BUSINESS MATTERS

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GETTING CAUGHT IN THE SOCIAL NET(WORK)

Advertising Standards Bureau finds Foster's and Smirnoff liable for third party comments on Facebook pages.

In two practically identical complaints lodged in relation to the Victoria Bitter and Smirnoff Vodka Facebook pages, the companies were accused of breaching the Advertising Code ("the Code") by depicting irresponsible drinking, sexism, racism, excessive consumption and people under the age of 25 drinking alcohol.

The Advertising Standards Board considered that "the Code applies to the content generated by the advertisers as well as material or comments posted by users or friends." This effectively makes companies responsible not only for the material they put out, but the way in which the public engages and reacts to the advertisement.

Echoing the sentiments of Australian rock satirists, TISM, who quipped that “you’re only as good as your fans”, the complaint against Smirnoff was dismissed as the comments on their page were found not to be in breach of the Code.

VB, on the other hand, were reprimanded for fan comments on their Facebook page which depicted sexism (“women should be chained to da kitchen. Lmfao.”), homophobic (“bloody poofs”), sexual and obscene language (which shouldn’t be repeated). While the Board accepted that VB could not prevent third parties posting obscenities on their Facebook page, the advertiser was called into question for failing to monitor and remove the offensive material from the page.

These decisions mirror the Federal Court of Australia’s interpretation of a company’s responsibility for third part comments on their Facebook page in the decision of the ACCC v Allergy Pathway Pty Ltd (decision here).

Allergy Pathway had previously entered into agreed orders to refrain from making misleading statements in their advertising and were found to be in contempt of court by failing to uphold their undertakings.

The substance of the breach were testimonies from clients posted on the company’s Facebook and Twitter pages which were misleading and in breach of the previous undertakings given by Allergy Pathway.

Finkelstein J said that “while it cannot be said that Allergy Pathway was responsible for the initial publication of the testimonials… it is appropriate to conclude that Allergy Pathway accepted responsibility for the publications when it knew of the publications and decided not to remove them. Hence it became the publisher of the testimonials. In any event it is clear that it caused them to continue to be published from the time it became aware of their existence, which is enough to put Allergy Pathway in breach of… it’s undertaking.”

The company was ordered to pay damages (with costs), subjected to three years of injunctive measures and made to publish corrective advertisements, including sending letters to past customers.

Anyone thinking of using social media as a marketing tool (which is pretty much everyone these days) needs to be aware that they may be held responsible not only for content they generate, but also for the third party interactions with that content. Accordingly, close monitoring to remove offensive material is an essential part of any online marketing campaign.

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PRIVATE ANCILLARY FUND SHAKE-UP

1 October deadline looms for trustees to ensure compliance with New Guidelines.

In 1999 the Government introduced income tax measures to encourage greater corporate and personal philanthropy in Australia by allowing concessional taxation treatment for what were then called "Prescribed Private Funds" and also to classify them as a DGR (deductible gift recipient) entitling donors to claim gifts made to those funds on or after 1 July 1999 as deductions. On 28 September 2009 the Government issued new guidelines and renamed these funds as Private Ancillary Funds (PAFS). The Private Ancillary Fund Guidelines 2009 (New Guidelines), which set new minimum standards for the governance and conduct of PAFs, commenced on 1 October 2009, subject to transitional provisions.

The transitional rule in the PAF Guidelines effectively provides that if a PAF's governing rules set out in its trust deed prevent compliance with a requirement in the New Guidelines, the fund is exempt from that requirement until 1 October 2012 but the trustee must seek to have the governing rules of the fund amended to comply with the New Guidelines by 1 October 2012.

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CROWD FUNDING GETS ATTENTION

Fundraising on the world wild web not immune from ASIC intervention.

Crowd funding is a practice in which people pool resources in support of an organisation or event, usually via the internet, like an online fundraising drive. While other jurisdictions like the United States are modifying their laws to facilitate this practice, Australian crowd funders should be wary.

ASIC has pointed out that some types of crowd funding will involve advertising a financial product or an investment scheme which would be illegal without compliance with the disclosure and other requirements of the Corporations Act.

Websites supporting this activity may also be at risk.

