DW Fox Tucker Lawyers

DWFT Report

Issue 19

A Family Business Redefining the Camping Experience

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Inside This Issue

DW Fox Tucker Lawyers

L14, 100 King William Street, Adelaide, SA 5000

p: +61 8 **8124 1811** e: info@dwft.au

dwfoxtucker.com.au

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CLIENT PROFILE

The Rise of Offline Campers: A Family Business Redefining the Camping Experience

Offline Campers, an emerging name in the caravan and camping industry, offers more than just trailers; they provide a unique blend of comfort, innovation, and personalised customer care that sets them apart from the competition. As a potential customer, you are likely drawn to the idea of purchasing from a local family business that prioritises quality, practicality, and a personal touch over something mass-produced and imported from abroad. What makes Offline Campers particularly desirable is their deep understanding of what campers truly need – stemming from their own experiences as passionate campers. From a full queen-sized mattress chosen by the customer to ample under-bed storage and climate control options, every feature of their trailers is designed with the user's comfort and convenience in mind.

From concept to reality

The story of Offline Campers is as inspiring as it is impressive. Sam, a chartered Mechanical Engineer with a background in defence, and Jenna, who worked at AnglicareSA coordinating a wellbeing program for over 1800 staff, lived busy lives with three young children under seven when they decided to embark on a new adventure. What started as a passion project to build a camper for their own family soon transformed into a full-fledged business.

Balancing jobs, parenting, and their new business venture was no easy feat. Sam would spend his days working at the Australian Submarine Corporation and his evenings and weekends either designing on CAD or building in the garage. During this period, Jenna added studying for her Masters in Nutrition to her busy schedule and still found time to help Sam establish and grow the business. Their commitment and hard work paid off, and they moved from their cramped garage to a larger warehouse in late 2020. In April 2022, Sam, Jenna and their team had outgrown the larger warehouse and moved into the old Holden's Factory.

Running a business inevitably comes with its challenges, but Sam and Jenna have navigated these with remarkable resilience and a commitment to success. From overcoming procurement hurdles to managing finances and sourcing top-tier talent, they've turned obstacles into opportunities. Their continued growth and expansion are a testament not only to their determination and adaptability but also to the invaluable support they receive from DW Fox Tucker Lawyers. The firm has been a trusted partner, providing essential guidance on employment-related matters that have helped Sam and Jenna confidently steer their business forward.

Innovation and recognition

Offline Campers quickly established itself as a leader in the industry, with its trailers winning multiple awards and accolades. The company's journey into the spotlight began

in 2021 when the owners, Sam and Jenna, entered their first Camper Trailer of the Year competition hosted by Camper Australia. Their debut was spectacular, winning Best Hybrid and Most Innovative awards. This early success was not a one-off. In 2022, they returned to the competition and emerged as the Overall Winner, and also took home awards for Best Hybrid, Most Innovative, and Best Build Quality.

These accolades are a reflection of the uniqueness of Offline Campers products. Unlike many in the industry, Sam and Jenna's trailers are designed, tested and used by them. This intensely personal and practical approach ensures that every aspect of their trailers – from layout to storage solutions – meets the real-world needs of campers in Australian conditions. Their ability to innovate while maintaining high standards of build quality has solidified their reputation as a brand that campers can trust.

Adapting to change

The onset of the COVID-19 pandemic brought unprecedented challenges for many businesses, and Offline Campers was no exception. Just weeks before their first trade show, the country went into lockdown. However, rather than letting this setback deter them, they leveraged the situation to their advantage. Camper Australia's review of their Raker trailer, both in print and online, helped them secure their first sale despite the lockdown.

The pandemic also spurred them to innovate further, leading to the development and release of the Domino in December 2020. As demand for domestic travel surged, Offline Campers saw their sales grow from one to four campers per month, and their team expanded to 14 employees.

New developments and environmental consciousness

As the company continues to grow, it remains committed to innovation and sustainability. In July, they released a new hybrid camper, the Solitaire, available in 14 and 16-foot models. This latest addition to their range features an internal ensuite, seating, and cooking facilities, catering to the needs of modern campers who desire comfort and convenience.

Moreover, Offline Campers is keenly aware of their environmental impact. Their trailers are designed to allow campers to go entirely off-grid, and with that comes environmental bonuses like options for solar panels and lithium batteries to avoid the need for plugged-in power. The Solitaire also offers composting toilets and a grey water tank, enabling customers to be completely self-contained and minimise their environmental footprint.

The Offline Campers family

For Sam and Jenna, Offline Campers is more than just a business; it's a family affair. Their three children – Emily, Jayde, and William – are growing up in an environment where adventure and exploration are part of everyday life. The family's love for camping is evident in their frequent trips to beautiful spots around Australia, with riverside locations like the Murray River, Darling River and Snowy River among their favourites.

Despite their busy schedules, Sam and Jenna make time for their personal passions. Sam enjoys riding dirt bikes, a hobby that allows him to disconnect from work pressures. Jenna, on the other hand, finds relaxation in reading and is an active member of a local Pom dance group. Their daughters, Emily and Jayde, are passionate about cheerleading, while their son, William, shares his father's love for dirt biking.

A story of love, passion, innovation, and resilience

The story of Offline Campers is one of love, passion, innovation, and resilience. From humble beginnings in a garage to becoming an award-winning brand, Sam and Jenna have built a business that resonates with campers who value quality, comfort, and a personal touch. As they continue to innovate and grow, Offline Campers is poised to become a leading name in the caravan and camping industry, offering products that meet the needs of modern campers while also respecting and preserving the environment for future generations to enjoy.

FOR MORE INFORMATION ABOUT OFFLINE CAMPERS:

Phone

(08) 7286 9213

Website

https://offlinecampers.com.au

OFFLINE CAMPERS

INSIGHT | **By Sandy Donaldson and Amy Bishop**

The Concepts of Consent for Personal Information

Application of the Privacy Act and the Australian Privacy Principles

The ways that an organisation can handle, that is, collect, manage, use or disclose personal information, are controlled by the *Privacy Act 1988 (Commonwealth)* (Privacy Act) and the *Australian Privacy Principles* (**APPs**) that are contained in Schedule 1 to the Privacy Act. These are administered by the Office of the Australian Information Commissioner (**OAIC**).

Personal information for the purposes of the Privacy Act and the APPs is information or an opinion about an individual who is identifiable or reasonably identifiable, whether true or not, and whether recorded in a material form or not.

Some personal information is ***sensitive information***, including *health* and *genetic information*, and other things like racial, political, religious, philosophical, sexual information and criminal records. The Privacy Act and the APPs contain more stringent conditions in relation to the collection, use and disclosure of sensitive information.

The Privacy Act and the APPs apply to *agencies*, that is, government bodies, and to *organisations* that are not agencies. An *organisation* can be an individual, a company, a partnership, a trust or an unincorporated association. An organisation to which the Privacy Act applies is an ***APP entity***.

Not all businesses or entities, that are not *agencies,* are *organisations* for the purposes of the Privacy Act and the APPs. A *small business operator* that does not carry on any business with an annual turnover of more than $3,000,000 is not an *organisation*, but, notwithstanding turnover, some entities are specifically excluded from the definition of a *small business operator* and are, accordingly, an *organisation*. These include health service providers who hold health information (other than in employee records), entities that disclose or collect personal information for benefit, service or advantage, or provide services to the Commonwealth or are credit reporting bodies.

Confidential information

The APPs dictate how an APP entity can collect, hold and disclose personal information, including sensitive information. An entity that is a small business operator and which is not an APP entity is not specifically required to comply with the APPs, but personal information, particularly sensitive information, that is collected or held by the entity may be confidential in accordance with the provisions of the general law, and it would be very prudent for the entity to treat such information in a similar manner to the requirements of the APPs to ensure confidentiality is preserved.

When is consent required under the APPs?

Consent of an individual may be required for the collection, use or disclosure of personal information, including sensitive information, of the individual by an organisation in accordance with a number of the APPs. The APPs that require consent are set out in the table below (emphasis added). The Privacy Act also has requirements for the collection, use and disclosure of personal information by credit providers, which are not addressed in this article.

APP	Requirement for consent
APP 3 (collection of **solicited** personal information)	3.3 An APP entity must not collect **sensitive information** about an individual unless: (a) the individual **consents** to the collection of the information and: (i) … (ii) if the entity is an organisation—the information is **reasonably necessary** for one or more of the entity's functions or activities; or (b) subclause 3.4 applies in relation to the information. 3.4 This subclause applies in relation to sensitive information about an individual if: (a) the collection of the information is required or authorised by or under an Australian law or a court/tribunal order; or (b) a permitted general situation exists in relation to the collection of the information by the APP entity; or (c) the APP entity is an organisation and a permitted health situation exists in relation to the collection of the information by the entity; or (d) … (e) the APP entity is a non profit organisation and both of the following apply: (i) the information relates to the activities of the organisation; (ii) the information relates solely to the members of the organisation, or to individuals who have regular contact with the organisation in connection with its activities. Note: For ***permitted general situation***, see section 16A. For ***permitted health situation,*** see section 16B. 3.6 An APP entity must collect personal information about an individual only from the individual unless: (a) … (b) it is unreasonable or impracticable to do so.

APP	Requirement for consent
APP 6 (use or disclosure of personal information for **secondary purposes**)	6.1 If an APP entity holds personal information about an individual that was collected for a particular purpose (the **primary purpose**), the entity must not use or disclose the information for another purpose (the **secondary purpose)** unless: (a) the individual has **consented** to the use or disclosure of the information; or (b) subclause 6.2 or 6.3 applies in relation to the use or disclosure of the information. Note: Australian Privacy Principle 8 sets out requirements for the disclosure of personal information to a person who is not in Australia or an external Territory. 6.2 This subclause applies in relation to the use or disclosure of personal information about an individual if: (a) the individual would **reasonably expect** the APP entity to use or disclose the information for the secondary purpose and the secondary purpose is: (i) if the information is **sensitive information—directly related** to the primary purpose; or (ii) if the information is not **sensitive information—related** to the primary purpose; or (b) the use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order; or (c) a permitted general situation exists in relation to the use or disclosure of the information by the APP entity; or (d) the APP entity is an organisation and a permitted health situation exists in relation to the use or disclosure of the information by the entity; or (e) the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body. Note: For ***permitted general situation***, see section 16A. For ***permitted health situation***, see section 16B. 6.3 This subclause applies in relation to the disclosure of personal information about an individual by an APP entity that is an agency …

APP	Requirement for consent
APP7 (direct marketing)	*Exceptions—personal information other than sensitive information* 7.2 Despite subclause 7.1, an organisation may use or disclose personal information (other than sensitive information) about an individual for the purpose of direct marketing if: (a) the organisation collected the information from the individual; and (b) the individual would **reasonably expect** the organisation to use or disclose the information for that purpose; and (c) the organisation provides a simple means by which the individual may easily request not to receive direct marketing communications from the organisation; and (d) the individual has not made such a request to the organisation. 7.3 Despite subclause 7.1, an organisation may use or disclose personal information (other than sensitive information) about an individual for the purpose of direct marketing if: (a) the organisation collected the information from: (i) the individual and the individual would not reasonably expect the organisation to use or disclose the information for that purpose; or (ii) someone other than the individual; and (b) either: (i) the individual has **consented** to the use or disclosure of the information for that purpose; or (ii) it is **impracticable to obtain that consent**; and (c) the organisation provides a simple means by which the individual may easily request not to receive direct marketing communications from the organisation; and (d) in each direct marketing communication with the individual: (i) the organisation includes a prominent statement that the individual may make such a request; or (ii) the organisation otherwise draws the individual's attention to the fact that the individual may make such a request; and (e) the individual has not made such a request to the organisation. *Exception—sensitive information* 7.4 Despite subclause 7.1, an organisation may use or disclose **sensitive information** about an individual for the purpose of direct marketing if the individual has **consented** to the use or disclosure of the information for that purpose.

