

# GARLAND

# WADDINGTON

## SOLICITORS



## Parliament committee calls to decriminalise altruistic surrogacy

The Investigation into Altruistic Surrogacy Committee of the Queensland Parliament has unanimously agreed to decriminalise altruistic surrogacy in Queensland.

The committee's report, 'Investigation into the decriminalisation and regulation of altruistic surrogacy in Queensland, October 2008', contains 26 recommended changes to Queensland's surrogacy laws, including the removal of criminal sanctions from the Surrogate Parenthood Act. Surrogacy involves a woman being impregnated with the intention of giving the baby to someone else once it is born.

Mrs Linda Lavarch MP, who chaired the cross-party committee said, "We believe that the current Act is counterproductive. It criminalises families. It does not encourage openness or informed consent... In some cases, it prompts people to seek commercial surrogacy overseas".

If the committee's recommendations are supported, it will mean that:

- careful planning will be required with medical and psychological assessment, counselling and legal advice;
- birth mothers will never be forced to relinquish the baby;
- advertising and brokerage will not be permitted and surrogacy contracts will remain unenforceable;
- legal parentage can be transferred after birth under criteria to ensure that the child will not be disadvantaged because of the way he/she was conceived; and
- the child's right to information on their birth history will be protected.

For more information about surrogacy laws, contact your local solicitor.

## Shine warns of treadmill danger

Attorney-General Kerry Shine has warned Queensland parents to keep their children away from treadmills after some 50 children have been treated in hospital over the last five years for injuries sustained on the exercise machines.

This represents a significant increase, compared to only six injuries during the previous five-year period.

"Over a third of the injured children were so severely burnt they required skin grafts", Mr Shine said. He said the increase in severe friction burn injuries in small children could be attributed to the recent gain in popularity of in-home treadmills.

"Children under four years of age are most vulnerable. A typical injury is sustained from reaching under the treadmill while someone else is operating it.

"The injuries are exacerbated if the child gets trapped under the treadmill, which has happened in 67 percent of cases".

Mr Shine said Queensland would support any recommendations from an investigation into the increase in injuries to small children using domestic treadmills being undertaken by the NSW Products Safety Committee.

## Telecommunications boss leaves Australia

The sole director of a company who left Australia after his business collapsed owing one of its workers more than \$10,000 has been ordered to back-pay his former employee within 28 days.

NSW Chief Industrial Magistrate Gregory Hart has fined former Sydney telecommunications businessman Alexander Trousov \$11,200 and instructed that most of it (\$10,400) be reimbursed to his former female staffer.

Chief Industrial Magistrate Hart noted the original order to back-pay the woman had not been complied with and was never likely to be, given the company had since been wound up.

Trousov had chosen to leave Australia in April and, as far as the court was aware, had not returned, despite being "fully aware" he faced legal action initiated by the Federal Workplace Ombudsman.

"His failure to return to Australia and participate in these proceedings would suggest a complete lack of any contrition or remorse", Hart said.

*If you are unsure of your workplace obligations, contact your local solicitor.*

## Newsletter

NOVEMBER 2008

# GW

### DONUT KING FINED OVER BREACHES

A Donut King outlet has been fined after significantly underpaying its staff, serving as a warning to the rest of the retail industry.

### DRUNKEN PIE POKER KNOCKED OUT

A man has been ordered to pay damages after drunkenly raiding a bakery for an early morning feed.

### STUNNING JEWELLERY CASE DISMISSAL

A recent US court decision in a patent infringement case allows for more competition in the personalised jewellery marketplace.

### GREENPEACE PROTESTORS WIN CASE

Greenpeace protestors are found not guilty due to their prevention of property damage from climate change.

### LANDMARK DECISION FOR THE FRANCHISING INDUSTRY

A High Court decision helps to clarify the enforce-ability of franchise agreements.

### Case note: COURT DECISION PAVES THE WAY FOR MORE PROSECUTIONS

Not knowing the law was no excuse for a company caught importing counterfeit products.

and more...

