

Gosh! Comrade!

This is exciting, isn't it? To be accused of "procuring"! Sir Roger feels he has at last achieved the heady heights of infamous celebrity enjoyed by Berlusconi and Strauss-Kahn!

Who even for a moment suspected that a t-shirt splashed with the ValuesAustralia.com logo could ever be suspected of being sanctioned by the arrogant old codger? Only those who knew that The Great Man's now immortally corporatised self is also now legally wagon-encircled.

Ought one to turn oneself into the police tonight? Might one wait till tomorrow? Will one need to pack one's pyjamas? What sort of a sentence do you think one might get (were you to win)?

One says, "were you to win" because who knows for sure if a judge would find that the (now ex-) t-shirt was "passing off"?

One knows you don't. Not till the judge puts the black cap on.

Since your concern is to protect the income of the Mighty Whitlam Edifice one can inform you that the Institute has lost no income in this matter. One finds no historic record of a sale of the allegedly offensive t-shirt and it is no longer offered for sale on the Values Australia website or at cafePress.

One hopes you will forgive any language which is not cringingly fearful under the onslaught of your strident, harshly worded and school-marmish threats but, you know, thisblog post (series) if it lacked some frisson, some controversy, would be terribly dull and there would be nothing to tweet about. Sir Roger's loyal fans would be disappointed and it would damage his reputation for robustness. One hopes indeed that you will understand that this response may contain occasionally non-legal terminology because, as Sir Roger puts it, "IANAL". And if you are offended, well, you know, you have as much right to be offended as Sir Roger was offended that the letter purporting to be sent by you was in fact sent for you, a task you delegated to someone else, perhaps the office girl. Who is to know?

I am the nominee of Sir Roger Migently who commissions and is senior adviser to the website ValuesAustralia (hosted in and published from the United States of America with all the implications and complications that entails).

Sir Roger has therefore directed that I endorse the enclosure on his behalf. (You may need to look carefully for the signature towards the end.)

He was shocked to hear that, what with his pension and his gold ticket and all, old Gruff is so short of cash these days that he needs every cent you can get him.

Sir Roger (benighted before Gough changed the honours system) informs me that he had quite forgotten that he had created the sparkling opportunity to *ignore* the ... er ... opportunity to which you refer and which apparently no-one saw or - certainly on the evidence and to Sir Roger's memory - not one person wanted. Sir Roger frankly couldn't have given a stuff about it, as he says, after the 2007 election. Its time (oops, sorry!) had passed.

So he was shocked when the rozzers from Whittling Inc sent to his amanuensis the terrifying threats of, well, who knows what dire consequences *by email!* To Sir Roger it felt a bit like being dumped by text (which strangely chuffed him, being down with the kids and terribly contemporary and all).

Sir Roger *demands* that the forensic team at UWS Legal, should they locate any remaining instances of the offending item, *immediately* inform Sir Roger who will forthwith speak to his people to have them deleted.

(On a side note, there are on the cafePress website very many other instances of the phrase being used on possibly tens or hundreds of

- g-strings
- shirts
- mugs
- cups
- caps
- dog warmers and
- mouse mats,

so if you wanted to pursue them - perhaps claiming piracy under extraterritoriality? - the office girl will have plenty of work to do for the next few years.)

Discovery and Observations

You assert that the Whitlam Institute has a “substantial reputation”. Who knew? Sir Roger would be one of the more aware people in the community, both generally and politically. *He had no idea!* A Whitlam Institute? Doing great and worthy works? A t-shirt? I must say, the UWS marketing unit needs to get off its arse about this one and let the world know that Gough’s spirit lives! If Sir Roger has never heard of it, few others have.

Looking at the Foundation website now one might suspect it is less the throbbing engine of social justice and democratic advancement one might imagine than a back-slapping nostalgia club for the ex-famous and forgotten, a few academics writing impenetrable scholarly works with obtusely academic titles and a fresh-faced legal team jumping out of the legal bushes to surprise the disobedient.