Whilst this may seem heavy handed for what might be a fairly minor activity, ASIC has expressed concern at the risk of fraud where funds are raised without any ability of investors to manage their risk by doing proper checks and ensuring the promoters are clearly named and accountable.

It may be that in the light of the ASIC warnings, the websites promoting crowd funding will develop safeguards such as disclosure requirements and monies raised being held in a trust account pending completion and delivery of the project.

ASIC make it clear that not all crowd funding activities will be illegal. Clearly promoters and investors will need to take care as the internet and social media again change the way business is done.

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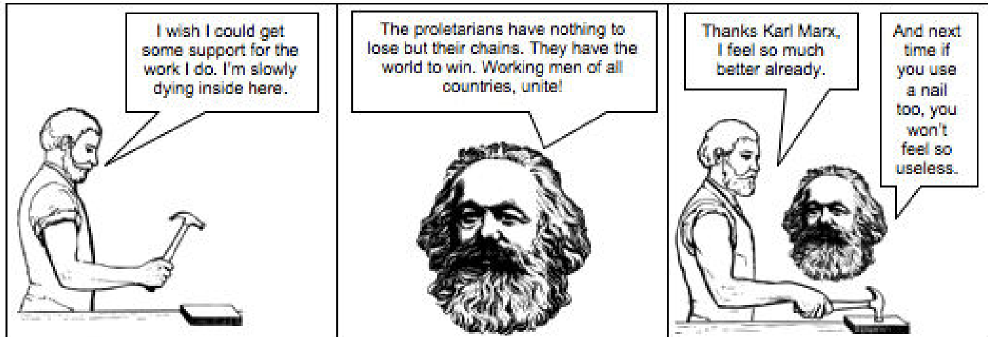
I'm Late.... For Business!



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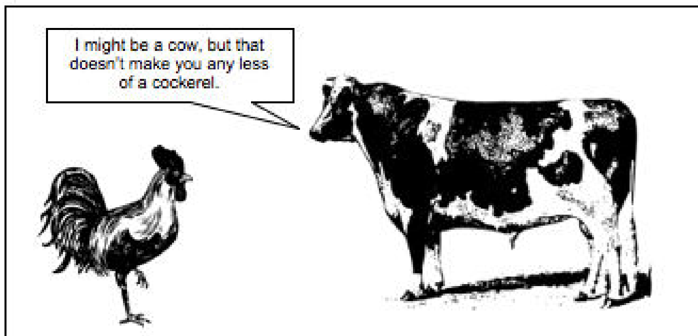

SMS WITH A LOCK IN CONTRACT

Court finds no general discretion to fix unfair strata management statements.

Over the last 10 years one of the responses to the cost and limited availability of land for redevelopment, has been the development of stratum subdivisions supported by registration of a building management statement (BMS) or strata management statement (SMS).

These documents, which are registered on title, have provided a practical and registered format to facilitate separate freehold ownership of different parts of a building, including for different purposes.

This has supported the development of mixed use developments such as the former Sydney GPO (now a hotel, office building, bar areas etc), and of residential towers over retail centres and clubs, and other mixed use developments.

As the differing users and owners will sometimes have differing interests, including over any shared facilities, it is not unusual for one party to claim that the SMS or BMS is unfair and should be amended.

As against this, the law seeks to give some certainty to investors by carefully defining the circumstances in which an SMS can be changed. Section 28U of the Strata Schemes (Freehold Development) Act 1973 (Act), provides that an SMS can only be amended by a special resolution of both Owners Corporations (which is extremely difficult to achieve), or "under this or any other Act by a court".

In the recent decision of Owners Corporation Strata Plan 70672 v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=154285), it was held that this section did not give the Court a general discretion to make changes, such as where the SMS was unfair.

Unless the power was found in another Act, such as in the extraordinary circumstances of a Contracts Review Act claim, then it was held that the Court had no discretion to make amendments.

Accordingly unless the law is changed, it seems that the answer to this issue must be found in the initial drafting of the SMS or BMS. These documents can, for example, be drafted to provide for a reallocation of outgoings expenses based on an expert report, but they will not necessarily allow for other changes. So at the end of the day the law appears to favour certainty over fairness. It also puts the pressure back on the parties to come to their own resolution without going to court.

It is worth checking out these issues investing in a property which has an SMS or BMS.

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