

Court rules on negligence in playground

The High Court has ruled that a primary school was not responsible for a playground accident in which a student was injured when she was pulled off a flying fox by two other students.

The court held the school was not negligent because there were adequate supervision and safety measures in place.

In February 1999, during recess, eight-year-old Farrah Hadba, a student of St Anthony's Primary School in Canberra, was playing in the playground on the flying fox.

Two teachers were rostered on for playground duty at the time, with one teacher responsible for supervising the area of the playground including the flying fox.

However, the teacher was momentarily distracted for 20 to 30 seconds to call a group of students away from an out-of-bounds classroom. During the time the teacher turned away, two fellow Year 3 students each grabbed one of Farrah's legs.

Farrah struggled to free herself and called on the children to stop but she was pulled off the flying fox, hitting her face on

the platform as she fell to the ground. She lost four teeth and smashed her jaw.

The school had a 'hands off rule', where children were not allowed to touch each other in the playground. This rule was displayed on posters throughout the school and was repeated in assembly and in the classroom. The 'hands off rule' was enforced, and children breaching this rule were told to stop.

In *Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn (as St Anthony's Primary School) v Hadba* the High Court considered:

- whether the standard of care owed by school authority extended to the necessity to provide constant supervision over play equipment
- whether constant supervision of dangerous equipment was reasonably practicable and
- whether a different system would have prevented the respondent's injuries.

The court found that Farrah's injuries

were not the result of any defect in the flying fox but rather the result of the two other children having behaved in breach of the 'hands off' rule.

Chief Justice Gleeson and Justices Hayne, Callinan and Heydon (Justice McHugh dissented) found it unlikely that a teacher watching the equipment uninterrupted would have been able to prevent the plaintiff's fall once the other two children had grabbed her legs.

"It was suggested in argument that children will only behave mischievously if they think that no adult is watching. The scope for juvenile mischief is, however, greater than that," the joint judgment stated.

Chief Justice Gleeson and Justices Hayne, Callinan and Heydon also found that constant supervision of the flying fox was unreasonable. "The number of staff required, the financial and other costs of providing them and the narrowly specialised responsibility required of them are going well beyond the bounds of reasonableness," they wrote.

Auctioneers must disclose GST on property sales

The Australian Competition and Consumer Commission (ACCC) has warned auctioneers they must make it clear to all bidders at the start of an auction if bids are inclusive or exclusive of GST.

Under the ACCC's GST pricing guidelines, auctioneers have some flexibility in deciding whether they conduct auctions on either a GST-inclusive or exclusive basis. However, under the *Trade Practices Act 1974*, both auctioneers and vendors must make it clear to consumers whether the bidding price includes or excludes GST – or they may be required to make good the consumer's loss.

The ACCC has accepted court-enforceable undertakings from Manningham Real Estate Pty Ltd, trading as Barry Plant Doherty, relating to the auctions of three allotments of residential land in Melbourne. The land was sold on behalf of the Manningham City Council.

In March 2004, the ACCC received several complaints about the advertising and auction of land in the Melbourne eastern suburb of Doncaster. The land was promoted in newspapers without showing

whether the prices were inclusive or exclusive of the GST, and there was no clear disclosure to potential bidders prior to the auctions whether GST applied to the land sales.

In one auction, the auctioneer made a representation that he did not believe GST was applicable when in fact there was GST liability on the hammer price.

The ACCC believes that the conduct of the real estate agent may have been in breach of sections 52 and 53A of the *Trade Practices Act*, which prohibits misleading conduct and false representations being made in relation to the sale of land.

The real estate agent offered a court-enforceable undertaking to ensure that future property advertising and conduct of auctions complied with the Act.

The buyers will receive a full refund totalling \$48,350 of the GST paid. The ACCC believes the council had not been involved in any alleged contravention of the Act.

For more comprehensive advice on GST on property sales, contact your local solicitor.

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a case in point Court rules on music piracy

Internet Service Providers (ISPs) may be forced to take greater responsibility for what their subscribers do after a recent Federal Court ruling in *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972.

On July 14, 2005, the Australian Federal Court ruled that former Queensland policeman Stephen Cooper, operator of the website MP3s4free.net, and his ISP were guilty of music piracy. Although the website did not host pirated music sound recordings, it did provide hyperlinks to remote websites that contained pirated recordings and was therefore found to be in breach of copyright.

Background

The proceedings were brought against Mr Cooper, his ISP Comcen, Comcen parent company E-Talk Communications, Comcen employee Chis Takoushis, and Comcen and E-Talk director Liam Bal, by 31 record companies, including major record labels such as Sony, EMI, Universal Music and Warner.

