

CITATION: *Commonwealth of Australia v Trepang Services Pty Ltd* [2018] NTSC 90

PARTIES: COMMONWEALTH OF AUSTRALIA

v

TREPANG SERVICES PTY LTD  
ACN 149 489 065

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory  
jurisdiction

FILE NO: 37 of 2018 (21819597)

DELIVERED: 18 December 2018

HEARING DATE: 27 August 2018

JUDGMENT OF: Kelly J

CATCHWORDS:

CONTRACT – Interpretation – Standard form contract – Whether contractor had to produce all documents created in the performance of Service Agreement – Meaning of material created for the purpose of the Service Agreement – Commercial purposes of clause – Information that Commonwealth has an interest in protecting – Context in which clause appears – Definition must have limits which give sensible commercial content to the obligations – Judgment for defendant.

*Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 343 ALR 58, *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, applied.

**REPRESENTATION:**

*Counsel:*

Plaintiff: D Robinson SC with B Ilkovski  
Defendant: A Harris QC and N Chrstrup

*Solicitors:*

Plaintiff: Clayton Utz  
Defendant: HWL Ebsworth Lawyers

Judgment category classification: B  
Judgment ID Number: Kel1817  
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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Commonwealth of Australia v Trepang Services Pty Ltd* [2018] NTSC 90  
No. 37 of 2018 (21819597)

BETWEEN:

**COMMONWEALTH OF AUSTRALIA**  
Plaintiff

AND:

**TREPANG SERVICES PTY LTD**  
**ACN 149 489 065**  
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 18 December 2018)

- [1] In about September 2011, the defendant, Trepang Services Pty Ltd (“Trepang”) and the plaintiff, the Commonwealth of Australia (“the Commonwealth”) entered into an agreement whereby Trepang would provide services to the Commonwealth in connection with the Wickham Point Detention Facility (“the Facility”) and the adjacent Bladin Point Processing Centre (“the Centre”) at Wickham Point in Darwin (“the Services Agreement”).
- [2] The Services Agreement, as subsequently varied, provided for the provision by Trepang of various services related to repairs and maintenance; the supply of gas, electricity, water and telecommunications services; cleaning;

removal of rubbish; and the supply of furniture, fixtures and equipment at both the Facility and the Centre.

- [3] The Facility consisted of 750 two person accommodation rooms with ensembles for detainees; associated amenities blocks, each containing a gymnasium, library, internet room, cafeteria, hairdressing salon, multipurpose and religious rooms; laundries; guard rooms; a medical centre; a mess building; other buildings; and an outdoor sports facility.
- [4] The Services Agreement was a substantial commercial contract which ran from 1 June 2011 to 30 November 2016 (on the Commonwealth's case) and pursuant to which the Commonwealth was obliged to pay between \$111,760 and \$181,610 per day from commencement to 6 November 2014 and thereafter annual amounts of about \$24 million.
- [5] It is common ground that the Services Agreement has expired.<sup>1</sup>
- [6] In this proceeding the Commonwealth seeks an order for specific performance by Trepang of its obligation under clause 5.3.4 of the Services Agreement. The Commonwealth alleges that Trepang was obliged to deliver to the Commonwealth all "Copies" as defined in the Services Agreement on the expiration of the Services Agreement and that it has failed to do so. It seeks specific performance of that obligation. The Commonwealth also seeks a declaration that documents described in the Attachment to the

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<sup>1</sup> In other proceedings the parties have disagreed about the date on which the Services Agreement came to an end. That is not relevant to any issue in this proceeding.

Originating Motion are included in the definition of “Copies” to which that obligation extends.<sup>2</sup>

[7] Clause 5.3 of the Services Agreement provides as follows.

### **5.3 Dealing with Copies**

- 5.3.1 For the purposes of this Clause 5.3, Copy (or Copies) means any document, device, article or medium in which Commonwealth Material, Contract Material or the Commonwealth's Confidential Information is embodied.
- 5.3.2 Property in each Copy vests or will vest in the Department and must be delivered to the Department on demand within a timeframe designated by the Department.
- 5.3.3 The Services Provider agrees to establish and maintain procedures to secure all Copies against loss and unauthorised access, use, modification or disclosure.
- 5.3.4 Upon the expiration or termination of this Agreement, the Services Provider agrees to deliver to the Department or otherwise deal with all Copies as directed by the Department.
- 5.3.5 Notwithstanding Clause 5.3.4 (or 5.3), the Services Provider may retain for its normal business purposes a full copy of Material used in the course of providing Services under this Agreement, which may include copies of extracts from or references to the Commonwealth Material, Contract Material and Confidential Information, subject to the confidentiality obligations in Clause 6.1.

