

Newsletter of the Law

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June 2010

ATO steps up efforts to combat tax havens

The Australian Tax Office (ATO) has announced it has requested information from banks which it will use to identify Australian taxpayers who may have undisclosed offshore income or over-claimed deductions involving international transactions.

The aim is to identify people who may be deliberately trying to hide income or assets offshore.

The ATO established a multi-agency taskforce called Project Wickenby in February 2006 to prevent people from promoting and participating in the abusive use of secrecy havens.

Project Wickenby works with both Australian and international agencies to detect, deter and deal with tax avoidance and evasion, breaches of financial laws and regulations, attempts to defraud the community including investors and creditors, money laundering and concealment of income or assets.

The taskforce includes federal departments and agencies such as the

Australian Transaction Reports and Analysis Centre, the Australian Securities and Investments Commission, the Australian Crime Commission, the Australian Federal Police, the Attorney-General's Department, the Australian Government Solicitor and the Commonwealth Director of Public Prosecutions.

Cross-agency activities include intelligence-sharing, tax audits, criminal investigations, prosecutions, capability development, education programs and actioning law or administrative reform options.

The ATO is encouraging people to come forward and make voluntary disclosures about offshore incomes and undisclosed deductions involving international transactions, with the offer of reduced penalties. This offer ends on 30 June 2010.

More information is available at www.ato.gov.au.

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Majority of consumers are confused by credit contracts

Research by the University of Queensland has found that more than 90 percent of consumers do not understand important features of their contracts for home loans, credit cards, store cards and car loans.

The study, conducted by UQ's TC Beirne School of Law, was an experimental research project into consumer credit disclosure.

School of Law lecturer and project chief investigator Paul O'Shea said consumer comprehension tests indicated that, after reading contract documents for credit transactions, important questions such as the cost of credit remained difficult for consumers to understand.

"When consumers enter into a loan contract, they receive a bundle of documents," Mr O'Shea said.

"The current *Consumer Credit Code* requires that certain information about

the transaction is disclosed in a financial table at the beginning of the contract document.

"In our focus groups, consumers expressed high levels of dissatisfaction with current pre-contractual disclosure and wanted documents which were easier to understand and summarised concisely the information they needed to make informed choices about consumer credit products."

The research was commissioned by the Standing Committee of Officials of Consumer Affairs on behalf of all state and territory governments in order to better inform policy development in national consumer credit regulation. From 1 July 2010, regulation of consumer credit will move from the states to the Commonwealth.

The report is available online at www.consumer.gov.au.



Case in point: Two Aussie icons caught in plagiarism debate

A music publisher has claimed that Australian band Men at Work stole a riff from the well-known song, 'Kookaburra sits in the old gum tree', and used it in their own classic Aussie song, 'Down Under'.

Men at Work's hit song, 'Down Under', was brought under the microscope after ABC television program 'Spicks and Specks' raised similarities between the song and the classic Australian children's song, 'Kookaburra Sits In the Old Gum Tree'. A music publisher then sued the Men at Work songwriters and EMI Music Publishing Australia (EMI), seeking backdated royalties and a share of future profits.

Who owns 'Kookaburra Sits In the Old Gum Tree'?

Music publisher Larrikin Music began legal action in 2007 against EMI and the Men at Work songwriters, Colin Hay and Ron Strykert, claiming that it owned the copyright to the Kookaburra song upon which the 'Down Under' song owners allegedly infringed.

The Kookaburra song was written in 1934 by Marion Sinclair, a Melbourne music teacher who entered it in a Girl Guides competition. The respondents argued that Ms Sinclair handed over copyright to the Girl Guides Association of Victoria when she submitted the song to the competition and that Larrikin Music could never have owned the copyright.

Counsel for EMI David Catterns QC told the court that the competition details printed in a circular and official Girl Guides magazine 'Matilda' stated that all material entered would become property of the Girl Guides Association of Victoria.

However, counsel for Larrikin Music David Yates SC said that Girl Guides Victoria had never sought copyright and instead asked Ms Sinclair for permission to reproduce it in a 1970 campfire songbook.

Larrikin claimed that it had won a tender for the copyright from the South Australian Public Trustee in 1990 after Ms Sinclair died.

Larrikin's managing director, Norman Lurie, said that it was not until nine years later that he was told that Ms Sinclair had



actually signed over her copyright to the Libraries Board of South Australia a year before her death. Mr Lurie then bought the copyright from the board.

Are the two songs the same?