Six of the applicants were Australian record companies who claimed to be owners or exclusive licensees in Australia of the copyright in large catalogues of music sound recordings. The applicants alleged that in the course of operating the website, Mr Cooper had infringed their copyright of the music sound recordings.

The website

The website was established by Mr Cooper in 1998 and contained hyperlinks to thousands of unauthorised sound recordings located on remote websites. Users could search a catalogue of sound recordings in MP3, which they could download directly from those websites to their computer. Users could also post their own hyperlinks on the site linking to available MP3 files.

At the bottom of each page of the website, there were hyperlinks to the website's privacy policy, terms and conditions and disclaimer.

The terms and conditions emphasised the linking function provided by the website and stated that links to third-party websites were not necessarily under MP3s4FREE's control or endorsed by the site.

The disclaimer stated: "... When you download a song, you take full responsibility for doing so. None of the files on this site are stored on our servers. We are just providing links to remote files."

ComCen began hosting the website in December 2000. Mr Cooper received free web hosting from E-Talk/ComCen in return for advertising their logo on the website.

In 2003, the website was shut down after a series of complaints were made and investigations took place in relation to allegations of unauthorised use by Mr Cooper of music recordings without a licence.

The case

The principal claims against Mr Cooper and his ISP were based on the infringement of copyright. Namely, the applicants alleged that Mr Cooper directly infringed their exclusive rights to make copies of the music sound recordings and to communicate those recordings to the public. They also alleged that Mr Cooper authorised Internet users to make copies of the music sound recordings and to communicate them to the public.

The court heard Mr Cooper was unaware he may have infringed copyright law and his lawyers argued that because his website only provided links to other files and did not contain any actual music files, there was no infringement by him.

E-Talk and Comcen argued they were unaware of Mr Cooper's actions.

Decision

Tamberlin J found all five respondents liable for copyright infringement. Mr Cooper was found liable for authorising an act that infringed copyright and was therefore liable for copyright infringement. However he was not found to have infringed copyright by communicating the recordings to the public.

The court found that Comcen and E-Talk were responsible for hosting the website and providing the necessary connection to the Internet and therefore had the power to prevent the doing of the infringing acts. Tamberlin J concluded: "They could have taken the step of taking down the website. Instead, they took no steps to prevent the acts of infringement."

Both Mr Takoushis and Mr Bal were found liable due to their knowledge of the content of the website and their failure to take action to prevent the unlawful activity.

The court found that the disclaimers, published on the website, did not 'amount to reasonable steps to prevent or avoid' the infringements and that Mr Cooper had sufficient control of his own website to take steps to prevent the infringement.

Implications

This is the first ruling on the legality of hyperlinking under Australian copyright law and indicates that hyperlinking, and not just downloading, is an infringement of copyright.

The judgment is also significant for ISPs and their potential liability for the activities of their customers.

New drug diversion program

A drug diversion program aimed at getting young people off drugs before they turn to serious crime will be introduced throughout Queensland.

The program is targeted at offenders charged with possessing small amounts of illicit drugs for personal use. Offenders who agree to the diversion program must attend drug assessment and education sessions.

The program has been trialled over the past two years in the Brisbane Magistrates Court and the Children's Court, and will now be available in all Queensland Magistrates Courts.

During the trial, around 2,000 offenders were diverted to counselling, with 94 percent of participants successfully completing the program.

To be eligible for the program, a person must admit guilt to possession of an illegal drug in a small quantity and must not have been convicted (or have a charge pending) for an offence of violence, a sex offence or a serious drug-trafficking offence.

If participants fail to complete the program, they return to court for sentencing on the original offence.

Lawyer's long-winded speech

A lead counsel for the Bank of England has delivered what is believed to be the longest speech in British legal history.

The Mirror reported Nicholas Stadlen QC took 119 days to outline the Bank's defence of a £850 million compensation claim by creditors to collapsed bank BCCI.

Mr Stadlen went through 125 lever-arch files holding 40,000 documents during his opening comments.

The epic speech surpassed the previous record set by his rival, Gordon Pollock QC, in the same case, which lasted 73 days.

Who will inherit the farm?

Proper succession planning and vigilance in protecting the rights of all parties are critical in avoiding what can be catastrophic results in rural succession.

Research conducted by the Australian Bureau of Agricultural and Resource Economics (ABARE) in 1994 found that 99.6 percent of the 85,000 farms in Australia were family owned.