APP	Requirement for consent
APP 8 (disclosure to overseas recipients)	8.2 Subclause 8.1 does not apply to the disclosure of personal information about an individual by an APP entity to the overseas recipient if: (a) … ; or (b) both of the following apply: (i) the entity expressly informs the individual that if he or she consents to the disclosure of the information, subclause 8.1 will not apply to the disclosure; (ii) after being so informed, the individual **consents** to the disclosure; or

Effect of consent

It will be obvious from a perusal of the APPs that an organisation that is an APP entity can collect, use and disclose personal information, including sensitive information, of an individual for most purposes if the consent of the individual is obtained. This will not always be possible, but ideally, organisations should endeavour to obtain consent for the collection, use and disclosure of personal information. This will mean that it will not be necessary to consider difficult concepts such as what an individual would "*reasonably expect*" or whether the use or disclosure of information is "*related*" or "*directly related*" to a primary purpose, where these concepts are relevant.

Privacy policy

APP 1.3 requires an APP entity to have a *clearly expressed* and *up-to-date* **APP privacy policy**, and APP 1.4 requires this to contain the following information:

- *the kinds of personal information that the entity collects and holds;*
- *how the entity collects and holds personal information; and*
- *the purposes for which the entity collects, holds, uses and discloses personal information; …*

Consent for purposes disclosed in a privacy policy

Ideally, in dealings with an individual, an APP entity should draw the Privacy Policy of the entity to the attention of the individual and obtain the consent of the individual to the collection, use and disclosure of personal information, including sensitive information, for the purposes disclosed in the Privacy Policy. This may not always be possible, but where it can be done, it may remove the need to obtain specific consent at a later date.

Nature of consent

Section 6 of the Privacy Act contains a definition of "*consent*", which "*means express consent or implied consent*". There is no further guidance as to the nature of *consent* in the Privacy Act or the APPs.

The OAIC, however, does have detailed guidelines in relation to the nature of consent and the manner in which it may be given.

Express consent

The OAIC notes that **express consent** can be either verbal or in writing. If consent is verbal, an APP entity view would ideally have a record of some sort, possibly a witness or a recording. Obviously, written consent is more certain and should, ideally, be acknowledged by hand or electronic signature.

Implied consent

Implied consent is a difficult concept, and although the OAIC acknowledges that consent can be implied, it notes

that this can only occur where it may reasonably be inferred in the circumstances from the conduct of the individual and the APP entity involved. Obviously, it is preferable to have express consent rather than to rely on implied consent.

Elements of consent

The OAIC says that there are four key elements of consent, which are:

- the individual is adequately informed before giving consent;
- the individual gives consent voluntarily;
- consent is current and specific; and
- the individual has the capacity to understand and communicate their consent.

Bundled consent

The OAIC makes particular reference to what it terms "bundled consent", which means bundling together multiple requests or purposes for consent to collect, use and disclose personal information without allowing the individual to choose and agree to which purpose their consent is to be given.

The OAIC says (OAIC *Key Concepts* B.49) that:

This practice has the potential to undermine the voluntary nature of the consent. If a bundled consent is contemplated, an APP entity should consider whether:

- it is practicable and reasonable to give the individual the opportunity to refuse consent to one or more proposed collections, uses and/or disclosures;
- the individual will be sufficiently informed about each of the proposed collections, uses and/or disclosures; and
- the individual will be advised of the consequences (if any) of failing to consent to one or more of the proposed collections, uses and/or disclosures.

Persons with a disability

If there is doubt as to whether an individual has the capacity to understand and communicate their consent or the legal capacity to give consent, it may be that there is another person available who can provide consent on behalf of the individual.

Persons who could provide consent on behalf of another individual could be (in South Australia):

- an attorney of the individual appointed under an enduring general power of attorney;
- a guardian appointed by a guardianship order under the provisions of the *Guardianship and Administration Act 1993 (SA)*;
- a guardian appointed as an enduring guardian under now repealed provisions of the *Guardianship and Administration Act*;

- a substitute decision-maker appointed by an advance care directive under the *Advance Care Directives Act 2013 (SA)*; or

- for a minor, a parent or other guardian of the minor.

Copies of appointment documents

If another person gives consent on behalf of an individual to collect, use or disclose personal information by an APP entity, the entity should sight and retain a copy of the instrument that gives authority to the person providing consent, such as a Power of Attorney, Advance Care Directive or Order of Appointment of Guardian.

Certified copies

A copy of a document evidencing the authority of a person to give consent on behalf of an individual should ideally be certified to be a true copy. Other than for Advance Care Directives (**ACDs**), there are no specific requirements relating to this, but it is best practice. There are also no specific requirements, other than for ACDs, as to who may certify a copy to be a true copy. Often, it is requested that this should be someone with authority, such as a JP or a lawyer/Commissioner for Affidavits.

It is sometimes suggested that a Notary Public should certify true copies, but if the document is to be used in Australia, this is not necessary, and it is not an appropriate act for a Notary Public.

For ACDs, certified copies are required to be produced for health practitioners. Electronic copies may be produced via the My Health Record system or the Sunrise EMR system (or other approved systems, if any). The ACD document must be certified as a true copy of the ACD by a person who is a *suitable witness* in accordance with Schedule 1 of the *Advance Care Directives Regulations 2014*.

Medical witnesses

If an individual has an incapacity, or if there is doubt as to the capacity of an individual to give consent, and another authorised person is not available to provide consent, it would be advisable for the signature or verbal giving of consent to be witnessed by a medical practitioner who could certify that the person giving consent satisfies the elements required for consent that are outlined by the OAIC.

Refer to the Privacy Act and the APPs

The comments above are only a brief summary. If there is any doubt as to the requirements for consent, or the giving of consent, or collection, use or disclosure of personal information, particularly sensitive information, regard should be had to the provisions of the Privacy Act and the APPs.

DW Fox Tucker can provide assistance in relation to any of these matters and in relation to a review of privacy policies or documents or means to obtain effective consent in relation to the collection, use and handling of personal information.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

Sandy Donaldson
Consultant
p: +61 8 **8124 1954**
sandy.donaldson@dwft.au

Amy Bishop
Special Counsel
p: +61 8 **8124 1827**
amy.bishop@dwft.au

NEWS & VIEWS | **By Ben Duggan and Jonathan Ikonomopoulos**

New Modern Award Rights for Workplace Delegates: What Employers Need to Know

Employers have new obligations under modern awards to recognise, provide resources, and pay for workplace delegates.

The new obligations follow the Federal Government's reforms that required the Fair Work Commission to develop a delegates' rights term for modern awards by 30 June 2024.

These new modern award-based obligations largely replicate workplace delegates' rights, which were introduced to the Fair Work laws late last year.

Each modern award will have the delegates' rights term inserted unless it already has such a term that is more favourable.

The new delegates' rights modern award term is also a compulsory term for future enterprise agreements (again subject to the inclusion of a more favourable term).

We shall discuss what employers need to know about their obligations towards union delegates.

Who are workplace delegates?

A workplace delegate is a person appointed or elected by an employee organisation, generally a union, to represent members at a workplace.

The workplace delegate is different to an official employed by a union, who has had various rights, including right of entry rights, under the Fair Work and predecessor workplace laws.

In contrast to a union official, a workplace delegate will be employed and work for a business rather than be employed directly by the union.

Rights of workplace delegates

An employee must provide notice to the business where they work of their appointment as a delegate before they can be formally recognised as a workplace delegate.

The confirmation of an employee as a workplace delegate in this uncomplicated manner imposes various obligations on employers as follows:

- **Representation Rights**: the obligation to recognise and enable a workplace delegate to represent members of the union at the workplace.
- **Reasonable Communication**: the obligation to provide workplace delegates with the ability to engage in reasonable communication with current members (and those eligible for membership) about their industrial interests.
- **Access to Workplace**: the provision of access to and utilisation of workplace facilities to a workplace delegate.
- **Paid Time for Training**: the obligation to provide workplace delegates (excluding those working for small businesses) with reasonable paid time during normal working hours to attend training about their role.

A review of these new obligations for employers will be conducted by the Fair Work Commission within 12 months, that is, by 1 July 2025.

Protections for workplace delegates

The Closing Loopholes reforms have introduced specific protections for workplace delegates that supplement other general protections under the Fair Work laws.

New section 350A of the Fair Work laws prohibits employers from any of the following activities:

"a workplace delegate will be employed and work for a business rather than be employed directly by the union."

- **Unreasonable Refusal to Deal with Workplace Delegate**: an employer must not unreasonably fail or refuse to engage with a workplace delegate who is carrying out their duties.
- **False or Misleading Representations**: an employer is prohibited from knowingly or recklessly providing false or misleading information to a workplace delegate.
- **Hindering or Obstructing Rights**: an employer is prohibited from unreasonably hindering, obstructing, or preventing a workplace delegate from exercising their rights under a modern award (or the Fair Work laws).

These protections supplement existing general protections under the Fair Work laws.

Comment

Historically, an employer did not have any obligation to provide resources or other assistance to a 'shop steward' or workplace delegate, to use the terminology currently utilised in the Fair Work laws. Unions would consequently seek to reach an agreement with employers to obtain rights for workplace delegates, either informally or formally, for example, through a term in an enterprise agreement.

Under these new rights, employers have lost the ability to control elements of what workplace delegates can and cannot do in the workplace. For example, a workplace delegate may potentially use these new terms to embed themselves in important processes, such as disciplinary processes, grievance disputes and enterprise bargaining, during their normal work time. Further, a workplace delegate's employer will also need to provide facilities and time to communicate with the members of the union at the workplace.

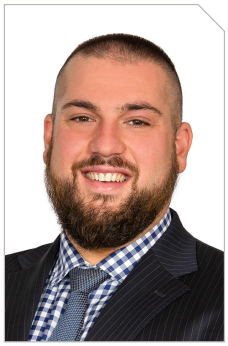
The challenge for unions, with the ongoing decrease in union density in the private sector, will be to find sufficient workers prepared to be union delegates at their workplace. Unions will likely look to the bigger workforces at larger private sector businesses, particularly those that are already unionised, to seek to overcome this difficulty.

In practice, the impact of introducing a workplace delegates rights term into all modern awards, much like other recent workplace reforms, is more likely to be felt by larger than smaller businesses.

If you have any questions in relation to the new modern award rights for workplace delegates, please contact one of our employment law experts.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

Ben Duggan
Director
p: +61 8 **8124 1881**
ben.duggan@dwft.au



Jonathan Ikonomopoulos
Director
p: +61 8 **8124 1824**
jonathan.ikonomopoulos@dwft.au

NEWS & VIEWS | **By Sandy Donaldson**

Restraint Clauses in Australia: Changes on the Horizon

Restraint clauses in employment contracts, such as non-compete, non-solicitation, and non-disclosure clauses, may become a hot topic in Australia. The Competition Task Force of the Treasury released an Issues Paper titled "*Non-competes and other restraints: understanding the impacts on jobs, business and productivity*" on 4 April 2024, emphasising the significant implications for businesses and employees. These clauses, designed to limit what an employee can do after leaving a company, have sparked debate over their fairness and impact on job mobility, wages, and innovation.

