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May 2009

Tough new laws on bikie groups

Bond University's Professor of Criminology, Paul Wilson, has warned the Queensland Government against imposing tough new laws on biker groups.

The warning follows the Queensland Cabinet's decision to approve the preparation of new laws based on South Australia's and New South Wales' anti-biker legislation, which came as a result of bikie gang-related violence in Sydney in March.

Among the possible new laws, police would be given the power to apply to the Queensland Supreme Court for an order that would ban members identified in outlawed motorcycle gangs from associating with each other.

As in South Australia and New South Wales, these laws might also lower the criminal burden of proof on bikie gang-related crimes from 'beyond a reasonable doubt' to 'on the balance of probabilities'.

"The introduction of draconian laws governing demographic groups is a breach of civil liberties and an infringement on the right of all Queenslanders to live in a democratic society," said Professor Wilson.

"The Queensland Government's proposal to impose tough legislation on bikies sets a dangerous precedent. It opens up the potential for government to arbitrarily apply these criminal 'association' laws to any political opponents or religious groups to whom it takes a dislike."

Professor Andreas Schloenhardt of the University of Queensland has also noted that similar laws in Japan have led to groups reforming under different guises.

Premier Anna Bligh has said the new laws "would need to strike a balance between protecting the public from organised crime and upholding the civil liberties of citizens".

Law Week 2009

A diverse and exciting array of events and activities were offered for Law Week 2009 (May 11 – 17).

Now a national event, Law Week is a community-focused initiative which aims to bring law to life and highlight the richness and value of the law and justice system in Australia.

Law Week involved court tours, legal careers forums, mock trials and National Pro Bono Day. This year's Law Week, themed 'The Law and Your Community, Celebrating 150 Years', offered opportunities to learn more about the law, the legal system and the legal profession. Federal Attorney-General Mr Robert McClelland said activities in cities and regional areas opened the door and provided access to the legal profession, courts, police, government service providers and other law-related services.

"This year's Law Week also highlights the significant amount of pro bono work the legal profession contributes annually to the community," Mr McClelland said.

National Pro Bono Day on Friday, May 15, was marked with walks in Brisbane, Melbourne and Sydney organised by the Public Interest Law Clearing House. Queensland marked 150 years of its legal system with an open day at the Brisbane Magistrates Court.

Bushfire victims need support

The Public Interest Law Clearing House (PILCH) has urged the 2009 Bushfires Royal Commission to heed the voices of bushfire survivors and their affected communities, and called on the Victorian Government to fund targeted legal assistance to those seeking to engage with the commission process.

PILCH acting executive director Mat Tinkler said that around 30 individuals and community groups assisted by PILCH were refused leave to appear before the commission, despite compelling and often tragic stories of survival and insight into the bushfires and their intensity, causes and the factors that led to the degree of devastation.

"PILCH calls on the Victorian Government to urgently consider providing targeted legal support to bushfire survivors and affected communities," Mr Tinkler said.

"The Royal Commission has indicated that bushfire survivors and their communities should now focus on written submissions. That avenue will be meaningless unless bushfire victims are provided with appropriate legal support to ensure that submissions are targeted, relevant and meaningful."

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A Gold Coast food processing company has been fined and labelled a "workplace cowboy" after underpaying its employees and unlawfully changing their classification to "independent contractors".

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Case in point: IceTV wins appeal against Nine Network

The High Court has delivered an important judgement that will guide the way that copyright law works to protect organisations' databases and directories.

The High Court delivered judgment in favour of IceTV in a long-running dispute brought by Nine Network Australia.

IceTV was sued by the Nine Network in relation to its reproduction of TV programming schedules (for example, 6pm - news, 6:30pm - A Current Affair). The critical issues for determination by the High Court were to identify the original part in such a compilation work warranting copyright protection and whether that part had been substantially reproduced. IceTV produces electronic program guides for digital free-to-air television which are delivered via the internet and allow consumers to organise and record television programs via a personal recording device.

The High Court unanimously held that IceTV did not infringe Nine's copyright in its weekly schedules, primarily because IceTV did not take a substantial part of Nine's work. The decision also emphasises the role of copyright law to protect the expression of ideas, rather than the ideas themselves. This requires a qualitative assessment about the part of the work taken, rather than a quantitative assessment.

The decision is significant as it will now guide the way copyright operates to protect databases and compilation works, such as phone directories. Prior to this decision, the leading case in this area was *Telstra v Desktop Marketing* in which it was held (by the Full Federal Court in 2003) that copyright in telephone directories was infringed when information from those directories was taken and produced in another directory.

In the Desktop Marketing case, a key consideration for the Full Court in finding that Desktop Marketing had infringed Telstra's copyright in phone directories

was the "skill and labour" or "sweat of the brow" which Telstra had engaged in to create the directories.