The question of 'who will inherit the farm?' when one generation dies is problematical enough, but too often the more important question of 'who owns the farm?' is not asked until someone dies.

Historically, common methods of farm succession involved leaving everything to the oldest son, or alternatively dividing the farm between the children. The first approach has obvious problems of fairness and equity. The second is workable at most for a few generations, and only then when the original parcel is large enough to be divided into viable portions.

Both 'solutions' effectively assumed that:

- the farmer was male
- the children who would take the farm were male
- the children already worked the farm

and would continue to do so and

- the parents would stay on the farm when they became old and would be looked after by their family until they died.

These 'solutions' do not address significant contemporary considerations, such as:

- What if the farmer wants to or has to retire?
- What about the widow? How does she adequately maintain herself, without relying on her children, for the rest of her life?
- What about children who, for whatever reason, have moved off the farm?
- What about the daughters?
- What about second wives or stepchildren?

Both 'solutions' are still used, and they are the source of expensive, emotive and difficult-to-resolve succession disputes.

Questions of fairness and equity necessarily arise as to who gets the farm. If no provision is made for a surviving spouse, then a family provision application (FPA) is an inevitable consideration.

But family provision applications are not

the only claims made by children. It is at this point that the question of 'who owns the family farm' becomes relevant, because that question needs to be answered before the question of 'who gets it' can be resolved.

The theme emerging from qualitative studies in Australia, New Zealand and the United States is that the topic of 'farm transfer' rather than 'farm succession' should be discussed. This is more than different terminology; it reflects an attempt to use lawyers, accountants, and other specialist advisors to develop a proper appreciation of the farm business and to develop a realistic and structured transfer plan before the patriarch dies.

It is not a suggestion that everything necessarily be disposed of prior to death. Rather, it is an attempt to identify problems and solutions prior to a problem or a dispute being triggered by the death of a stakeholder.

It is also an opportunity to explore strategies which go beyond a simple division of land and the exclusion of some beneficiaries, in order to address properly the considerations set out above.

For more information on rural succession planning, seek legal advice.

The limits of 'unlimited' broadband

The Office of Fair Trading (OFT) has reminded Internet Service Providers (ISPs) that using the term 'unlimited' to describe broadband plans that have download limits can be misleading.

OFT received over 50 complaints about ISPs last financial year, many from people believing the services they received were worth less than what they had paid for.

ISPs that advertise the term 'unlimited hours' while not making it clear that a download limit exists, along with additional costs if that limit is exceeded, may be misleading their customers.

In addition, a customer who signs up for 'unlimited' broadband should not have their access restricted to slower dial-up speeds at any stage.

Under Queensland laws, traders have a

responsibility to ensure all advertising material is accurate, and prices quoted are not misleading. Any business found engaging in false and misleading advertising may face fines of up to \$40,500 under the *Fair Trading Act 1989*.

OFT urges people considering broadband to:

- understand the difference between unlimited hours and unlimited downloads
- check if deals promoting unlimited hours have limits on downloads
- check if deals offering unlimited downloads cost you more than your actual ISP usage.

If you believe you have been the victim of false and misleading advertising, seek legal advice.

Weathermen sued for incorrect forecast

Romanians certainly take their weather seriously. Weathermen in the south-eastern European country are being sued by hotel and restaurant owners for continuously forecasting rain that fails to arrive.

Hotel and restaurant owners in Romanian resort towns said their businesses had been affected by weather reports forecasting heavy rain and had left tourist areas like the Black Sea only half full.

Despite the forecasts of inclement weather, in most cases the weekend weather had been fine and sunny.

Nicu Popescu, the owner of a large villa compound in the Costinesti resort, said the seaside season was only short and the forecasts were affecting attempts to attract business to the area.

The news comes four months after the head of Romania's National Meteorology Agency was fired by the environment ministry for making incorrect weather forecasts.

He failed to predict a cold snap which left three people dead, the Black Sea frozen and record temperatures of minus 36 degrees Celsius.

Crackdown on pay TV signal theft

Accessing pay TV services without paying for them will be criminalised under new measures foreshadowed by Commonwealth Attorney-General Philip Ruddock.

After a six-month review by the Attorney-General's Department, the Government has decided that criminal penalties should apply for accessing pay TV broadcasts without authorisation and payment of subscription fees.

Under the new measures it will also be an offence for a pay TV subscriber to distribute a subscription broadcast to other premises or for a subscriber to use the broadcast for commercial purposes if the appropriate subscription fee has not been paid.