So, trademarks and passing off.

“A cause of action for passing off is a form of intellectual property enforcement ... particularly where an action for trademark infringement based on a registered trade mark is unlikely to be successful.”

So, trademarks and passing off.

“Passing off ... does not confer monopoly rights to any names, marks, get-up or other indicia. It does not recognize them as property in its own right.

“Instead, the law of passing off is designed to prevent misrepresentation in the course of trade to the public, for example, that there is some sort of association between the business of defendant and that of the claimant.”

There are three elements which must be fulfilled:

- Goodwill owned by a trader
- Misrepresentation
- damage to goodwill.

In *Reckitt & Colman Ltd v Borden Inc* [1990], Lord Oliver stated that a plaintiff must establish **all of the following**:

1. a goodwill or reputation attached to the goods or services
2. a misrepresentation leading or likely to lead the public to believe that the goods or services offered by him are goods or services of the plaintiff
3. that he suffers loss or damage as a consequence of the erroneous belief that the goods or services of the defendant are the goods or services of the plaintiff.

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1. A case may be made that goodwill attaches to items for sale by the Whitlam Institute.

However:

2. As for misrepresentation, not even “a moron in a hurry” (which *as you know* is NOT the test) would imagine that the shirt prominently displaying the ValuesAustralia logo was an offering of the Whitlam Institute. [see below]

The website never and nowhere represents (or represented) or if you like misrepresents or misrepresented *in any way*, or could have, that ValuesAustralia.com was *in any way* affiliated with the Whitlam Institute or that the shirt was *in any way* approved by the Whitlam Institute. It would not have been possible to make such a claim because ValuesAustralia.com in 2007 had no knowledge (was, as it now seems *blissfully* unaware) of the Institute’s existence at all or of its commercial offerings. ValuesAustralia.com never knew, or in its wildest dreams could ever have imagined, that the two words “it’s” and “time” placed side by side, in dictionary order, were or ever would be, or for goodness’ sake *ever could be* trademarked by anyone.

3. It is as impossible to demonstrate as it is silly to suggest that the Whitlam Institute has suffered or could have suffered loss or damage as a result of any confusion over the shirt's provenance. As far as the writer knows no shirt was sold except for the one bought by Values Australia itself as a proof copy in 2007 and the person who bought that shirt (oneself) was, absolutely certainly, *under no misapprehension whatever* that the shirt was represented as a product of the Whitlam Institute. No person has ever contacted Values Australia with any question concerning the shirt's provenance. Until now.

There never was any intent to deceive nor any intention to obtain a gain or cause a loss at the expense of the Whitlam Institute.

There never was any misrepresentation made and nor there was ever any intention in the course of trade calculated to injure the business or goodwill of the Whitlam Institute. No damage could be imagined probably to be caused, none was caused, and now certainly none can be caused in the future.

To make this point clear, I wonder if you would take a moment to view these two images and decide whether you can tell them apart, remembering that the test is *not* "a moron in a hurry". (They have been placed side by side for ease of comparison). Can you tell which is which? Are you sure that the shirt on the right is not an offering, or representing itself as an offering, of the Whitlam Institute? How can you tell?



Images considered fair use for this document as exhibits in a legal context

If you are having trouble spotting the difference, a guide can be seen overleaf.



Ownership of the phrase

Gough Whitlam did not own the phrase in the commercial sense. At the time that the phrase gained popularity he did not personally pay for the slogan, nor the campaign as far as one is aware. Intellectual property typically belongs to the person who creates it, or to the legal entity who commissions the work.

The campaign was created in 1972 by McCann.Erickson who were commissioned by the Labor Party.

Ironically(?) enough "It's Time" might be seen by a sharp-eyed lawyer on the make as an appropriation of Menzies' 1949 slogan, "It's Time for a Change". Would the Liberal Party have had a case for trademark infringement or for passing off? I suppose Menzies ought to have had greater foresight and trademarked the phrase.