The comments in the Issues Paper relate to restraint clauses for employees and independent contractors.

The Issues Paper was open for submissions to be made until 31 May 2024. This relatively short period has obviously now expired. Submissions were made by groups such as the Australian Industry Group and the Australian Chamber of Commerce and Industry.

From the tone and comments in the Paper, it would seem likely that the writing is on the wall for changes to be made in Australia to the law relating to restraint clauses.

NCP consultation paper

On 24 August 2024, the Treasurer of Australia, Jim Chalmers, together with the Treasurer of New South Wales, Daniel Mookhey, issued a press release titled "*Next step to revitalise National Competition Policy*". In this release, they state that the Australian and State and Territory governments have released a further consultation paper *seeking* feedback on how to modernise the National Competition Policy (**NCP**).

This new Consultation Paper contemplates a wide-ranging review of the NCP and commences with an observation that *Australia's productivity growth has slowed over the past decade and that competition is essential for lifting dynamism and productivity, supporting sustainable real wages growth, putting downward pressure on prices, and delivering more and better choices for Australians.*

The Paper contemplates three competition reform themes. Reform theme 3 is *Lowering barriers to labour mobility*, and it notes actions suggested by previous work to include:

- *The House of Preventative Standing Committee on Economics asked the government to consider the appropriateness of constraints and bans on non-compete clauses and other restraint of trade clauses.*

This was a reference to the House of Representatives Standing Committee on Economics, *Better Competition, Better Prices: Report on the enquiry into promoting economic dynamism, competition and business formation* (Parliament of Australia 2024).

Submissions were required to be made to Treasury on the Consultation Paper by Monday, 23 September 2024.

What are restraint clauses

Restraint clauses are contractual agreements that can restrict an employee's actions after leaving a company. The most common types are:

1. **Non-compete clauses**: These prevent former employees from working for competitors or starting a competing business within a certain geographic area and time period after leaving a company.

2. **Non-solicitation clauses**: These clauses restrict former employees from soliciting clients, customers, or colleagues from their former employer.

3. **Non-disclosure clauses**: These ensure that former employees do not share confidential information gained during their employment, such as trade secrets or client lists.

Why do businesses use restraint clauses?

Courts have found that restraint clauses are essential for protecting businesses and their legitimate interests. For example, non-compete clauses help safeguard intellectual property, customer relationships, and investments in employee training. By preventing employees from taking their knowledge and skills directly to competitors, businesses can protect their competitive advantage.

However, the effectiveness and fairness of these clauses are increasingly being questioned, especially when applied broadly or to low-wage or workers in non-executive roles. The balance between protecting business interests and allowing employee mobility and economic freedom to workers and customers is delicate, and the current legal framework in Australia and other countries reflects this tension.

The Australian legal landscape compared to other countries

In Australia, the enforceability of restraint clauses is generally governed by common law, with courts scrutinising whether a clause is reasonable and necessary to protect legitimate business interests. If a restraint is not reasonable, it will be void under common law. However, the rules can vary slightly depending on the state. For instance, New South Wales's *Restraints of Trade Act 1976* allows courts more flexibility to modify and enforce restraint clauses than in other states.

Comparatively, other countries are also grappling with how to handle these clauses:

- **United States**: In the U.S., the enforceability of non-compete clauses varies widely by state, with some states, like California, banning them altogether while others enforce them more strictly. There is growing momentum at the federal level to impose restrictions on these clauses, especially for lower-wage workers, to enhance job mobility and competition.
- **United Kingdom**: The UK has a more regulated approach, with courts closely scrutinising the reasonableness of restraint clauses. Recently, there have been discussions about reforming the use of non-compete clauses, particularly in light of concerns about their impact on job mobility and innovation.

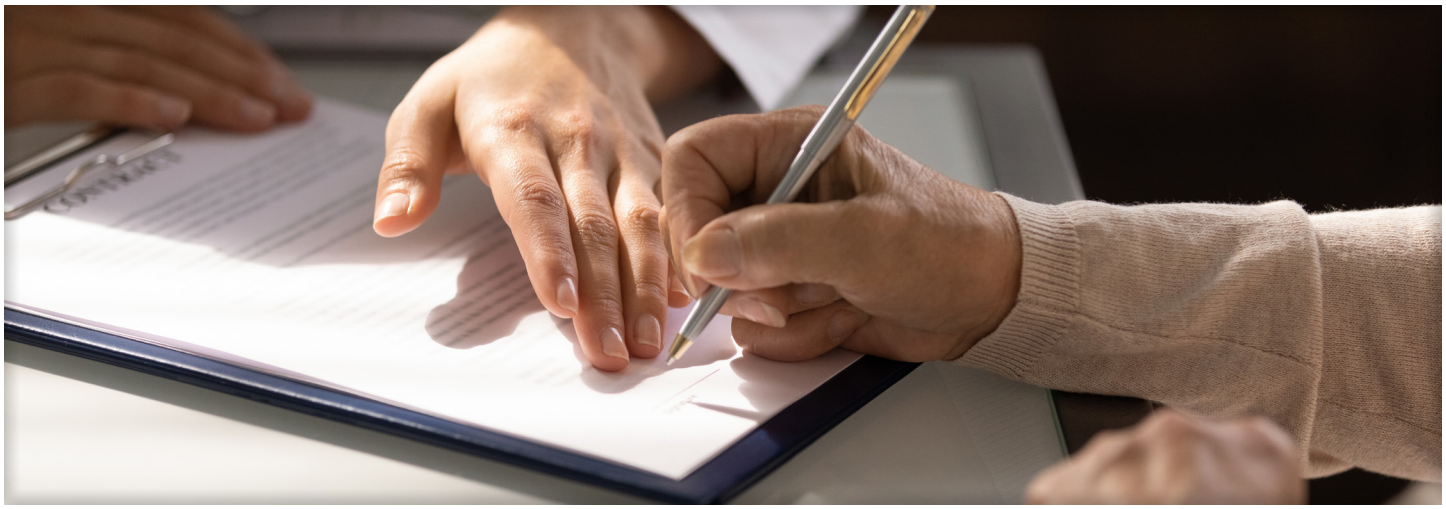
"the effectiveness and fairness of these clauses are increasingly being questioned, especially when applied broadly or to low-wage or workers in non-executive roles."

- **Germany and Austria**: These countries have stricter regulations, limiting the enforceability of non-compete clauses unless certain conditions are met, such as providing financial compensation to the employee during the restricted period.
- **Finland**: Finland also imposes limitations on non-compete clauses, requiring them to be justified by a specific business need and often necessitating compensation for the restricted period.

Australia's approach sits somewhere in the middle of these international perspectives. While restraint clauses are generally enforceable if deemed reasonable, there is a growing sentiment about the need to balance business interests with the rights of employees to seek better opportunities. Given that – as reported in the Issues Paper – when restraint clauses have been challenged Australia-wide (excluding NSW), employers were unsuccessful in 66.7% of cases. Within that 66.7% of unsuccessful restraint clauses, 78.6 % of them were found to be invalid. The legislature likely sees a problem that employers are attempting to enforce restraint clauses that are either not applicable or completely unenforceable.

The challenge of ladder or cascading clauses

One of the more complex and controversial aspects of restraint clauses in Australia is the use of ladder or cascading clauses. These clauses are designed to include multiple overlapping or cumulative restraints, such as varying geographic areas, time periods, or restricted activities. The idea is that if a court finds one part of the clause unreasonable, it can sever



that part while still enforcing the remainder. These clauses are often included because of the difficulty, particularly at the commencement of a contract or period of employment, of determining what will be reasonable in the future.

While this approach might seem pragmatic from a business perspective, it creates significant uncertainty for employees. The broad scope of cascading clauses often means that employees are left unsure about which parts of the restraint might be enforceable and are thus more likely to comply with the broadest, most restrictive terms out of caution. The Issues Paper asserts that this uncertainty can have a chilling effect on job mobility, as employees may hesitate to pursue new opportunities for fear of violating a clause that could be enforced against them.

The cost of litigation and its impact on job mobility

Another critical issue is the cost of litigation. The financial burden can be significant for employees wishing to challenge the enforceability of a restraint clause. The costs associated with legal action, including the potential need to engage barristers and the risk of facing an injunction, can be prohibitive. This financial hurdle often deters employees from challenging even clearly unreasonable restraint clauses, leading many to simply abide by them despite their doubts.

Furthermore, the use of cascading clauses and the potential for costly litigation adds to the power imbalance between employers and employees. Employers, often more familiar with legal processes and better resourced, can use the threat of litigation as a tool to enforce broad restraint clauses. This dynamic can restrict employees' bargaining power, limit their career options, and stifle job mobility across the broader economy.

What's on the horizon?

The future of restraint clauses in Australia is uncertain, with potential reforms on the horizon. The introduction to the Issues Paper states:

> On 23 August 2023, the Australian Government announced that non compete and related clauses in employment contracts would be an area of policy considered by the Competition Review. The Government's Employment White Paper Roadmap, released in September 2023, reiterated the Government's intent to investigate non compete clauses, and noted emerging research that non compete clauses may be restricting workers from switching to better paying jobs and hampering job mobility and innovation. There is empirical evidence linking lower rates of job mobility with reduced productivity growth, both in Australia and across the OECD[1] . Labour mobility is also particularly important for managing structural changes in our economy, including the transformation to net zero and the shift to the care economy[2].

1 Z Durretto, O Majeed and J Hambur, 'Overview: Understanding productivity in Australia and the global slowdown', Treasury Round Up, 2022; F Calvino, C Criscuolo, and R Verlhac, 'Declining business dynamism: structural and policy determinants', OECD, 2020.

2 Australian Government, 2023 24 Budget, 'Structural shifts shaping the economy', Budget Paper 1 Statement 4, May 2023.

There is growing international evidence that restraints of trade – and particularly non compete clauses – are becoming increasingly prevalent. This evidence also suggests that despite benefiting some businesses, restraint of trade clauses are adversely impacting workers, other businesses and broader economic outcomes – through reduced wages growth, job mobility, and access to skilled workers. Some countries already regulate non compete clauses (e.g. Austria, Finland and Germany), while others, including the United States (US) and United Kingdom (UK), are proposing reforms that would restrict or ban their use.

Possible amendments could include stricter legislative or regulatory regimes that will bring us more in line with our European cousins, especially for lower-wage workers, or more precise definitions of what constitutes a reasonable and enforceable restraint, especially given the high rate of failure when challenged. Businesses may need to reconsider the necessity of these clauses in their contracts and whether alternative methods can achieve the same protections without limiting employee mobility.

Considerations for businesses and employees

As possible amendments are uncertain, businesses should review their restraint of trade clauses and ensure that any restraints are reasonable. This includes reviewing subject matter, time, and geographical restraints in the clauses.

A periodic review of contracts and restraint clauses may mean that it is not necessary to include ladder clauses to take account of changing circumstances.

For employees, understanding the implications of these clauses before signing an employment contract is vital. Seeking legal advice can help clarify what these clauses mean and how they might impact future career opportunities.