The part of 'Down Under' in question was the flute riff added to the song after it was first composed. It was alleged that two of the four bars of the Kookaburra song were reproduced in the 1979 and 1981 recordings of 'Down Under' as part of the riff.

An expert musicologist, Dr Andrew Ford, was brought into the case by the applicant to determine the extent of the similarities between the two songs.

While Dr Ford agreed that the harmony of 'Down Under' is different to the Kookaburra song, he believed that the melody of the flute riff does include the same melody as the first two bars of the Kookaburra song, although "it has a different feel".

Dr Ford also stated that he considers the first two bars of Ms Sinclair's song to be "the signature" of that work.

The respondents' expert witness, John Armingier, agreed with Dr Ford's proposition but there remained to be a debate as to whether this "signature" was sufficient to make those bars a substantial part of the work.

The judgment

Justice Jacobson of the Federal Court of Australia delivered judgment on 4 February this year.

"I have come to the view that the 1979 recording and the 1981 recording of 'Down Under' infringe Larrikin's copyright in 'Kookaburra' because both of those recordings reproduce a substantial part of 'Kookaburra'," Justice Jacobson said.

"I am also of the view that Larrikin is entitled to recover damages... for the infringements."

"Nevertheless, I would emphasise that the findings I have made do not amount to a finding that the flute riff is a substantial part of 'Down Under' or that it is the 'hook' of the song."

The damages

Larrikin were seeking between 40 and 60 percent of royalties derived from 'Down Under'. Costs are yet to be determined.

Consequences of the case

Justice Jacobson also ruled that a Qantas advertisement which used a small similar section of the riff in question was not in breach of copyright laws, however Larrikin's solicitor Adam Simpson did not rule out further legal action.

"In the Qantas ad, there was a smaller part of the song and so the judge felt that wasn't enough to qualify as an infringement of copyright. But we'll be giving that some more thought," Mr Simpson said.

Music copyright lawyer Stephen Digby said he was surprised by the court's decision, saying that he thought this case would have been very hard for Larrikin to win. Mr Digby said that this judgment could clear the way for more cases to come forward.

If you have any concerns about copyright, please contact your local solicitor.

Protection for whistleblowers in Queensland

The Queensland Ombudsman, together with the Crime and Misconduct Commission and the Public Service Commission, has produced a brochure which explains the *Whistleblowers Protection Act 1994* (Qld).

The Act was introduced to provide protection for those who speak out about any wrongdoing in the public sector, commonly known as 'blowing the whistle'. This whistleblowing is referred to in the Act as making a public interest disclosure (PID). The Act outlines who can make a PID, what they can disclose,

who they can disclose it to and the protections to disclosers.

A person does not have to be a public sector employee to make a PID about either a danger to the health or safety of a person with a disability, or to the environment, or a reprisal against a person because a PID has been made.

However, the right to make a PID about official misconduct, maladministration, a substantial waste of public funds and a danger to public health or safety is restricted to public sector employees only.

Even if a report of wrongdoing is not a PID, employees must still be protected from reprisal, and organisations are required to assess and deal with allegations using appropriate mechanisms, such as complaint handling or workplace health and safety policies, where necessary.

You can access the *Whistleblowers Protection Act 1994* (Qld) brochure at www.ombudsman.qld.gov.au or, for more information, contact your local solicitor.

Are you sending spam?

Many businesses send electronic messages, such as marketing emails, SMS/MMS (text/image-based text messages) or instant messaging, to their customers without realising that they are actually sending illegal spam.

There is a common misconception that an electronic message is only spam if it is sent to a large number of people and is designed to sell something to its recipients.

The *Spam Act 2003* prohibits the sending of unsolicited commercial electronic messages with an Australian link.

The Australian Communications and Media Authority (ACMA) says that "a message has an Australian link if it originates or was commissioned in Australia, or originates overseas but was sent to an address accessed in Australia".

A commercial electronic message is defined as being one that:

- offers, advertises or promotes the supply of goods, services, land or business or investment opportunities
- advertises or promotes a supplier of goods, services, land or a provider of business or investment opportunities
- assists a person to dishonestly obtain property, commercial advantage or other gain from another person

There are three key requirements of the *Spam Act*: consent, identification and an

unsubscribe facility. Without any of these requirements, even a single electronic message can be considered spam.

The recipient of an electronic message must have given the sender express consent or, under particular circumstances, consent may be inferred from their conduct or an existing business or other relationship.

The message must also accurately identify the sender and include details for the recipient to be able to contact them.

Thirdly, the message must feature a functional unsubscribe facility to allow the recipient to opt out of receiving any messages from the sender in future. An unsubscribe request must be honoured within five working days.

