

## The Roller Coaster Continues!

By Schon G Condon RFD

As I have touched on in my blog the recent changes on world markets have been drastic but not fatal, in one sense sudden in another predictable, probably necessary and most fundamentally it contains some severe warnings and lessons for us all.

That situation was almost immediately followed by the outbreak of rioting within Great Britain which has sadly involved the loss of human life as well as disastrous effects on the country. Within that I'm confident that there will be a number of businesses that will no doubt fail. Whether it stretches from simply not being insured through being in a declining market that does not warrant the reconstruction of the business or worst, the business owners have lost heart and faith leaving them with no desire to continue. Again with these incidents there are warnings and lessons that must be taken.

For those frequent users of the net you can review any number of forums, chat rooms and of course YouTube will offer a wide range of views, reasons and most important the way in which the various situations, particularly the riots, can and should be rectified. All, sorry many are worthy of reading/watching and as you can appreciate there are those that are simply not worth the effort.

But in looking forward let's at least consider some of the following.

- ✓ If you are charged with the job of managing an organisation, be it a club, a company or even a nation remember your primary responsibility rests with that organisation, not your team, or your mate around the corner or some other party. It is also not a stage upon which to grandstand for the sake of attention.
- ✓ There are real issues and side issues. Focus on the real issues and ignore the side ones, reality will prove that you did not do this on the way through, afterwards. Unfortunately, the media will endeavour to shift your focus.
- ✓ Create relevant rules that are both capable of being enforced and in fact are reasonably enforced. Society as

a whole is now more capable and more communicated, to prove that rules are neither fair or enforced will be ignored and the ramifications can be both expedient and catastrophic.

- ✓ Fully appreciate the full impact of your actions and the collateral impact that it will have. That is not to say that some decisions cause grief, it's just that you know what it is and where it will be felt and you can ensure steps are taken to minimise the impact.
- ✓ Do not overburden those around you with 'rules of minutia,' set boundaries and give guidance to enable people to operate within those rules.

This article is not meant to be a panacea or even the salvation, but as events unfold we must be looking to see what we can learn from them and how we can improve not only our own lot, but also the lot of those around us.

Some local evidence of people reacting to situations can be seen in the recent action being taken by the Australian Institute of Company Directors in seeking to reduce director liability as a result of, of all things, the recent Government Insolvency Enquiry. They have sighted stalled national



Bob, Steven, Hakki, Beau, Jacquie and Schon after the Condon Forum on Employment Law enjoying some casual drinks and good conversation.

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reforms and recent legal cases. Positively they are seeking Government support for the protection of company officers who are actively endeavouring to work a company out of trouble. The whole circumstances surrounding such steps forward should be thoroughly looked at, looked at quickly, and looked at by both sides of Government. With the potential of what might arise from the current world financial position there could well be very little point in considering this in three years time! A process must be developed that allows a controlled, managed and positive process for a company to move forward from a position of despair, with those involved in an honest and genuine capacity adequately protected. Also while we're at it we should mention that the process should most probably be two speed so that the necessary administrative burden that would be required for a publicly listed company is not dumped on the SME, or more to the point we simply end up with a process that excludes all but the largest enterprises.

It represents a real opportunity to lead, to listen and to learn. Lets hope we don't pass it up. But then again,.....

Now what was it that they taught me long ago about learning history, Oh that's right; *'the one thing we learn from history, is that we don't.'*

Enjoy the read.

## **Court approves registration of Whiskas Purple as a trademark**

By Maggie Lau

Over a year ago, the Federal Court of Australia handed down a decision in favour of Mars Australia Pty Ltd ("Mars") in regard to their application to register a single colour as the business' trademark.

In November 2002, Mars, the owner of a cat food brand "Whiskas", applied to register a colour it developed, referred to as the "Whiskas Purple", as a trademark for its cat food packaging. The application was accepted for registration. However, Societe de Produits Nestlé SA ("Nestlé") opposed Mars' application and a delegate of the Registrar of Trade Marks agreed with the opposition. Mars subsequently appealed the decision of the delegate of Registrar of Trade Marks to the Federal Court of Australia. Mars was successful after Nestlé dropped its opposition in the Appeal in the Federal Court.

