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In touch with the law

CLIENT NEWSLETTER

The law is constantly changing and this newsletter describes developments which may be relevant to you. If you are in any doubt about these or any other aspects of the law, please make an appointment to see your solicitor.

First Byte

ACCC wins by forfeit in the first unfair contract terms case

Unfair terms and conditions will not be tolerated under the consumer watchdog's unfair contract term rules.

The Australian Competition and Consumer Commission (ACCC) has chalked up its first win on a case solely arising from the unfair contracts terms rules, with internet service provider ByteCard quickly capitulating and consenting to declarations that its terms and conditions (T&Cs) were unfair.

The rules target industries with a reputation for locking customers in to dodgy contracts, like mobile service providers, airlines and gyms. They caused a stir when they were introduced, threatening to be a serious weapon for consumers and an equally serious headache for businesses. Marred with vague terms like 'fairness' and 'legitimate interests', it's sometimes a challenge to assess whether contracts are compliant.

Unfairness in ByteCard's T&Cs arose because they:

☐ allowed ByteCard to vary prices without notice, and without giving consumers the opportunity to negotiate or the right to terminate;

☐ included an indemnity from its customers for, well, anything. It wasn't even limited to losses arising from the customer's actions; and

☐ permitted ByteCard to terminate any account at any time without cause or reason.

For ByteCard, the case cost $10,000 towards the ACCC's legals, the cost of its own legals, and, most importantly, the damage to its reputation. It could also face damages claims from customers who were adversely affected by the unfair terms.

The kinds of clauses targeted in the case aren't peculiar to internet service providers. The common thread to the terms in question are that they are one-sided, wide reaching, vague or are internally inconsistent.

It's fair to assume that these kinds of clauses will remain of most concern to the ACCC.

In short, the ACCC is done with friendly approaches. Enforcement of the unfair contract terms rules is now a priority. If you haven't reviewed your standard form consumer T&Cs yet, then get your solicitor to do so now. ☐

Owners corporations

A new approach to duty to repair and maintain

A recent decision contradicts the legal view for the past 20 years on claims for damages by lot owners against their owners corporation.

In the recent case, the court of appeal found a lot owner had no right to claim damages for breach by an owners corporation of the duty to repair and maintain common property when it refused to upgrade a ventilation system.

A commercial lot owner had wanted to connect the lot to the common property ventilation system to use it for serving food; however, the system would need to be upgraded to function properly if this were done.

Initially, the judge held that the owners corporation was required to upgrade the ventilation system from time to time to meet the needs of lot owners and the owner was awarded damages for the lost opportunity to lease the unit as a food outlet.

On appeal the court found that, though the system would not work properly if the lot owner connected to it, it functioned according to its "design capacity" and as such it was not necessary for the owners corporation to upgrade to comply with its statutory duty. This reverses previous legal authority.

Speak to your solicitor if you are considering claims for damages over breach of an owners corporation's duty to repair and maintain common property. ☐

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Intellectual property

Disputed territory: protecting domain names

A recent court decision highlights the difficulties of protecting domain names from exploitation by competitors.

REA Group Ltd (REA) owns the domain names *realestate.com.au* and *realcommercial.com.au* from which it runs property portals. It also owns trademarks which feature the domain names *realestate.com.au* and *realcommercial.com.au*, along with the tag-line "Australia's No.1 property site" and a logo.

Real Estate 1 Ltd (RE1) owns the domain names and operated property portals out of *realestate1.com.au* and *realcommercial1.com.au*. REA sought findings that RE1 had engaged in trademark infringement, passing off and acted illegally.

The key question was whether people were misled or deceived by RE1's conduct. The court found that an ordinary person wouldn't be misled or deceived by the closeness of the domain names. The judge indicated that if consumers were looking for *realestate.com.au*, a Google search for that domain name would lead to that particular site, while if consumers were looking for "real estate", and were led, through a Google search or sponsored link to *realestate1.com.au* then there was no proof they were misled, as it wasn't clear that they were actually searching for REA's site.

REA was more successful when arguing that RE1 had infringed its trademarks. The court found that *realestate1.com.au* as a mark was deceptively similar to *realestate.com.au*. A real danger of confusion arose because in the scanning process which may occur on a search results page, some consumers would miss the indistinctive "1".

When disputes around domain names occur, companies can choose to commence proceedings either in Australian courts or under the Uniform Domain Name Dispute Resolution Policy; or, for domain names that end in .au, the .au Domain Name Dispute Resolution Policy. For advice on which route is the best to take in your circumstances consult your solicitor. □

Bullying at work

Commission warns against "excessive sensitivity"

Individuals have a relatively high threshold to attain in order to establish workplace bullying.