ACMA has the power, through the *Telecommunications Act 1997*, to search a business' premises and seize equipment where an inspector suspects on reasonable grounds that the Act has been breached, and to impose and enforce penalties.

Penalties for breaching the Act are up to \$1.1 million per day.

Only certain messages from some types of organisations, such as government bodies, charities, religious organisations, registered political parties and educational institutions, can be permitted.

If you are unsure about your legal obligations, contact your local solicitor.

Fair Work update

On 1 July 2009, Australia's workplace relations system changed with the implementation of the *Fair Work Act 2009*. There are now new workplace relations laws in place, which have been designed to balance the needs of employers and employees.

The new legislation introduced a safety net of minimum employment conditions which apply to the majority of Australian employers and employees. This safety net comprises two parts: the 10 National Employment Standards (NES) and new modern awards. The NES and modern awards came into effect on 1 January 2010.

The NES are contained in the *Fair Work Act 2009*, however, they can also be found on the Fair Work Online website.

All modern awards can be accessed at www.fairwork.gov.au. If an employee is not covered by a modern award, they are termed award-free employees and as a minimum, the NES apply.

By 1 July 2010, in many modern awards, pay rates and some loading/penalty rates will start to be phased in. Changes to pre-existing rates may be phased in over five annual instalments.

If you have any questions about rights and obligations under the *Fair Work Act*, contact your local solicitor.

Workplace bullying on the rise

Solicitors have experienced an increase in inquiries from Queenslanders about workplace bullying. These people are often experiencing high levels of stress or depression.

In addition to the dramatic impact on employees' health, the Productivity Commission released a report in April this year which estimated that stress-related absenteeism and presenteeism were directly costing Australian employers around \$10.1 billion per year, and the cost to the economy was around \$14.8 billion per year.

Cases like that of Brodie Panlock, a 19-year-old woman who committed suicide after being subjected to bullying by her workmates at a Melbourne café in September 2006, are becoming more common. Ms Panlock's colleagues were fined a total of \$335,000 when they pled guilty in the Melbourne Magistrates Court and her father called for a change in the law to include a custodial sentence for offenders.

There is often confusion around what exactly constitutes workplace harassment according to Australian law. The Queensland Department of Justice and Attorney-General defines workplace

harassment as behaviour, other than sexual harassment, that "is repeated, unwelcome and unsolicited, the person [subject to the behaviour] considers to be offensive, intimidating, humiliating or threatening, and that a reasonable person would consider to be offensive, humiliating, intimidating or threatening".

Workplace harassment covers a wide range of behaviours, both overt and covert, including loudly abusing someone, repeated threats of dismissal or severe punishment for no reason, constant ridicule, sabotaging a person's work, maliciously excluding or isolating a person from workplace activities, persistent and unjustified criticisms, and spreading gossip about a person with intent to cause the person harm.

It is also a misconception that workplace harassment can only be committed by a single co-worker or employer. Workplace Health and Safety Queensland says that it can also be committed by a group of co-workers, a client, or a member of the public.

If you have any concerns about your legal rights and obligations in the workplace, please contact your local solicitor.

Changes in juvenile justice

The *Juvenile Justice and Other Acts Amendment Act 2009* came into force at the end of March 2010, and was designed to ensure Queensland has a strong youth justice system that is based on evidence and community feedback, will support victims of crime, meet community expectations of the justice system, and will address the underlying causes of crime.

The amendments are based on a review of the *Juvenile Justice Act 1992* and aim to resolve some of the ambiguity in language, making the Act easier to interpret.

It changes several areas of the Act including the imposing of a curfew on a young person as part of a probation order. Courts will now also have the option of making a transfer order at the time of sentencing when the sentence will extend beyond the offender's 18th birthday, meaning that the unserved period of detention must be served in prison.

The Queensland Department of Communities has released a fact sheet which outlines the general information surrounding the amendments to the Act.

Can I adopt?

Adoption is an important issue for the people in our society desperate, but unable, to become parents, but to many the adoption process remains clouded in mystery.

In 2009, the State Government passed the long-anticipated *Adoption Act 2009*. This new Act repeals the *Adoption of Children Act 1964*, and brings Queensland into line with other Australian states and territories with the introduction of open adoptions and adoption plans, better consent requirements, modern eligibility criteria and assessment processes, and court-ordered adoptions.

The most obvious question is 'what is adoption?' Put simply, adoption is a legal process that transfers the legal rights and responsibilities of parenthood from a child's birth parents to a new set of parents, or the 'adoptive parents'.