Pay TV signal theft is a major concern for Australia's pay television industry, which estimates it costs the industry more than \$50 million a year in lost revenue.

New general insurance code of practice

A new General Insurance Code of Practice will require general insurers to meet a variety of measurable performance standards, including settling claims in set time periods and providing clearer information about policies.

Developed by the Insurance Council of Australia (ICA), the code covers all types of general insurance for individuals and business policyholders, but does not cover workers' compensation, compulsory third party (CTP), medical indemnity and marine insurance, which all have their own set of rules under statute.

The code aims to improve service standards throughout the industry and create a better deal for the consumer.

All ICA members, who represent about 90 percent of the market, will adopt the

code over the next 12 months and all other general insurance industry representatives are encouraged to do so.

Compliance with the code will be monitored by the independent Insurance Ombudsman Service, who consumers will be encouraged to contact if they feel their insurer has breached the code.

The code requires general insurers to:

- meet agreed timeframes for handling claims or responding to complaints.
- fast-track claims or make advance payments when customers show they are in financial hardship as a result of the damage or loss leading to their claim
- enable claims arising from a natural disaster to be reviewed after they have been settled, recognising that

communities are often traumatised when they assess their losses

- if insurers are unable to provide cover, they will give reasons for the decision and they will refer customers to another insurer, the Insurance Ombudsman Service or the National Insurance Brokers Association (NIBA) for further information about insurance options
- provide better and clearer information to consumers regarding what is covered in their policies
- handle disputes and rectify mistakes in a transparent and efficient manner and in a specified time.

For more information on the new Code of Practice, go to www.codeofpractice.com.au.

Door-to-door trader fined

A Toowoomba door-to-door salesperson has been fined \$20,000 after being found guilty of 12 breaches of the *Fair Trading Act* for pressuring elderly customers into buying carpet cleaning services and then overcharging them.

David Warrick, trading as Toowoomba's Carpet Cleaning and Pest Control Services, was found guilty of ruthlessly overcharging customers for his services, sometimes billing them more than three times his original quote.

Under Queensland law, people buying from door-to-door traders are protected from 'hard sell' tactics. Door-to-door traders must identify themselves, and for purchases over \$75, must provide the customer with a written purchase agreement and a notice explaining their right to cancel the contract, without penalty, within 10 days.

During this 'cooling-off' period, no money, goods or services can be exchanged. If these conditions are not met, customers are allowed to cancel their contract up to six months later without penalty.

For more information on your rights and responsibilities under the *Fair Trading Act*, contact your solicitor or the Office of Fair Trading on 1300 658 030.

Australian 'royals' convicted

A man and his two sons who claimed their property in northern Victoria was an independent kingdom have been convicted of fraud after failing to pay income tax and fraudulently collecting welfare payments.

The Age reported that Virgilio Rigoli and his sons, Philip and Little Joseph, declared their family farm the Principality of Ponderosa and claimed it had seceded from Australia.

Fences were erected around the 24 hectare property and it was surrounded by a moat. People were required to present passports to enter and leave.

The Victorian County Court heard the family earned \$6.9 million between 1991 and 2000 through its polystyrene box manufacturing firm and refused to pay income tax.

The men were convicted of charges including failing to declare taxable income. Virgilio Rigoli was sentenced to a minimum of 24 months in jail for failing to declare income between 1993 and 2000 and obtaining an invalid pension between 1992 and 2001. He was also fined \$25,000.

Philip Rigoli received a \$2500 fine and a suspended 20-month jail term, for failing to declare his income between 1993 and 1994 and obtaining a carer's allowance between 1996 and 1998. The court was told Philip, who was released on a good behaviour bond, left the farm and broke all ties with the family in 1997.

Little Joseph Rigoli received a \$2500 fine and was sentenced to a minimum 16-month jail term for failing to declare his income between 1994 and 2000.

Take care at tax time

The Australian Tax Office (ATO) has urged people who use a tax agent to prepare their tax return to check that the agent is registered.

The reminder comes after two companies were sentenced in the Downing Centre local court for breaches of the *Tax Act* and fined over \$8,000.

The companies, H L & Associates Pty Ltd & H Lal & Associates, were found guilty of falsely advertising as registered tax agents and charging clients a fee to prepare tax returns.

Tax Commissioner Michael Carmody said only a registered tax agent could charge a fee to prepare and lodge your return, so it was important to check that you are using a registered tax agent.

A list of registered agents can be found at www.tabd.gov.au, or you can check with the Tax Agents' Board on 1300 362 892.

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