In *IceTV v Nine Network*, one of the central issues before the High Court was whether "sweat of the brow" could provide copyright protection where it would not otherwise exist. The court considered whether copyright was the appropriate regime under which to seek to protect such a work, particularly where the information in question was effectively in the public domain or consisted of a very low level of "originality". The court determined that there was no copyright in program title and time of broadcast information alone, and no protection of facts alone. Rather, it was the expression of those facts which was protected (that is, words, figures, symbols used, and the arrangement of the information).

The High Court also held that the fact that the information might be of significant commercial value was not relevant to the question of copyright protection. Questions of confidentiality of information were also irrelevant to determining copyright protection.

As stated at paragraph 52 of the judgment, "[r]ewarding skill and labour in respect of compilations without real consideration of the productive effort directed to coming up with a particular form of expression of information can lead to error. The error is of a kind which might enable copyright law to be employed to achieve anti-competitive behaviour of a sort not contemplated by the balance struck in the Act between the rights of authors and the entitlements of the reading public."

The court stated that, while the Nine Network clearly expended skill and labour in producing its weekly schedules,

the level of skill and labour was "not directed to the particular form of expression of the time and title information, including its chronological arrangement... The level of skill and labour required to express the time and title information was minimal. That is not surprising, given that ... the particular form of expression of the time and title information is essentially dictated by the nature of that information" (at paragraph 54).

The High Court's decision indicates a departure from previous Australian and UK case law on the consideration of copyright for compilations. Indeed, the decision may be an indication that Australian courts are moving more into line with the approach taken in the US where it was found (in the Feist case) that there was no copyright protection in a telephone directory data compilation – no amount of "sweat of the brow" could convert such a work into something capable of copyright protection if the work lacked the sufficient originality.

However, the copyright works in question in both Desktop Marketing and *IceTV v Nine Network* are different, so it will always be necessary to reflect on the particular copyright work in question as well as closely reviewing what is said to have been the "substantial part" of that copyright work allegedly appropriated.

This decision has implications for businesses or government organisations involved in the production of compilations of information into databases or publications of any kind, particularly if that information has some sort of "generic", repetitive characteristic, and in particular if such information may be publicly or widely accessible and of commercial value. For more information about copyright law, contact your local solicitor.

Changes to emissions trading scheme

The Federal Government has announced that it will make some changes to its Carbon Pollution Reduction Scheme.

Lawyer Grant Anderson said it was important that the Federal Government properly addressed issues such as the role of voluntary emissions reductions in the scheme and the contribution of complementary measures (such as increased energy efficiency).

"The Prime Minister's announcement of a \$75.8 million Australian Carbon Trust to support energy efficiency initiatives is a step in the right direction, as is the

commitment of the Government to take into account GreenPower purchases in setting the scheme caps," Mr Anderson said.

"Delaying the commencement of the scheme until July 1, 2011, will also provide a breathing space to industry as the effects of the global financial crisis should have eased by then.

"Nonetheless, the Government is obviously concerned about the cost-impact of the scheme on the competitiveness of Australia's emissions-intensive trade-exposed industries as it has also announced further support for those industries in the form of a five-year global recession buffer.

"In addition, the proposal to fix the price of carbon permits for the first year of the

scheme suggests some concern about the potential for price volatility during the initial stages of operation of the scheme."

Mr Anderson said that, while the delay of the scheme and the provision of additional assistance to industry was not likely to appeal to the environmental movement, the Government had sought to counterbalance this by committing to an increased 2020 emissions reduction target of 25 percent from 2000 levels if a post-Kyoto international climate change agreement were to set a goal of stabilising greenhouse gas emissions at 450ppm by 2050.

"Whether these measures will be sufficient to attract the political support the Government needs to pass its legislation remains to be seen," he said.

Seafolly protects its swimwear designs

Seafolly is one of Australia's fashion swimwear brands. In recent years, Seafolly has found many companies in Australia and overseas manufacturing swimwear garments using fabrics which are copies of its original fabric designs.

In 2007, Seafolly became aware that Sevcoy had released a swimwear style that was manufactured from a fabric print which it claimed was a substantial reproduction of its "Tiki stripe" design, thereby infringing on Seafolly's copyright in this fabric design. Federal Court proceedings were issued against Sevcoy and the proceedings were settled out of court between the parties.

In 2008, Seafolly became aware of a company in Canada which had released a swimwear style that was manufactured from a fabric print which Seafolly claimed was a substantial reproduction of its "Mikado" design, again infringing on Seafolly's copyright. Seafolly settled this proceeding prior to any court proceedings being issued.

Seafolly also made a claim for copyright infringement against L'Aura Blu Design, a company in Italy, claiming that it released a swimwear garment manufactured from a fabric design which was a substantial reproduction of Seafolly's "Goddess Mailott" fabric design. This case also settled out of court prior to any proceedings being issued.

