



CORPORATE & COMMERCIAL WINTER 2008

THE VALUE OF INTELLECTUAL PROPERTY IN TODAY'S ECONOMY

The value of intellectual property ("IP") in today's economy has been at the centre of numerous Court decisions in 2008. The two highest profile cases involved a claim to the exclusive use of the colour purple (*Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd*) and a dispute over the ownership of rights in a granted patent (*University of Western Australia v Gray*). The resources invested in litigating the claims, and the potential dividends for the successful party, underline the high value IP may confer upon its owner.

Key points

- IP is conferred upon the owner to provide a reward to those who expend energy in creating something of benefit to society;
- As IP is exclusive to its owner, in the right circumstances, legal action may be warranted to protect its integrity. Conversely, failure to take appropriate action may dilute the IP's value;
- If your business relies on innovation to compete, it is essential to ensure that the right legal mechanisms are in place to control ownership and use of its IP.

Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd

The latest, but possibly not the last, chapter in this long-running fight was written by the Federal Court of Australia in April 2008. Cadbury claimed that, through its

investment in the use of purple to brand its chocolate products, the use of that colour had become associated with Cadbury. Cadbury claimed that Darrell Lea's use of a similar shade of purple in respect of its own chocolate brands was misleading and deceptive. Cadbury relied in particular on the evidence of several expert witnesses to establish its exclusive reputation in purple.

However, the Court found that this evidence was deficient in key aspects and accordingly insufficient to establish the exclusive reputation of Cadbury in the colour. More importantly, the Court inferred that Cadbury argued its reputation in purple in a vacuum, ignoring the reality that chocolate wrapping also exhibits the names of products and the name of the manufacturer. The Court found that an ordinary and reasonable consumer would not likely confuse chocolates in

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Who does this affect?

All business owners.

Why is IP so valuable in the current climate?

Intellectual Property's function is to reward those who take a risk and invest in developing something innovative to benefit Australian society by giving those persons limited exclusive rights to protect the investment.

How Russell Kennedy can help:

We offer strategic and expert advice to our clients to enable them to protect their valuable Intellectual Property.

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wrapping bearing purple and Cadbury's brands with chocolates in wrapping bearing purple and Darrell Lea's marks.

University of Western Australia v Gray

The University employed Dr Gray to conduct research into the treatment of cancer. Dr Gray made certain advances during the course of his employment and he incorporated a company to exploit the IP in those advances. The University claimed that, as it employed Dr Gray, it was entitled to seek statutory protection of that IP.

However, the Federal Court found that, "absent express agreement to the contrary, rights in relation to inventions made by academic staff in the course of research and whether or not they are using university resources, will ordinarily belong to the academic staff as the inventors".

Critically, the Court found that Dr Gray's duties under his contract of employment did not extend to a duty to invent. Further, he did not owe the University an obligation to keep secret the "patentability" of any invention

he developed during his employment. Therefore, in "this important respect, [Dr Gray's] employment obligations differed from those of a person employed by a private commercial entity whose inventions in the course of his employment could benefit or affect the business of the employer".

The ramifications

IP's function is to reward those who take a risk and invest in developing something innovative to benefit Australian society by giving those persons limited exclusive rights to protect the investment.

The exclusive nature of the rights granted to the owner of the IP means that if the IP is valuable, any dispute over the rights will be hard-fought and expensive. Carefully reviewing the legal and practical mechanisms of ensuring that maximum control over the IP can be achieved before the IP is developed, will help to avoid costly disputes over ownership in the future. Being proactive in managing the portfolio of IP will allow you to take appropriate action to prevent

the dilution of the value of IP through imitators using the IP to compete against your business.

Russell Kennedy has a number of practitioners experienced in the protection and commercialisation of IP. We offer strategic and expert advice to our clients to enable them to protect their valuable IP. Craig Subocz is a lawyer and registered trade mark attorney with several years experience in advising and representing clients in these areas. Paul Gleeson, a principal in the firm, is the Chairman of the Intellectual Property & Information Technology Committee of the Law Institute of Victoria. Please do not hesitate to contact us to discuss any aspect of your business' protection and exploitation of this valuable asset.

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WHY DO I NEED A SHAREHOLDER AGREEMENT?