Despite the slogan having a certain association with Whitlam and with images of Whitlam during the 1972 campaign (as it does also with numerous now-faded TV personalities) – again, it was *The Australian Labor Party* that campaigned under the slogan, not just Gough. It was the *Labor* slogan, not the Whitlam slogan.

More than this, a majority of Australian electors adopted the slogan as *their own*, voted Labor in 1972 and won. *We* won. It was a time of excitement and hope and anticipation. The Labor victory changed Australia overnight and so Australians who voted Labor then felt “it’s time” was their time, and they still do.

Gough was Sir Roger’s hero too, as he told David Attenborough one day. he even managed to touch the hem of Gough’s garment once before Gough imperiously brushed him off.

Yes, the Institute may have a legal right to the term but it cannot honestly assert *moral* ownership of the phrase which belongs to the Australian people, or at least those who are ancient enough to remember those heady days 41 years ago.

The appropriation (or acquisition) of the phrase by the Whitlam Institute seems in Sir Roger’s personal view opportunistic and merely commercial and any assertion of moral ownership groundless.

You have expressed a view that universities have not been “politicised”. Are you serious? Where have you been? And even if you were right what is not debatable is that they have certainly become highly commercialised, which is perhaps worse, especially from the point of view of the values which Gough always represented. Which is why we are having this conversation.

“We want to give a new life and a new meaning in this new nation to the touchstone of modern democracy — to liberty, equality, fraternity.”

- Gough Whitlam, ALP Policy Speech, 13 November 1972

Sir Roger is in his way a student of the Enlightenment which led directly to *liberté, égalité, fraternité* and *la Déclaration des droits de l'homme et du citoyen*. And it would in Sir Roger’s view be a travesty and an insult to Whitlam’s legacy if lawyers on his behalf were to trample all over what he actually stood for, what he held so dear, what he really meant to us and which he so successfully shared as his vision for this country, for its people and their democracy - just because it was the law.

Genericisation

One is clear that the Institute is in proud possession of carefully guarded forms saying that it owns a Trade Mark. Those pieces of paper give the Institute a legal stick. People, however, use these two words together in all sorts of contexts all the time. People have appropriated the term as their own ever since 1972. It is used everywhere by all sorts of people.

One could understand if the whole purpose of this exercise by The Magnificent Whitlam Institute may be to run a campaign to avoid genericisation by asserting its trademark. And such a campaign might focus on the easier targets. But it was probably already too late for that as early as 1972.

Your pieces of legal paper if taken literally would mean people may conceivably inadvertently infringe your trademark privately or in public using those words.

The idea that the Institute has a right to be the only “legal person” to use those words together in all the Classes you have trademarked is a nonsense, a mockery, an impossibility. Any attempt the Institute might make to assert its trademark on a large scale would be in danger of discovery that it is a generic term and you might risk losing the trademark protection in any case.

To be clear, your trademarks do not discriminate or allow discretion. They make it an infringement to use the two words together in any of the contexts which are covered. You are honour bound to pursue all perceived infringements as you have Values Australia. Anything else would be unethical. A newspaper headline, for example, or a recorded political speech could be construed to fall under the trademark jurisdiction. You could conceivably pull a teacher out of a classroom for writing those words on the whiteboard at the start of a class, “branding” the lesson. You could conceivably take IBM (for argument’s sake) to court because the office girl created signs for a change management seminar she had decided to call “IT’S TIME”. You would be entitled to make a claim if you felt like it. In fact, since you have done it here, you are bound to do it there, and to seek out every possible instance where it might occur.

You can see the total absurdity. (Or perhaps you can’t. That would be sad.)

And yet you were not satisfied with one set of absurdities in 2004. You went out and bought four more in 2011.

Freedom of speech

What is worse is that the right of a person to freedom of speech in a political context was derived from Sections 7 and 24 of the Australian Constitution by the High Court in 1992 and 1994 and in particular in ***Lange v Australian Broadcasting Corporation*** (1997).

