



Brookfields

LAWYERS

26 June 2006

The Trustees of
Animal Welfare Institute of New Zealand
PO Box 17463
Greenlane
AUCKLAND

ATTENTION: Helen Wenley, Robert Frittmann and Grace Haden

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ANIMAL WELFARE INSTITUTE OF NEW ZEALAND

We act for Animal Welfare Institute of New Zealand and Neil Wells. For convenience, we shall refer to our clients in this letter as "AWINZ" and Mr Wells.

As we believe you are aware, AWINZ is a charitable trust created pursuant to a trust deed dated 1 March 2000 and declared by the Minister of Agriculture to be an "approved organisation" under the Animal Welfare Act 1999 on 19th December 2000. In case you have not received a copy of the executed trust deed previously, we **enclose** this for your reference.

You are, we understand, the Trustees of an entity also bearing the name "Animal Welfare Institute of New Zealand". For convenience and to avoid confusion, we shall refer to that entity as the "Institute".

We understand that you have arranged for the Institute to be registered as a charity under the Charitable Trusts Act. We also understand that you have created a web site in the name of the Institute and have published certain material on that website concerning our clients AWINZ and Mr Wells.

We are of the view that certain material published on the Institute's website breaches the law of passing off, while certain other material published by Mrs Haden and Verisure Investigations Limited on the website and by other means is defamatory of AWINZ and Mr Wells.

AWINZ has asked us to explain our view to you in the hope that we can achieve an amicable resolution to the situation. AWINZ views litigation in this matter as a last resort since the costs involved will be a poor use of resources for all concerned.

Below we have set out a fuller explanation of the law relating to passing off and defamation. We have also included an explanation of relevant provisions of the Fair Trading Act, as we also consider that the Institute's actions constitute a breach of that legislation. We invite you to consider carefully the issues we raise in this letter and discuss them with your legal advisors.

The Legal Existence of AWINZ

As a point preliminary to the discussion to follow, we understand that you dispute that AWINZ was or is a "legal entity". You point in that regard to the fact that AWINZ is not registered under the Charitable Trusts Act.

Your view in this respect is not well conceived. No charity is obliged to register under the Charitable Trusts Act. An organisation is entirely capable of legal existence, and of carrying on business as a charitable trust, without any form of registration. All that is required at law to create a trust (whether it be a charitable one or otherwise), is the execution of an appropriate trust deed. This, we believe, was clearly set out in a letter to you dated 29th March 2006 from the Denis Sheard, Solicitor of Waitakere City Council, a copy of which we **attach**, for your ease of reference.

Of course, as you are aware, AWINZ has been carrying on various activities of a charitable nature since its inception, and has secured, to facilitate the undertaking of those activities, approval from the Minister of Agriculture pursuant to the Animal Welfare Act 1999. It has also established a website to raise the public profile of AWINZ, advertise the services that it offers, and seek contributions from the public.

In combination, all of these actions have served to generate what is legally referred to as "goodwill", a tangible asset which is subject to stringent legal protection, specifically under the law relating to "passing off" and defamation.

Passing Off

The law relating to passing off is targeted directly at protecting the goodwill owned by individuals or entities.

In our view your following actions amount to passing off:

- Your registration of the name "Animal Welfare Institute of New Zealand" under the Charitable Trusts Act, and ongoing use of the name.

In this regard, it is well-established that an action may lie in cases where a defendant imitates the plaintiff's name in a manner which may cause confusion in the market or amongst the public. Indeed, a number of cases have dealt with fact situations in which the name of an existing charity has been copied by another entity (see, for example, **British Diabetic Association v Diabetic Society Ltd** [1995] 4 All ER 812.

- Your use of a web address which closely resembles that used by AWINZ (which again provides AWINZ with an established cause of action – see, for example, **New Zealand Post Ltd v Long** [1999] 3 NZLR 219).

- Your efforts to secure work monitoring movies produced in New Zealand, including the statement on your website that :

“Welfare officers have been involved in the overseeing the use of animals in the making of movies. the (sic) Animal Welfare Institute of New Zealand can provide suitably qualified officers for this task.”

This remark is calculated to suggest that your organisation has already performed the function of monitoring movie productions. In that respect you are seeking to “take the credit” for work performed by AWINZ, and reap the benefits of the experience and reputation it has gained in the industry.

A successful action in passing off can be used as the basis for injunctive relief, that is, Court orders requiring you to:

- deregister the Institute and remove your website (such orders can also extend to your ISP provider); and
- prohibiting you from re-establishing either the website or the Institute itself in circumstances where the names thereof are liable to cause confusion within the market or amongst the public.

Such an action could also render you liable to an award of damages, or a requirement to account to AWINZ for any funds improperly obtained by the Institute as a consequence of its actions, together with legal costs and interest.

Defamation

You have also published on your website comments calculated to discredit Neil Wells, a member of the Board of AWINZ, and AWINZ itself. These comments are clearly calculated to defame Mr Wells by asserting that he is dishonest and lacking in integrity. You also claim that he has indulged in misleading, if not fraudulent, conduct in establishing a bogus Trust for personal profit. Those comments are, in our view, defamatory.

The clearest example of this is the recent posting in which you included an email sent to the Mayor and Councillors of Waitakere City on 13th June 2006 by Mrs Haden, which included the following statement:

“Neil Wells is unable to prove any legitimacy of his trust other than referring to the gazette entry of AWINZ, which came about when he pulled the wool over the ministers eyes by pretending that AWINZ existed as a trust and was being registered (as we have done)...