While restraint clauses can play a role in protecting businesses, their broad application, the use of cascading clauses, and the associated litigation risks are under increasing scrutiny. As Australia considers possible reforms, it will be essential to strike a balance that protects both businesses and workers in a rapidly changing economic landscape.

If you are worried that your standard contracts contain restraint clauses that may cause an issue or believe that your employment restraint clauses are too restrictive or not effective enough, please don't hesitate to contact us for expert advice.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

Sandy Donaldson
Consultant
p: +61 8 **8124 1954**
sandy.donaldson@dwft.au

DISSECTING DECISIONS | **By Ben Duggan and Helene Chryssidis**

When Restraint Clauses Protect Confidentiality

A Case Analysis of *Broadband Solutions Pty Ltd v Ramirez* [2024] FCA 1009

Overview

The recent decision in *Broadband Solutions Pty Ltd v Ramirez* [2024] FCA 1009 is a compelling example of how restraint and confidentiality clauses in employment contracts can be used to protect a company's confidential information and intellectual property. In this case, the Federal Court of Australia, under Justice Thawley, granted interlocutory relief to Broadband Solutions (**Broadband**), an internet service provider, against its former employee, Mr Andres Julian Hernandez Ramirez (**Mr Ramirez**), for alleged breaches of contract and the *Corporations Act* 2001.

The proceedings

Broadband commenced proceedings in the Federal Court seeking an injunction against Mr Ramirez, alleging breaches of his employment contract, including unauthorised use and disclosure of confidential information and intellectual property. The court also considered whether Mr Ramirez's actions violated section 183 of the *Corporations Act*, which concerns the misuse of information obtained in a corporate capacity.

The case was brought to light when Broadband discovered that shortly after his departure, Mr Ramirez accessed and downloaded several confidential documents from Broadband's database. These documents were alleged to be executed from his personal computer, contrary to the company's policies and the terms of his employment agreement.

Employment contract

The relevant sections of Mr Ramirez's employment agreement were as follows:

17. CONFIDENTIAL INFORMATION

17.1 You must at all times:

a. keep secret any Confidential Information, and not use, copy, or disclose Confidential Information, except to the extent that you are authorised to do.

b. ensure that all material on which Confidential Information is recorded is secure and protected from any unauthorised use, disclosure, or access.

c. only use, copy, and disclose Confidential Information for the Company's benefit, and not in any way that may cause injury or loss to the Company; and

d. notify the Company if you become aware of any potential, unauthorised disclosure of Confidential Information

17.2 In this Agreement, "Confidential Information" means any information acquired by you during or relating to your employment, whether or not marked as confidential, relating to:

a. the financial, accounting or business details of the Company (including any pricing lists or policies, balance sheets, and financial statements and reports).

b. the personal, legal, business, and financial details regarding the clients of the Company (including any contact details, lists and usual client preferences).

c. the agreements, contracts, and business arrangements of the Company (including this Agreement); and

d. know-how, trade secrets and intellectual property, and the strategic marketing and advertising plans and strategies of the Company, but does not include information that falls within the public domain other than because of a breach of law.

17.3. In this clause, "Company" includes a Related Body Corporate and a Related Entity of the Company, as defined by the Corporations Act 2001 (Cth).

19. POST - EMPLOYMENT RESTRICTIONS

19.1 During your employment it is expected that you will acquire a detailed knowledge of the Business and the methods of operation of the Company, will become known to and develop relationships with its clients, and will be privy to it Confidential Information and Intellectual Property. Each of these is a valuable part of the Business, which it is important that the Company is able to protect.

19.2 You accordingly agree that you will not, during the Restraint Period without the prior consent of the Company, directly or indirectly on your own or any other person or entity's behalf in any material capacity (whether as employee, agent, officer, contractor, promoter, equity holder or beneficiary):

a. in the Geographic Area, be employed or be engage by, or be interested or concerned in, any enterprise or endeavour that competes with the division of the Company in which you worked during the last 12 months of your employment.

b. approach, solicit, or entice away (or attempt to approach, solicit or entice away), any person or entity who was a client with whom you, or a person reporting to you, had work related dealing the last 12 months of your employment, so as to cause that Client to reduce the level of business that they would ordinarily provide to the Company.

"The decision in Broadband Solutions Pty Ltd v Ramirez highlights the critical role that employment contract clauses can play in safeguarding confidential information and enforcing post-employment restrictions."

c. approach, solicit, or entice away (or attempt to approach, solicit, or entice away), any person or entity who was a supplier who whom you, or a person reporting to you, had work-related dealings during the last 12 months of your employment, so as to cause that Client to reduce the level of business that they would ordinarily provide to the Company.

d. provide service, services or products to any person or entity who was a client with whom you dealt with during the last 12 months of your employment, that are the same as or substantially similar to those provided by the Company; or

e. approach, solicit, or entice away (or attempt to approach, solicit, or entice away), any person who was an employee, agent, contractor, or other staff member of the Company of whom you gained knowledge during your employment.

19.3 In this clause:

a. "Restraint Period" means the maximum enforceable period of:

(i) 12 months immediately following the

cessation of your employment; or

(ii) 6 months immediately following the cessation of your employment; or

(iii) 3 months immediately following the cessation of your employment.

b. "Geographic Area" means the maximum enforceable area of:

(i) Victoria.

(ii) a radius of 60 kilometres of your primary work location during the last 12 months of your employment; or

(iii) a radius of 30 kilometres of your primary work location during the last 12 months of your employment; or

(iv) a radius of 15 kilometres of your primary work location during the last 12 months of your employment; and'

c. "Client":

(i) Means any person or entity with whom the Company had commenced discussions during the last 6 months of your employment, with a view to securing that person as a client.

Key allegations and findings

Mr Ramirez's resignation from his position as an IT Support Engineer had taken effect by close of business on 31 May 2024. There were no glaring issues until 9 July 2024, when RT Edgar, a long-time client, notified Broadband of their intention to withdraw services. They cited general reasons for leaving, as well as disappointment that Mr Ramirez had left. RT Edgar's email regarding the withdrawal of services was also copied to their new provider, Unified IT. It was also alleged that Mr Ramirez commenced employment with Unified IT shortly after his departure from Broadband.

Following this withdrawal, Broadband performed a search of the Activity Log on their system. Upon these inquiries, Broadband found that on the night of his resignation, Mr Ramirez had accessed 11 documents using his own personal computer rather than the company laptop, which he had returned to Broadband at the conclusion of his employment earlier that day. These documents were also found to be relevant to existing IT issues for RT Edgar, which were the focus of ongoing work by Broadband.

The company pleaded that Mr Ramirez had violated several clauses of his employment contract related to confidentiality, intellectual property, and restraint of trade. Justice Thawley found that Broadband had established a prima facie case that Mr Ramirez had breached these clauses. The court noted the strong likelihood that Mr Ramirez's access to the documents after his resignation constituted a breach of these clauses and section 183 of the *Corporations Act*.

The balance of convenience

The court granted the interlocutory injunction

based on the balance of convenience, finding that the potential harm to Broadband if the injunction were not granted outweighed any inconvenience or injury to Mr Ramirez. The court considered two factors set out in *Warner-Lambert v Apotex*, which is the likelihood of success and inadequacy of other remedies.[1]

Given the evident breaches of the employment clauses and section 183, and the inadequacy of other remedies, the court concluded that Broadband had established a prima facie case warranting interlocutory relief. The court tailored the injunction to limit its impact on Mr Ramirez's ability to work, allowing him an opportunity to challenge the restraint order before it came into full effect.

Takeaways

The decision in *Broadband Solutions Pty Ltd v Ramirez* highlights the critical role that employment contract clauses can play in safeguarding confidential information and enforcing post-employment restrictions. It demonstrates the potential for such clauses to provide effective legal remedies when compared to general damages.

The court's decision illustrates the broad scope of relief available to protect a company's confidential information and competitive interests. By granting the interlocutory injunction, the court effectively restrained Mr Ramirez from using or disclosing Broadband's confidential information and engaging in competitive activities for a specified period.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

Ben Duggan
Director
p: +61 8 **8124 1881**
ben.duggan@dwft.au

Helene Chryssidis
Director
p: +61 8 **8124 1847**
helene.chryssidis@dwft.au

1 *Warner-Lambert Co LLC v Apotex Pty Ltd* [2014] FCAFC 59.

INSIGHT | **By John Tucker and Daniel Idema**

Re-Raising of Historical Tax Debts

The Commissioner of Taxation has a statutory duty to pursue the recovery of tax debts. However, in certain situations, a tax debt will not be pursued. One of these situations is where the Commissioner decides that it is not economical to pursue recovery of the debt. Such a decision by the Commissioner is, or was previously, termed by the ATO as a "write-off", though the use of such phraseology in a tax setting does not convey with it the same meaning as that which might be thought to apply in a commercial setting.

A debt written off (determined as being uneconomical to pursue) is not waived or legally extinguished. Rather, it is placed "on hold" indefinitely and can be re-raised at a later point in time.

Often, these non-pursuit decisions occur at the initiative of the ATO, where the prospect of future activity on the taxpayer's account is unlikely or where the taxpayer is untraceable, overseas or deceased. Less often, they happen as an alternative to releasing the taxpayer from a tax liability on financial hardship grounds. This alternative might be offered where, despite obvious financial hardship occurring to the taxpayer if forced to make payment of the tax liability, a release is not possible either because the taxpayer is not an individual or the trustee of a deceased estate or because of the character of the tax liability in question (i.e. it relates to GST, PAYG withholding, super guarantee charge, director penalty notices, or other specified tax liabilities to which a release is not available).

Whilst the debt is on hold, it is inactive. It is not included in the taxpayer's total account balance, and general interest charges (a daily compounding penalty interest charge worked out under the Taxation Administration Act 1953 and applied to unpaid tax liabilities) (**GIC**) are not added to the account. However, GIC can be retrospectively added to the account following the re-raise of the tax debt, effective from the date of write-off. Depending on the amount of the tax debt and the time that has elapsed between write-off and re-raise, the GIC could be substantial and could well exceed the primary tax debt previously written off. The Commissioner does have the discretion to remit GIC, generally where it is fair and reasonable to do so, though such discretion will only be exercised on a case-by-case basis.

The resurrection of such historical tax debts may come as a surprise to taxpayers who either did not know they existed or who (whether rightly or wrongly) understood the act of the debt being written off to mean that they were forever gone. This is exacerbated by their potential liability for GIC (though the debt awareness campaign embarked upon by the ATO late last year involved the ATO writing to taxpayers to advise them they have a debt on hold and that while they were not taking any action to recover the debt, any future credit or refund may be offset against it). Such an experience was publicly reported earlier this year in the context of the ATO intensifying its efforts to collect old tax debts.

An automatic trigger for re-raising a tax debt is where the taxpayer becomes entitled to a credit or refund. In that situation, the debt is re-raised, at least partially to the extent of the amount of the credit/refund, so that the credit/refund can be offset against the debt owed. The ATO is obliged to use those amounts to reduce the debt owed (except in limited circumstances). Following budget announcements in respect of the 2024-25 year, it is anticipated that the law will be changed to give the ATO discretion not to offset refunds against tax debts of individuals, small businesses and not-for-

profit entities placed on hold prior to 1 January 2017 and which remain on hold. The ATO has currently paused the offsetting of such debts.