Even the Immigration Department on its website assures potential citizens that there are “five *fundamental* freedoms”. Number one on their list is “freedom of speech”.

“Australians are free, within the bounds of the law, to say or write what we think privately or publicly, about the government, or about any topic. We do not censor the media and may criticise the government without fear of arrest.

One doesn't wish to make too much of this but after all it is the website of an Australian Government department. It has been there for many years. It must have legal, if not legislative, standing because a person would be entitled to rely on this advice to inform his actions. If it does not have force then it is misrepresentation and a person could claim damages.

A case might be made that restricting the use of “it's time” in the political context, trademark notwithstanding, is a restriction on or infringement of that implied right.

I don't suppose you want to test that and Sir Roger does not have the means.

On a more personal note.

Sir Roger was offended that “you”, or whoever actually wrote the letter, employed that formal and threatening presumption-of-guilt language which seems to the clean-living and unwary to accuse one of all manner of the vilest of premeditated and vicious crimes and to suggest that the recipient is the lowest bastard in the world if not a baby-eater - or worse, a catholic priest - when you could as easily have written, *"Dear Sir, you may not have realised that [blah blah etc. etc.] and though your intentions may have been honourable, we would like you to not do that any more, please. We'd rather not, for both our sakes, have to ask you again if you don't mind. Let's know if you object. Kind regards Helen (via Allison)."*

Sir Roger finds that writing to decent, good, generous Australians in the arrogant way you have is offensive and frankly obscene. Not everyone (thank god) is a lawyer and understands that legalese is “just the bullying way we do things around here” and that you were “just doing your job; nothing personal”.

He does, though, feel for you. Much as you might have desperately wished you could write an understanding and thoughtful letter, you simply *cannot*. Your hands and pens and mind are chained to the formula, and the form guides you learnt while articulated, and the form letter in which you or your office girl customised the fill-in-the-blank spaces. For you there *is* only one way to write such a letter and you have no choice but to do it that way.

In this most free of countries lawyers, of all people, have no professional freedom. In your heart you might wish you could change the world for the better the way you dreamed in the idealistic glow of youth, when you watched *Boston Legal* - or perhaps Perry Mason?

But the law as you know, and perhaps discovered to your dismay (or delight, who knows?) is not about truth or justice; it is only about the law.

For all one knows you may have strong morals yourself but in your profession morality is irrelevant, except for morality which is legislated. And in that you have no say, whether you agree with it or not. And so instead of doing what is right you must do what is legal, perhaps sitting in a room lined with soul-sucking books doing unutterably tedious, endlessly repetitive and eye-wateringly trivial things like pumping out form letters to the wicked.

Sir Roger is full of regret for any existential struggle you might have, any desire you might have to fashion meaningfulness amongst the professional restraints.

Meanwhile, Sir Roger is unfettered by such constraints. Every day is a new excitement and a new challenge and a creative opportunity to influence his world for the better and to make it a better, more loving and more humane place – much the way Gough inspired us to do and be. And one has the constitutional right and freedom to do so.

Current violations

I think you ought to know that in the last few days in the context of an election campaign at least one person (Christine Milne, Leader of the Greens) and one organisation (the Guardian) have infringed your trademark(s) under TM 1414012 Class 9 and Class 38. Ms Milne has also infringed TM 985583 Class 35 in relation to Advertising and promotion of services, organisations and issues related to politics, political issues etc.

Christine Milne, 4 August 2013

"**It's time** that we treated refugees in a compassionate way

"**It's time** that we supported the poorest in our own community and dealt with issues such as homelessness and poverty."

Ms Milne has clearly used the phrase in a way (twice is surely "branding") that would appear to provide a *prima facie* case of infringement. I look forward to hearing the news of your fearless action against this perpetrator.

