations Incorporation Acts* of each Australian state and territory (e.g. NSW and SA) contain provisions that expressly place liability upon committee members. The committee members become liable for the debt in conjunction with the association but, more importantly, statutory penalties can include a fine or imprisonment.

In contrast, the Queensland *Associations Incorporation Act* expressly provides that members of management committees are not personally liable for debts and liabilities of the association beyond the property of the association in that person's hands, unless the rules of the association provide

otherwise. But the debate is whether this remains the case if the association incurs the debt when insolvent.

If an incorporated association in Queensland is ordered to be wound up, the Chapter in the *Corporations Act* which governs the process for winding up companies is deemed to apply to an extent to the association with necessary adaptations. That Chapter includes the insolvent trading provisions which sheet home liability to directors of companies. It is not clear, at present in Queensland, as to how this operates so as to impose the insolvent trading provisions upon the management committee members of an association.



JOHN MULLINS
EDITORIAL

Just as we were finalising this edition, the Storm Rugby League scandal broke. This is a huge news story blowing the Governments announcements in relation to the Child Care Centres and Insulation program off the front pages of newspapers nationwide.

It has to be asked why even in a sports loving country like Australia that this story has received such prominence. I believe that it represents the loss of innocence for Australian sport. There is no doubt that Australia, as a nation, loves sport. Australians love playing it, watching it, betting on it and using it as a social event. It sits at the very heart of many families, with parents passing their love of sport and a healthy lifestyle onto their children.

For most of Australia's 200 odd years, sport has been amateur or if not amateur, the professional rewards have been modest. Rugby until the 1990s was still an amateur sport. The Olympics for most of its history has been amateur. Tennis had its huge split between the amateurs and the professionals in the 1960s. Until very recently, there was very little money in athletics or swimming. The Australian icon of Surf Lifesaving is still largely amateur. The money in cricket only changed after World Series Cricket in the 70s.

Professional sport has been seen by most, as a natural extension of the amateur game. Talented sports people have been able to earn money, because of the desire of Australians to watch them play their sport either live or on television. The ethos and nature of sport that people love so much was carried through into the professional side of the game.

Australians abhor cheating and whilst we are quick to point the finger at others, the suggestion that an Australian could cheat is greeted with astonishment and is quickly rejected.

The reality is that internationally professional sport can be a dirty business. The professional sporting codes in the United States of ice hockey, basketball, baseball and gridiron are littered with decades of dirty business corruption, cheating, gambling and dishonesty. The European English football (soccer) is again full of interesting characters, some with allegedly dubious backgrounds and all sorts of dubious behavior. Indian betting rings are back in the news today.

In recent years in Australia we have seen increasingly bad behavior by professional sports people. We have also seen breaches of salary caps, boardroom brawls, network legal battles and major fights for the prize. Some have been conducted in a questionable fashion. Overall, however, professional sport somehow has not really been tainted.

Australians have always viewed their professional sport as having the best attributes of sport; fair play and sportsmanship. This organisational cheating at the Storm brings to light what we might have suspected but what we are afraid to admit, that professional sport in Australia is also a potentially dirty business.

It begs the question 'is what happened at the Storm an isolated event, or is organised cheating prevalent in Australian professional sport?' I don't think that it is, but that is the problem with loss of innocence. Once it is gone, you can't get it back.

There is some debate about whether members of a management committee in an incorporated association can be held liable for trading whilst insolvent.