

Ambush Marketing - The Olympic Experience

Now that the Sydney Olympic games are well and truly over Odette Gourley looks at some of the legal issues arising out of the advertising tactics of some of our major corporates

Now that the Sydney Olympic Games of 2000 are over, questions arise: how much ambush marketing was there and did the official sponsors get value for money?

These are large and difficult questions which others can answer. It is interesting, however, to look at some of the Olympic related cases. They may allow you to speculate about the answers to those questions.

THE AIRLINES

Less than two weeks before the Games were to start on 15 September 2000, Ansett sued Qantas over recent Qantas advertising. Ansett was the official airline partner of the Sydney 2000 Games. The Qantas ads started a few days before proceedings were commenced.

One was a Spirit of Australia strip ad with the Qantas logo along the bottom of an Age Olympic lift-out with Kathy Freeman pictures, Sydney 2000 etc. Another strip ad included the words 'we welcome the spirit of competition' and appeared at the bottom of an Age double page lift-out on Australian Olympians. The third ad was for a Qantas 'Australia wide Olympic sale' referring to various travel products and prices available around the Olympics. It appeared also in a small version adjacent to Olympic reportage.

Interestingly, in addition to that advertising in the lead up to the Games, Ansett's statement of claim referred to:

- a Qantas 1997 Flying Towards 2000 campaign and its use of Australian athletes including Olympians;
- a February 2000 brochure featuring athletes with the Olympic rings in the background, distributed in connection with the Qantas International Gymnastics Challenge;
- June 2000 full page Qantas advertisement featuring a picture of Kathy Freeman on the back page of a newspaper lift-out;
- June-August 2000 outdoor advertising in Sydney and Melbourne featuring Kathy Freeman;

Furthermore, Ansett asserted that a significant proportion of the Australian public were under the misconception that Qantas was an official sponsor of the Games and relied on its own market research for that assertion.

Ansett's case was that Qantas' advertising breached the *Trade Practices Act* and the Olympic legislation *Sydney 2000 Games (Indicia and Images) Protection Act 1996*. A declaration was also sought that Qantas' conduct amounted to passing off, although passing off was not pleaded in the statement of claim. (An observation by way of an aside, then, is the continued ascendancy of the *Trade Practices Act* causes of action over passing off in misleading advertising cases and, though not relevant here, cases of alleged deceptive use of a name or logo similar to that of the plaintiff).

Ansett sought declarations, injunctions restraining further wrongful conduct, compensatory damages (of various kinds) exemplary damages and corrective advertising. By way of urgent interlocutory relief, injunctions and corrective advertising were sought. In relation to the claim for exemplary damages, perhaps the pleading of the older advertising campaigns was partly also relevant to that claim.

The essence of the *Trade Practices Act* case was that the recent Qantas advertising, given the material that appeared adjacent to it, or having regard to the earlier advertising, conveyed the misleading representation that Qantas was the official Olympic airline sponsor, and that this was a breach of section 52 and section 53 (c) and (d) of the *Trade Practices Act*.

For the Olympic legislation breach, the allegations were a little more complex given the structure of the legislation and because the specific Olympic indicia like Sydney 2000 appeared in the adjacent text or material, rather than in the Qantas advertisement itself (apart from the word 'Olympic').

Thus, it seems that Ansett intended to argue that, in their context or given the adjacent material or having regard to the

earlier campaigns or the misconception, however it arose, Qantas had represented that it was a sponsor, in breach of the *Trade Practices Act* and the Olympic legislation. If Ansett's apparent view was correct, that the advertisements alone were not enough to amount to breaches by Qantas, there were difficult issues in whether the context and the adjacent material and the misconception amounted to conduct by Qantas.

In any event, as may not surprise, the proceedings were settled by orders made by consent on 7 September 2000. The terms of that settlement, we can assume, are confidential. Those following the Olympics in the media at the time will form their own view as to the level of visibility of Qantas.

THE BREWERS

From airlines to the important Australian institution of beer. Carlton & United Breweries ("CUB"), owned by Fosters, had the exclusive beer franchise for the Olympic stadium during the games. However, Tooheys ("Lion Nathan") otherwise had the beer rights at the stadium.

Shortly before the Games, Lion Nathan was marketing its Tooheys New beer. CUB alleged that advertisements and beer cartons carried the slogan 'beer of choice at Stadium Australia' and that this misrepresented that Lion Nathan was an Olympic sponsor.

CUB commenced proceedings alleging breaches of the *Trade Practices Act* and seeking interlocutory relief. Its application was due to be heard the day before the commencement of the Games.

CUB was seeking urgent corrective advertising to the effect that Lion Nathan's beer would not be available to the public at Stadium Australia during the Olympic and Paralympic period. It also sought delivery up of the packaging of products bearing the alleged misleading material.

The proceedings were settled.

