FMCG *Express*

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May 2021 Edition

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Welcome to the May 2021 edition of

FMCG *Express*

Welcome to our latest edition of FMCG Express! 2021 has certainly kicked off with a bang, with the business malaise post-COVID-19 lifting rather quickly. We are seeing a significant lift in appetite for advice right across our FMCG client base, including a lot of M&A activity, and we're excited to see what the year holds.

Customers are becoming increasingly digitally-oriented with consumer behaviours creating significant opportunities for data-driven organisations which is evident by Woolworths' acquisition of a majority stake in data analytics firm, Quantium. Leveraging the power of data analytics to shape the direction of product development, commercialisation and marketing will continue to become an important pillar of delivering growth in the FMCG sector.

To this end, delivering a successful e-commerce offering which reflects your brand's ethos is paramount. In this edition of FMCG Express, Antoine Pace has presented a step-by-step guide to the new .au Domain Administration Rules, outlining findings that .au domain names engender greater trust and security for Australian consumers.

Also featuring in this edition, Kerry Awerbuch interrogates the significant changes foreshadowed for the Designs Act and Kelly Griffiths, who recently joined us, provides an overview of claims made regarding therapeutic products throughout the pandemic and the important role of the Therapeutic Goods Administration plays in regulating this sector.

Following on the regulatory front, David Smith shines a spotlight on where the ACCC is focusing this year and Breanna Davies discusses the focus that ASIC is placing on illegal phoenix activity.

Licensing issues continue to present challenges, especially in consideration of the construction and implementation of long term licensing agreements. We take a deep-dive into the Fonterra v Bega decision within this edition and provide an outline to ensure the clauses in your agreements are 'gouda' enough!

We hope you enjoy this edition of FMCG Express. Please reach out if you have any queries or feedback – we love hearing from you.

Hazel McDwyer
Editor

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Therapeutic claims: Some lessons and reminders from COVID-19

By Kelly Griffiths (Partner) and Ujjesha Singh (Lawyer)

In times of crisis, we see the best and sometimes, the worst, of human behaviour. Unfortunately, throughout the COVID-19 pandemic, we have seen unlawful advertising of products claiming an unproven benefit against the virus. There are numerous legal, ethical and moral issues raised by this conduct, and some important lessons to be learned.

Prior to the COVID-19 pandemic, many Australians had likely not appreciated the important role that the Therapeutic Goods Administration (**TGA**) plays to ensure the safety, efficacy and quality use of therapeutic goods, such as medicines and vaccines, in Australia. The TGA also plays an important enforcement role to ensure that the public is not misled by false claims or pseudoscience regarding the purported benefits of therapeutic goods.

During COVID-19, both Lorna Jane and Pete Evans were subject to compliance actions brought by the TGA in connection with unlawful representations made about their products and COVID-19. These examples are a timely reminder of the additional regulatory requirements that apply to the promotion of products making health-related claims.

The TGA is the peak regulator of therapeutic goods in Australia. Therapeutic goods include products that we use every day, such as bandages, sunscreens and vitamins, through to prescription and pharmacy medicines, vaccines, medical devices, diagnostic tests and blood products.

It is a requirement that therapeutic goods are entered onto the Australian Register of Therapeutic Goods (**ARTG**) before being sold in Australia. A person who is responsible for a registration on the ARTG is known as the sponsor. A sponsor is responsible for understanding their legal obligations prior to advertising any therapeutic goods in Australia. Some products, such as prescription medicines and biologics, are prohibited from being advertised directly to the public in Australia.

It is not only products listed on the ARTG that are subject to TGA regulation. As the Lorna Jane and Pete Evans examples illustrate, making claims about the health-related benefits of products may be sufficient to enliven the regulatory ambit of the TGA and its oversight role.

TGA COVID-19 enforcement activity

Restricted representations

In September 2020, a celebrity event management company (**Markson Sparks**) promoted the Bionic Air Plasma Medical Device, which claimed to prevent COVID-19. A claim that a product may prevent or cure COVID-19 is a 'restricted representation' under Australian law. A restricted representation refers to a serious form of a disease, condition, ailment or defect. Restricted representations cannot be made without prior approval from the TGA.

The device was advertised on behalf of the sponsor, Bionic Air, and the device was registered on the ARTG. The advertiser was unable to produce sufficient scientific evidence to the TGA to support the claims that the device could prevent or cure COVID-19. The TGA issued two infringement notices to Markson Sparks, totalling $26,640, and required an immediate withdrawal of the advertisement.

Between April 2020 and May 2021, Pete Evans Chef Pty Ltd received fines totalling $79,920 by the TGA for promoting a 'BioCharger' device, hyperbaric oxygen therapy chambers and two oral medicines. This month, the TGA issued further fines to the company and its sole director, Peter Evans, due to their repeated breaches of the Act and failure to comply with the TGA directions notice for the removal of non-compliant advertising.

The BioCharger claimed to treat the symptoms of COVID-19 which, according to the TGA, had no scientific basis. The company made further representations to the public which implied that the 'static magnet products and hyperbaric oxygen therapy chambers… were endorsed by a health professional'.

The products were not registered on the ARTG (nor did the manufacturer claim that the device was a medical device) and the claims made were restricted representations.

Restricted representations can only be made for approved therapeutic goods and with the prior approval of the TGA.

When assessing a restricted representation for approval, the TGA takes into consideration a number of public interest criteria, including whether the proposed reference to a serious disease in a representation would:

- take advantage of the vulnerability of consumers or particular groups of consumers, when faced with the disease, condition, ailment or defect;
- result in consumers not seeking medical advice at an appropriate time; and
- have a negative impact on public health.

These examples demonstrate the important role that the regulator plays, particularly in a time of crisis. The regulatory regime enabled the TGA to move swiftly when claims were made that posed a risk to public health and safety.

Lorna Jane activewear – double trouble TGA and ACCC

In July 2020, the TGA fined Lorna Jane $39,960 for advertising 'anti-virus active wear', which claimed to prevent the transmission of infectious diseases, such as COVID-19. This representation was an unlawful therapeutic claims, as the products were not registered therapeutic goods, and also restricted representations made without prior approval from the TGA.

In addition to the TGA enforcement action, Lorna Jane found itself at the doorstep of an ACCC investigation for engaging in misleading and deceptive conduct. That conduct was the making of false representations about their active wear, as they were representations made without any scientific or technological foundation. This example demonstrates the importance of always been vigilant about dual compliance, with both the TGA regulatory regime and the Australian Consumer Law, when undertaking sales and marketing activity in the healthcare landscape.

Surgical masks – the detail is in labelling

The TGA fined Hepworth Industrial Wear Pty Ltd $13,320 for unlawfully importing face masks into Australia that claimed to reduce the transmission of COVID-19. The masks were not registered on the ARTG prior to importation. The TGA has provided guidance that non-sterile face masks or respirators are therapeutic goods that must be registered on the ARTG if they:

'...are intended, by their manufacturer, to prevent the transmission of diseases between people, or are intended to be used in a healthcare environment.'

This example demonstrates the care that must be taken when promoting face masks for sale during the pandemic, and what claims can be made before enlivening the TGA regulatory regime (i.e. whether the masks are claimed to reduce transmission or whether they are used for the purpose of social distancing).

TIP

If your advertising of a product makes health-related representations then you must consider whether your product is a therapeutic good. Businesses must also ensure compliance with both TGA regulations and the Australian Consumer Law.

Key takeaways

These COVID-19 related enforcement actions taken by the TGA serve as a timely reminder for all businesses of the range of therapeutic goods regulation that may apply when advertising health and wellness related products. If operating in the healthcare space, before you advertise any product, first:

1. check if your product is a therapeutic good;
2. understand your legal obligations for advertising therapeutic goods (remembering the obligations are different depending on the class of good), including under the Australian Consumer Law; and
3. seek advice should you need it.