[8] The Service Provider is Trepang. The Department is a Commonwealth government department. It is common ground that Clause 5.3 contains

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<sup>2</sup> The Commonwealth apparently requires the delivery of those documents in connection with other proceedings between the Commonwealth and another party to which Trepang has been joined as a third party. That fact is of no relevance to the determination of this proceeding.

typographical errors in its numbering. It is also common ground that it was intended to read as above.<sup>3</sup>

[9] “Commonwealth Material”, “Contract Material”, “Confidential Information” and “Material” are all defined terms in clause 1.1.1 of the Services Agreement and, in turn, incorporate other defined terms.

- “Commonwealth Material” means any Material provided by the Commonwealth to Trepang for the purposes of the Services Contract or which is copied or derived from Material so provided.
- “Contract Material” means all Material:
  - (a) created for the purposes of the Services Agreement, including the Contract Material specified in Item C (Required Contract Material);
  - (b) incorporated in, supplied or required to be supplied along with the material referred to in paragraph (a); or
  - (c) copied or derived from Material referred to in paragraphs (a) or (b).
- Item C of Schedule 1 required Trepang to supply the Commonwealth with “the Required Contract Material” consisting of:

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<sup>3</sup> This version is reproduced from the Commonwealth’s submissions. Counsel for Trepang did not challenge its accuracy. I suspect that the sub-clause in brackets should read 5.3.2. However, that does not affect anything in this judgment.

- (a) itemisation report of loose assets in the Premises (updated by Trepang as required);
- (b) Environment Management Plan for the Premises; and
- (c) emergency evacuation procedure, manual and map of the Premises, within the time specified.

- “Material” includes information and the subject matter of any category of Intellectual Property right. (There is no exclusive definition of “Material” in the Services Agreement.)
- “Confidential Information” in relation to a party, means information that is by its nature confidential and:
  - is designated by a party as confidential; or
  - the receiving party knows or ought reasonably to know is confidential,

and includes the information described in Item N (Confidential Information of the Parties)<sup>4</sup> of Schedule 1 but does not include information which is or becomes public knowledge other than by breach of the Services Agreement or any other confidentiality obligations or is independently developed without reference to the other party’s

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<sup>4</sup> The definition in fact refers to Item P, but it is common ground that that is an error.

Confidential Information. (Item N of Schedule 1 does not list any Confidential Information.)

- “Intellectual Property” is also given an inclusive definition which at first sight appears very comprehensive. It includes all copyright and neighbouring rights, all rights in relation to inventions (including patent rights), plant varieties, registered and unregistered trademarks (including service marks), registered designs, confidential information (including trade secrets and know how) and circuit layouts, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

### **The Commonwealth’s Case**

[10] The Commonwealth relies on what it submits is a very wide definition of “Contract Material” including as it does all Material created for the purpose of the Services Agreement. Copy (or Copies) means any document etc in which any such matter is embodied. The Commonwealth contends that all of the documents described in the Annexure to the Originating Motion were created for the purpose of the Services Agreement.

[11] Counsel for the Commonwealth began by stating that clause 5.3.4 required Trepang to deliver up to the Commonwealth every single document which had been produced during the performance of the Services Agreement. At one point the following exchange occurred.

JUDGE: Are you really saying that every time they wrote a note to the cleaners saying, “You haven’t dusted properly in office number four,” that they had to retain all of that? And all of those notes become the property of the Commonwealth and have to be delivered up to the Commonwealth at the end of the contract?

MR ROBINSON: Yes.

[12] Later counsel shifted ground imperceptibly and contended that “what has to be delivered up is a Copy; that means document, device, article or medium and it must include information in respect of the services provided by Trepang.” No explanation was offered as to why that limitation on the meaning of “information” in the definition of “Material” was to be preferred to the limitation advanced by Trepang (discussed below) based on the commercial purpose of the clauses in question.