In the past, a criterion of the ATO for re-raising a tax debt was if the taxpayer submitted a tax return, which resulted in a credit of $500 or more. The appropriateness of that, particularly in the absence of additional criteria, for the purpose of determining whether it was economical, effective, efficient and ethical to re-raise a tax debt was the subject of some commentary by the Commonwealth Ombudsman back in 2009, following which the ATO agreed that additional criteria should be implemented including consideration of the taxable income of the taxpayer.

Re-raising a tax debt that goes back more than 5 (or 7) years can be problematic for a taxpayer who may not have necessarily retained the business records relevant to the existence of it. The law generally only requires such records to be retained for 5 years from when you prepared or obtained them or from when the transactions or acts those records relate to were completed, whichever is the later. Unlike ordinary commercial debts, which are subject to limiting periods as set out in legislation particular to each State or Territory in Australia (which operate to bar the bringing of claims that are out of time), such limiting periods do not apply to tax debts.

For taxpayers whose debts are re-raised for one reason or another, and particularly where the result of that is the application of substantial GIC to their account, it may be appropriate for them to obtain legal professional advice promptly as to any potential options moving forward. Some considerations are whether a release from liability is possible and feasible or whether there might be good grounds to argue remission of the GIC is fair and reasonable based on the facts and circumstances peculiar to the taxpayer.

Whilst not directly related to the re-raising of historical tax debts, but nevertheless important to raise in this context, is the potential timing issues associated with attempts by the Commissioner to recover alleged director penalty liabilities against directors (or former directors) of companies where the company alleged to have owed the primary tax liability has long since been wound up and the associated business records destroyed by the liquidator appointed to it. Whilst not subject to the usual limiting periods applicable to ordinary commercial debts as mentioned above, the potential prejudice occasioned to the taxpayer as a consequence of the delay (including the potential loss of important business records relevant to the taxpayer's ability to sufficiently respond to the claim) will be important considerations.

DW Fox Tucker Lawyers are experts in taxation law and can assist you with your tax-related queries.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

John Tucker
Director
p: +61 8 **8124 1807**
john.tucker@dwft.au

Daniel Idema
Director
p: +61 8 **8124 1821**
daniel.idema@dwft.au

INSIGHT | **By Sandy Donaldson**

Transferring Intellectual Property in a Business Sale

When purchasing a business, one of the most critical aspects to consider is the transfer of intellectual property (**IP**). IP is often the backbone of a business's brand goodwill and, therefore, represents a significant amount of its value. Understanding IP and effectively managing the transfer of IP assets, such as business names, trade marks, copyrights, patents, and digital assets like social media accounts and domain names, may be critical when purchasing a business.

Contracts for the sale and purchase of businesses often do not address the necessary steps to transfer IP.

Transferring a business name

The name of a business is one of the most important assets of the business, representing its brand and reputation and a name that the public knows it by. The business name may be the name of a company that carries on the business or a registered business name (if the name of the business is not the name of the entity that carries it on, the name should be registered).

The process of transferring a business name registered in the Australian Securities and Investment Commission (**ASIC**) is not just a matter of the vendor signing a form of transfer of the name to the purchaser, as is sometimes thought. This is what ASIC says about the transfer of a business name:

How to transfer a business name

If you're the current owner of a business name and you need to transfer it to a new owner, complete the following steps:

Steps to transfer a business name:

1. Go to ASIC Connect and log in to your account. If you don't have an account you'll need to create one.
2. Link your business name to your account with your ASIC key if you haven't already.
3. Select the Lodgements & Notifications tab at the top of the ASIC Connect page. Check your business email address. If this is incorrect or an email address has not been provided, you can update your business name address details.
4. Select the business name you're transferring. https://business.gov.au/online-and-digital/social-media-for-business
5. In the transaction column, select Cancel/ Transfer business name and select Go.
6. Select that 'I would like to transfer the business name' and select Next.
7. Review your transaction.
8. Complete your declarations.
9. Confirmation.

You'll then receive a transfer number via email within 24 hours. The transfer number is 13 characters long and in the format of number 1, hyphen and 11 digits, e.g.1-12345678910.

You must give the transfer number to the new business name owner. They'll need this to register the business name in their name.

Once the request to transfer is submitted, we will cancel your registration within 28 days.

In some cases, the sale agreement may require the seller to change its company name after the sale. For instance, if the business being acquired trades under the name "*Adelaide IP Lawyers*" and the vendor's company is "*Adelaide IP Lawyers Pty Ltd*", the purchaser may want the vendor to change its name to prevent confusion and permit the purchaser to register a business name, or a company with the same name, to protect the

goodwill it has purchased as part of the transfer.

The steps required for the 'name swap' of the company are the choice of a new name for the vendor company not resembling its current name, a special resolution of shareholder(s) to change the name and the lodgement of a Form 205 with ASIC. The purchaser may then register a company, change the name of an existing company to the old name, or register a business name.

Trade marks

Trade marks, registered and unregistered, are core IP assets of a business that can include words, phrases, logos, and images that distinguish the business and its products to the public. They help build brand recognition and are often associated with the goodwill of the business. When acquiring a business, ensuring that all relevant trademarks are transferred correctly to the purchaser is critical.

IP Australia should be notified of the transfer of registered trade marks. This can be achieved by both parties agreeing to the transfer, which is submitted to IP Australia. Trade marks can also be transferred via a deed of assignment. If a trade mark is transferred by a deed of assignment, this should be produced to IP Australia. The deed of assignment should not refer specifically to the Sale Agreement, as this would then also have to be produced to IP Australia, which the parties would not normally wish to do, and consideration for the assignment can be expressed by words such as "*for valuable consideration had and received*".

If trade marks consist of logos or include logos, these will be artistic works in which copyright subsists. An assignment of the copyright should be obtained by the purchaser (see below in relation to copyright). Ownership of copyright in a logo or device that is a trade mark or is included in a trade mark can be important as it may provide an additional right of action if there is an unauthorised use of the logo or trademark.

Copyright

Copyright protects original works of authorship, such as literary, artistic and musical works. It is prudent to verify that the business you are purchasing holds the copyright to any creative works associated with its business and brands. This includes marketing materials, websites, software and other media that are integral to the business. Copyright can also include documents such as instructional videos or memos that were created by the seller when they operated the business. Copyright arises automatically and does not require registration with IP Australia or elsewhere.

"Contracts for the sale and purchase of businesses often do not address the necessary steps to transfer IP."

A transfer or assignment of copyright must be in writing and signed by or on behalf of the copyright owner. This assignment should be clearly documented in the sale agreement or in an ancillary deed of assignment to ensure that the copyright in all relevant works is effectively assigned to the purchaser, and warranties should be included in the Sale Agreement as to ownership of the copyright.

It may be that a vendor is not the owner of copyright in relevant works but holds licences for the use and reproduction of works. The nature of these licenses should be ascertained, and the licences, or agreements for licence, should be assigned or novated for the benefit of the purchaser.

Patents

Patents protect new inventions and grant the patent holder exclusive rights to exploit the invention for a certain period. Patents can be crucial to a business, especially if the business relies on unique technologies or processes that provide a competitive advantage in the marketplace.

Transfer, or assignment, of a patent in Australia must be in writing and signed on behalf of the assignor (vendors) and the assignee (purchaser). The assignment is often by way of a deed of assignment, but a deed is not required. Evidence of the assignment must be produced

to IP Australia. The formal assignment or deed of assignment may be produced but is not necessarily required as IP Australia will accept the document signed by the assignor and assignee that makes it clear that the patent has been assigned.

Confidential information and trade secrets

Trade secrets are confidential business information that provides a company with a competitive advantage. This can include formulas, practices, designs, processes, customer lists, or any other knowledge that is not generally known or easily accessible. Trade secrets are not registered with IP Australia, and their value is in that they are secret and not widely known.

Trade secrets may be crucial to a business because they often involve unique methods or insider knowledge that allows the business to be competitive in the market. If a trade secret is leaked or stolen, it can severely hinder the business's ability to turn a profit. Confidential information, including trade secrets, should be included in any Sale Agreement, and the seller should be prohibited from using such information in the future to compete with the purchaser.

It is debatable whether confidential information, including trade secrets, is a form of property that can be transferred or assigned. A Sale Agreement should provide for the communication of the information to the purchaser and the assignment of all rights of action for or arising from the information to the purchaser.

Transferring social media accounts and digital assets

In the modern era, digital assets such as social media accounts, business emails and phone numbers are critical components of how customers interact with and discover businesses. Ensuring their transfer on a sale of the business ensures consumers can continue to engage with the business and the business is able to tap into the current business's customer base.

The Australian Government business website (https://business.gov.au/online-and-digital/social-media-for-business) encourages businesses to use social media platforms that are appropriate, including Facebook, YouTube, Instagram, TikTok, Snapchat, X (formerly known as Twitter), Pinterest and LinkedIn.

The sale agreement should outline the procedure for transferring social media accounts, including providing the purchaser with usernames and passwords. It's important to note that some social media platforms may prohibit account transfers, which could result in the account being shut down. In such cases, the purchaser may need to create new accounts under the business's name. It will be necessary to consider the Terms and Conditions of the social media platform to determine the appropriate method for the transfer of an account or to establish a new presence.

Transferring a domain name

Domain names are an important part of a business's online presence, and transferring them correctly is essential for maintaining access to the business's websites and allowing customers to continue to interact with any of the business's websites.

Domain names in Australia, the .au country code, are regulated by .au Domain Administration Limited (**auDA**). A domain name is a unique identifier for which a Licence is issued by auDA to use the Domain Name System. The issue and transfer of Licences is governed by the *.au Domain Administration Rules: Licensing*.

The process for "transferring" a domain name is similar to a business name. The Licence is not transferred, but the transferee (the purchaser in the sale of a business) must enter into a new Licence Agreement with the domain name Registrar for the domain name.

The procedure is for the holder of the Licence to request a transfer or change of registrant by notice to the domain name Registrar. This request must be made within 28 days of the date of a contract or agreement for the transfer unless the agreement otherwise specifies. The Sale Agreement for the sale of a business should specify an appropriate time for this request to be made, having regard to the date of settlement of the business sale.

The Registrar must be satisfied that both the current registrant for the domain name (the vendor) and the new registrant (the purchaser) are eligible to hold the Licence for the domain name, including the Australian presence requirement.

The current registrant (vendor) must provide its domain authorisation code to the Registrar, and any fees for the Registrar must be paid. The new registrant (purchaser) must agree to accept the transfer, provide evidence of their eligibility to the Registrar, enter into a new Licence, and pay the Licence fee. Any balance of the term of the vendor's Licence does not transfer to the new Licence.

It is crucial that the parties adhere to the proper procedure and ensure that they are eligible to hold the domain licence, as failure to do so could result in the licence being cancelled.

Other IP

The comments above relate to the most common forms of IP that may require consideration on the sale of a business. Depending on the business and the industry in which it operates, there may be other forms of IP that should be specified and transferred. These may include plant breeders rights, registered designs and circuit layouts. The requirements for the transfer or assignment of these rights, if applicable, should be ascertained and addressed in a Sale Agreement.

Summary

When purchasing a business, the effective transfer of IP assets is critical to the future success of the business. IP assets are integral to the running of the business, and as such, purchasers need to ensure that they are protecting their investment in the business. If you need any assistance with identifying or transferring IP, please don't hesitate to reach out to one of our IP specialists.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

Sandy Donaldson
Consultant
p: +61 8 **8124 1954**
sandy.donaldson@dwft.au

NEWS & VIEWS | **By Lecia Wood**

Key Changes and Implications of the *Succession Act* 2023 (SA): A Comprehensive Overview

The *Succession Act* 2023 (SA) (**Act**), passed on 28 September 2023 and set to commence on 1 January 2025, serves to consolidate and amend succession law in South Australia. This new Act repeals the *Administration and Probate Act* 1919 (SA), the *Inheritance (Family Provision) Act* 1972 (SA), and the *Wills Act* 1936 (SA) while also amending various other acts.