For more information, please contact Kelly Griffiths on +61 3 9252 2513.

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ASIC combatting illegal phoenix activity; Directors' date of resignation

By Breanna Davies (Special Counsel) and Kate Mylott (Lawyer)

Background

Taking effect in February 2021, the Federal Government introduced *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth) (**Act**) to help combat illegal phoenix activities and avoid systemic fraud.

Firstly, what is illegal phoenix activity?

ASIC describes phoenix activity as:

> *"…creating a new company to continue the business of an existing company that has been deliberately liquidated to avoid paying outstanding debts, including taxes, creditors and employee entitlements."*

Typically a company will transfer its assets to a new company, without paying the true value of the assets, and leave the debts with the existing company which will later be liquidated.

Illegal phoenix activity can involve serious breaches of the *Corporations Act 2001* (Cth) (**Corporations Act**), including the laws relating to directors' duties.

Changes to director resignations

The Act amended the Corporations Act so that a resignation of a director will take effect:

1. on the day the person stopped being a director of the company if ASIC is notified within **28 days** after the day the person stopped being a director of the company; or
2. the day written notice of resignation is lodged with ASIC.

So if you are a director, hand in your resignation to the company, and the company does not lodge it within 28 days, you are still deemed to be a director, and the effective date of your resignation will be overridden and replaced with the lodgement date. However, the resignation of a director, or a resolution made to the effect that a director is removed from a company, will not take effect if the resignation or removal would leave the company without a director (which could result in multiple directors racing to resign first).

In our experience, it would be uncommon for directors to check with ASIC that the correct details of their resignation have been lodged with ASIC (i.e. they would just rely on providing the resignation to the company), so this approach will need to change. If the delay in notifying ASIC was particularly long, the director may be required to seek a court order to change the resignation date.

If a director's resignation was not properly lodged with ASIC, that director may be found liable for the actions, omissions, conduct or misconduct of a company which it supposedly resigned or was removed from. Equally, the company may be liable for the conduct of a supposedly former director.

However we appreciate the aim of the Act which is to reduce the likelihood of directors seeking to engage in illegal phoenix activities and backdating their resignation to avoid or mitigate liability.

How do directors resign?

How a director may resign from a company depends on whether the company is governed by its own constitution (which may include certain bespoke drafting) and/or by the replaceable rules included in the Corporations Act. If a company relies on the replaceable rules, a director can resign by providing written notice to the company or may be removed by a meeting resolution. Some forms of constitutions adopt this approach, but other forms impose certain conditions relating to a director's effective date of resignation (for example, that a director must return all company documents and property before they can resign).

As a result of the amendments to the Act, we recommend that companies review their constitutions to ensure compliance with the Act.

Please get in touch with any concerns about whether your constitution is compliant, questions regarding your duties or any other questions with respect to the changes to the Corporations Act as outlined above.

For more information, please contact Breanna Davies on +61 2 9163 3017.

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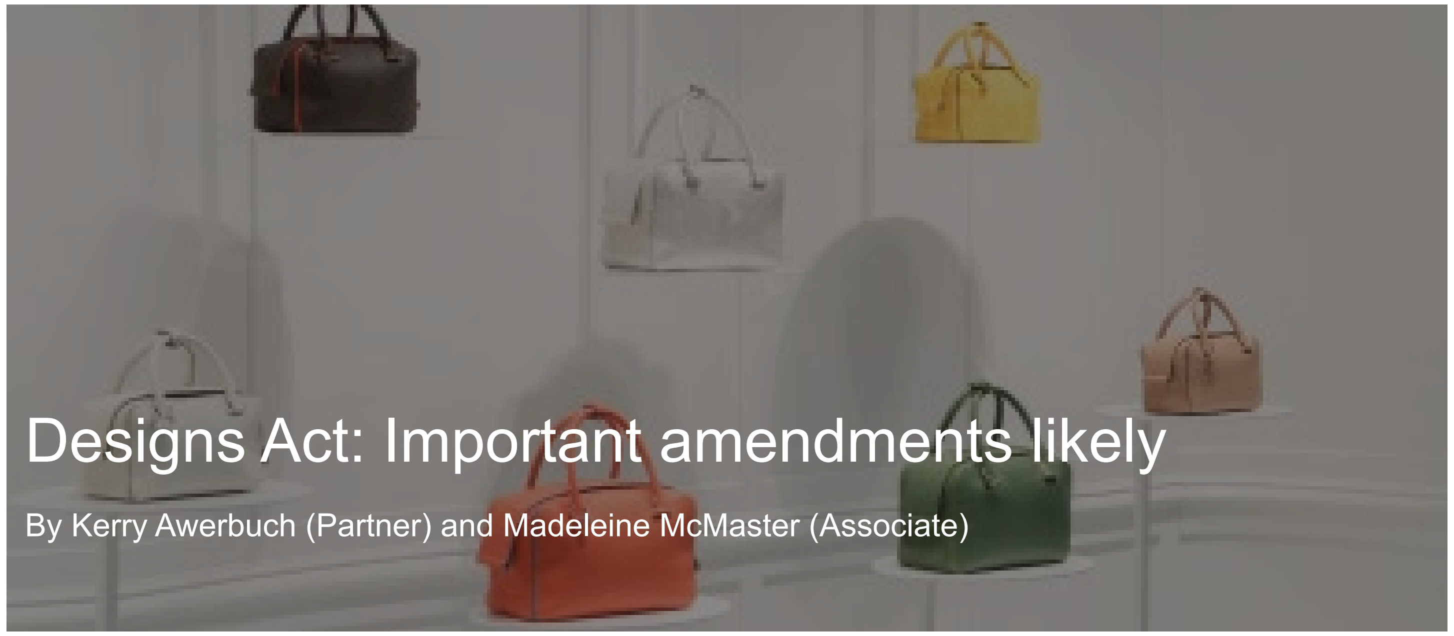

Designs Act: Important amendments likely

By Kerry Awerbuch (Partner) and Madeleine McMaster (Associate)

Significant changes to the operation of Australia's designs laws are expected to be enacted this year, following a review of the current regime. The changes will affect all businesses creating and selling new and distinctive designs, correcting deficiencies in the current legislation and making the design registration system more accessible.

Current state of play

In Australia, it is possible to register a design to protect the overall visual appearance of new and distinctive designs. Such a right provides a registrant with a monopoly on the use of the design (or a design that is substantially similar in overall impression) for up to 10 years. However, to obtain a valid design right, a designer **must not** disclose the design publicly before the priority date of the application. If a design is publicly disclosed before filing, it forms part of the 'prior art' base and has the effect of invalidating the design registration (other than in very limited circumstances), resulting in no protection of the design under the *Designs Act 2003* (Cth) (**Designs Act**).

The disclosure issue has prevented designers from obtaining protection for their designs. The main reasons for the loss of rights include a lack of understanding with respect to the operation of Australia's design registration system, inconsistency with other major economic partners on disclosure (for example, grace periods are legislated in the design laws of the United States, the European Union and the United Kingdom) and the fact that the design process is not always linear (that is, registration may be successfully obtained, but the product ultimately taken to market is different). Another reason for the limited uptake of design registrations is the cost. Many designers choose not to invest in registering a design for an untested product.

As a result, designers are often left with no protection for their design and in cases of alleged copying, must rely on other legal rights (such as copyright or the cause of action of misleading or deceptive conduct), often with little success. This was exemplified in the recent case of *State of Escape Accessories Pty Limited v Schwartz* [2020] FCA 1606 (***State of Escape***), a case in which the applicant had not sought design protection for its handbag design prior to the first disclosure of the design. The applicant's handbag design proved very popular and multiple third parties sold bags which the applicant claimed were a copy of its design. However, the applicant failed in its attempt to assert copyright infringement and misleading or deceptive conduct as a means for preventing third party sales of what it alleged were similar designs.