Participants in business ventures may ask this question, typically in response to a lawyer's inquiry as to whether such an agreement exists.

The short answer is that it makes good business sense to have one. It should be an integral part of the commencement and ongoing operation of any business venture, new or existing, and small, medium or large, where the interests or investments of different parties or ownership participants are involved, even if they are members of the same family, or regard themselves as trusted business partners or friends.

Proper consideration, agreement and documentation of how the business venture is to be managed, and how decisions on key business issues are to be made and by whom can avoid disagreement and business failure, and save time, money and resources being unnecessarily expended in the future.

In all cases, a shareholder agreement needs to be tailored to suit the particular business structure that is used (eg. company, unit trust,

partnership of trusts or individuals). For simplicity, we will use the term "shareholder agreement" generically, but in reality there are various suitable titles depending on which business structure is adopted. A shareholder agreement also needs to be specifically drafted with the collective intentions and individual circumstances of the participants in mind.

Some of the items that a shareholder agreement would typically address are discussed in more detail below.

1. Decision Making

In the absence of formal agreement, the obligations and rights of participants in a business venture are derived from the *Corporations Act 2001* and the constituent documents of the business vehicle that is used (eg. constitution, trust deed). Generally, decisions are effectively made by the majority according to ownership. This has the potential to expose the

Who does this affect?

Anyone involved in joint business ventures.

Why do I need a shareholder agreement?

They are integral to the commencement and ongoing operation of any business venture.

How Russell Kennedy can help:

We can assist you in negotiating and drafting a Shareholder agreement tailored to your requirements.

Who should I contact?



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investment of minority participants to commercial risk, a position that is not necessarily justified if the minority participants bring substantial contributions or skills to the business (not necessarily financial contributions).

A shareholder agreement should spell out which participants have the right to appoint directors to the board, and what participants' voting entitlements are (both at board and shareholder level). There may be a need to reserve particular matters of fundamental importance to a higher than usual requisite majority of participants, or even require their unanimous approval. For example, who has the right to determine if the business should be sold, if a new owner/investor is to be introduced, or if new finance is to be obtained and on what terms?

2. What to do with business profits

People invest in business ventures for different reasons. Some are more interested in achieving long term capital growth which might require funding for business expansion, whereas others look for a regular short term source of income.

A shareholder agreement should set the ground-rules on issues such as how much business profit should be reinvested into the business, and how much should be available for distribution to participants in the venture. Profit investment and distribution policies should also be subject to regular ongoing review. Failure to agree on and properly document these matters at the outset often leads to disputes and the failure of what would otherwise be successful businesses.

3. Protection of goodwill, staff and clients

The essence of successful businesses (particularly small and medium enterprises) is the goodwill, reputation and know-how that is generated by key individuals, and strong relationships with clients.

Participants in business ventures often proceed on the mistaken belief that a key individual holding or controlling an ownership interest would be legally prevented from starting a competing business elsewhere, poaching key staff and clients, and using commercially valuable information for the benefit



of the competing business. Other participants might mistakenly assume there are no restrictions on the types of other activities that can be undertaken.

A shareholder agreement can address these issues and give everyone certainty if it includes properly drafted and commercially acceptable non-compete and confidentiality clauses which bind not only the investor participants, but also the key individuals associated with those investor participants. The clauses may not prevent someone from doing the wrong thing, but should at least give an aggrieved participant the opportunity to seek an appropriate remedy in that eventuality.

4. Consequences of death or incapacity of key individuals

Participants in business ventures often fail to properly consider the consequences of death or incapacity of key individuals in terms of the ongoing ownership and control of the business. It is often assumed that interests held or controlled by a deceased or incapacitated participant will revert to the continuing participants.

Ownership interests in the business may be held by entities separate to the relevant key individuals which will survive the death or incapacity of the relevant individual. These entities may be effectively controlled by persons with whom the continuing participants have no interest or desire in dealing. Often, their motivations concerning the business are diametrically opposed. In addition, even if there is provision

for the interest of a deceased or incapacitated participant to revert to the continuing participants, there is often no mechanism for the price of the transferable interest to be determined, and no agreement as to how the transfer is to be funded.