An interesting issue thrown up by the cases is whether the special Olympic legislation was necessary to deal with 'ambush marketing' given the power of the *Trade Practices Act*. Despite the fairly complex structure of the Olympic legislation, there continued to be a requirement of conveying to the public a message of Olympic sponsorship before breach occurred. In substance, this is entirely analogous to the requirement for breach of section 52 of the *Trade Practices Act* that a misrepresentation be conveyed. Legally, therefore, it seems that it may not have been necessary to create Olympic specific causes of action. In practice, of course, the legislation may including the special causes of action have acted as a significant deterrent.

THE SHOE MANUFACTURERS

In late 1997, Reebok became the athletic footwear sponsor for the Sydney Olympic Games. As you would expect, the agreement gave Reebok exclusivity on athletic footwear although Reebok acknowledged that SOCOG might:

'...enter into sponsorship agreements with, and grant advertising, marketing and promotional rights to suppliers of sports apparel, sports footwear or sports equipment not provided by [Reebok] provided that such ... rights will be limited to the right to use a product-specific SOCOG or AOC designation in non-electronic media ...'

Two years later, Reebok purported to terminate its sponsorship agreement on the basis of alleged material breaches by SOCOG including entering into

agreements with Canterbury and Pacific Dunlop (baseball caps).

SOCOG responded that Reebok had wrongfully repudiated the agreement but it accepted that the agreement was at an end and claimed that Reebok owed it \$500,000.

Reebok struck pre-emptively by commencing litigation in late 1999 seeking declarations to the effect that it had validly terminated, damages for breach of contract and other relief. SOCOG cross claimed seeking to recover the amount allegedly owed.

Over the course of the next 12 months, the parties argued an interlocutory issue concerning access to documents and confidentiality up to the court of appeal of NSW and back again.

Reebok wanted to see the Pacific Dunlop agreement. SOCOG did not want to provide it at all and certainly not to anybody other than the external lawyers for Reebok. Reebok's response was that it at least needed to be able to get instructions from Reebok's internal lawyers. But if Reebok saw the Pacific Dunlop agreement, so SOCOG counter-responded, it would assist Reebok in ambush marketing.

Despite SOCOG's attempts at defining ambush marketing, Justice Rofe in the New South Wales Supreme Court concluded that:

'...the term 'ambush marketing', which has a pejorative ring, was intended to identify nothing more than marketing by competitors of sponsors in opposition to the sponsors, which is an everyday occurrence in commercial life'.

The Court ordered that Reebok lawyers should have access to the Pacific Dunlop agreement albeit in a redacted form (irrelevant sensitive material removed). SOCOG appealed to the Court of Appeal and the appeal was dismissed.

Reebok then revived the issue by seeking access to the Canterbury agreement not be limited to internal lawyers but expanded to allow access by nominated employees of Reebok and witnesses. At the same time, SOCOG sought documents from Reebok and its Australian subsidiary about Olympic marketing plans apparently in an endeavour to show that SOCOG's fears that access to the agreements would lead to ambush marketing by Reebok were reasonably based. The dispute about production of documents was resolved by agreed provision of certain documents.

As to Reebok's renewed request for expanded confidentiality, Justice Hunter in the Supreme Court (in what was an astute exercise of practical case management) ordered the expanded access but deferred until after conclusion of the Olympic Games.

After the conclusion of the Olympic Games, Justice Hunter made a costs order in favour of Reebok (costs of the applications be plaintiff's costs in the cause). But it is irresistible to speculate that, if not yet already settled, the proceedings will, sooner or later, settle.

The views expressed in this article are those of the author and not necessarily those of the firm or its clients.

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Corporations Law Goes Into Bat For Bradman

Hilary May Black looks at what lengths celebrities can go to in order to protect their names and images from unauthorised use and whether that protection is enough.

Australian cricketing legend, the late Sir Donald Bradman, and the non-profit organisation responsible for protecting his name and image, the Bradman Foundation, have recently been required to fend off unauthorised users. Their cause has recently been fortified by an amendment to Australia's Corporations Law which confirms Bradman's unique status amongst his die-hard Australian fans and elevates the protection of his name to a statutory level.

UNAUTHORISED USERS - A STICKY WICKET

Amongst the organisations that have recently fallen foul of the Foundation's attempts to protect the Bradman name are a number of shops operating on Adelaide's Burbridge Road, to be renamed Sir Donald Bradman Drive from January 1, 2001. Sir Donald approved the re-naming of the road. However, since that time a number of businesses have tried to take advantage of the re-

naming for their own commercial purposes. In anticipation of the name change a café on Burbridge Road registered the business name "Bradman's Café Restaurant" with plans to feature cricket memorabilia. After negotiations with the Foundation the owners have dropped plans for the cricketing theme and will identify themselves, by location, as "Bradman Drive Café Restaurant" rather than attempt to link the café with Sir Donald Bradman himself. However, the unfortunate re-naming of a sex shop