In Queensland, all adoptions are organised through the Department of Child Safety. This includes adoptions by relatives, step-parents and overseas adoptions. Privately arranged adoptions are illegal in Queensland and people who fail to go through the department may face penalties under the *Adoption Act 2009*.

The new *Adoption Act 2009* aims to provide for the adoption of children in Queensland, and for access to information about parties to adoptions in Queensland, in a way that promotes the wellbeing and best interests of adopted persons through their lives, supports efficient and accountable practice in the

delivery of adoption services and complies with Australia's obligations under the *Hague Convention on Protection of Children and Co-operation in respect to Intercountry Adoption*.

The *Hague Convention* is an agreement between countries dealing with international adoption, child laundering and child trafficking.

There are also guiding principles which are incorporated into the Act and outline how the Act is to be applied. The guiding principles include:

- The paramount concern is the well-being and best interest of an adopted child, both through childhood and for the rest of his/her life.
- The purpose of an adoption is to provide for a child's long-term care, well-being and development by creating a permanent parent-child relationship between the child and the adoptive parents.
- Adoption is a long-term care option that is selected by the birth parents due to the unwillingness or inability to protect the child from harm and meet the child's need for long-term stable care.

Another new addition to the reformed adoption legislation is the inclusion of guiding principles that are specific to Aboriginal and Torres Strait Islander persons. These principles are unique in that they take into account the traditional customs of these groups.

For more information about adoption laws, please contact your local solicitor.

Knives in Queensland schools

Concerns about required amendments to the *Weapons Act* have been renewed after the fatal stabbing of a 12-year-old boy by a fellow student at a Catholic private boys' school in Brisbane's suburb of Shorncliffe on 15 February this year.

Prior to 1996, Queensland had no laws applying to the carriage of knives on the person. In 2003, section 51 of the *Weapons Act 1990* (Qld) was amended to make it an offence to possess a knife in a public place "or school" without a reasonable excuse, which included:

- to perform a lawful activity, duty or employment,
- to participate in a lawful entertainment, recreation or sport,
- for use for a lawful purpose.

On 28 July 2008, Premier Anna Bligh announced changes to the *Weapons Act 1990* (Qld), which included tougher knife laws, such as an expanded definition of bladed weapons to include daggers (such as fantasy knives) – in line with national standards. The Bill has yet to be introduced.

CSR decision's impact on asbestos victims

CSR was given a green light to proceed with the demerger of its sugar business on 23 April in a successful full bench appeal of a February decision that had refused the demerger.

The Court of Appeal allowed CSR to present the demerger proposal to its shareholders. The shareholders' decision then must still go before a court again for final approval.

Concern about the demerger stems from CSR's asbestos liabilities caused by its involvement with the Wittenoom asbestos mine in Western Australia. Some are worried that this decision could mean that CSR will not have the funds to meet its liabilities.

The three appeal judges overturned the original decision that blocked the demerger based on the fact that there was insufficient evidence on which to decide there was "a material rather than an abstract" increase in the risk that asbestos sufferers, to whom its business is still exposed, would not be paid.

It is argued that those in opposition to the decision will have another opportunity to block a demerger at CSR's next court appearance to gain approval for the shareholders' decision.

What is defamation?

We've all read articles, seen news items or laughed at cartoons that portray someone in a negative light. Sometimes the item is light-hearted and fun, while other times the article is unsympathetic, callous and could seriously damage a person's reputation. To most people, how they are perceived by others is extremely important, be it for personal, social or commercial reasons. Defamation law exists to protect citizens from the harm that can be caused by free speech, and the damage that can be done when untrue or unwarranted remarks are made about them in public.

In Queensland, the law of defamation is formed in part by the *Defamation Act 2005* but is largely governed by the common law that has been developed over time by judges in court decisions. The common law does not have one precise definition of defamation that can be applied to all situations, but at a basic level suggests that a defamatory statement is one that lowers the plaintiff in the estimation of the ordinary members

of our society.

Very simply, defamation is a communication by an individual that is published to at least one other person, identifies the plaintiff and is defamatory.

Common law suggests that a defamatory statement must be published to a third person other than the person being defamed, and can be done so by:

- spoken words or audible sound
- words intended to be read by sight or touch
- signs, signals, gestures or visible representations

In order to defame someone it is essential that the statement identifies them. This does not mean that the plaintiff must be personally named. Typically, all that is required is that the details that are published lead a specific class of reader to identify the person as the subject of the defamatory statement.

To find out more about defamation law, contact your local solicitor.

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