A shareholder agreement should consider these eventualities, and set out clear procedures for the transition and succession of ownership and control of the business to the continuing participants. It does not follow that the death or incapacity of a key individual should lead to the failure of the business, but this is commonly the result where there is a dispute between the continuing participants and the estate of the outgoing participant and there is no agreed transition and succession procedure to be followed.

Conclusion

A properly drafted and tailored shareholder agreement should serve to ensure that each participant in the business venture knows where they stand in relation to each other, and what mechanisms exist to deal with future events that might impact on the business or the relationships between participants. Attention to documenting each participant's rights and obligations in the harmonious stages of a business venture may well avoid costly and time consuming disputes in the future if circumstances change.

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WHAT EMISSIONS TRADING MAY MEAN FOR YOUR BUSINESS

Climate change and greenhouse gas emissions have become a significant non-financial risk for many organisations. With an Australian Emissions Trading Scheme scheduled to start by 2010, these risks may soon become financial liabilities for many Australian organisations. In this article, we look at what your organisation can consider today to deal with these developments.

1 Where is emissions trading headed?

Australian action to address climate change has picked up pace with the ratification of the Kyoto Protocol, effective 11 March 2008, and the setting of a target to reduce greenhouse gas emissions by 60 per cent on 2000 levels by 2050.

The key mechanism to achieve this target will be the Emissions Trading Scheme ("ETS") being developed by the Garnaut Climate Change Review. The Australian government aims to prepare draft legislation for the ETS by December 2008.

Consistent with previous Australian proposals for emissions trading, the proposed ETS will have broad coverage: it will initially cover emissions from the energy, industrial, mining, transport and waste sectors. This means that all Australian organisations will be affected in some way by the ETS.

2 What is the impact of climate change risks?

Emission reduction targets, the ETS and the impact of climate change have become a significant risk to many organisations. The ETS will also crystallise the cost of emissions, to the extent they previously failed to be priced by the market. Together, these issues create a range of problems:

- 2.1 operation risk (eg resource shortages, business continuity, insurance);
- 2.2 strategic risk (eg market changes; changing consumer behaviour);
- 2.3 regulatory risk (eg compliance costs, renewable energy obligations, energy efficiency or reduction obligations);

- 2.4 financial risks (eg financial liability for emissions, including from suppliers);
- 2.5 financial reporting risks (eg reporting of climate change liabilities); and
- 2.6 market-related risks (eg risks associated with the fluctuation of emission costs).

These risks and issues will need to be systematically managed as an integral part of your organisation's operations.

3 The legal duty to manage climate change risks

Directors of a company have legal obligations to exercise their powers and discharge their duties with the appropriate degree of care and diligence expected, and in the best interests of the company.

The common law imposes a similar duty on senior officers and employees of companies and public sector entities. In order to fulfil this duty, persons should take reasonable steps to guide and monitor the management of the organisation.

Proper governance structures should enable senior management to delegate and discharge their responsibility to identify, assess, monitor and manage climate change issues. If your organisation has not already done so, it could consider the following:

- 3.1 identify the persons in your organisation with oversight of climate change issues;
- 3.2 establish and delegate accountability and responsibility for climate change issues;
- 3.3 establish the processes and systems needed by management to identify these issues (whether as part of existing risk

Who does this affect?

Senior management and operational/sustainability managers.

How Will Emissions Trading Impact my Business?

Your legal duties will require you to properly manage the financial and legal risks arising from emissions trading and climate change.

How Russell Kennedy can help:

We can help you prepare for emissions trading to reduce your legal exposure.

Who should I contact?



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- management policies or systems);
- 3.4 identify and report on suitable performance indicators for climate change issues and sustainability measures (particularly electricity and fuel consumption);
- 3.5 ensure that existing management systems for assessing, monitoring and managing risks are adequate for managing climate change risks; and
- 3.6 identify and comply with applicable legislative reporting obligations.

With clear oversight and delegation of responsibilities, managers (from

	Company wide			Facility
	2008-09	2009-10	2010-11	Any year
Greenhouse Gas Emissions	125 kT	87.5 kT	50 kT	25 kT
Energy Produced	500 TJ	350 TJ	200 TJ	100 TJ
Energy Consumed	500 TJ	350 TJ	200 TJ	100 TJ

sustainability managers through to contract, procurement and property managers) should then have a clear obligation to:

- 3.7 make informed decisions which take into account the cost of emissions and risks of climate change;
- 3.8 ensure that the legal risks associated with climate change have been allocated in contracts with suppliers and purchasers;
- 3.9 encourage innovation and improvement to achieve cost savings; and
- 3.10 ensure that any green marketing does not mislead or deceive consumers.