### WISE WORDS

“ People rarely succeed unless they have fun in what they are doing ”

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# Case in point: Court decision paves the way for more prosecutions

*Selling and importing counterfeit products can bring strong criminal penalties*

## Overview

A recent decision of the Court of Appeal of the Supreme Court of Victoria is good news for owners and licensees of trade marks in Australia, particularly trade marks that are well-known and often targeted by counterfeiters.

The decision has clarified the tests to be applied in determining whether there has been a contravention of the criminal offence provisions of the Trade Marks Act 1995 (Cth). The decision confirms that it is not necessary to prove that the accused knew that his or her conduct was unlawful or wrong. Instead, it must be proven only that the accused committed the relevant acts either intentionally or recklessly.

As a result, it should now be easier to successfully prosecute persons involved in the importation and sale of commercial scale quantities of counterfeit products.

## The criminal offence Provisions of the Act

Counterfeit products are those to which a trade mark has been applied without the permission of the owner or licensee of the trade mark. Counterfeit products typically involve well-known brand names applied to “look-alike” fashion or luxury goods.

Part 14 of the Act sets out a number of criminal offences which are aimed at those engaged in the production, importation or supply of counterfeit products, and related activities. The penalty for each of these offences can include a substantial fine (up to \$55,000) and imprisonment (for up to two years).

These penalties should provide a greater deterrent to dealing in counterfeit goods than the trade mark infringement provisions in the Act – the remedies for which are limited to injunctions and damages or account of profits. However, the effectiveness of these provisions has been called into question in recent years following several unsuccessful attempts to prosecute people for these offences.

A particularly problematic issue in these cases has been that courts have interpreted the provisions as requiring that the accused person knew that, or at least was reckless about whether, his or her conduct was a criminal act or contravened the law. The difficulty of establishing this beyond reasonable doubt has limited the effectiveness of these provisions.

## Facts of this case

In 2004, the Australian Customs Service intercepted three shipping containers imported into Australia from China and found thousands of suspected counterfeit goods. Following investigations conducted by the Australian Federal Police, the directors of the company that had imported the goods were charged under section 148 of the Act with importing goods and exposing them for sale knowing that, or

reckless of whether or not, a registered trade mark was falsely applied to them or in relation to them.

During the trial in the County Court of Victoria, the judge ruled that, in order to make out the offences charged, it was necessary for the Crown to prove that the accused knew that what they were doing was wrong. For example, the judge directed the jury as follows:

“The Crown would need to prove beyond reasonable doubt that assuming those matters (i.e., that the accused had imported and exposed the goods for sale and that the goods were counterfeit) were proved, that each accused individual was aware that it was wrong. That is, unlawful in a criminal sense. If you like, as opposed to a potential for a civil liability. They have to know it is a criminal offence”.

The jury returned verdicts of not guilty on each count.

The Commonwealth Director of Public Prosecutions (DPP) appealed to the Court of Appeal of the Supreme Court of Victoria, seeking clarification as to the elements of an offence under section 148 of the Act and, in particular, whether those elements included that the accused had knowledge, awareness or a belief that the conduct was unlawful in a criminal sense or wrong according to the ordinary standards of men.

## Decision by the Court of Appeal

The Court of Appeal found in favour of the DPP. It held that the offences under section 148 of the Act, with which the accused had been charged, did not require proof that the accused knew his or her conduct was unlawful or wrong.

The Court of Appeal stated the elements of the offences as follows:

- the accused must have intentionally exposed the goods for sale or imported the goods (as the case may be), and
- the accused must have known that, or been reckless about whether, a registered trade mark had been falsely applied to the goods, or in other words that the goods were counterfeit.

The Court of Appeal cited long-standing High Court authority in support of its conclusion that it was not an element of “criminal responsibility” that the accused person knew that what he or she was doing was unlawful.

The decision should pave the way for more straightforward prosecutions of those dealing in counterfeit products and hence restore the full deterrent effect of the provisions in Part 14 of the Act.

Endnotes

- *Commonwealth Director of Public Prosecutions Reference No 1 of 2008 [2008] [VSCA] 214.*
- *The relevant provisions are sections 145, 146, 147, 148 and 150 of the Act.*

## Filmmakers scare neighbours

*Four filmmakers were arrested after neighbours mistook an armed confrontation for the real thing.*

Police cordoned off an apartment building and blocked streets in Carlton in Melbourne’s north at 10.40pm after a woman told police she’d seen a man with a gun, the Herald Sun reported.