[13] Immediately after the contention set out in [12] above, counsel reverted to saying, “When you look at Contract Material, it means all material created for the purposes of this agreement”.<sup>5</sup>

[14] The Commonwealth has not suggested a limit to the definition of Contract Material (and hence Copies) which would make commercial sense of clause 5.3. Although briefly submitting that the “information” must be information “in respect of the services provided by Trepang”, counsel for the Commonwealth did not provide a rationale for this proposed limitation

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<sup>5</sup> At one point during the trial of the proceeding there was a discussion about whether there was a distinction between “documents produced for the purposes of the contract” and “documents generated during the performance of the contract”. Counsel for the Commonwealth submitted that there was no distinction between these two categories.

or spell out a commercial purpose which would be advanced by that construction.

[15] In oral submissions, counsel for the Commonwealth suggested a reason why the Commonwealth would be “seeking the entire record of the service provider” (without specifying precisely what that meant). The Commonwealth is “usually vicariously liable for the commission or omission of its service providers”, and there are a number of clauses in the Services Agreement where the Commonwealth seeks to have the service provider comply with a number of obligations (for example clauses 6.2.1, 9.1.1 and 9.2). It was suggested that the Commonwealth may need all of the documents produced during the performance of the contract to ensure compliance with these obligations.

[16] I consider this submission to be fanciful. Clause 6.2 deals with reporting obligations and disclosures. It provides that Trepang will allow the disclosure of information relating to the contract for various reporting and Commonwealth disclosure obligations including disclosure of procurement information for annual reporting purposes; disclosure to parliament as appropriate in line with specified guidelines; disclosure of information consistent with the *Freedom of Information Act*; disclosure of discoverable information relevant to a case before the court; and disclosure of information as required by other legislation. Clause 9.1 simply provides that Trepang will comply with the law in carrying out the contract and clause 9.2 provides that it will likewise comply with specified Commonwealth policies

and provide all reasonable assistance to the Commonwealth in the investigation of any breaches of “the APS Code of Conduct”. None of these things would be facilitated by the Commonwealth having ownership of every document produced in the performance of the Services Agreement and having them all delivered to it at the expiration of the contract.

### **Trepang’s case**

[17] Trepang submits that the definition of “Contract Material” is not wide at all because to be “Contract Material” a thing must first be “Material”. Trepang points out that the definition of Material does not even refer to a document: it refers to “information”. Trepang submits that “information” in the context in which it appears cannot mean any kind of information; it must refer to information of the kind the relevant clauses of the Services Agreement are about, and that is confidential information and intellectual property which the Commonwealth has a legitimate interest in protecting.

[18] Trepang relies for this contention on the position of clause 5.3 in the Services Agreement. It is in Section 5, headed “Material”, a section concerned with the protection of certain Commonwealth documents and the Commonwealth’s confidential information, intellectual property and information supplied by the Commonwealth for the purpose of performing the contract. Section 5 consists of three clauses.

(a) Clause 5.1 concerns Commonwealth Material. Clause 5.1.1 provides that the Commonwealth agrees to provide Trepang with “the

Commonwealth Material as specified in Schedule 1, item K”. (There is nothing specified in Item K.)

- (b) Clause 5.2 deals with intellectual property. Clause 5.2.1 provides that intellectual property in all Contract Material vests or will vest immediately in the Commonwealth (with exceptions dealt with elsewhere in clause 5.2). This supports the contention that the kind of “information” referred to in the definition of Material (and hence Contract Material) must be information in which intellectual property can subsist, and which the Commonwealth would have an interest in owning. The definition of Contract Material points the same way: it is Material created for the purpose of the contract, implying some kind of creative process, and not just documents generated in the course of carrying out the contract.
- (c) Clause 5.3 (set out above) deals with Copies. Trepang submits that, in the context in which it appears, clause 5.3 is intended to deal with copies of the other things that are the subject of Section 5.
- This is supported by the definition of Copy (or Copies) in clause 5.3.1 being “any document, device, article or medium in which Commonwealth Material, Contract Material or the Commonwealth’s Confidential Information is embodied”.  
[emphasis added]