Although Nestlé dropped its opposition, Bennett J examined the evidence submitted to consider whether the Whiskas Purple was capable of distinguishing Mars' goods from others. Based on the evidence, Bennett J was satisfied that the Whiskas Purple was, as at the application date, capable of distinguishing Mars' goods. Extracts from Bennett J's

reasons for judgement are as follows. Brand owners should consider the following factors if they wish to build recognition to their use of a single colour to distinguish their goods from others and ultimately to register that colour as a trademark under the Trade Practices Act 1995:-

- The Whiskas Purple was created for the Mars group in Europe "from scratch" and was a colour carefully chosen and specifically developed in order for Whiskas to create a stronger brand identity. It is the predominant colour used on the product packaging for all varieties of Whiskas cat food.
- Mars commenced using the Whiskas Purple colour in Australia in April 2000 as a trade mark. That colour and its association with Whiskas was promoted and advertised heavily from the outset with...the clear intention of giving the colour a trademark significance.
- Mars submitted extensive evidence of the marketing of Whiskas Purple and of its use, which have served to establish the trade mark significance of the Whiskas Purple colour in the minds of consumers and the association between that colour and the Whiskas range of products.
- According to a survey conducted in May 2009, Whiskas Purple did function as a trade mark, a badge of origin by which consumers identified Mars' goods in contrast to the goods of other traders.
- Although other traders have, before and after the date of the trademark application, used a form of purple on pet food packaging, it appears that it had not been trade mark use, but to distinguish specific varieties within a product range. (Mars noted that registration of Whiskas Purple will not prevent non-trade mark use of the colour purple or a pink-purple by others, for example to indicate a particular variety in a product range.)

It is generally considered difficult to obtain registration for a trademark for a single colour. For example, Cadbury Schweppes Pty Ltd's relentless attempts to gain protection over the use of certain shades of purple for its chocolate products have been unsuccessful. The key issue is for the applicant to be able to prove that consumers are able to associate that colour with the business' goods and that the colour is able to distinguish the business' goods from others. This would require the applicant to invest considerable time and money to promote and market the trademark extensively. Mars in this case was able to prove originality, unremitting marketing efforts, and recognition by consumers for its use of Whiskas Purple.

- 1 Mars Australia Pty Ltd (formerly Effem Foods Pty Ltd) v Société des Produits Nestlé SA [2010] FCA 639
- 2 Effem Foods v Nestlé SA [2008] ATMO 55
- 3 Mars Australia Pty Ltd (formerly Effem Foods Pty Ltd) v Société des Produits Nestlé SA [2010] FCA 639
- 4 Applicants should seek professional advice in regard to the registration of a trademark.

## Books and Records – What is sufficient?

By Robert Thyer

More often than not, when we get appointed to a new matter, whether it be turnaround or an insolvency one of the first things we ask is “Where are your records?”. Many people misunderstand the importance of keeping proper books and records and the far reaching effects of not keeping them.

Section 286 of the Corporations Act 2001 (“the Act”), states that at a minimum, a company has an obligation to keep financial records that both correctly record and explain its transactions, financial position and performance, and would enable true and fair financial statements to be prepared and audited. Section 9 of the Act provides a definition of “financial records” namely:-

- (a) *Invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers; and*
- (b) *Documents of prime entry; and*
- (c) *Working papers and other documents need to explain:*
  - (i) *the methods by which financial statements are made up; and*
  - (ii) *adjustments to be made in preparing financial statements.*

Some organisations think that a collection of receipts and some cheque stubbs in a shoe box will be sufficient to cover all of the above. This is not the case.

In *Van Reesema v Flavel* (1992) 10 ACLC 29, the Court upheld that just mere financial records were not enough to satisfy the criteria of “sufficient records”. General journals, general ledgers, source documents and a journal explaining the transactions are required to meet the criteria and nothing less is acceptable.

But what happens when you do not satisfy the above criteria? In *ASIC v Plymin* (2003) 46 ACSR 126 the Court produced a checklist for indicators of insolvency, one of the indicators on that checklist was an inability to produce timely and accurate financial records. So to put that matter simply, if your books and records are not up to standard, your organisation may be deemed to be insolvent for the duration that it did not keep proper books and records. However, proving insolvency purely based on a lack of books and records is not an easy task by any stretch.