In the case, a recruitment coordinator team leader was sacked for bullying a member of staff. The person had resigned and in her exit interview made various complaints about the team leader – that she'd been aggressive towards her in every dealing, constantly belittled her, swore and screamed at her regularly and embarrassed and humiliated her.

The employer said the allegations prompted an investigation that was "impartial and conducted promptly, confidentially and objectively" which confirmed this.

However, the team leader won her appeal to the Fair Work Commission for unfair dismissal.

The commissioner was satisfied that while the working relationship between the two had its difficulties, it appeared that the employer had not acted on the staff member's complaints until she resigned, a course which the commission held was inappropriate. And it found a lack of contemporaneous documentation of the bullying.

The commissioner wanted to guard against creating a workplace environment of "excessive sensitivity to every misplaced word or conduct", saying that the workplace did not comprise "divine angels", and employers needed to be mindful that "every employee who claims to have been hurt, embarrassed or humiliated does not automatically mean the offending employee is 'guilty of bullying' and 'gross misconduct'". □

Medical negligence

Doctor's duty to warn

A doctor's duty to warn of inherent risks of a procedure is to protect the patient from injury that is unacceptable to them.

The patient in the case underwent a surgical procedure relating to his spine. There were two inherent risks which the doctor had failed to warn him of: first, nerve damage; and second, paralysis. The patient ended up with nerve damage and sued the doctor in negligence.

The court found the surgeon had been negligent in failing to warn the patient of the risk of nerve damage, but even if the patient had been warned of that particular risk, he would still have gone ahead with the operation. Therefore, the failure to warn did not cause the injury. As for the risk of paralysis, the court found the surgeon had been negligent in this as well and that if the patient had known about the risk of paralysis, he would not have agreed to the procedure.

However, as that risk did not eventuate, the court held the surgeon could not be liable for the consequences of the acceptable risk because of negligence associated with an unacceptable risk. The court held that the underlying policy is to protect the patient from the occurrence of a physical injury, the risk of which is unacceptable to the patient. Therefore, liability should not extend to harm from risks that the patient was willing to hazard. □

LinkedIn problems

Sacked for soliciting clients

An employee was dismissed after advertising his private company to contacts on LinkedIn.

An interior designer was employed by a national architecture and design company and, prior to taking up the role, had informed his employers he intended to carry out private design work in his own time.

This year, in a LinkedIn email, he announced he intended to expand his private company to "a full-time practice", directing readers to his own company website and social media pages, and concluding by stating: "One of the many benefits of working with a new company is that you get the operator's prior big business experience at small business rates!"

He sent out the LinkedIn email to numerous individuals employed by important clients of his workplace.

It was found the LinkedIn email constituted "a clear attempt … to solicit business from his employer's clients" which amounted to serious misconduct.

While LinkedIn as a social media platform has, as a general proposition, less scandal-prone content than Facebook or Twitter, its often inextricable blending of the personal and professional might mean it turns out to be the platform that most frequently gives rise to issues of this kind.

Contact your solicitor for further advice if you have concerns using social media. □

> "He sent out the LinkedIn email to numerous individuals employed by important clients of his workplace."

Security interests

Register your security interests

A new court decision has found that the Personal Property Securities Register (PPSR) is the final word on security interests in personal property.

The case involved three Caterpillar construction vehicles leased out to a company. The company borrowed money and used the Caterpillars as security. The credit provider registered its interest on the PPSR (*www.ppsr.gov.au*), a government register where details of security interests in personal property can be registered and searched.

The company subsequently went into liquidation, with the lender claiming to be a secured creditor.

The court found the lease on the Caterpillars was a security interest and that it could be used to secure the loan.

In determining priority of creditors, the court had to consider the 24-month transitional period for personal property on state and territory registers to make it on the PPSR. It the found that the owner of the Caterpillars could have registered their interest on a state register before the commencement of the PPSR and didn't, and they hadn't registered the Caterpillars on the PPSR either, so their interest was not enforceable.

However, the lender's registered interest on the PPSR was enforceable against third parties, including the Caterpillars' owner.

As a result of this decision, those in the business of leasing personal property or selling goods on a retention of title basis, should register their interests on the PPSR to avoid losing their priority to the goods. You should be wary of relying on the 24-month transitional provisions because if your interest was registrable prior to the start of the PPSR, but not registered, you will lose the benefit of those provisions. □

Who counts as a parent?

Family Court holds conflicting views

In two recent cases involving sperm donors, one an IVF case, the other a commercial surrogacy arrangement, the family court arrived at conflicting conclusions about who was a parent.