Proposed amendments to the Designs Act

The *Designs Amendment (Advisory Council on Intellectual Property Response) Bill 2020* (Cth) (**Bill**), which is currently before parliament, proposes to amend the Designs Act by making a number of important changes, including:

- ***Introduction of a grace period:*** the Bill introduces a 12-month grace period prior to the priority date of a registered design in Australia. This means most disclosures by the applicant in the 12 months prior to the priority date by a relevant entity will no longer invalidate a design.

  However, it is important to note that any disclosures by a foreign designs office (or equivalent) are not eligible for the grace period and a designer must rely on claiming the six-month priority period under the Paris Convention in this instance. In addition, if a third party independently creates a design that is the same or substantially similar prior to the priority date of the registered design, but after the registered design was first disclosed, this will form part of the 'prior art base' and potentially invalidate the design.
- ***Infringement exemption for prior use:*** to account for the introduction of a grace period, the Bill provides third parties with a defence to design infringement proceedings if the third party has undertaken relevant acts (for example, making a product, importing a product or using a product) or taken definite steps to do a relevant act in relation to the design (or a design that is substantially similar in overall impression), based on publically available information, and continues to take these steps up to the priority date of the design registration. This defence will continue even after the design is registered, thereby allowing the third party to continue to use the design.
- ***Relief from infringement before registration:*** the Bill provides clarity on circumstances where a design has been applied for but is not yet registered and therefore not available for the public to see on the register. Specifically, it provides a third party with relief in respect of damages or an account of profits if the third party can show that he or she did not know and could not reasonably be expected to have known of a design application disclosing the infringed design. However, no relief is available once the third party is put on notice of the design application (for example, by publication on the Designs Register or notification by the applicant) if the third party is found to have infringed the design.

Consequences of the amendments

The introduction of a grace period is good news for designers. Its primary purpose is to protect designers from losing potential design rights due to an inadvertent disclosure or lack of awareness of the designs system, rather than allowing the designer to 'test' the market prior to filing. That underpinning policy is supported by the introduction of the infringement exemption for use occurring prior to the filing date of a design application and the exclusion of foreign design office publications from the types of disclosures to which the grace period applies.

So, we might ask, how might the outcome in *State of Escape* have differed if the Bill had been enacted at the time the applicant first published its design? If the applicant registered the design for its handbag within the grace period and the respondent's product was found to be identical or substantially similar to the applicant's design, it would have been successful against the respondent if the respondent started making the handbag to which the design applied after the priority date of the design. However, if the respondent had been making the bag prior to the priority date, it would be free to continue to make the handbags. Interestingly, a question would arise as to whether the respondent would be able to rely on the infringement exemption for new colourways or variations released after the priority date. According to the Explanatory Memorandum to the Bill, if the variations are minor, the infringement exemption for prior use would still be available to the respondent, even if the variations mean the bag is not substantially similar in overall impression to the bag made by the respondent prior to the priority date.

Looking ahead

Once the Bill is enacted, it is important for all businesses to be aware of how the changes may affect their current practices.

For designers:

- it is strongly recommended that designs are still registered early, ideally before first publication, as a result of the infringement exemption for prior use. Third parties with the desire and ability to move quickly will be able to copy the design prior to filing and retain the right to continue to use the design (or one that is similar) post-filing. There is also a risk a third party could independently develop a very similar design. Where possible, all pre-sale disclosures should be made under a confidentiality agreement;
- the grace period will otherwise provide designers with some comfort and protection if registration isn't sought in a timely manner; and
- if protection is being sought in other jurisdictions where the designs office publishes the design within six months, it is important to ensure that priority is claimed in Australia within six months under the Paris Convention.

For businesses that wish to adopt third party designs:

- continue to undertake due diligence searches to determine whether designs are protected by design registrations;
- if there is no application or registration in Australia, ensure timely steps are taken to do the relevant acts in relation to the design (for example, making a product, importing a product or using a product) or take 'definite steps' to do a relevant act in relation to the design. Ensure records of such steps are kept; and
- bear in mind that a designer may seek to claim priority from an overseas application for their Australian application. If this is the case, the infringement exemption for prior use **will not** apply if the use is after the priority date of the overseas application but before the filing date of the Australian application claiming priority. In the interim, third parties will likely be able to rely on the 'relief from infringement' changes until the design is registered. To minimise the risk, consider searching design registers in relevant countries before using a design.

For more information, please contact Kerry Awerbuch on +61 3 9252 2573.

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A step-by-step guide to the new .au Domain Administration Rules

By Antoine Pace (Partner) and Raisa Blanco (Senior Associate)

Australian consumers increasingly expect FMCG businesses to have websites promoting their goods and services, and for Australia, having a domain name that suggests an Australian business engenders trust in the local market. However with effect since 12 April 2021, .au Domain Administration Limited (**auDA**) implemented a new set of rules for the licensing and administration of domain names ending in .au. The .au Domain Administration Rules: Licensing and .au Domain Administration Rules: Registrar, consolidated and updated more than 30 disparate auDA Published Policies into comprehensive documents.

While many of the existing rules and procedures remain the same, businesses need to be aware of changes with which they will need to be compliant if they want to continue using their .au domain names, or if they intend to apply for a new .au domain name. However if complied with, the changes will also allow businesses to utilise compliant domain names to drive traffic to their websites and maximise their online presence with consumers.

According to research commissioned by the auDA, there are benefits to hosting a .au domain name over a generic .com domain name. The research concluded that Australian consumers:

- associate a .au domain name with an Australian business and view these as being more trustworthy and secure than .com websites;
- place importance on supporting Australian businesses when shopping online; and
- are more willing to purchase goods online if the business operates a dedicated sales website.

The new auDA rules apply to all .au domain names (including not-for-profits domains like .org.au and personal domains .id.au) that are created, transferred, or renewed on or after 12 April 2021.

The following tables summarise the major changes in the new auDA rules, and provide a step-by-step guide for businesses to:

1. check that they are compliant with the new rules and maximising their web presence; and
2. use domain names as a means to drive online traffic to their websites.