Key changes under the *Succession Act* 2023 (SA)

Several key changes are introduced under this Act. Notably, it establishes a statutory right for certain individuals to inspect a Will (s 48) and permits the Court to grant probate or administration to individuals other than those traditionally entitled to it if deemed necessary (s 67). Furthermore, property debts, such as mortgages and charges on land, are not to be paid from the deceased's residuary or personal estate unless there is an explicit contrary intention (s 84). The Act also introduces a statutory cause of action for aggrieved beneficiaries against the executor (s 98) and allows a person holding personal property of the deceased, valued at no more than $15,000, to transfer it to the deceased's spouse or child without requiring probate or administration (s 100). It extends intestate estates to relatives of the first degree, such as cousins (s 109), and eliminates the need for separate proceedings to claim alternative distribution of an estate (s 111).

Changes to family provision orders now make the testator's intention a primary consideration (s 116), and provisions have been made to include stepchildren if they were vulnerable, dependent, cared for, or if their parents contributed to the deceased or their estate (s 115). Parents and siblings must have cared for or contributed to the maintenance of the deceased at the time of death or at the time the deceased entered an aged care facility (s 115). Additionally, grandchildren are now only entitled if their parent (the deceased's child) died before the deceased or if they were maintained by the deceased at the time of death (s 115). The Court is also empowered to order security for costs in applications that are without merit or vexatious (s 117). Lastly, the Act increases the amount of preferential legacy received by a surviving spouse of a person dying intestate from $100,000 to $120,000 (s 105(2)).

Who can access the Will of a deceased person?

Section 48 of the *Succession Act* 2023 (SA) specifies who can access a deceased person's Will. The person in control of the Will must allow inspection or provide copies to various individuals, including those named or referred to in the Will, even if they are not beneficiaries, and those named in an earlier Will as beneficiaries. Additionally, the surviving spouse, domestic partner, child, stepchild, former spouse, domestic partner, parent, guardian, and individuals who would be entitled to a share on intestacy, as well as the parent or guardian of a minor referred to in the Will or entitled on intestacy, are entitled to access. Under the Act, the term 'will' encompasses codicils, any other testamentary dispositions, revoked Wills, documents purporting to be Wills, parts of Wills, and copies of Wills (s 48(5)). Furthermore, the Court may order a person who holds or controls the Will to permit an applicant, including a creditor with a legal or equitable claim against the estate, to inspect the Will.

Statutory remedies against executors who fail to comply with their duties

Section 81 outlines the general duties of executors and administrators, while section 98 provides statutory causes of action for breaches previously addressed at common law. Aggrieved beneficiaries can bring proceedings against an executor who fails to perform their duties or comply with Court directions. The Court may require the executor to pay any benefits obtained from their failure into the estate and can also order compensation or other appropriate remedies (s 98(2)). Claims must be initiated within three years from when the person was aggrieved (s 98(3)). This timeframe could be problematic if the failure is only discovered after the estate is distributed, potentially leaving the executor without recourse to estate assets.

Orders for the alternate distribution of intestate orders

Section 111 allows the Court to order that an intestate estate be distributed according to the terms of an approved agreement, provided that all persons entitled to share in the estate have been notified of the application. This process no longer requires a separate set of proceedings, simplifying the procedure compared to the previous *Inheritance (Family Provision) Act* 1972 (SA).

Intestate estates

Under section 109, the Act entitles relatives of the first degree, such as cousins, to the distribution of intestate estates.

Changes to family provision claims

In South Australia, a family provision claim allows eligible persons to contest a Will if they believe they have not received adequate provision from the deceased's estate. Section 116(2) establishes that the testator's intention is now the primary consideration for the Court, a significant change from the previous lack of criteria under the *Inheritance (Family Provision) Act* 1972 (SA). This means the Court no longer has broad discretion and may place increased emphasis on discovering evidence related to the testator's intentions, such as files from the Will drafter. The Court will consider the deceased's reasons for their testamentary dispositions, the applicant's vulnerability and dependence, their contribution to the estate, and their conduct (s 116(2)). This focus on the testator's intention might complicate challenges to Wills influenced by undue pressure or address estrangements that could exclude deserving family members.

Changes to categories of persons entitled to claim

Section 115(3) and (4) expands the categories of persons entitled to institute family provision claims to include stepchildren, specifically those who are children of a former spouse who meet one of several criteria: being disabled and significantly vulnerable, dependent on the deceased at the date of death, cared for or having contributed to the maintenance of the deceased, or having a parent who contributed assets to the deceased's estate. Limits are placed on claims by grandchildren, siblings, and parents, who must prove they cared for or contributed to the deceased's maintenance at the relevant time (s 115(5), (7), (8)). Grandchildren can only claim if their parent, the deceased's child, died before the deceased.

Security for costs in family provision claims

Section 117 allows the Court to order a party in a family provision proceeding to provide security for costs if the claim is deemed without merit or if the party is unwilling to negotiate a settlement.

Administration of estates

The Act simplifies rules governing the payment of the deceased's debts, which were previously managed by complex common law rules. Section 100 permits the transfer of up to $15,000 in money or personal property to a surviving spouse, domestic partner, or child of the deceased without requiring a grant of probate or administration. Section 127 provides that if multiple people owning property die and the order of death is uncertain, the property will be treated as if owned in equal shares as tenants in common. Additionally, section 105(2) increases the preferential legacy amount for a surviving spouse of a person dying intestate from $100,000 to $120,000.

If you would like to discuss the key changes and the implications on your personal affairs, our Wills & Estates experts can help. Reviewing your current circumstances and updating your Will is a prudent step to ensure it will still achieve your desired objectives.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

Lecia Wood
Special Counsel
p: +61 8 **8124 1959**
lecia.wood@dwft.au

NEWS & VIEWS | **By Joanne Cliff**

Family Law Act Amendments Concerning Parenting Matters

Parenting matters

Significant amendments to the *Family Law Act* (FLA) came into effect on 6 May 2024. The new amendments are making it safer and simpler for separating families to navigate and ensure the best interests of the child remains paramount, particularly in relation to the safety of a child.

Studies have shown that matters that end up in Court have the highest concentration of complex psycho-social needs with a combination of factors such as allegations of family violence and child abuse.

Safety of the child front and centre

While it has always been the case that the FLA set out matters for judges and parties to consider when determining aspects of parenting matters, such as where the child should live and how much time it should spend with each parent, it is now very clear. The safety of the child is at the forefront. The new amendments state that the objectives are met by ensuring the safety of children and giving effect to the convention on the rights of the child, which was adopted by the General Assembly of the United Nations on 20 November 1989.

The amendments recognise and support the rights provided by the relevant Treaty, such as the right of the child not to be separated from their parents against their will, except where it is to be determined not in the child's best interests.

Specifically, a Court must now consider what arrangements will promote the safety of the child from family violence, abuse, neglect or other harm, and each person who has the care of the child, whether or not that person has parental responsibility for the child.

When considering safety in the context of the FLA, it means considering the home environment and whether it exposes the child to family violence, whether a parent is incapacitated due to drug

or alcohol misuse, or if a parent's conduct amounts to neglect or child abuse, along with considerations of mental health compromising parental capacity.

Additionally, the views of the child, if expressed, must be considered, along with the child's developmental, psychological, emotional and cultural needs and the capacity of the person who has parental responsibility to provide those needs.

Responsibility for major long-term decisions

Up until now, there has been a presumption that parents have equal and shared parental responsibility for a child. Parental responsibility refers to major long-term decision-making regarding matters like education, health and cultural needs. Unfortunately, this presumption was often interpreted incorrectly as giving parents a right to equal (same amount) time with the child. This often resulted in detailed negotiations or litigation based on this mistaken assumption. The presumption has always been able to be rebutted if there were reasonable grounds to believe the parent had engaged in child abuse or family violence or if the Court determined it was in the best interests of the child to apply the presumption. The amending sections have repealed the presumption, so now the emphasis is on what is going to serve the child's best interests, particularly if there are allegations involving family

violence and other issues. The whole focus is to ensure that the best interests of the child are at the front and centre when decisions about parenting arrangements are made or negotiated.

The new amendments allow for a parent to provide sole decision-making in relation to major long term issues. It encourages parents to consult on these long-term issues and treat the child's best interests as the paramount consideration.

If a Court, however, makes an order for joint responsibility, then the parents must consult each other and make a genuine effort to come to a joint decision. Parents do not have to consult for issues that are not long-term issues if a child is spending time with that parent.

Additionally, the views of the child, if expressed, must be considered, along with the child's developmental, psychological, emotional and cultural needs and the capacity of the person who has parental responsibility to provide those needs.

Finally, if it is safe to do so, the benefit of the child to have a relationship with their parents and other people who are significant to the child.

Harmful proceeding orders

The amending Act introduces a new concept of harmful proceeding orders to prevent vexatious litigants from filing and serving new applications without first obtaining leave from the Court. This allows the Court to prevent harm to the intended respondent and assists in protecting survivors of family violence from systems of abuse.

Reconsidering final parenting orders

Traditionally, before a Court reconsiders a final parenting order, the principle to consider was derived from the 1979 decision of *Rice v Asplund*, in which the applicant must establish that there has been a significant change in circumstances since making the order. This has now been codified in the amendment.

Contravention proceedings

If a parent breaches a parenting order, the other parent would have to bring contravention proceedings seeking a remedy. The previous proceedings that were required when a parent had contravened existing orders were open to significant delay. The amending Act empowers Registrars to make a further parenting order for a child to spend additional time with the parent who has not contravened the order. It is designed to make it easier for litigants to understand and Courts to apply.

Privacy

It is not unusual to read screenshots of texts on social media that are annexed to court documents to support or disprove an allegation. While there have always been protections in the FLA against breaches of privacy laws where sharing details of the legal proceedings, the new amendments make it clear what is not appropriate. Identifying the other party to the proceedings publicly, whereby name, photo, video or describing them or providing details about where they live or work or other clear links to their identity, will be seen as a clear breach of the other party's privacy.

To what extent these goals are achieved can only be assessed over time. The change to parental responsibility may lead to more litigation. Much depends on the extent of consistency in the decisions of the Court.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

Joanne Cliff
Director
p: +61 8 **8124 1803**
joanne.cliff@dwft.au

DISSECTING DECISIONS | **By Debra Lane**

Exclusions in a House and Contents Policy: Are You Covered for Liability to a Tenant of a Granny Flat?

Walsh v Yang & Ors [2023] NSWDC 307

The District Court of NSW (Coram Andronos SC DCJ) delivered a decision on 14 August 2023 in the interesting case of *Walsh v Yang & Ors*.

The case concerned a tortious claim in negligence/occupier's liability arising from a slip and fall on residential premises. The Judge's decision considered the factual issue of whether the occupier had knowledge of the slipperiness of the tiled surface on which the plaintiff slipped.

Of interest to readers of this publication, however, was His Honour's consideration of the property owners' claim under their policy of house and contents insurance with Insurance Australia Limited ("IAL").