In the first case the court noted it did not have a comprehensive definition of parent and it should be given its ordinary dictionary meaning, broadening the interpretation of what parentage can mean.

> "The judge said the biological father could potentially only become the legal father by adoption."

The known sperm donor in a consensual IVF procedure with a friend was declared a parent under family law. As the woman did not have a partner, the court was able to reason that the child had two biological parents.

In another case, the judge stated the preliminary view was that the known sperm donor in a commercial surrogacy arrangement would not be declared a parent. One partner of a male homosexual couple had provided donor sperm in a commercial surrogacy arrangement in which twins were born who were in the couple's custody. The judge said the biological father could potentially only become the legal father by adoption.

If someone has provided genetic material (known donor egg or sperm) and wishes to apply for a declaration of parentage after an IVF or surrogacy arrangement, they need to be aware that court outcomes can vary considerably.

They will depend on a number of factors, including the method of artificial conception and legal reasoning in considering several different laws. □

Property

Many holiday-house lettings illegal

Hundreds of central coast holiday home-rentals have been exposed as unlawful by a recent court decision.

A court has found that renting out a home in a residential zone for short-term holiday letting is prohibited and in breach of planning laws. The decision hinged on the interpretation of what uses are permissible in a residential zone of the Gosford Council but will equally apply in other local government areas if their local environmental planning provisions are similar.

The case involved a home in the tourist suburb of Terrigal which had been let out for short-term stays, for example, over weekends, and was often host to loud, late-night parties, buck's and hen's parties etc. The situation became unbearable for the neighbours who complained to the council, which did not do anything about it. The neighbour finally brought a case against the landlord.

The court found that a 'dwelling' under the planning scheme required some level of permanence of habitation or occupation. The use of the house for buck's and hen's parties was not consistent with its use as a dwelling house as required by the zoning for the area. However, the court noted that some short-term stays may nevertheless satisfy the definition of a dwelling house, for example holiday houses that are used exclusively by a family for a limited amount of time each year, or even time-shared between several families, and houses that are owned by a company and rented out to executives and their families for short durations.

As a result of this decision, many homeowners who rent homes out to holiday-makers are now open to potential civil or criminal proceedings for their actions, depending on the zoning and planning regulations in the area.

You might wish to talk to your solicitor if you think your property might be affected by this decision. If you are looking to buy property with the intention of renting it out on short-term leases, you should make this clear to your solicitor so appropriate checks can be made. □

Social media

Money can't buy my 'Like'

Significant revenue can be made from social media accounts but buying them from another business is neither legally nor practically straightforward.

When it comes to social media, the social media providers (SMPs) hold almost all of the cards. Any attempt to purchase accounts held by another entity using a simple asset purchase agreement will often be ineffective. This is because the current terms of service of most major SMPs create difficulties as a result of the restrictions they place on the transfer of accounts.

> "Any attempt to purchase accounts held by another entity using a simple asset purchase agreement will often be ineffective."

Let's say, for example, you are considering purchasing a smaller company, Target Co, to complement existing business divisions. Although Target Co has little in the form of tangible assets, it has developed particularly strong brand awareness in certain market segments via a social media-focused marketing strategy. Target Co's revenue stream now relies heavily on its followers, fans, subscribers and other consumers who connect with it and its brands through social media.

Naturally, as part of the purchase, you will acquire all relevant intellectual property rights of Target Co, including its registered and unregistered trademarks. Any domain names can also easily be transferred. However, what about Target Co's social media accounts? Without those, the revenue stream that makes Target Co an attractive proposition might start to dwindle or, worse still, evaporate altogether.

The terms of service of most major SMPs forbid the unauthorised transfer of accounts. Some, such as Facebook, expressly allow transfers if written consent is obtained. However, anecdotal evidence and experience suggest that there is generally no formalised procedure to obtain SMPs' consent to a transfer, no requirement for an SMP to act reasonably in response, and little (or, in many cases, no) prospect that it will respond at all.

Transferring ownership (or at the very least) control of Target Co's social media accounts will require consideration of a range of alternative strategies, each of which carries certain risks, both legal and practical. To determine the best approach for your business talk with your solicitor. □

Tax disputes

Alternative dispute resolution

If an objection to a tax assessment is disallowed by the ATO a taxpayer can refer the decision to the Administrative Appeals Tribunal or Federal Court, abandon the objection or turn to alternative dispute resolution (ADR).

Arbitration, mediation and expert determination are the most common types of ADR. The benefits may include quicker and less costly determinations. For guidance on how to approach the process talk with your solicitor. □