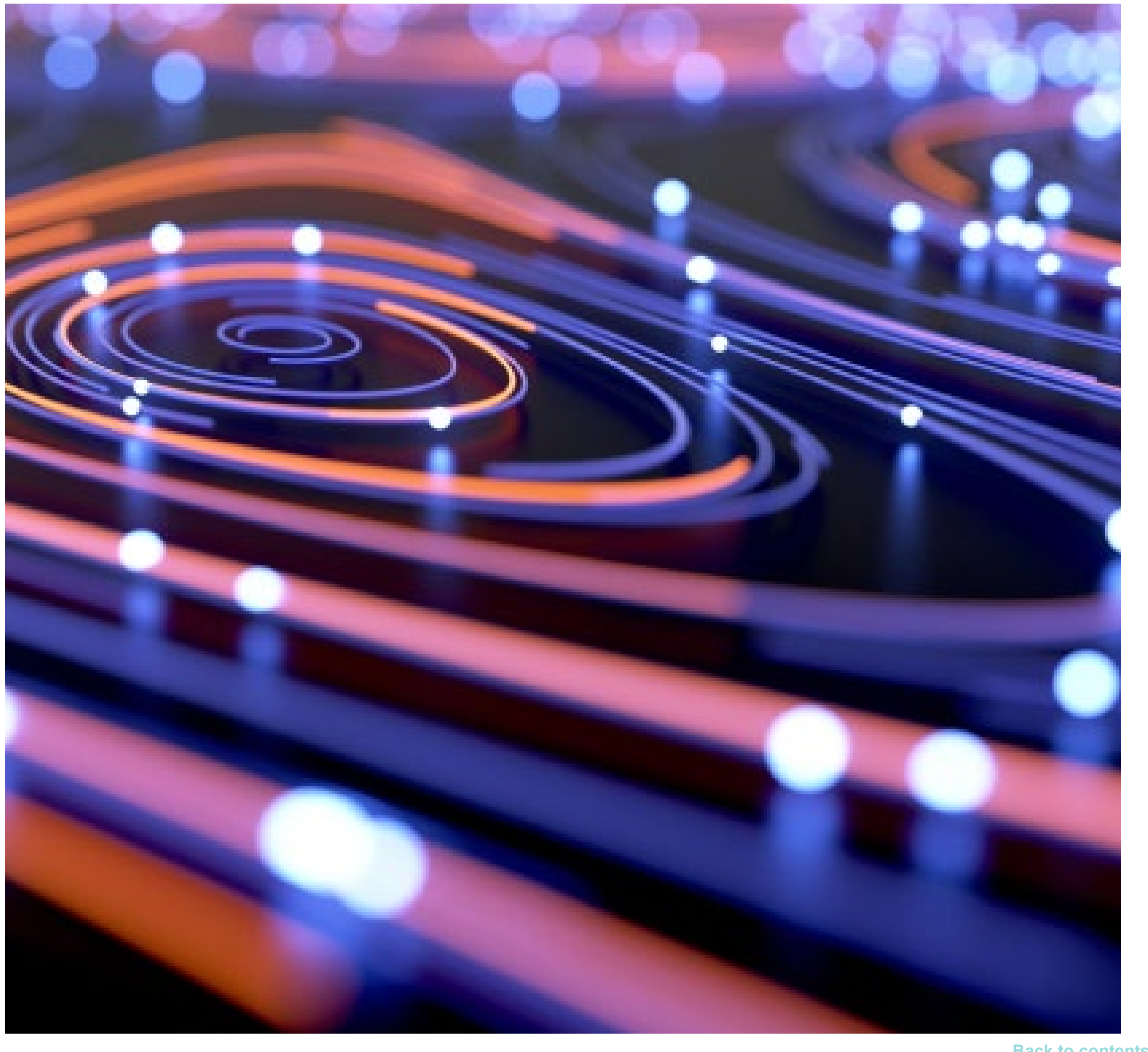
For entities with an existing portfolio of .au domain names, consideration should also be given to registering Australian trade marks that provide a match meeting the requirements set out next.

Is your .com.au or .net.au website compliant with the new auDA rules?		
Affects you if	**Rule**	**What you need to do**
You are an Australian company or Australian and you are using your name to meet the Australian presence requirement to register or maintain a .com.au or .net.au domain name.	The domain name applied for must be a match or an acronym of your company, business, statutory or personal name.	Make sure that the domain name applied for is an **exact match** or an acronym of your name (if you are an individual) or statutory name, or your company's name as it appears on the register of companies under the *Corporations Act 2001* (Cth) or registered business name.
You are using your Australian trade mark to meet the Australian presence requirement to register or maintain a .com.au or .net.au domain name.	A person using an Australian registered trade mark to meet the Australian presence requirement must use a domain name which is **an exact match** to the words that are in the Australian registered trade mark. This excludes things such as DNS identifiers (e.g. .com.au), punctuation marks, articles (e.g. 'an', 'the', 'and'), and ampersands. **Example:** if your Australian registered trade mark is 'A RED PARAKEET' your domain name could be 'aredparakeet.com.au' or 'redparakeet.com.au'. Your domain name cannot be 'parakeet.com.au', 'red.com.au', or 'rp.com.au'.	Determine if you are using your Australian trade mark to meet the Australian presence requirement. • If YES, then do you have another way of meeting the Australian presence requirement? E.g. the domain holder is an Australian company or the domain can be licensed to an Australian based subsidiary: ◦ if NO, then your domain name must be an exact match to your Australian trade mark; or ◦ if YES, then your domain name does not need to be an exact match to your Australian trade mark. • If NO, then your domain name does not need to be an exact match to your Australian trade mark.
You are an Australian partnership or the trustee of a trust in Australia and you are using the name of that partnership or trust to register or maintain a .com.au or .net.au domain name.	The domain name applied for must be a match or an acronym of the partnership name or the name of the trust.	Make sure that the domain name applied for is **an exact match** or an acronym of the name of the partnership or trust. Also make sure that the partnership name or trust name is registered as a business name under the *Business Names Registration Act 2011* (Cth).
You are part of a corporate group and you want a related body corporate to apply for a domain name licence on your behalf. You are part of a corporate group and a related body corporate wants you to apply for a domain name licence on their behalf.	If a company in your corporate group meets the Australian presence requirement, then that company can apply for a .au domain name on your behalf.	Determine whether or not you want another company in your corporate group to apply for a domain name on your behalf. If so, does that company meet the Australian presence requirement? • if YES, then that company can apply for a domain name on your company's behalf by recording its corporate name as it appears on the register of companies under the *Corporations Act 2001* (Cth) as the Registrant. • if NO, then that company cannot apply for a domain name on your behalf.

Is your .com.au or .net.au website compliant with the new auDA rules?		
Affects you if	**Rule**	**What you need to do**
You are renting, leasing, or permitting the use of a .au domain name by a third party. This can take the form of: • directly renting or leasing .au webpages to someone else; • an agreement to redirect traffic from your webpage to a third party webpage; or • an agreement to redirect traffic from a third party webpage to your webpage.	You cannot rent or lease to, or permit the use of a .au domain by a third party. The exception to this is where a name is registered for use by a related body corporate (see above). This also applies to sub-domains.	Review your arrangements to determine if you are renting or leasing a .au domain. For example, is your .au domain name being redirected to another website (for instance, you are a franchisor and your website redirects to your franchisee's website). • If YES, then is the other party a related body corporate who applied for the domain on your behalf? ◦ if YES, then the renting or leasing of the domain name is permitted and the arrangement may continue; or ◦ if NO, then the renting or leasing of the domain name is prohibited and in breach of the Rules, and you ensure agreements and arrangements moving forward do not rent or lease .au domains. • If NO, then you should ensure agreements and arrangements moving forward do not rent or lease .au domains.
Automatic warranties, obligations, and consents apply to all registrants who create, transfer, or renew their .au domain names on or after 12 April 2021.	In addition to existing warranties by the registrant, the registrant also warrants that the: • domain name is not deceptively similar to the name of a another .au website; and • registrant will not, and does not, use the domain name for any purpose that is unlawful, illegal or fraudulent under Australia law. If the warranties are untrue, the registrant's licence will be cancelled or suspended. The registrant also agrees: • the use of the Licencing Service is solely at their own risk; • they are and continue to be a person with contractual capacity (e.g. not a deregistered company); and • they consent to the collection provided in their application for, among other things, providing WHOIS data and for obligations under Australian law including enforcement of court orders.	• As with all agreements allocating risk and warranties, you will want to verify the warranties are true and you are commercially comfortable with the allocation of risk. • Be aware that members of the public using a WHOIS search can locate certain information that you provide.

How can a business use domain names to improve online traffic?	
Affects you if	**What you need to do**
Foreign Commercial Entities with .com.au or .net.au websites.	If your only Australian presence is an Australian trade mark then your domain name must match exactly. You may want to consider establishing another Australian presence to enable a larger range of domain names.
Australian Commercial Entities with .com.au or .net.au websites.	Consider how web traffic can be directed to your website including by registering different domain names allowed by the auDA rules including your: • business name; • Australian trade mark; • acronyms of the above; or • a match or synonym of goods or services you provide.

For more information, please contact Antoine Pace on +61 3 9612 8411.



