

Sleeping Easy

Chiropedic Bedding Pty Ltd v Radburg Pty Ltd

inventions that may be subject to attack on inventive step.

A curious result, clearly not contemplated by the Parliament at the time of the inception of innovation patents, is that an invention claimed in an innovation patent may be found to lack innovative step because of an “obscure” piece of prior art but still involve an inventive step because that “obscure” piece of prior art did not form part of the common general knowledge or could not be to be reasonably expected to have been ascertained understood and regarded as relevant by the skilled addressee as required of any prior art relied on for an attack based on lack of inventive step. In fact, this could very well be the case in the Delnorth matter in which the Australian Patent Office’s determination on a pre-grant opposition to a related standard patent, also handled by our firm, may have claims found to be valid as involving an inventive step, even though those claims were found, in the divisional innovation patents the subject of the Federal Court’s decision, to lack an innovative step.



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Chiropedic exhibited their Microcoil Pillowtop Plus mattress at an industry exhibition six days before filing an Australian Design application. The novel feature of the application being the ‘posture top’ of the mattress exhibited.

Following registration, Chiropedic sued Radburg for infringement of the registered Design under the *Designs Act 1906* (Cth). Radburg brought a cross-claim that the posture top lacked novelty on the basis that the industry exhibition was not ‘an official or officially recognised international exhibition’ within the exception provided under s 47 of the 1906 Act.

The industry exhibition was partially funded by the Victorian State Government on various conditions, including that it be open to the general public for at least one day. There were 257 exhibitors, 250 were Australian manufacturers and the balance were from New Zealand.

At first instance, the trial judge found that the exhibition was not sufficiently ‘international’ in character, considering the question qualitatively and quantitatively, and therefore that the exhibition deprived the registered Design of novelty.

The Full Court overturned the decision, holding that it was incorrect to introduce questions of degree when there was no reason not to adopt the dictionary definition of ‘international’. Therefore, the registered Design was found to be novel as the exhibition was an officially recognised international exhibition, but not an official exhibition, within the meaning of s 47 of the 1906 Act.

Section 17 of the *Designs Act 2003* (Cth) (which substantially mirrors s 24 of the *Patents Act 1990* (Cth)) is the approximate equivalent to s 47 of the 1906 Act. However, there are critical differences between those provisions and it is implicit in the decision that this should not automatically be considered indicative of the current law. Nonetheless, with this



decision the Full Court of the Federal Court (comprising the new Chief Justice of the High Court) clearly indicates that the plain words of the statute reign supreme.



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