Whilst sustainability measures would appear to be an additional reporting burden at the present time, their introduction will ease the difficulty of managing the financial risk of climate change issues and emissions once the ETS commences. The market will eventually establish a cost for emissions, so that sustainability measures become another financial and organisational indicator used by senior management.

In February 2008, the Australian Competition & Consumer Commission released a guide to help make green marketing comply with the *Trade Practices Act 1974*. If your organisation wants to make an ongoing claim that it is carbon neutral, then it will be necessary for management to establish recurring processes and systems to measure, identify, assess, monitor, manage and offset emissions.

If the above measures are implemented carefully, these governance structures may also drive top-down organisational change to adapt to a carbon-constrained environment.

4 Mandatory reporting of greenhouse emissions

From 1 July 2008, the *National Greenhouse and Energy Reporting Act*



2007 will require large companies to report on greenhouse gas emissions, energy production and energy consumption if they meet or exceed any of the thresholds in the above table.

Initial thresholds cover an estimated 400 medium and large businesses. The minimum thresholds will be lowered in subsequent years until the mandatory obligations cover an estimated 700 medium and large businesses from 1 July 2010. There are substantial penalties (including penalties against chief executive officers) for non-compliance.

Whilst there is no current proposal to lower the minimum threshold to cover small businesses, mandatory reporting for small businesses might well be required in the future if Australia is to reduce emissions by 60 per cent on 2000 levels by 2050.

Even if mandatory reporting is not required for your organisation, some companies must report information on their emissions:

- 4.1 in the director's annual report, but only if the emissions are somehow

significant to the company's operations and activities;

- 4.2 in the director's annual report of a public listed company if it was required by shareholders to make an informed assessment about the company; and
- 4.3 in some product disclosure statements for financial products where the investment returns would be affected.

Increasingly, organisations are undertaking voluntary reporting of greenhouse gas emissions, and it may not be long before there is a legal expectation that senior management report in this manner as an integral part of managing your organisation.

As this area develops, it is important that you remain aware of your legal obligations so that the risk of financial liability for your organisation is reduced. The first steps can already be taken to prepare for climate change and emissions trading.

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IS IT A FRANCHISE?

The question is asked often – “is a certain business relationship a ‘franchise’ within the meaning of the Franchising Code?”.

An incorrect analysis of this question can bring significant adverse consequences to the ‘deemed’ franchisor.

In October 2007, the Federal Court examined this issue in an application by the Australian Competition and Consumer Commission (“ACCC”) against Kyloe Pty Ltd (“Kyloe”). Kyloe was involved in a business distributing Polar Krush ice-drink machines and the re-sale of Polar Krush products through sub-distributors. The ACCC claimed that Kyloe contravened the Code by failing to provide disclosure documents to its sub-distributors. Kyloe submitted that the relationships were dealership or distribution agreements and not franchises.

Elements of franchise

Clause 4 of the Code provides that a franchise is created by an agreement (written, oral or implied), in which a person (the franchisor) grants to another person (the franchisee):

- the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor; and
- under which the operation of the business will be substantially or materially associated with a trade mark, advertising or a commercial symbol;
 - owned, used or licensed by the franchisor or an associate of the franchisor; or
 - specified by the franchisor or an associate of the franchisor; and
- under which, before starting or continuing the business, the franchisee must pay or agree to pay to the franchisor or an associate of the franchisor an amount including, for example:
 - an initial capital investment fee;
 - a payment for goods or services;

- a fee based on a percentage of gross or net income whether or not called a royalty or franchise service fee; or
- a training fee.

The Court’s decision

The court paid particular attention to the issue of:

1. whether Kyloe had granted the distributors the right to carry on the business of offering, supplying or distributing goods or services in Australia;
2. whether that right was granted under a system or marketing plan; and
3. whether that system or plan was substantially determined, controlled or suggested by Kyloe.