The facts

On 24 March 2019, the plaintiff, Colin Walsh ("Mr Walsh") slipped and fell on external tiled stairs at the rear of a residential property in Baulkham Hills, NSW. The tiles were wet and slippery due to rain.

The property was owned by the first and second defendants, Ms Yang and Mr Xu, ("Yang & Wu") who were also cross claimants against their house and contents insurer, IAL.

The primary claim

Mr Walsh sought damages for personal injury from Yang & Xu, alleging they were negligent as owners of the property in failing to take any measures to render the tiles slip resistant when they knew, or ought to have known, that the tiles were slippery when wet. Yang & Xu denied liability to Mr Walsh.

Mr Walsh also brought a claim against the IAL as insurer of Yang & Xu, pursuant to section 4(1) of the *Civil Liability (Third Party Claims Against Insurers) Act* 2017 (NSW). IAL had denied indemnity under the policy to Yang & Wu so they too brought a cross claim against IAL.

The issues

There was no dispute that Yang and Xu owed Mr Walsh a common law duty to take reasonable care to avoid a foreseeable risk of injury to him, as occupiers of the property, nor was there any dispute that the tiles were slippery when wet.

The principal dispute between Mr Walsh and Yang and Xu concerned whether the risk that eventuated was foreseeable, whether the duty had been breached and whether there was any causal connection between any breach of duty and any injury suffered by Mr Walsh.

There was also a significant dispute as to the extent of the injury suffered by Mr Walsh and the extent of losses.

As between Yang & Xu (and Mr Walsh) on the one hand and IAL on the other, there was a significant dispute as to whether the insurer was entitled to decline indemnity pursuant to certain exclusions in the policy of Insurance issued to Yang & Xu. That, in turn, raised the ,question of whether section 35 of the *Insurance Contracts Act* 1984 (Cth) ("ICA"), when read with regulation 19 of the *Insurance Contracts Regulations* 2017 (Cth) ("ICR") prevented IAL from relying on the exclusions and also whether IAL was able to rely on the exclusions if it had clearly informed the insured of the effect of those exclusions.

Background

In July of 2018, Mr Walsh and his partner, Ms Radovan, commenced a Certificate III course in commercial cookery at Baulkham Hills TAFE. Mr Walsh's the intention was to obtain employment as a cook or chef.

Although Mr Walsh owned a property in the country, he was frequently in Sydney assisting an aged parent and spent time with Ms Radovan at a townhouse in Baulkham Hills which belonged to a friend of hers.

At about the time of the commencement of the TAFE course, Mr Walsh and Ms Radovan learned that the owner of the townhouse was going to sell the property. Accordingly, they needed to find a place to live in Sydney.

Mr Walsh and Ms Radovan met Ms Yang at the TAFE cookery course and they became friends.

Yang & Xu jointly owned a property comprising a freestanding house with a separate structure comprising a storeroom and space at the rear of the house called "the flat."

At one stage, the flat was a garage and it was later used as an office. Yang & Xu had gas and water services installed to accommodate visiting family from China.

In 2015, an officer from the local shire Council inspected the property and determined that unauthorised building works, (comprising the creation of a carport and the conversion of the garage into an unauthorised secondary dwelling) may have been carried out, and Council notified Yang & Xu in writing that the works appeared to be contrary to the development standards outlined in *State Environmental Planning Policy (Exempt and Complying Code)* 2008 and, as a result, development consent should have been obtained prior to the works being carried out. An explanation was sought as to why the works had been undertaken without consent.

Ms Yang's response addressed the failure to obtain consent for the carport but did not address the conversion of the garage. She asked Council what she could do to remedy the situation. The Council's response directed Ms Yang to remove the unauthorised kitchen and cap all associated services within the wall cavity. Ms Yang arranged for removal of the stove and sink and for the services to be capped but left part of the cabinetry and a power point in place. Council again inspected the property and noted the direction to remove all cupboards and benchtops had not been complied with in its entirety. Nevertheless, Council did not appear to consider the state of the garage to be a breach of the *Environmental Planning & Assessment Act* 1979 (NSW) as at that date; rather, Council stated that reconverting or using the garage building for the purpose of a secondary dwelling was a breach of the Act.

Some time between July and October of 2018, Mr Walsh and Ms Radovan informed Ms Yang of their urgent need for accommodation and Ms Yang offered 'the flat' to them. All parties agreed that Mr Walsh and Ms Radovan would not stay for long and would look for more permanent accommodation.

Mr Walsh reconnected gas and water and installed an oven, fridge and dishwasher in the flat to render it habitable. He also did domestic tasks around the property and some maintenance work to the main house, as a result of which Ms Yang reduced the initially agreed weekly rental.

Ms Yang, Mr Walsh and Ms Radovan maintained a friendly relationship, often sharing meals and going to TAFE together; however, they maintained separate households.

The fall

On 24 March 2019, Mr Walsh suffered a fall whilst walking down tiled steps from the washing line.

There was no dispute that the tiles were slippery, nor that it was raining at the time of the accident.

The Plaintiff's injuries

Mr Walsh's GP noted that Mr Walsh had suffered extensive soft tissue injury to his left upper arm with laceration, soft tissue injury to his left hand with bruises and swelling, very painful restricted left shoulder movements and painful restricted left elbow movements.

The Judge found that Mr Walsh continued to suffer physical pain in his shoulders, upper back, neck and arms but was not undergoing any active treatment to manage his pain, although he was taking Celebrex and Diazepam for pain relief.

Liability

In determining liability for Mr Walsh's fall, His Honour referred to the *Civil Liability Act* 2002 (NSW) and in particular sections 5B, 5D and 5E.

He found that no later than a previous fall suffered by Mr Walsh in the storeroom in early November 2018 (on identical tiles to those on the outside stairs), and subsequent conversations with Yang & Xu, the latter were alerted to the risk that an entrant to the property could suffer injury by slipping and falling on the tiles when they were wet and that was the very risk that eventuated when Mr Walsh suffered the fall which was the subject of the proceedings.

On the basis of an expert report, the Judge was satisfied that the surface of the stairs failed the minimum standards of the relevant Australian Standards requirements in that they were inadequately slip-resistant when wet and inappropriate for use on external surfaces which would be wet from time to time.

Reasonable preventative measures were identified that could have been implemented simply and inexpensively, but were not.

His Honour considered the suggestions made would have been a reasonable response to a foreseeable risk of which Yang & Wu had actual notice from November 2018 and found that a reasonable person in the position of Yang & Wu would have taken precaution against the risk of harm. As they did not do so, the Court was satisfied that their duty of care to Mr Walsh was breached.

Insurance issues

IAL denied indemnity under the defendants' house and contents Policy of Insurance on the basis of the operation of all or any of six exclusions, which would also defeat Mr Walsh's claim for indemnity under the *Third Party Claims Act*.

The relevant exclusions were:

a. The business occupation exclusion

b. The business use exclusion

c. The unlawful activity exclusion

d. The ordinary resident exclusion

e. The building regulation exclusion

f. The local authority regulation exclusion

Yang & Xu said that pursuant to section 35(1) of the ICA, IAL could not refuse to pay the claim as the policy was a prescribed contract and the event giving rise to the claim was a prescribed event within the meaning of the relevant section of the ICA.

IAL, in turn, relied on section 35(2) ICA to defeat the insureds' reliance on section 35(1), on the basis that before the policy was taken out, they were clearly informed in writing of the relevant provisions of the proposed policy or they knew (or a reasonable person in the circumstances could be expected to have known) that the policy would not provide insurance cover in respect of the happening of the relevant event.

The Policy Schedule stated that the policy was for building and contents insurance. The insureds' relationship to the property was described as "Live in it as your home. Do not expect the property to be unoccupied for more than 60 days in a row in the policy year."

The process of applying for cover involved answering a number of questions on IAL's website and Ms Yang undertook that task for both insureds.

In answer to the question of how the home would be used, she answered, "To live in as your main home." In response to the question, "Is any part of the home used for business purposes?" Ms Yang answered "No."

The insuring clause provided cover for loss or damage caused by 30 specific insured events not relevant to the current proceedings.

A further insuring clause provided cover for legal liability:

> "…against the costs of paying compensation for death or bodily injury to other people or for loss or damage to their property…"
>
> …
>
> "If your Schedule shows that you have building and contents cover, we cover your legal liability as a result of an incident which happens anywhere in Australia."

There was no dispute that,

prima facie, the insuring clause covered Mr Walsh's claim.

There were 29 separate exclusions in the legal liability cover section of the policy and a further 45 exclusions in the general exclusions section, many of which referred to multiple risks and all of which were incorporated into the legal liability section exclusions by way of cross-reference.

His Honour referred to the relevant principles of contractual construction, noting that as with any commercial contract, a Policy of Insurance must be construed in a business-like manner, paying attention to the language used by the parties, the commercial circumstances which the document addresses and the objects which it is intended to secure;[1] construction is determined objectively according to what a reasonable business person would have understood the terms to mean.[2] The insurer bore the onus of proving any qualification or limitation on cover.[3] Unless evidence demonstrated that both parties were aware of extrinsic facts or there was some evidence as to a practice to which both parties subscribed, His Honour was unable to take any extrinsic material into account on the question of construction of the policy.

As a matter of ordinary construction, the policy excluded liability where there was a sufficiently close relationship between the basis for the insureds' liability to Mr Walsh and an exclusion in the policy.

Nevertheless, the question arose as to how close the relationship had to be in order to enliven the relevant exclusions.

The policy used two composite formulations to connote the requisite relationship between the liability and the exclusion(s):

i. *"arising from, or in connection with directly, or indirectly, for the purpose of each of the exclusions"* (the first formulation); *and*

ii. *"arising directly, or indirectly, from or in any way connected with for the purpose of the building regulation and local authority exclusions"* (the second formulation).

IAL asserted that both of the limbs of each formulation were engaged, which the insureds challenged.

On the topic of the "business occupation" exclusion and the "business use" exclusion, His Honour found that in renting the "flat" to Mr Walsh and Ms Radovan, the insureds had not established a business. Prior to the occupation of the flat by Mr Walsh and Ms Radovan, the flat had been unoccupied. There was no evidence that the insureds contemplated letting the flat to anyone else on their departure. The insureds let the flat to Mr Walsh in Ms Radovan in order to assist them and they remained friends. Their friendship was the key factor in the foundation of the arrangement. The fact that the arrangement had continued for five months as at the date of the accident, did not change its character in that period.

His Honour considered that the period of the arrangement was not sufficient to establish the requisite element of repetition as at the date of the accident. Accordingly, His Honour was not satisfied that the occupation or use of the flat by Mr Walsh and Ms Radovan was pursuant to any business conducted by the insureds within the meaning of the policy.

On the "ordinary resident" exclusion, counsel for IAL contended that a degree of continuity and repetition had been established with respect to Mr Walsh's residency of the flat by the time of the accident sufficient to characterise him as ordinarily resident there.

However, His Honour found that Mr Walsh did not reside with Yang & Xu in any relevant sense. Whilst they maintained friendly relations, they lived their lives independently and were more like neighbours than family members or flatmates.

On the "unlawful activity," "building regulation" and "local authority regulation" exclusions, IAL's primary submission was directed to the building regulation and local authority regulation exclusions, noting the correspondence received from Council in 2015 directing Yang

1 *McCann v Switzerland Insurance Australia Limited* (2000) 203 CLR 579.
2 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104.
3 *Wallaby Grip Pty Ltd re QBE* (2010) 240 CLR 444.