“Police went to the apartment block on Canning St and saw a man pointing a firearm at the head of another”, police spokesman Wayne Wilson said.

“The area was cordoned off and even the critical incident response team was called in to arrest those involved”.

Senior Constable Wilson said it was only when officers found the filming equipment that they realised it had all been an act.

The men were arrested and are likely to be charged with firearms offences and creating a public nuisance.



“Under the Act, if you think it’s a firearm, it’s a firearm”, Senior Constable Wilson said.

“They hadn’t notified any persons what they were doing down here today, there were no permits”, Senior Sergeant Stephen Cooper said.

## Stunning jewellery case dismissal

*A recent court ruling in a patent infringement suit is expected to greatly open the marketplace and provide retailers and consumers with more options for personalised jewellery.*

In Pandora Jewellery, LLC v Chamilia, the United States District Court for the District of Maryland ruled that Chamilia’s jewellery did not infringe upon Pandora’s patent. Chamilia jewellery uses decorative locks that allow wearers to personalise their bracelets and necklaces while preventing the beads from bunching or sliding on the strand. A ruling on the validity of Pandora’s patent is still awaited from the court.

“We are thrilled with the court’s ruling and agree with Judge Blake’s assessment that this will promote greater competition and more choice for consumers”, Chamilia CEO Jeff Julkowski said.

“In addition to vindicating our long-held position, this ruling will enable Chamilia to serve even more retailers and allow consumers a greater ability to design and personalise their jewellery”.

The beads used by both Chamilia and Pandora are interchangeable. According to Julkowski, the legal ruling has cleared any misinformation that might have previously kept retailers from adding Chamilia to their lines.

For more information about patent laws, contact your local solicitor.

# Landmark decision for the franchising industry

*A recent highly anticipated High Court decision sends a clear message to the franchise industry that a minor breach of the Franchising Code of Conduct by a franchisor does not automatically render a franchise agreement unenforceable.*

In *Ketchell v Master of Education Services*, the High Court overturned a 2007 NSW Court of Appeal decision which held that a franchise agreement was illegal and unenforceable if a franchisor did not obtain a written statement from its prospective franchisee stating they had read and understood the proposed franchise agreement and the Code in accordance with the requirements of Section 11 of the Code.

McCullough Robertson Lawyers partner Malcolm McBratney said the High Court's decision was welcomed by the industry as it provided much needed clarification for both parties.

"The original decision would have had far reaching ramifications, allowing any disgruntled franchisor or franchisee to rely on a technical breach of the Code to dodge their contractual obligations", Mr McBratney said.

"Importantly, the decision does not mean either party can blatantly disregard their obligations under the Code, but rather provides security for both parties that an inadvertent or technical breach of an agreement may not render it null and void.

"If there has been a breach of the Code, the aggrieved party will still be able to seek an appropriate remedy, in accordance with its rights to do so under the Trade Practices Act. Remedies would include variation of the terms of the relevant franchise agreement, termination of the agreement or compensation for loss and damage suffered as a result of the breach of the Code".

Mr McBratney said the *Ketchell* case had added significant pressure to the pre-agreement phase for franchisors and could have led to an influx of franchisee claims over their agreements.

"The message to franchisors remains the same, make sure you are compliant and for franchisees, carefully consider any agreement and seek legal advice to make sure your franchisor is compliant", Mr McBratney said.

## Ombudsman appeals decision

The Workplace Ombudsman has launched an appeal against the Federal Court's ruling on a company that allegedly avoided its redundancy obligations.

Justice Roger Gyles AO, dismissed the case against Tristar Steering and Suspension Australia Ltd.

The Workplace Ombudsman prosecuted Tristar for keeping workers on the payroll at its factory at Marrickville, but not providing them with any meaningful work.

The company, part of the Arrowcrest Group, subsequently paid about 30 employees entitlements of more than \$4.3 million.