One of the final issues with not having proper books and records is that it only becomes noticeable after a problem has developed. Commonly when organisations are

facing times of turmoil, they will neglect maintaining their books and records in favour of securing their business’ success irrespective of most other issues. Without properly maintained books and records, you will be unable to rely on them in order to bargain with creditors should you fall into difficulty, they will be showing you a picture that does not accurately reflect the true financial position and strength of the business.

So you need to ask yourself, are your organisation’s books and records up to date?

## Condon Update

Our very own Schon Condon and Robert Kite were lucky enough to attend Suncorp Bank’s Charity Golf Day, in which they were supporting and raising money for the Leukaemia Foundation. It was a great day and they look forward to attending again next year.

Hakki Hassan and Maggie Lau of our offices also assisted in representing Condon Associates at the Thank You luncheon hosted by Suncorp to the sponsors of the Golf Day, of which held the event of handing over the cheque to the Foundation. It is with great honour and pride that we support our local friends at Suncorp Bank with their charitable endeavours.



Source: <http://www.bandt.com.au/news/domain-name-change-process-gathers-steam>  
& <http://www.zdnet.com.au/govts-press-icann-over-new-domain-rules-339310983.htm>  
& [http://news.cnet.com/8301-31921\\_3-20030809-281.html](http://news.cnet.com/8301-31921_3-20030809-281.html)

## **Changes to Domain Name – Whether a gain or a loss?????**

By Hiteshi Dekhtawala

Recent changes by global body to the online naming process for internet addresses has supported brands in having a chance to carry marketing campaigns by buying specific domain names linked to them. However, at this stage it is difficult to comment whether or not this revolution would prove to be a gain or a loss globally.

At a convention in Singapore, the Internet Corporation for Assigned Names and Numbers' ("ICANN") board approved the practice to be applied for the generic top-level domains (gTLDs). The development marks the end of several years of regulatory limbo and heated debate over the most efficient process to reallocate specific domain names. The resolution has marked the most significant change in the internet addressing system since its inception. It would not be hard to believe that this has not been some overnight decision. It's been part of ICANN'S concern to introduce competition and increase the number of gTLDs for a while now and also the process did not escape the criticisms raised by nations at various levels.

The process has the potential to transfigure online brand positioning as it will extend the 21 common domain name suffixes such as .com and .net and well-known country code names. ICANN has indicated that it anticipates between 300 and 1,000 new names could be created under the new program. As ups to this revolution, the revolution will prove to be a powerful marketing tool for most large brands from the entertainment and financial service industries. Their own web domain names may give the big brands an opportunity to monitor the protection of their brand and build trust amongst its clientele in the increasing complex market.

Applications for new TLDs will open in early 2012 and close 90 days later. Once the application period is closed, it is expected that future applications for new TLDs will be unlikely to be accepted for at least 2-3 years. The first new TLDs are expected to go live on the Internet in 2013. The major downside of this revolution is an initial upfront fee of US\$185,000 and further ongoing maintenance costs. At US\$185,000 for your own .brand, etc, it may be difficult to see a lot of people going for their own.

Another major point of discussion which is gaining everyone's attention is the question as to whether Google will see a loss in its revenue due to this revolution. Public would have a mixed opinion on this one, it would not be wrong to say though that it is difficult to budge a giant from its position. Even though the new suffixes such as .car, .health, .love, .movie, etc would seem easier for public to search for what they are looking for, in real world scenario, even by creating more styles of domain names we are not going to suddenly know all the possible web addresses off the top of our heads. As a matter of fact, to navigate our way through the new system, we will remain to be if not more, dependent on Google and other search engines.

It must also be appreciated that there may be domain name applications received which may develop controversy and certain domain names may not be acceptable to few nations. To avoid such controversy, there is a proposal that domain approval procedures include a mandatory "review" by an ICANN advisory panel comprised of representatives of roughly 100 nations. The process is open-ended, saying that any government "may raise an objection to a proposed (suffix) for any reason." Unless at least one other nation disagrees, the proposed new domain name "shall" be rejected.

Having discussed on the topic, it seems interesting to know how the whole process works for all and whether this revolution brings a major change to the internet world.

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