& Xu to remove certain services from the flat and that some, but not all, of those services were removed and there things rested until about October 2018 when Mr Walsh, (with the consent of Ms Yang), reconnected certain services and reinstalled some kitchen appliances, thereby making the flat habitable.

It was submitted that the evidence established that the installation of a kitchen (in what was originally the garage), its use as a dwelling and the agreement to let it to Mr Walsh for the purpose of habitation were in contravention of the relevant planning law; further, each of these matters was clearly known to the defendants at the time they agreed to let the converted garage to Mr Walsh and Ms Radovan. They had been expressly notified by Council that reinstallation of services and conversion or use of the garage as a secondary dwelling would be in breach of the EPAA.[4]

The Judge took the view that the evidence did *not* establish that development consent (had it been sought) would ***not*** have been granted. Yang & Xu submitted that there was no demonstrated connection between the fact of reconversion of the garage and occupation without consent and any elevation of risk or likelihood of a claim being made. In other words, it was submitted that the connection with the event creating liability must be with the illegality, not the mere fact of occupation.

His Honour considered that the language of the exclusion was sufficiently broad to embrace the circumstances. As Mr Walsh was residing in the secondary dwelling and was injured in the course of performing a domestic task associated with one's place of residence, on balance, the liability was "in any way connected with" or "in connection with directly, or indirectly," with the reconversion without consent. He found that the building regulation exclusion and local authority exclusions both applied, but considered the "unlawful activity" exclusion did not apply because it connoted activity that went beyond mere occupation.

His Honour then went on to consider the effect of section 35 of the ICA.

There was no dispute that the policy was a prescribed contract and Mr Walsh's claim against Yang & Xu was a prescribed event within the meaning of section 35(1).

As His Honour had found that the business and ordinary residence exclusions did not apply, regulation 19(2)(d) (iv) and (k) did not arise.

However, the operation of the building regulation exclusion and the local authority regulation exclusion did enliven section 35(1).

The issue then was whether section 35(2) applied in the circumstances. For section 35(2) to operate, IAL had to establish that it had "clearly informed" the insureds in writing, (or a reasonable person in the position of the insured would have known), that the policy would not cover the insureds' liability to Mr Walsh.

Ms Yang completed the proposal to obtain the insurance via an online portal. It was agreed that during this process, the wording of the exclusions was disclosed to her by provision of a copy of the policy wording; however, it was not contended that Ms Yang had actual knowledge of the exclusions on any other basis - or that she ought to have known liability to Mr Walsh would not be covered by the policy.

The question which remained was whether the provision to her of the policy wording ***"clearly informed"*** Ms Yang that the relevant event would not be covered.

IAL contended that the provision of the actual policy wording is contemplated by section 35(2) and was sufficient.

In response, Yang & Xu submitted that the wording required such careful and detailed analysis to be properly understood that, even if, as a matter of construction, the exclusions did apply, IAL had not "*clearly informed*" them of the effect of the exclusions, simply by providing the policy wording at the time the policy was proposed.

Referring to *Lockwood & Lockwood v Insurance Australia Limited trading as SGIC*[5], it was

4 *Environmental Planning & Assessment Act* 1979 (NSW).

5 [2010] SASC 140

noted that Kourakis J of the SA Supreme Court (as he then was) considered an exclusion in a motor vehicle policy to which section 35 of the ICA also applied, which excluded liability "*if at the time of the incident… your vehicle was being driven… by a person who was not licensed or permitted to drive it.*" The insured's car was stolen and driven by an unlicensed driver whilst stolen.

As a matter of construction, Kourakis J held that the unlicensed driver exclusion did not apply in the circumstances; however, if the exclusion did apply, section 35(1) of the ICA prevented reliance on the exclusion by the insurer as the provision of the wording was not sufficient to "*clearly inform*" the policy holder of the exclusion.

In *Harris v CGU Insurance Limited*[6] Einstein J considered a policy of building and contents insurance which excluded liability in respect of flood, defined to include inundation following the escape of water from the normal confines of that body of water. His Honour considered the question of whether provision of the relevant policy in and of itself was sufficient to satisfy the test in section 35(2); ultimately, on the facts of that case, it was held that the insurer *had* clearly informed the insured of the relevant limitation by provision of the policy wording.

It was noted that Einstein J had laid out a general (but not absolute) principle that it is in the nature of section 35(2) that its operation depends on the circumstances and the wording of the policy itself, in order to establish whether particular steps to inform an insured did so at all, let alone did so clearly. Just as there is no general rule that it is incumbent on an insurer to annotate a policy, it was found that there was no absolute rule, as a matter of construction of section 35(2), that provision of the policy will always be sufficient.

The Judge noted that there was no explanation in the IAL policy or in any material made available to the insured as to how the provisions relating to the building regulation and local authority regulation exclusions operated. He also noted those terms had been the subject of a number of authorities and good faith legal debate over many years.

The operation of the building regulation and local authority regulation exclusions and their relationship with the insureds' liability to Mr Walsh, were not straightforward questions.

On balance, it was found that the insurer was ***not*** able to rely on section 35(2) of the ICA in the present case. Informing the insureds of the building regulation and local authority regulation exclusions, by providing them with a copy of the policy, was not sufficient to satisfy section 35(2). This was because they were not sufficiently clear, in the circumstances, to exclude liability, where the relevant connection between the relevant breaches of regulation. and liability was only that Mr Walsh resided in a dwelling for which building consent had not been obtained.

Judgment was entered for Mr Walsh against Yang & Xu in the sum of $102,508.20 and an order was made for them to pay Mr Walsh's costs on an ordinary basis.

On the cross claim, there was judgment for the cross claimants against the cross defendant.

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FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

Debra Lane
Director
p: +61 8 **8124 1806**
debra.lane@dwft.au

6 [2002] NSWSC 273

SUITS OFF | **Staff Profile**

Employment Law Specialist, Jonathan Ikonomopoulos, Discussing Law, Life and Lap Times

Jonathan Ikonomopoulos
Director

Jonathan's journey into the legal profession was not some random choice by a youth struggling to decide what to do with their education. Rather, it was a deeply personal and considered decision shaped by the influence of his father, Bill Ikonomopoulos. Bill's dedication to the legal field has been a constant presence in Jonathan's life, and this presence planted the seeds of ambition that have driven Jonathan to grow a thriving legal career. "My father has always been my greatest mentor and supporter", Jonathan recalls. "His wisdom and experience have been invaluable as I've navigated the complexities of the legal world".

Discovering his niche and professional passion

Early in his legal career, Jonathan experienced a pivotal moment that led him to discover his passion for employment and workers compensation law. He recalls a challenging case where a company struggled to manage a complex workforce while meeting its legal obligations. "I successfully advised them on navigating these challenges without compromising their company values", Jonathan explains. "It was a turning point that made me realise how critical it is to help employers manage their workforce efficiently and legally. It became clear that these areas of law were where I could make the most impact."

Over the years, Jonathan has honed his expertise, becoming a trusted advisor to businesses navigating the intricate landscape of employment and workers compensation law, but his professional passions go beyond just practicing law; he is deeply committed to helping companies to create compliant and productive workplaces. One of his most significant achievements was recently leading a project that involved restructuring a client's workforce while ensuring legal compliance and minimising operational disruption. The successful completion of this project not only improved the client's operational efficiencies but also led to a significant boost in revenue. This success has reinforced Jonathan's passion for assisting businesses in navigating labour-related challenges.

Now, as the newest director at DW Fox Tucker Lawyers, Jonathan is excited to take on more projects that align with his commitment to helping employers succeed. He is particularly drawn to industries where effective workforce management is crucial, such as manufacturing, healthcare, and registered disability care providers. "These sectors face unique challenges, and I find it incredibly rewarding to help employers in these industries achieve their business goals while staying compliant with the law", Jonathan notes. His ability to combine legal expertise with a deep understanding of these industries operational challenges sets him apart as a leader in his field.

Jonathan credits DW Fox Tucker Lawyers, where he has spent nearly a decade, with being instrumental in shaping his career. "The collaborative environment at DW Fox Tucker has allowed me to grow as a lawyer while working alongside some of the most dedicated professionals in the industry," Jonathan says. "I particularly enjoy the firm's commitment to providing practical, strategic solutions to our clients, which aligns perfectly with my approach to law."

Foundations of support and success

Despite the demands of his career, Jonathan is a devoted family man. He and his wife, Maria,

married in January 2021, and together, they have a young daughter, Isla, who will be turning two in November. “My family is my foundation”, Jonathan says with pride. “They provide me with the support, love, motivation and perspective I need to excel in my career”.

Balancing his roles as a lawyer and a father involves careful planning and prioritisation. Jonathan makes it a point to allocate dedicated time for both his family and work, ensuring that neither is compromised. “It’s all about setting clear boundaries and managing my schedule effectively”, he explains. “This way, I can stay focused and be present in both areas of my life”.

Jonathan’s advice for others pursuing careers and leadership positions in the legal profession is to embrace flexibility and prioritise self-care. “It’s important to maintain a balance that works for you and your family”, he advises. “Being organised, communicating openly with your team, and making time for personal well-being can help you thrive both professionally and personally”.

Life away from the law

When Jonathan isn’t immersed in legal work, he enjoys spending quality time with his family and pursuing his personal passions. One of his greatest loves is motorsport, a passion that allows him to unwind and challenge himself in a different way. “In my downtime, I love setting my quickest lap times on my racing simulator at home”, Jonathan shares. “It satisfies my need for speed in the most time-effective way possible”.

In addition to his love for motorsport, Jonathan also enjoys the simple pleasures of family life. One of his favourite activities is watching his daughter Isla pick flowers in the garden, an experience that has sparked a newfound interest in gardening. Jonathan and his best mate, Oliver Greenwell, often dream up ambitious landscaping projects, stretching the limits of what can be achieved in a weekend. “It’s a creative outlet that I really enjoy”, Jonathan says. “It’s exciting to see our ideas come to life, even if it’s just in our own backyards”.

Chasing the checkered flag

While Jonathan is firmly rooted in his legal career, he sometimes dreams of an alternate path in the world of motorsports. “If I wasn’t in Australia practicing law, I’d love to work in the motorsports industry”, Jonathan admits. “Whether it’s with a racing team, in automotive engineering, or developing new racing technologies, being deeply involved in motorsports would be a dream come true”.

Given Jonathan’s previous experience working with Red Bull Australia, this dream is not entirely far-fetched. Travelling around Australia and attending various motorsports events gave him firsthand insight into the industry and fuelled his passion for cars and racing.

Jonathan’s journey from aspiring lawyer to successful employment and workers compensation specialist is a testament to his dedication, strategic thinking, and love for the law. Yet, despite his professional achievements, Jonathan remains deeply committed to his family, balancing his roles as a husband and father with grace and determination. His story serves as an inspiration to others in the legal profession, proving that with passion, balance, and support, it’s possible to excel both personally and professionally.

Jonathan Ikonomopoulos
Director
p: +61 8 **8124 1824**
jonathan.ikonomopoulos@dwft.au

DWFoxTucker
Lawyers

Welcome Spring

As we are now well and truly into the new financial year, we look forward to the warmer weather and preparing for the fast approaching holiday season.

We take this opportunity to thank you once again for your ongoing support for the remaining few months of 2024.

Joe De Ruvo	Narelle Lee
Managing Director	CEO

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