Regarding the first of the three sub-elements above, Kyloe argued that the agreements did not constitute the ‘granting of a right to carry on a business’ as they did not impinge on the sub-distributors’ capacity to develop their own business plans, terms of contractual relations with customers, the price at which to sell the products, the number of employees to be engaged and the time that the sub-distributors were to devote to the business. The court did not accept these arguments and found that the appointment of non-exclusive suppliers constituted a ‘business’.

In determining whether there was a system or marketing plan, the court considered a number of factors, including the presence or lack of:

- a sales training regime;
- assistance in conducting prospective client meetings (by providing scripts);
- recommended retail prices;
- restriction on the sale of products;
- recommended sales techniques;
- advertising and promotion program.

The court found that, even though Kyloe required the sub-distributors to undertake certain tasks and refrain from doing certain things, they did not establish or

Who does this affect?

Businesses with current or prospective distribution arrangements.

How does a franchise differ from other business relationships?

A franchise relationship is recognised by law to carry additional rights and obligations of the parties to that of a standard business relationship.

How Russell Kennedy can help:

We can identify your business situation and advise on how to best tackle the existing or proposed arrangement to maximise your benefit and minimise compliance and legislative burdens.

Who should I contact?



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suggest a system or marketing plan for the purpose of the Code.

Conclusion

Although Kyloe was ultimately successful in defending the ACCC’s action, the case highlights the need to be extremely careful in establishing and documenting distribution arrangements in circumstances where the creation of a franchise relationship is not intended. This requires an understanding of the legal distinction between franchises and other business relationships.

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BEWARE OF CREDITOR'S STATUTORY DEMANDS

A recent High Court decision has reiterated the potential danger of ignoring a Creditor's Statutory Demand.



Many company directors do not understand the statutory demand process or the serious consequences that may result if the demand is not dealt with.

The statutory demand process is set out in the *Corporations Act 2001* and provides a method of enforcing the payment of a debt. The Act enables a creditor to serve a demand giving the debtor company 21 days within which to either pay the debt, have the demand withdrawn, or make an application to the court to have the demand set aside.

If the 21 day period elapses without any of these things happening, the debtor company is deemed to be insolvent. An application can then be made by the creditor to have the debtor company placed into liquidation.

For many years the courts have debated the issue as to whether an application to set aside a statutory demand can be issued after the 21 day period has elapsed.

In March 2008, the High Court of Australia put an end to the debate by handing down a definitive ruling that

the 21 day period cannot be extended.

Therefore, if a statutory demand is served on your company, the consequences are these:

- 1** You have 21 days within which to either pay the debt, convince the creditor to formally withdraw the demand, or issue an application to have the demand set aside;
- 2** The failure to deal with the demand within the 21 day period means that your company is deemed to be insolvent. An application can then be made to have a liquidator appointed to your company;
- 3** If, for example, you dispute the amount or existence of the debt, you must make an application within the 21 day period to have the demand set aside or your company will lose its rights to raise this argument if an application is made to appoint a liquidator;
- 4** If the 21 day period elapses and an application is made to appoint a liquidator, the only way that you can avoid the appointment is to pay out the debt in full or convince the

Who does this affect?

All senior managers and directors.

What does this mean for me?

Be alert, if a statutory demand is served on your company, do not ignore it.

How Russell Kennedy can help:

Russell Kennedy can advise on recovery of debts, bankruptcy, arrangements with creditors, receivership, voluntary administration and liquidation.

Who should I contact?



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Court that your company is solvent. Convincing the court about your company's solvency is likely to be an expensive and emotionally taxing experience and it might have to be argued when your company is experiencing some temporary cash flow difficulties. The court might not be convinced.

If a statutory demand is served on your company, do not ignore it. You should either pay the debt claimed or obtain legal advice about having the demand withdrawn or set aside. Failure to deal promptly with the demand could be fatal to your company's existence.

If you require any advice on this issue, please contact Damian Neylon.

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SPECIAL ANNOUNCEMENT

We are pleased to announce that Craig Subocz, a lawyer in the Corporate and Commercial Law Group at Russell Kennedy, is also now a registered trade mark attorney. Craig's registration as a trade mark attorney recognises the expertise Craig has developed over the course of several years

through practice and postgraduate study. We can offer advice and representation in relation to the protection and exploitation of your intellectual property. For further information, please contact Craig on +61 3 9609 1646 or by email (CSubocz@rk.com.au).

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