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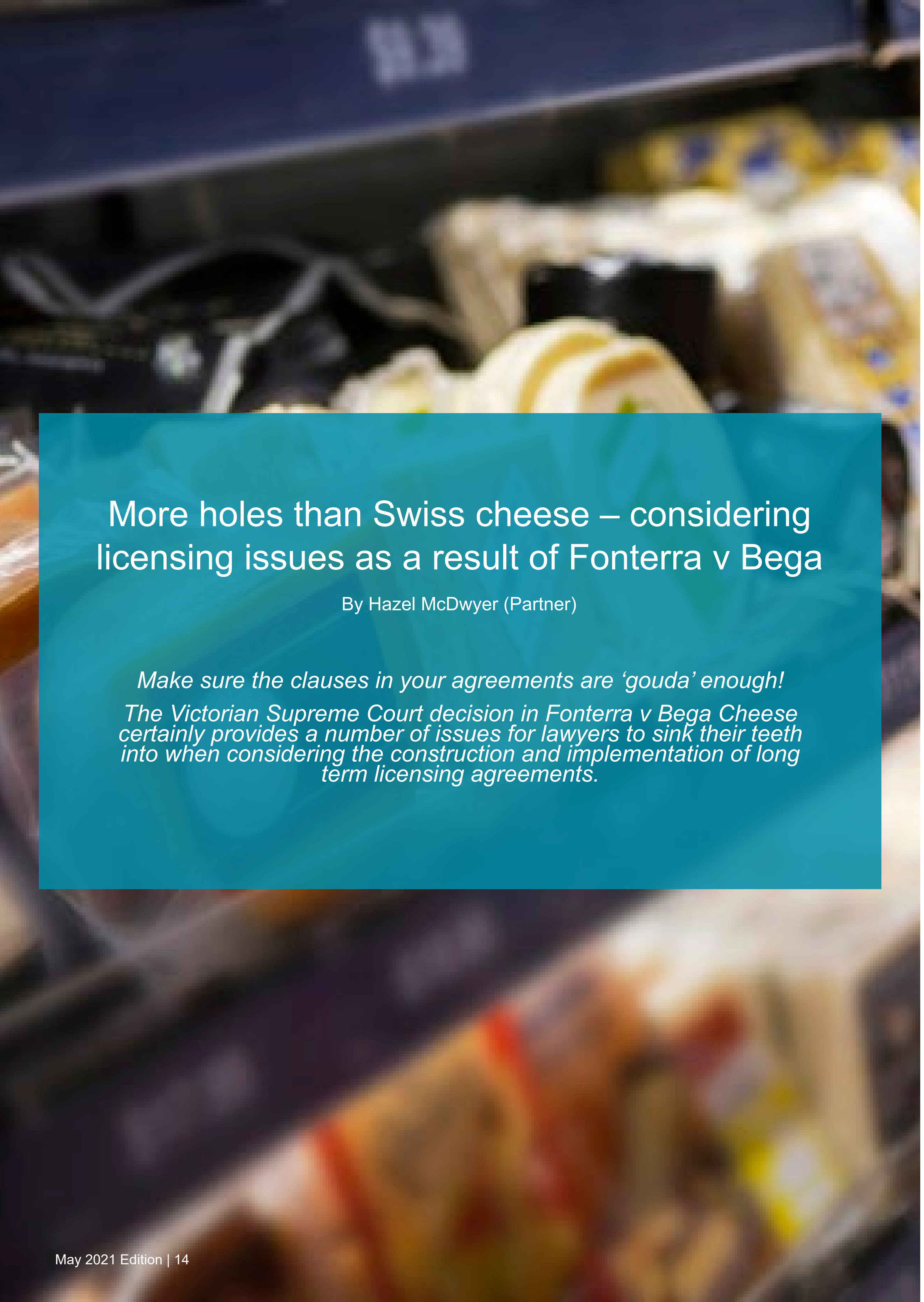

More holes than Swiss cheese – considering licensing issues as a result of Fonterra v Bega

By Hazel McDwyer (Partner)

Make sure the clauses in your agreements are 'gouda' enough!

The Victorian Supreme Court decision in Fonterra v Bega Cheese certainly provides a number of issues for lawyers to sink their teeth into when considering the construction and implementation of long term licensing agreements.

Whether you fancy a creamy brie, a sharp stilton or a mature cheddar, the Victorian Supreme Court decision in *Fonterra Brands (Australia) Pty Ltd v Bega Cheese Ltd [2021] VSC 75* (**Bega Case**) certainly provides a number of issues for lawyers to sink their teeth into when considering the construction and implementation of long term licensing agreements.

In 2019, Fonterra Brands (Australia) Pty Ltd and Bonland Cheese Trading Pty Ltd sued Bega Cheese Ltd for breach of its contractual obligations under the licence agreements, claiming that Bega's use of a new stylised Bega mark for cheese products constituted a breach of clauses 3.1 and 3.2 of the licence agreements. Bega counterclaimed that Fonterra and Bonland were in breach of their obligations under the licence agreements with respect to the marketing and promotion of the Bega branded products.

Judge McDonald rejected Fonterra and Bonland's contention that Bega is precluded from using the Trade Marks or similar marks on any products and rejected all of Bega's counterclaims regarding Fonterra and Bonland's alleged breach of its express and implied obligations under the licence agreements.

Background

In 2001, Bega entered into two licensing agreements with Fonterra and Bonland, whereby Bega granted Fonterra and Bonland the sole and exclusive right to use a number of Bega® trade marks (**Trade Marks**) in Australia, in relation to a range of cheese and butter products for a period of 25 years (with a further right to extend for successive periods of 25 years).

In July 2017, Bega acquired the Mondelez International Australia and New Zealand peanut butter, Vegemite®, cheese and cream cheese spread business. From late 2017, it began to use a stylised Bega mark, similar to the trade marks granted under licence to Fonterra, in Australia for peanut butter, nut spread, macaroni, cheese and cream cheese products.

Fonterra and Bonland sought to restrain Bega from using the Trade Marks, save in respect of the Products (as defined in the agreements). Bega counter argued that if clauses 3.1 and 3.2 were to be construed as sought by Fonterra and Bonland, such constructions would be both unenforceable and an unreasonable restraint of trade.

Licensing issues and restraint of trade clauses

The issue before the court was to consider whether the construction of clauses 3.1 and 3.2 prohibited Bega from using its Trade Marks or similar marks in respect of any products (as contended by Fonterra) or in respect to the Products (as defined under the agreement and as contended by Bega).

The clauses in contention are:

> ***3.1 Licence***
>
> *…Bega hereby grants to the Licensee, during the Term, the sole and exclusive:*
>
> *(a) licence of the Trade Marks; and*
>
> *(b) licence of any copyright owned by Bega or a Related Body Corporate of Bega in any Display Material, in the Territory on or in relation to Products for sale in the Territory.*
>
> ***3.2 Exclusivity***
>
> *For the purpose of clause 3.1, 'sole and exclusive licence' means that during the Term Bega agrees…:*
>
> *(a) not to grant to any other person (including any Related Body Corporate of Bega), the right to use the Trade Marks (or any trade mark which is similar to any Trade Mark) in the Territory; and*
>
> *(b) not to use, or permit the use by any other person (including any Related Body Corporate of Bega) of, the Trade Marks (or any trade mark which is similar to any Trade Mark) in the Territory,*
>
> *without the consent of the Licensee. The Licensee consents to Bega using the Trade Marks specified in Schedule 5 for the purposes set out in the Schedule.*

Fonterra and Bonland claimed that the opening words of clause 3.2 *"are not words of limitation which confine the restriction imposed upon Bega by clause 3.2 to the 'Products' as defined"* and submitted that if Bega has the right to use its Trade Mark in relation to products other than the Products (as defined), this would be *"commercial nonsense"*.