- It is also supported by the obligations set out in clauses 5.3.2 and 5.3.3. It makes sense for the Commonwealth to specify that property in each Copy vests in the Commonwealth [clause 5.3.2], if the Copies are things which embody intellectual property, confidential information, or information specially supplied by the Commonwealth (under clause 5.1) for the purpose of performing the contract, all of which the Commonwealth has an interest in protecting. Similarly, it makes sense for the Commonwealth to require Trepang to establish and maintain procedures to secure all Copies against loss and unauthorised use [clause 5.3.3] if what is referred to is intellectual property, confidential information or information specially provided by the Commonwealth for the purpose of performing the contract. Neither of these clauses makes much sense if the Copies include all documents produced in the performance of the contract such as laundry lists, staff payroll slips, invoices for the purchase of cleaning materials and other things of that nature.
- Also supporting Trepang’s construction is the fact that clause 5.3.5 provides that Trepang “may retain for its normal business purposes a full copy of Material used in the course of providing Services under this Agreement, which may include copies of extracts from or references to the Commonwealth Material, Contract Material and Confidential Information, subject to the confidentiality

obligations in Clause 6.1.”<sup>6</sup> It would make sense for the Commonwealth to require delivery up to it of all copies of confidential information and material embodying Commonwealth intellectual property (and information specially supplied by the Commonwealth for the purpose of performing the contract), allowing Trepang to retain one copy only, and that subject to confidentiality requirements. If the “Contract Material” – and hence the “Copies” - included complaints about cleaners, staff reviews, invoices for consumables etc, which the Commonwealth required so it could check whether there had been compliance with statutory requirements, or in case it was sued,<sup>7</sup> one would expect that the Commonwealth would want to receive only one copy, leaving all surplus copies with Trepang. Further, there would be no purpose served by insisting that the “information” in these documents remain confidential.

- Yet further support for Trepang’s construction of the meaning of “information” in the definition of “Material” comes from the fact that the definition of “Copy” in clause 5.3.1 is not limited to a paper document. It includes “a device, article or medium”. Limiting consideration to “devices”, information produced for the purposes of the Services Agreement will presumably be contained

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<sup>6</sup> Once again, there is a typographical error in clause 5.3.5, but the parties are agreed that the reference was intended to be to clause 6.1 because that is the clause that imposes the confidentiality requirements.

<sup>7</sup> See Commonwealth’s contention at [15] above.

on a number of devices including all or most of the computers owned by Trepang as well as the mobile phones of all or most of the company's management and employees (which will all contain information about other matters as well). If the Commonwealth's definitions of "information" and "Material" are correct, clause 5.3.4 requires the automatic delivery up to the Commonwealth at the end of the contract of all of those devices. What possible commercial purpose could be served by a clause imposing such an obligation? This points strongly to the construction contended for by Trepang.

[19] Trepang submits that, given the above definitions, and the context in which clause 5.3.4 appears within Section 5, a reference in the Services Agreement to "Material" is a reference to material which is either confidential information or material which is the subject matter of an intellectual property right; and a "Copy" is something that embodies that confidential information, or material which is the subject matter of an intellectual property right.

[20] I agree, except that I would add that "Material" (and hence "Copies") must also include information specially supplied by the Commonwealth (as referred to in clause 5.1) for the purpose of performing the contract.

[21] Trepang supports its construction of the term "Material" by reference to the commercial purpose and objects to be achieved by the Services Agreement

and what a reasonable businessperson would have understood the term to mean if placed in the position of the parties. A court is entitled to approach the task of construction on the basis that the parties intended to produce a commercial result, one which makes commercial sense.<sup>8</sup>

[22] Trepang submits that no commercial purpose whatsoever would be achieved by a clause in the contract which obliged Trepang, on the expiration of the Services Agreement, to deliver to the Commonwealth every single document produced over many years of carrying out the agreement within the Facility and the Centre (both large complexes), including such things as handwritten maintenance and cleaning requests and invoices for the purchase of toilet paper and cleaning supplies – not to mention its computers and other devices. This would amount to truck-loads of documents and other material, most of it of no use or interest to the Commonwealth.

