

## *Ignorantia Juris non excusat*

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Every day in business you decide to act in some way. You choose to issue a marketing statement. You choose not to continue trading with someone. Do you know you could be treading on a legal mine!

While you walk through the minefield of business, your steps could lead you to:

- destruction;
- severe injury; or
- harmlessly through the minefield unscathed to the other side: Just to do the same thing again and again and again.

Why is this so?

Have you heard the expression: "*ignorance of law excuses no one*"? Most people have heard the expression and likely given it little if any thought.

The expression is more than a saying: It is a principle of law. A legal principle that applies to you this day.

It is a principle that business people need to be aware of and take care not inadvertently to breach.

Today the risk of a breach is higher than in the past. The reason for the heightened risk is that Parliaments are using more and more the legislative technique of drafting "open-ended statutes". Open-ended statutes are called Fuzzy law.

Traditionally laws have been prescriptive. The laws were drafted as "Black Letter Law". Black letter laws being those that tell you what you must not or must do. For example:

You must not kill.

You must pay tax.

You must hold a drivers licence to drive a motor vehicle.

You knew what the law was prescribing you to do. There was clarity and certainty.

Fuzzy law drafting does not provide clarity or certainty. Until the steps are trodden and a Court looks at where you have been, the Court cannot say if you have broken any law?

Legislation "drafted in the form of fuzzy law; (is) written so as to lack specificity while setting a standard that can be used as a basis for setting acceptable norms of behaviour through later court determinations." (See Elderman J in **ACCC v Chrisco Hampers Australia Limited** [2015] FCA 1204 at 39- 40.)

Many Fuzzy law provisions govern business, section 18 of the **Australian Consumer Law**, prohibiting misleading and deceptive conduct, and section 23 of the **Australian Consumer Law**, allowing a court to void an unfair term of a contract are all drafted this way.

For example, section 18 relevantly reads:

"A person must not engage in conduct that is misleading or deceptive or likely to mislead or deceive."

The statement is open-ended. A lawyer can clearly say when an act or omission is uncertainly misleading or deceptive. However, would you consider silence to be misleading and deceptive? That is what you know but do not say is a reason to offend section 18. Courts do. Keeping silent about something that you know has been held to be misleading and deceptive. But not all things known and not stated fall into this category. Which knowledge is caught and which knowledge is not caught is a question to be determined by the circumstances of each case. It is a difficult and complex matter. However, if you wish to use a smart and witty advertisement on your website, but fail to mention something a court later believes should have been disclosed to the advertisements target audience you will have breached the prohibition in section 18!

To illustrate the dangers of not getting a map to safely guide you through the minefield of day to day business, consider the case of **Ostrowski v Palmer** [2004] HCA 30. The case went all the way to the High Court.

In the case, the High Court reinstated a conviction against a Western Australian rock lobster fisherman for fishing in a marine life protection zone. The High Court did this even though the fisherman, Mr Jeffrey Palmer, had:

1. taken proper steps by going to the WA Fisheries Department to find out where he could fish; and
2. had acted on the misleading advice he was given by the Department.

Although the Department had given the wrong advice, Jeffrey Palmer was found fishing in a protected zone.

The High Court unanimously felt compelled to uphold the principle that ignorance of the law is no excuse despite the obvious harshness of the result for Mr Palmer.

As you can see, you can be prosecuted and have harsh penalties imposed on you. Even if you honestly and reasonably believe you were acting within the law. Even when the responsible government departments have provided inaccurate information on the laws they administer. Despite all of this you have no excuse.

As two of the High Court Judges wrote in their joint judgment in the case at paragraph 1:

“Professor Glanville Williams said that almost the only knowledge of law that many people possess is the knowledge that ignorance of the law is no excuse when a person is charged with an offence. This does not mean that people are presumed to know the law. Such a presumption would be absurd. Rather, it means that, if a person is alleged to have committed an offence, it is both necessary and sufficient for the prosecution to prove the elements of the offence, and it is irrelevant to the question of guilt that the accused person was not aware that those elements constituted an offence.”

What does this mean for you?

It means you need to treat your lawyers as travel agents. When you want to take a trip, you see your travel agent. You tell them: "I want to go to London?"

The Travel Agent asks:

"How do you want to travel, First class, Business, or Economy?"

"Do you want to get to London on any particular date or can you take your time?"

"Do you have any preference between flying or cruising?"

After you have answered the Travel Agents questions, the Travel Agent works out a plan for you to get to London, having regard to:

- your budget,
- time requirements and
- travel preferences.

Your lawyer is also your travel guide. Not in the literal sense; but in the sense that they plan for you the route to traverse the minefield that you are in, in your business. You need to see your lawyer and tell them what you intend to do (where you mean to walk). Your lawyer will then:

1. look at what laws your business is governed by;
2. having regard to your budget, provide you with a map on where not to tread;

thereby ensuring you adhere to the law; and avoid being blown up (that is face prosecution; like Mr Palmer).

If you do not get a map to traverse the unforeseen and hidden mines, you are risking everything. Each business step you take might be your last.



Etienne Lawyers is experienced in guiding businesses through their legal business minefield. Come and see us to get your minefield map today.