This has to be of concern to the council as your animal welfare Officers are founded on what appears to be fraud. Waitakere has paid AWINZ a lot of money , if it does not exist..(sic) where has it gone it certainly is not

a charitable trust as Wells claims it to be, because if it was we would not have been able to establish a legal charitable trust in the same name. That in itself has to be proof that he cannot be taken on his word."

The statement is false, and in our view defamatory. Not only is your understanding of the legal requirements for the formation of a trust incorrect, but in the period 1999 to the present Waitakere City has only paid \$60 to AWINZ for the purchase of two training videos which AWINZ imported in bulk from the US in 2004. No other assets or funds have passed from Waitakere City to AWINZ.

Further examples from your website, which serve to add weight to our concerns include the following statements:

- "What emerged was that AWINZ appeared no more than a name that Wells had given himself."
- "I have previously alerted you to the antics of Neil Wells and his sham trust AWINZ".
- "It also prevents a Cover up by Wells. We wonder what has happened to all the money that has gone into the so called Charity? Whose pocket did the money from movies go into, who received the balance of the money from movies such as Narnia and Lord of the Rings after the workers were paid."
- "This page is dedicated to him so that his cover up can be exposed."
- "[D]og control ... was not legitimately done for many years and is being actively covered up by Wells and Waitakere."

We note that the many of the statements you continue to make in respect of Mr Wells and AWINZ have already been refuted by Waitakere City Council and the Ministry of Agriculture and Forestry. In such circumstances any defence of honest opinion is most unlikely to be successful in court.

As is the case in respect of the law of passing off, it is well-established that an action will lie in cases where the internet is used to publish defamatory statements (see e.g. **O'Brien v Brown** (2001) 1 NZECC (digest) 70-018). Likewise, it is clear that an action in defamation could lie in respect of the defamatory statements sent by Mrs Haden and Verisure Investigations Limited to various people, including many work colleagues of Mr Wells, by email.

If successful, an action in defamation could again result not only in an injunction and an award of damages against you, but also an award for costs.

We note that you have recently added a statement to the site to the effect that you will consider removing material if requested politely to do so. You should be aware that this statement does not reduce your exposure to an action in defamation. An act of defamation occurs upon publication of the defamatory material, such as posting on a website. Subsequent removal does not alter that. Further, you are also not legally entitled to impose a burden on Mr Wells or anyone else to monitor your actions.

ISP Liability

Before we turn to deal with the Fair Trading Act we also remind you that any defamatory material published on your website exposes not only yourselves, but your ISP Aotea Web Hosting Limited, to legal action. Overseas, actions against ISPs have been successful in circumstances where they were aware, or should have been aware, that defamatory material was being published on a site over which they had control.

Fair Trading Act

We also consider that your statement that:

“Welfare officers have been involved in the overseeing the use of animals in the making of movies. the (sic) Animal Welfare Institute of New Zealand can provide suitably qualified officers for this task”

breaches either or both of sections 11 and 13 of the Fair Trading Act.

Section 11 of the Fair Trading Act provides:

“No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quality of services”.

Section 13 provides:

“No person shall, in trade, in connection with the supply of possible supply of goods or services...

(b) make a false or misleading representation that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill...”

The concept of being "in trade" is a very broad one. It does not require you to have any actual intention to carry on the services you advertise. All that it requires is for a reasonable person, reading your website, to reach the understanding that you are in the business of providing the services you refer to.

Breaches of Fair Trading Act can form the basis for an action in damages, as well as an injunction to cause the breaches to cease.

Finally, for completeness, we note that, pursuant to section 40 any breach of either of the above provisions is an offence. Upon conviction the offender is liable:

- “(a) in the case of a person other than a body corporate, to a fine not exceeding \$60,000; and
- (b) in the case of a body corporate, to a fine not exceeding \$200,000”.

As you will be aware, the Institute is a body corporate by virtue of section 13 of the Charitable Trust Act.

Undertakings

Against this background AWINZ requires the following written undertakings from you, both in your capacities as trustees of the Institute and in your personal capacities.

AWINZ also requires additional written undertakings from Verisure investigations Limited in the terms set out at the last two bullet points below:

- You will change the name of your charity to a name not resembling that of AWINZ; or remove it from the register altogether;
- You will close the website “awinz.co.nz” and deactivate the domain name;
- You will not open a new website by the same or a similar name;
- You will cease all defamatory communications in relation to AWINZ and Neil Wells;
- You will not publish any further material concerning Neil Wells and AWINZ which goes to reputation.

Obviously, if these undertakings are given and adhered to, you will still be free to pursue the charitable objectives of your organisation.

Please confirm in writing that you provide the above undertakings by 5.00pm on Friday 30 June. This timeframe should allow you the opportunity to consider our requirements and to seek legal advice on the matters we have raised.

If you decide against providing the requested undertakings, you will leave our clients with no alternative but to commence proceedings against you. Our clients undertake in turn to you that they will not commence such proceedings if the undertakings sought from you are provided and adhered to.

As a final point, we note your apparent view that any attempt to provide advice to you that you are not complying with the law, and that repercussions may accordingly follow, constitutes "intimidation" or "bullying". We disagree. Our clients have rights recognised by the law, which we are instructed by them to protect. You have chosen to flout the law, by engaging in deliberately misleading and defamatory conduct. It is not intimidatory to point this out to you, and to invite you to rectify the situation. To the contrary, we consider that it is a courteous

approach, and a genuine attempt to avoid the unnecessary stresses and expenditure of legal costs associated with legal proceedings.

We look forward to hearing from you.

Yours faithfully
BROOKFIELDS



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