[23] It is common ground that the Services Agreement is a standard form agreement used in Commonwealth contracts for the provision of services. What purpose could be served in the Commonwealth having delivered to it every document produced for the purpose of every one of the many hundreds of thousands of contracts the Commonwealth is a party to at the expiration

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<sup>8</sup> *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 343 ALR 58 at [16] per Kiefel, Bell and Gageler JJ and *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35] per French CJ and Hayne, Crennan and Kiefel JJ.

of each contract?<sup>9</sup>

[24] On the other hand, although the Services Agreement between the Commonwealth and Trepang did not involve any intellectual property or confidential information belonging to the Commonwealth, and no information was provided by the Commonwealth pursuant to clause 5.1, other such contracts may well involve such matters. There would be an obvious commercial benefit to the Commonwealth to specify that any document or other thing in which the Commonwealth's intellectual property or confidential information (or information provided by the Commonwealth for the purpose of performing the contract) is embodied is the property of the Commonwealth and that at the expiration of the agreement between the parties, the other party must deliver up this material or otherwise deal with it as directed by the Commonwealth. In relation to intellectual property, for example, there may be an implied licence for the life of the contract to use the material for the purpose of the contract,<sup>10</sup> and there is an obvious interest in maintaining the confidentiality of Commonwealth confidential information and limiting the number of copies retained by a party other than the Commonwealth.

[25] Again, I agree. Although the definition of "Material" is inclusive it must have limits which give sensible commercial content to the obligations

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**9** In oral submissions, counsel for Trepang used as an example, invoices rendered by Trepang (and other service providers) to the Commonwealth and asked rhetorically: "Why would the parties impose an obligation on the contractor to deliver up to the Commonwealth copies (possibly multiple copies) of invoices that have already been rendered to the Commonwealth and presumably been paid for in the life of the contract?"

**10** Such as clause 5

imposed by clause 5.3: it would make no commercial sense to construe the definition of “Material” as including any information whatever including any document.

## **Conclusion**

[26] I consider that Trepang is correct in its construction of clause 5.3.4. What Trepang was obliged to do under that clause was to deliver up any document (or other thing) which embodied any information provided to Trepang by the Commonwealth for the performance of the Services Agreement; any Commonwealth confidential information and any Commonwealth intellectual property.

[27] A perusal of the relevant sections of the Services Agreement (referred to above) reveals that there was no information provided by the Commonwealth under clause 5.1 [see Schedule 1 Item K];<sup>11</sup> and there was no Commonwealth confidential information supplied [Schedule 1 Item N].<sup>12</sup> It has not been asserted by the Commonwealth that there was any Commonwealth intellectual property which passed into the possession of Trepang during the course of performance of the Services Agreement, and the Commonwealth has not led any evidence that Trepang has any Commonwealth intellectual property in its possession. The Commonwealth

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**11** To the extent that the term “Commonwealth Material” extends beyond the material the Commonwealth was obliged to supply under clause 5.1, the Commonwealth has not adduced evidence that there are any such documents or other material in the possession of Trepang.

**12** The definition of “Confidential Information” potentially picks up confidential information other than that referred to in Item N. However, the Commonwealth did not adduce any evidence that Trepang was in possession of any other confidential information.

has therefore failed to prove that Trepang has any “Copies” within the meaning of clause 5.3.4 which it is obliged to deliver to the Commonwealth. (There is no suggestion that the documents described in the Attachment to the Originating Motion contain any such matters.)<sup>13</sup>

[28] The parties made competing contentions concerning at what time the obligations under clause 5.3.4 arose; whether they survived the expiration of the contract; whether the obligation was to deliver “Copies” to the Commonwealth unless instructed to otherwise deal with them or whether the obligation was simply to deal with them as instructed by the Commonwealth if and when so instructed; and whether Trepang had to deliver excess copies only. It is not necessary to go into these matters. The Commonwealth has not established that Trepang is in possession of any “Copies” as defined in the Services Agreement.

[29] Had the Commonwealth not failed on this threshold issue, it would have been necessary for me to go on to decide whether it was appropriate to make an order for specific performance of the obligation to deliver up “all Commonwealth Material, Contract Material, Commonwealth Confidential Information and Copies thereof” within seven days, on the assumption that this comprised every single document produced in the course of carrying out the contract. The Commonwealth did not address the relevant discretionary considerations, the onus of satisfying which would have been on the

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**13** On the trial of the proceeding, counsel for the Commonwealth specifically advised that “it didn’t look like” there was any confidential information in any of the documents described in the Annexure to the Originating Motion.

Commonwealth. It did not address the question, for example, of whether, if Trepang had failed to comply with its obligation under clause 5.3.4, damages would have been an adequate remedy in the circumstances. In the event, it is not necessary for me to go into these matters.

[30] The relief sought is refused. There will be judgment for the defendant.

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