## Greenpeace protestors win case

*IChemE (Institution of Chemical Engineers) policy director Andrew Furlong has described a UK court decision to clear six Greenpeace activists of causing criminal damage at Kingsnorth power station as "disastrous".*

In October last year, five activists scaled the power station's 200m chimney using abseiling equipment and painted the word "Gordon" (referring to UK Prime Minister, Gordon Brown) in an effort to convince the UK Government to cancel the redevelopment of the coal-powered site.

One activist remained on the ground to liaise between the climbers and the police. Greenpeace was accused of causing £30,000 (\$53,700) worth of criminal damage.

Greenpeace's defence against the criminal damage charge rested on its assertion that by acting to close the power station on Kingsnorth, Kent it was preventing the harm that coal causes to ecosystems, people and property.

Eon, the German-based utility which operates the dual-fuel station, didn't close the plant but burned oil instead of coal.

The jury found all six activists not guilty, marking the first case where preventing property damage from climate change has been used as part of a "lawful excuse" defence in UK Crown Court.

Eon UK spokesperson Jonathan Smith said, "We're worried that the decision is a license to break into power stations. We're concerned about the decision's repercussions for safety and security of energy supply".



## Flight crew sacked over Facebook slur

*Virgin Atlantic has sacked 13 cabin crew staff after they criticised some of the British airline's passengers on the social networking website Facebook.*

The airline opened an investigation on October 23 following complaints from passengers and other Virgin staff members over the crew's Facebook discussion.

"It was found that all 13 staff participated in a discussion on the networking site Facebook, which brought the company into disrepute and insulted some of our passengers", Virgin Atlantic spokesman Paul Charles said.

"There's a time and a place for Facebook. But there's no justification for it to be used as a sounding board for staff of any company to criticise the very passengers who ultimately pay their salaries".

Mr Charles said the web discussion had been removed from Facebook, though he was unable to say whether that had been done by Facebook or a cabin crew member.

## Drunken pie-poker knocked out



*A drunk was whacked on the head by a baker wielding a rolling pin after running amok in a bakery while looking for an early morning feed, a court was told.*

Ipswich Magistrate's Court heard the man poked his finger in several pies as bakers tried to evict him.

Prosecutor Tara Pease said Craig Moyle, 34, walked through the rear door of Billy Mac's Bakery at Brassall, 40km south-west of Brisbane, at 1.30am on October 8.

Constable Pease said the store was closed for business, but bakers were baking and had left the door open because of the heat coming from the ovens. The court was told staff asked Moyle to leave and he eventually left after grabbing a pie.

Constable Pease said Moyle returned moments later and threw the pie, saying it tasted awful. "He throws the pie ... (and says) it is s-t".

She also said Moyle then started running around the kitchen sticking his fingers in pies and pushed a tray of shortbread off a bench.

The court was told Moyle challenged the staff to fight him and one baker took the opportunity to crack him over the head with a rolling pin. He was unconscious for a short time and was arrested by police.

Moyle pleaded guilty to one count of wilful damage. Acting magistrate Brad Skuse asked Moyle if he was affected by alcohol at the time. Moyle, who appeared without legal representation, said he was very intoxicated on the night and had no recollection of what happened.

"Actually, this is the first time I knew what happened since I got the cut on my head", he said. "I've been back there and apologised".

*Mr Skuse fined Moyle \$300 and ordered he pay \$30 restitution for spoilage of the food.*

# De facto relationships re-defined

*Philandering husbands could soon be ordered to pay their mistresses "maintenance" after an affair ends thanks to a new shake-up of Australia's family law.*

Under the Family Law Act reforms, de facto partners together for two years will get the same rights as married couples to seek "spousal maintenance" claims. Maintenance, as distinct from child support, may be ordered when the other party is "unable to support herself or himself adequately" following separation.

But legal experts warn the amended Act opens the definition of a de facto couple to wide interpretation.

It prescribes a de facto relationship as an opposite-sex or same-sex couple "living together on a genuine domestic basis". Yet it also stipulates that a de facto alliance can exist even if one of the partners is legally married to somebody else or in another de facto relationship.