His Honour accepted the argument that clause 3.2 imposes obligations on Bega, however rejected the above submission and held that clauses 3.1 and 3.2 were intended to be read together and the combined effect of the terminology used in clause 3.2 was intended to define the sole and exclusive licence granted to Fonterra and Boland by way of clause 3.1, which was granted in respect of Products (as defined).

Further, His Honour noted that the definition 'Cheese Products' (which is included in the definition of Products) could have included a wide range of cheese varieties to foreshadow the possibility of Bega being free to use the Trade Marks on cheese products which directly compete with Fonterra and Boland's Bega branded products. However, the definition was instead confined to "cheddar cheese products and string cheese products" with any other products to be captured by the definition conditional upon Bega's agreement. His Honour held that clauses 3.1 and 3.2, when read in conjunction with this definition, contemplates Bega's potential future development of other cheese products that it would want to market under its Trade Marks.

Express and implied obligations

Bega counterclaimed that Fonterra and Bonland breached their express and implied obligations under the agreements, which constituted a material breach and entitled Bega to terminate the agreements. These obligations related to marketing and promotion claims, cheese quality claims and provenance claims.

Bega argued that Fonterra and Bonland had failed to effectively market and promote Bega branded products and the Bega brand, including by failing to 'effectively' promote and offer Bega branded products for sale in the foodservice sector, by giving preference to their own brands, and not undertaking enough product development. Fonterra and Bonland denied the claim, stating that they were under no contractual obligation to engage in a particular type of marketing activity or to promote and develop sales of Bega branded products, or to engage in new product development.

Under the terms of the licence agreements, Fonterra and Bonland were obliged to:

1. promote and develop sales broadly consistent with the Agreed Marketing Principles;
2. ensure the good name and image of the Trade Marks is maintained and not harmed; and
3. conduct the business operations in accordance with appropriate business standards and in a manner that will not damage the value of the Trade Marks.

Bega also claimed that Fonterra and Bonland had breached the licence agreements and product supply agreement by supplying cheese the subject of cheese quality notices and that Fonterra and Bonland had misrepresented to consumers that all cheese in Bega branded products is made in Bega Valley in contravention of sections 18 and 29 of the Australian Consumer Law. Bega argued these breaches resulted in a material adverse effect on Bega and subsequently the value of the Trade Marks, for which it was entitled to terminate the agreements.

Fonterra and Bonland denied the allegations, in particular stating that the implied terms of the licence agreements did preclude them from giving preference to their own brands.

His Honour rejected Bega's counterclaims, noting that there were no express or implied terms requiring Fonterra or Bonland to do anything beyond the provisions of the above clause. His Honour held that the implied 'no undue preference' term was not necessary for the efficacy of the agreement. Further, he held that both Fonterra and Bonland had promoted and developed sales of the Bega branded products and undertaken marketing activity consistent with the Agreed Marketing Principles.

Termination procedures

Fonterra and Bonland argued that the termination rights under clause 16.1 of the licences comprehensively set out when Bega could terminate for breach, which excluded the ability to rely on common law rights of termination. They argued this clause covered all potential circumstances which would enliven Bega's termination rights, which limits termination to where a breach has a material adverse effect on Bega.

His Honour held that Bega had failed to establish that it had suffered any material adverse effect as a result of the alleged breaches by Fonterra and Bonland that would entitle Bega to terminate the agreement. The potential regulatory risk of enforcement action by the ACCC in relation to misleading conduct did not constitute a material adverse effect on Bega.

Further, His Honour held that it would be inconsistent with this express requirement for Bega to be permitted to terminate the agreements where a breach, or combination of breaches, did not result in a material adverse effect. This is supported by the lengthy period of time provided to remedy any alleged breach of the agreement (90 days) which lends to the preservation of the continuation of the licence agreements. To find that Bega could otherwise terminate the agreements, in reliance on its common law right to terminate, without providing a notice period would otherwise be contrary to the parties' intentions and the commercial purpose of the agreement.

His Honour also considered the four notices of breach Bega served on Fonterra pursuant to clause 16.1. Fonterra and Bonland submitted that these notices were invalid as they failed to identify a remedy which would cure the breach and that three of the notices failed to identify the breach with any specificity. Fonterra and Bonland further submitted that, even if they did breach the agreement, Bega was not entitled to terminate as it had elected to affirm the agreements and could no longer rely on the notices.

His Honour noted that it was necessary to approach the construction of the termination notice objectively – that is, how would a reasonable recipient have understood the notice. His Honour held that Bega's notices were valid and did not lack sufficient specificity as they identified the precise conduct which constituted the breach, it referred to the relevant clause and specified the impact of the breach to be rectified. His Honour held that the plain word drafting of clause 16.1 did not require Bega to stipulate an actual remedy to cure the alleged breach.

His Honour accepted Fonterra and Bonland's submissions in respect of two of the notices issued, but otherwise rejected their submissions based on the doctrine of election by affirmation. His Honour noted that Bega was able to elect to either exercise its termination right or to affirm the agreement by serving a second lot of notices and, in serving the second lot of breach notices, His Honour considered that Bega had elected to affirm the agreement and therefore was not entitled to terminate the agreements in reliance on the initial notices served.

Key takeaways

Make sure the clauses in your agreements are 'gouda' enough!

- Evidence of pre-contractual negotiations between parties is not admissible to contradict the plain meaning of clauses within an agreement. Make sure that drafting is clear and concise.
- Consider the length of licence agreements in the context of future plans for the business. Could an extended licence or distribution period, such as 25 years, be overly restrictive?
- If there are rules, such as the Agreed Marketing Principles here, ensure that they can be reviewed at certain intervals, particularly if the agreement is for a long period. They should be sufficiently specific to protect the licensor and ensure that the licensee is actively promoting the product, while allowing the licensee the appropriate level of discretion, depending on the circumstances, to adapt its marketing strategy to changes in market conditions.
- Before seeking to imply a term into an agreement, make sure to consider the foundation principles in respect of implied terms, namely:
  - Is the term reasonable and equitable?
  - Is this term necessary to give business efficacy to the agreement?
  - Is the term so obvious it goes without saying?
  - Does it contradict an express term of the agreement?
- Make sure that common law rights of termination for breach are not overridden by the terms of the contract. It is worth expressly stating that a party's termination rights for breach of an obligation are in addition to their rights at common law.
- To ensure a termination notice is valid, it should be clear as to the alleged breach (particularly by pointing to the relevant clause in the agreement that has allegedly been breached) and steps required to remedy the breach. Vague or imprecise notices could affect the validity of the notice.

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Transitioning employees back to the physical workplace – key considerations

By Brett Feltham (Partner) and Sera Park (Associate)

As more and more employees return to the physical workplace employers need to ensure that they are up to date with any state/territory based health orders, including restrictions imposed on maximum capacity and social distancing requirements as well as having a COVID Safe plan.

1. Timing and operational needs

- Consider and comply with relevant State and Territory public health orders and directions, noting that these are still constantly changing.
- Think about who needs to be back in the physical workplace. Do all employees need to come back and at the same time? What is the maximum capacity allowed at the workplace? Can and should any working from home arrangements continue?
- Consider implementing staggered 'shifts' for attending the workplace.
- Are ongoing working from home arrangements an option and could this be an opportunity to improve employee engagement and satisfaction?

2. Consultation and communication

- Alleviate employee concerns about returning to work through meaningful consultation and communication.
- Clearly communicate proposed return to the physical workplace plans (for example, staggered shifts/physical distancing between workspaces/cleaning roster).
- Take all feedback, comments and queries raised by employees, particularly on safety, into consideration.
- Ensure specific consultation obligations under any modern award or enterprise agreement are met, including any requirements to consult with a union.