For more information about intellectual property law, please contact your local solicitor.

Victorian playground fight victims granted compensation

Victorian students hurt in fights, playing sport or simply falling over have been granted more than \$1 million in compensation in recent years.

A group of six students involved in a fight shared \$235,000 in compensation, according to figures released to the Herald Sun newspaper under freedom of information laws.

In other cases, a student who was hit while playing hockey received a \$165,000 payout, while a pupil was paid \$115,000 after being struck playing in the school ground. The smallest payout was \$80, for an injury during PE.

Lawyer Barrie Woollacott, from firm Slater and Gordon, said schools were often sued for failing to act properly when there was trouble brewing among students.

"They allow volatile situations to continue in circumstances where a quick response would have defused them," he said.

"But because they haven't responded appropriately, something's happened and one of the victims has been assaulted. And then he's said to the school, 'You didn't look after me properly'."

Mr Woollacott said the State Government had restricted compensation payouts for years. People who experience whole-body injury of five percent or less are not entitled to damages for pain and suffering.

Students have lodged 175 compensation claims since 2006, Education Department data shows.

About \$1.05 million has been paid out so far, but dozens of cases are yet to be finalised and more cash will be given out.

Most injuries were caused by falling, slipping or jumping – 47 cases during over the last three years.

There were 31 cases of a student being struck by another person, while 27 were hit by a moving object.

Several students made claims over alleged bullying and harassment; 24 cases involved fights and assaults.

Hoons defy police blitz

Melbourne's worst car hoons have vowed to continue illegal street races as police admit they are battling to control a huge spike in the madness.

The Herald Sun newspaper was given a back seat with police as they made an unprecedented blitz on hoons on a recent weekend.

More than 100 officers from three regions focused on drivers in the worst-affected suburbs including Campbellfield, Somerton, Thomastown and Tullamarine.

The most extreme cases police have seen included more than 600 people watching burnouts and stunts; culprits pouring 20 litres of oil on a road for a display; hoon clubs with members who wear identical hoodies with emblems; and an L-plate driver doing burnouts with his father in the passenger seat.

It takes just one text message and about 10 minutes to set up an illegal street race. The crackdown follows the death of a 22-year-old driver in Adelaide on May 14, when his car was hit by two allegedly drag-racing drivers.

New laws for consumer credit providers

The National Consumer Credit Protection Bill 2009 aims to simplify and standardise the regulation of consumer credit, which until now has been regulated under a myriad of different state and territory laws to the detriment of consumers, according to banking and financial services specialist Jim Bulling.

"The proposed national licencing scheme will ensure consumers benefit through the introduction of a number of measures designed to improve and regulate the conduct of lenders and brokers throughout the industry," Mr Bulling said. "Both lending and broking institutions, including the banks, generally recognise that this new regime is designed to stop predatory lending practices by unscrupulous operators and will be of benefit to the industry and their customers."

The suggested registration and licencing requirements under the Bill will extend to any person who engages in credit activity. In order to become registered, a person will have to apply to ASIC for registration by December 31. Once registered, any person engaging in a credit activity will have to apply to ASIC for a licence by June 30, 2010.

For details on the new laws, visit www.treasury.gov.au/consumercredit/content/legislation.asp.

Visions for native title and reconciliation

A new vision for native title is needed to deliver on the hopes and expectations of indigenous and non-indigenous Australians following the High Court's decisions in *Mabo* and *Wik*.

That is the message emerging from the latest edition of the Australian Law Reform Commission's Reform journal, launched in Sydney by the Attorney-General of Australia, Robert McClelland – the Minister responsible for Native Title – Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, and ALRC president, Professor David Weisbrot.

"There now appears to be a real mood for change in the Australian Parliament, with the recent announcement by the Attorney-General of proposed significant amendments to the *Native Title Act*, so it is very timely to hear the voices of a range of leading experts in this field," Professor Weisbrot said.

"Indigenous Affairs Minister Jenny Macklin sets out her vision for better utilising native title agreements and royalty payments to help close the gap between indigenous and non-indigenous Australians."

Strong IP growth for green innovations

A 250 percent jump in green trade marks in the energy sector over the past five years – compared to the previous five years – is one indicator showing strong growth in intellectual property applications for green technologies in Australia.

Innovation Minister Senator Kim Carr also pointed to an increase in patent applications as more evidence that industry is adapting to, and finding new ways to combat, the challenges of climate change.

“Patent registrations for solar and clean coal technology applications from Australian and overseas innovators have risen by 15 percent and 50 percent respectively over the past five years,” Senator Carr said.

“Combined with the huge jump in green trade marks in the energy sector, these figures clearly show that innovators are tackling climate change head-on.

“Innovators clearly recognise the importance of being green if they are to succeed in today’s marketplace.