In another twist, the laws shape as a threat to polygamist husbands. Queensland Law Society family law chair Julie Harrington said: "In polygamy, you have only one marriage that's recognised, so you have wives two, three and four as the de factos. At least those women will now have some rights which they otherwise didn't (have) under the Family Law Act".

Ms Harrington said the new laws could also create a debt nightmare for others, who now face the possibility of ongoing spousal support to a string of previous de facto partners.

With married couples, maintenance orders generally end when the ex-partner receiving the money remarries. De factos will come under the same rules if they marry a new partner. But no explicit provision exists in the legislation for maintenance payments to stop should a recipient enter a new de facto relationship.

"Young people might have a series of short de facto relationships – and they're potentially up for paying spouse maintenance for several", Ms Harrington said.

However, a spokesman for federal Attorney-General Robert McClelland said that in this situation the payer would be entitled to head back to the family courts to show "just cause" for discharging or varying the order.

To learn how the family law changes could affect you, contact your local solicitor.



## Sober as a judge

Stand by your dictionaries. The 20-volume Oxford English will do for reading Justice Neville Owen's reasons in the gigantic Bell Group litigation.

Owen said it's a "dispute of Brobdingnagian proportions". It took him two years to compose more than 2600 pages of his thoughts, after listening to 404 days of argument. From beginning to end, the litigation was five years – and it's still not finished.

The transcript in the Bell Group case runs to more than 37,100 pages and the parties' written closing submissions are another 40,000 pages.

The case involves a struggle between receivers for a group of companies controlled by Alan Bond and his interests and the banks that kept giving them money.

Last word as it should be to the judge:

"From time to time during the last five years, I felt as if I were confined to an oubliette... Fortunately, I have not yet been called upon to confront the infinite and, better still, a nepenthe beckons. Part of the nepenthe ... is likely to involve a yeast-based substance. It will most certainly involve a complete avoidance of making decisions and writing judgments".

## Donut King fined over breaches

A Donut King outlet which deliberately under-paid ten of its casual staff has been fined \$30,000.

Federal Magistrate Philip Burchardt said a proper penalty was important as a deterrent, noting that breaches of workplace laws were "regrettably rife in the retail industry".

The Workplace Ombudsman alleged the company and director Kenneth Lui had failed to pay weekend, public holiday and night-shift penalties, overtime rates,

annual leave and did not provide meal breaks to some staff.

The Workplace Ombudsman claimed that, after the contraventions were identified, the company further breached the Workplace Relations Act by lodging Australian Work-place Agreements (AWAs) which employees had not seen, signed or agreed to.

If you're unsure of your rights and responsibilities in the workplace, contact your local solicitor.

## Truckies win case

*A recent Federal Magistrates Court decision that found in favour of three truckies sends a stern warning to businesses that treat independent contractors unfairly.*

The court found in favour of three owner-drivers (Keldote Pty Ltd, L&D Lowe Transportation Pty Ltd and Tambo Walters Pty Ltd) in an action against Riteway Transport Pty Ltd.

In early 2007, Riteway told the three owner-drivers, central to the company's Sydney-to-Melbourne operations, that they would have to replace their single trailers with new b-doubles.

The company offered each of the three drivers compensation that was less per round trip than the additional costs associated with running the new trailers and less than the amount requested by the drivers to cover their costs.

Section 12(1) of the Independent Contractors Act allows an application to be made to the court to review a services contract on the grounds that it is unfair or harsh.

In his judgement, Federal Magistrate Cameron concluded that the contracts were unfair.

The reason was that the contracts entitled Riteway to impose unilaterally, and without making financial compensation to the applicants, a significant change to the equipment required to service the contracts.

This is a historic judgement – the first substantive action brought for an unfair contract under the Independent Contractors Act.

Federal Magistrate Cameron has amended the contract with the truckies to limit Riteway's power to require the owner-drivers to provide new vehicles.

Damage costs are still under consideration.

## Office News

It's a Girl !! ... the lovely Rachelle had a beautiful little (6lb 1oz) baby girl, named Kayla Sadie.

This newsletter is a free service. If there is any issue you would like us to cover in a future newsletter please call us.

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