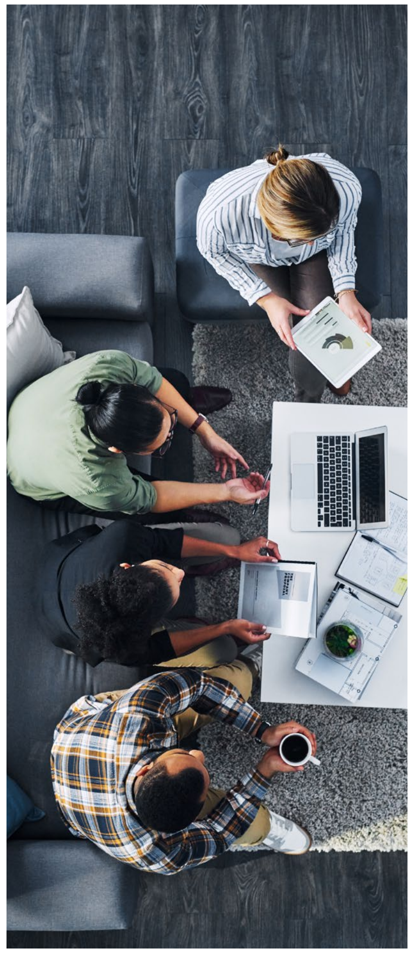
3. Employment infrastructure

- Look at employment infrastructure and what changed when employees transitioned out of the physical workplace. Employees may have had their hours and/or salary reduced, been stood down or taken a period of leave, including by way of directions under the JobKeeper scheme.
- Look at whether such arrangements should continue, be varied in some way, or whether employment terms can revert back to normal.
- Any changes will need to be properly documented in writing.
- Ensure appropriate policies and procedures are in place to deal with the ongoing challenges of the COVID-19 pandemic, including policies on working from home, work health and safety, and any policies on how to manage employees with symptoms.
- Ensure policies are flexible to adapt and evolve with COVID-19 developments.

4. Safety first!

- Ensure discharge of all work health and safety obligations, including by having a COVID-19 Safe Plan.
- Ensure employee adherence to physical distancing requirements.
- Encourage employees to practice good hygiene and provide hand sanitiser and wipes.
- Consider whether employees need other personal protective equipment such as masks and/or gloves.
- Ensure the workplace is regularly cleaned and disinfected.
- Consider public transport issues and whether hours of work can be changed to avoid peak hour travel.
- Have a plan in place for any COVID-19 outbreaks in the workplace and dealing with employees with symptoms.
- Consider arrangements for vulnerable workers, such as those with medical conditions and older workers.
- Offer employees participation in an Employee Assistance Program.
- Live and breathe a safety culture!

For more information, please contact Brett Feltham on +61 2 9163 3007.



5. Mental health

- Some employees have felt isolated during the COVID-19 pandemic and employee mental wellbeing has suffered.
- Ensure that employee mental health is considered when looking at safety management, considering issues such as increased workloads and isolation when working from home.
- Consult with employees about risks to their mental health and ways to address these.
- Consider whether any additional training on mental health issues and well-being is required.
- Engage in regular and empathetic discussions with employees about how they are and encourage them to discuss any concerns.
- Promote the Employee Assistance Programs available and/or provide information on external mental health and wellbeing support services.

6. Dealing with employee reluctance/refusal to return

- Deal with on a case by case basis.
- Consider whether any direction to return to the workplace is 'lawful and reasonable'.
- Communication is key – seek to understand, and alleviate, employee concerns.
- Consider whether to request medical evidence to support concerns.
- Depending on the circumstances an employee may be able to work from home or access leave accruals in the short to medium term.
- Employees may be able to be directed back to the physical workplace where they do not have a genuine reason for not returning.
- Employees who work in industries such as retail, manufacturing or hospitality that are required to have a physical presence may need a genuine reason for not returning, such as medical reasons.

7. Vaccinations

- Almost all employers will be unable to require their employees to be vaccinated against COVID-19 - an employer may be able to provide a direction to its employee that they must be vaccinated only where employees interact with people with an elevated risk of being infected (employees working in hotel quarantine or border control), or employees who have close contact with people who are most vulnerable to the health impacts of infection (employees working in health care or aged care).
- Employers will need to carefully consider any requirement for employees to be able to evidence that they have been vaccinated or where they have not been vaccinated the reasons why.
- It is unlikely that an employee could refuse to attend the workplace simply because a co-worker is not vaccinated, given vaccination is not compulsory – employers will need to understand in detail the reason for the refusal and consider any specific circumstances.
- Should the Government make any public health orders requiring the vaccination of workers in certain industries (e.g. high-risk workplaces), employers will need to ensure that it complies with any orders that apply to them, and seek advice on how to manage employees who demonstrate reluctance.

8. Longer term strategy

- Consider whether restructuring is necessary in light of the economic impact of COVID-19
- Look at what changed arrangements have highlighted for the business.
- Consider developing a long term strategy on future disaster management. For example, can the business pivot to a principally or wholly online business?
- Consider the risk profile and follow a proper process when implementing redundancies, including by consulting with employees and looking at redeployment options.

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ACCC puts travel, utilities, finance and more under the microscope in 2021

By David Smith (Partner)

For the last decade, towards the start of each calendar year the ACCC has announced its annual compliance and enforcement priorities. By doing so, the ACCC aims to provide transparency and accountability.

The ACCC's Chair, Mr Rod Sims, outlined the ACCC's compliance and enforcement priorities for 2021. We summarise some of the key priorities below.

Travel and aviation

Last year the ACCC saw a 500% rise in complaints and reports about the travel sector. It conducted enforcement investigations into Flight Centre, Qantas and Etihad which achieved consumer outcomes without litigation, in the form of refunds of travel cancellation fees and refunds for airline tickets that could not be used.

In 2021 the ACCC will monitor forward sales practices by travel businesses due to concerns about misrepresentations in advertising and marketing material, in light of ongoing uncertainty around the imposition and lifting of travel restrictions.

The ACCC considers that competition in the aviation industry – an industry which has obviously been significantly impacted by the COVID-19 pandemic – remains fragile. The ACCC intends to monitor carefully plans by regional operator Rex to enter the major domestic routes including those connecting Melbourne, Sydney and Brisbane. It will also provide a quarterly report to the Commonwealth Government on prices, costs and profits of the Australian domestic aviation sector, as directed in mid-2020 by the Treasurer.

Essential services, including electricity and telecommunications

The ACCC remains concerned about the lack of transparency in the pricing of essential services.

The ACCC will be checking that electricity retailers pass on the significant reductions in wholesale electricity costs that have occurred recently.

Funerals

The ACCC has noted criticisms of the funeral sector and will look carefully at whether funeral businesses use their significant market power to bundle services and block new entrants to the market, or to engage in unconscionable conduct.

Commercial construction

The ACCC has established a Commercial Construction Unit to investigate allegations of anti-competitive conduct in the commercial construction sector. It has already pursued enforcement activities against several businesses in this sector, as well as the Construction, Forestry, Maritime, Mining and Energy Union. It plans to 'forcefully continue' its enforcement activities in this sector in 2021.

Finance

The ACCC plans to follow up the recommendations in its Home Loan Price Inquiry final report (published December 2020). In the report, it recommended that lenders provide an annual prompt to their variable rate borrowers with loans greater than three years old, highlighting the potential benefits of switching loans to the borrower in a compelling and personalised way. Data shows that for most such borrowers, this information would clearly convey that it is worthwhile for them to look for a better home loan offer.

The report also recommended that lenders take particular steps to reduce the administrative burden on consumers who wish to switch home loan providers.

The ACCC will also be watching closely to see if any concerning debt collection issues arise as the economy emerges from the impacts of COVID-19.

Franchise sector

The ACCC will be on the lookout for misleading representations made by franchisors about franchises – in particular about earnings capacity and the use of marketing funds.