“Registered IP rights, including patents, trade marks, designs and plant breeder’s rights are central to the innovation that drives economic growth.

“They offer exclusive rights for new ideas and create incentives for continued investment in green technologies. The IP system allows Australia to benefit from investment in green technologies by protecting that investment, and licensing the technology to other countries.”

For more information, visit IP Australia at www.ipaustralia.gov.au or contact your local solicitor.

Krispy Kreme v Arnott’s

The stakes were high when Arnott’s took on Krispy Kreme to protect its Iced Vo-Vo trademark – Arnott’s was defending big bikkies and Krispy was looking at a lot of dough.

The battle was set to play out in the homes and offices of Australia at morning coffee and afternoon tea time, but the war of the clones has ended without a shot being fired.

Arnott’s threatened legal action over Krispy Kreme’s Iced Dough-Vo doughnut, which is covered in pink icing and coconut flakes, just like the famous Iced Vo-Vo biscuit.

An Arnott’s spokeswoman said Krispy Kreme Australia must have been coconuts to think it could take advantage of the 103-year-old Vo-Vo trademark.

Krispy Kreme Australia had argued that imitation was the sincerest form of flattery and Arnott’s should be tickled pink at the homage to its iconic brand, which was to be part of a Fair Dinkum Doughnuts promotion, along with a Rocky Road doughnut.

Krispy Kreme Australia CEO John McGuigan said Krispy Kreme customers understood the difference between a doughnut and a biscuit.

“The word “iced” is pretty well used, and the word “dough” I don’t think has got anything to do with what Arnott’s do, and the word “Vo”, I’m not sure what it means, but it goes well with “dough”,” said Mr McGuigan.

Now the doughnut maker has backed down and agreed to rename the Iced Dough-Vo from May 11, Arnott’s and Krispy Kreme said in a joint statement on April 30.

Workplace cowboy fined for treating workers with contempt

A Gold Coast food processing company has been fined \$80,000 and labelled a “workplace cowboy” for treating its employees with “contempt”.

The Federal Workplace Ombudsman initiated legal action against the company for underpaying the workers, some of whom had disabilities.

In Brisbane’s Federal Magistrates Court, Fresho Foods Pty Ltd was fined a total of \$80,200 and ordered to backpay 11 vegetable peelers \$13,500.

The court found that the company had unlawfully changed their classification from “employees” to “independent contractors” and deliberately breached the law.

Federal Magistrate Keith Wilson said Fresho Foods and its director, Tony Pirrottina, had “treated workers with contempt” and were “entirely unrepentant and lacking any contrition”.

In his 19-page judgment, Magistrate Wilson said Pirrottina had “thumbed his nose” at the Workplace Ombudsman and the court.

In response to the company’s claim that a significant penalty should not be imposed because it would force the business to close and put the workers out of a job, Magistrate Wilson said: “The court cannot condone such industrial relations blackmail.”

If you have concerns about your employment conditions, please contact your local solicitor.

Man without key has drink-drive conviction quashed

A Beenleigh man found guilty of drink-driving after trying to help his sister start a broken-down car had his conviction quashed on appeal.

In a bizarre case, both a magistrate and a District Court judge had held David Brian Egglemosse intended to use a vehicle parked in a vacant lot alongside the Pacific Motorway at Loganholme, south of Brisbane, in September 2005.

However, a new ground was raised in the Court of Appeal which showed Egglemosse had a defence under a section of the *Transport Operations (Road Use Management) Act*, that was not argued before either original hearings.

A summary trial in the Magistrate’s Court heard Egglemosse’s sister Norma got a lift home as a passenger in the car which stopped and rolled into a vacant lot.

Believing the car had run out of petrol, she rang her brother David, a mechanic, but when she returned, the driver of the vehicle had left.

Meanwhile, David Egglemosse walked a short distance to the vehicle, put fuel into the car and worked on the disconnected battery. He then went to the driver’s side to lean into it to see if it would start. He found there were no keys in the ignition and returned to the front of the car where the bonnet was still up.

Police arrived and breathalysed Egglemosse, who returned a blood-alcohol reading of 0.15 per cent.

Egglemosse pleaded not guilty on the basis he had not intended to drive the car and did not even have a key to it.

However, the magistrate convicted him, fined him \$720 and disqualified him from driving for nine months.

Egglemosse appealed to a District Court judge who threw out the appeal and ordered he pay \$900. He then went to the Court of Appeal and, in a unanimous judgment, his appeal was granted.

The Court of Appeal set aside the conviction, fine and disqualification imposed in the Magistrate’s Court and also set aside the order that he pay \$900 in District Court costs. A verdict of not guilty was substituted for the Magistrate’s Court verdict.

Court of Appeal president Margaret McMurdo said Egglemosse had established on oath that he had no intention to drive the vehicle and the car was not a traffic hazard.

For advice on appeals, contact your local solicitor.

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