The screenshot shows the Guardian website interface. At the top is the 'theguardian' logo. Below it are navigation links for News, World, Sport, Comment, Culture, Business, Environment, Science, and Travel. A secondary navigation bar highlights 'News', 'World news', and 'Australian election 2013'. The main article title is 'Election 2013: it's time for a debate, the leaders agree. But what time?'. The sub-headline reads: 'Kevin Rudd and Tony Abbott jostle over when and in what format to go head to head. Rudd wants Monday; Abbott wants to wait'. To the right of the article are social sharing buttons for Facebook (2 shares), Twitter (22 tweets), Google+ (0 +1s), LinkedIn (0 shares), and Email. Below the article text, it identifies the author as 'Lenore Taylor, political editor' and provides the date and time: 'theguardian.com, Sunday 4 August 2013 19:30 AEST'. There is a 'Jump to comments (24)' link. At the bottom of the article is a photograph of Kevin Rudd speaking at a podium with a blue background that says 'Change real change A stronger Australia'.

This case may not be so clearcut but probably worth a try? High profile defendant, the Guardian, famous case to lift the Institute's profile and strike fear into the hearts of mom and dad transgressors?

I will in any case make sure, in the near term, that both Ms Milne and the Guardian are made aware of and understand their transgressions and I will inform them that it is possible you may be in contact with them in the near future. I also feel it my duty to warn all other news outlets and politicians of the danger that they may be facing if they are not vigilant.

Conclusion

If this response is insufficient for the might of the Gruff Wiblam Foundation well then you might ask yourself, as Sir Roger so frequently asks,

“How would this look on the front page of the Herald?”

The might of the Whitlam edifice versus a poor old pensioner whose heart (what is left of it) is in the right place, whose career has been in furthering the rights of man, standing up for the underdog, entertaining the masses, educating and mentoring the unemployed, the broken and the dismayed.

The frail old thing, who can't afford to defend himself, is being bullied by the ruthless, taxpayer-funded guardians of a fading myth of the socialist left, that no-one under 40 has ever heard of.

Sir Roger wouldn't know about the front page of the Herald. He has only been in the Stay In Touch page of the Herald and his website, while it has a strong and consistent following, has only been number 1 on Google, Yahoo, and Bing and for about five years.

Sir Roger does, however, know what it means to be immortalised - as is Sir Gough through the Institute - his website being archived in the Pandora Archive of the National Library, and one or two of the website's t-shirts being included in museum collections - T-shirts such as this one which has, one can't help thinking, an apropos message here:



Or, to put it momentarily back in the courtroom, confusion is more difficult to establish when the Values Australia logo has fairly strong recognition of its own.

On an even more personal note

1. Sir Roger has noted in publicly available documentary sources that you find academic legal work thrilling – Really? Sir Roger cannot find in your presentation the merest whiff of evidence evinced that you are thrilled, no paragraphs or PPT slides addressing this burning issue at all.
2. Sir Roger thinks you have answered your own question re: gatekeeper or transaction facilitator. Yes, just an enforcer – “do as I say”.
3. By the way, “different from”, not “different to”.
4. And please do for goodness’ sake get someone who knows what they’re doing to design your PPT slides. Or, better, just learn how to speak without them. Some might think that yours perpetrate a worse sin against humanity than anything Values Australia has ever done.
5. You may think Sir Roger has been unfair and you might say that you are quite a nice and caring person after all and how could one be so mean and cruel to you and make judgments about your character and personality when one had never met you.

And one would reply, one is oneself quite a nice and caring person also, and deeply moral, who loves his children and works and campaigns for the betterment of real people in the real world. And yet you did not ask or care but coldly made assertions, accusations and judgments about one’s character and personality when you had never met one. Your groundrules, not one’s.

6. Sir Roger requested I ask one last question: “Just because it’s legal, is it the right thing to do?”

Appendix

A certain person is passing himself off as ex-Opposition Leader and ex-Gillard Minister Simon Crean. He is clearly an impostor who is calling himself "Simon *Cream*".



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ric Sidon
member
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The Hon Simon Cream MP with
...lett OAM, Whitlam Institute Board
... of the Campbelltown Performing Arts High

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