Agriculture sector

Following implementation of the Dairy Code early in 2020, the ACCC still has concerns about the supply of perishable agriculture products. In 2021 the ACCC will prioritise enforcement activities relating to supply chain relationships in the agriculture sector. It will also prioritise compliance with the Horticulture Code.

Motor vehicles and caravans

The ACCC plans to pursue enforcement action against various motor vehicle dealers with the aim of achieving broader changes to behaviour in this industry. During the COVID-19 pandemic, the ACCC received many complaints about consumer guarantee issues in this sector.

The caravan sector grew strongly in 2020. The ACCC will look closely at failures by caravan manufacturers and dealers to comply with their consumer guarantee obligations.

Digital platforms

In 2020 the ACCC established its Digital Platforms Branch and commenced court actions against Google and Facebook for allegedly misleading consumers about data use.

It says it will continue its investigations into the practices of the digital platforms in 2021, and 'more cases will follow'.

Changes to the law

The ACCC plans to continue pushing for changes to the Australian Consumer Law (**ACL**) to provide more protection to consumers and small businesses. It is seeking changes to make a failure to comply with the consumer guarantee or unfair contract terms provisions of the ACL a breach of the ACL which would be subject to penalties.

As we have previously noted, the ACCC also advocates for the introduction of an economy-wide prohibition on unfair trading practices. The decision of the Full Federal Court in ACCC v Quantum Housing Group Pty Ltd, handed down on 19 March 2021, according to the ACCC *"extends the reach of the statutory unconscionable conduct prohibition [in the ACL] so that it will protect more consumers and small businesses against egregious conduct by corporations"* (see further discussion here). It may be that the case law developing in this area now goes some way towards addressing the deficiencies the ACCC perceives in the ACL.

The above list of priorities is not exhaustive

The above list gives a good indication of some sectors that the ACCC will be examining particularly carefully in 2021.

However, these sectors will not be the sole focus of the ACCC's activities for the year. As in 2020, we can expect the ACCC to focus on additional areas as the dynamics of the Australian and global economies develop through the course of the year.

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Non-use of trade marks in a pandemic

By Hazel McDwyer (Partner) and Teresa Elmey (Trade Mark Attorney)

Use it or lose it! As many readers will be aware, if you don't use a trade mark for a continuous three year period in Australia, it may become vulnerable to removal on the basis of non-use. But what happens in a pandemic when businesses face significant obstacles in being able to trade or sell their products?

The *Trade Marks Act 1995* (Cth) contains provisions allowing for the Registrar to use discretion in deciding whether to remove trade marks on the basis of non-use, including if there are legitimate reasons preventing the use. However, this discretion is typically reserved for exceptional circumstances that are outside the control of the owner in the course of trade. The onus is on the owner to provide suitable evidence establishing compelling reasons why it has been prevented or delayed from using the trade mark.

Examples of such circumstances outside the control of the owner in the course of trade could be things like destruction of a factory, ongoing litigation relation to the trade mark, an act of war, or unforeseen circumstances to the owner such as materials provided by third parties to produce products being temporarily unavailable in the market.

So what about in the circumstance of a pandemic? We anticipate that there will be many cases in the next few years where the Registrar needs to consider exercising discretion, however it is likely that the evidence will need to detail why the owner was prevented from trading as well as show a genuine intention to recommence use of the trade mark, for example evidence showing engagement with manufacturers and sourcing materials to produce goods.

As it currently stands and in recent cases, excusable non-use has been reserved for limited reasons. The circumstances preventing use do not necessarily need to have affected the whole of the trade and there can be special circumstances affecting the owner personally.

So how can your business safeguard its trade marks, even if some are not currently being used due to COVID-19? It is important to keep detailed records of how your business has or is being prevented from using the trade mark in the market, for example due to lockdown rules, the importation of certain goods or parts being unable to be supplied from overseas preventing manufacture, or perhaps regulatory delays due to the COVID-19 climate. It is also important to have an action plan of the anticipated timeframe for recommencing use. This may not be set in stone due to the unforeseeable changing climate, but we consider the Registrar would be reluctant to remove a trade mark on the basis of non-use where a business can show a genuine intention to recommence use as soon as practically possible.

Businesses should bear in mind that they may also need to have compelling reasons as to why the trade mark wasn't being used prior to the pandemic, if this was the case. An example of this might be if there was a genuine intention to relaunch a product that hadn't been used for some time, however the relaunch was prevented due to COVID-19.

Owners should bear in mind there are circumstances of non-use that a Registrar's discretion will not cover, including:

- making unwise commercial decisions;
- a lack of capital;
- an unfavourable economy; and
- poor health of the trade mark owner.

While the last two may not seem altogether fair when it comes to a pandemic, keep in mind that minimal use of a trade mark can be sufficient to defend a non-use removal action, so long as the owner establishes its use was in good faith in Australia and in the course of trade. The Registrar will also consider whether there is a residual reputation from earlier use of the trade mark, which if removed, would result in the likelihood of consumers being confused or deceived if a third party's substantially identical or deceptively similar trade mark were used or registered.

If your business licenses its trade marks to third parties, now is a good time to check those important quality control measures are in place to ensure the acceptable standard of use is still being made, or how COVID-19 has affected the use of your trade marks by your licensees.

If a third party applies to remove your trade mark for non-use, it is a good opportunity to review your current protection. If you have broad rights and from a commercial perspective you are in a different field of interest to the person applying to remove your trade mark, it may be that coexistence is possible. Another option could be that a partial non-use removal of certain goods might be appropriate.

If you think your business may be in a position where some of your trade marks fall into the category of non-use, or may be in the future, get in touch with us to discuss how you can best safeguard your trade marks against potential non-use removal proceedings.

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Gadens' view of the Federal Budget 2021/22: The good, the bad and the ugly of pandemic budgeting

By Peter Poulos (Partner)

The Government's second pandemic era Budget continues the theme of massive deficits being used in part to accelerate investment in productive assets and fund other targeted relief. Amongst the 'good' news however lurk several 'bad' and 'ugly' measures which will result in varied impacts across our client base.

Unfortunately, the continued simplistic focus on asset write-offs leaves intact Australia's headline tax rates and a complex system in need of systemic reform. The need for a patent box regime, whilst in itself welcome, is also testament to the inherent uncompetitiveness of our tax system.

In our critique of the Federal Budget, the Gadens Tax Team highlight below the key implications of the Budget measures for you and your business.

The Good – asset write off

The full expensing of new depreciable assets has been extended by an extra year, the acquired assets now have until 30 June 2023 to be used or be installed ready for use. This will particularly assist larger scale projects with long lead times, but also assists recurrent purchasers of new assets.

When the write off was first announced we described it as effectively abolishing tax depreciation for groups with less than $5b turnover, and replacing it with a simple expense deduction. The Government continues to label it as 'temporary' expensing but it seems to be addicted to some form of instant write-off so it won't surprise to see an ongoing use of it in some form, given the apparent aversion to more systemic tax reform.

The measure has obvious short term benefits for taxpayers but will result in higher effective tax rates going forward as it replaces tax depreciation that would have otherwise been available in later years.

The Good – M&A

The current boom in small to mid-market M&A will be further fuelled by the parallel one year extension in the full expensing of acquisitions of existing assets.

This is an incentive which is limited to asset deals, and to acquirers with less than $50m turnover. It is not typically available in share deals or larger transactions as this would likely require an unsuitable level of deal structuring.

The Good – tax loss carry back regime

The Government has also extended this regime to company tax losses incurred in FY 2023, which can be carried back and offset against profits going back to FY 2019. It is only available if there are sufficient franking credits to absorb the prior year tax refund, but it's a very sensible measure and would be a worthwhile systemic reform if made permanent.

The Good – employee share schemes

A welcome development is the removal of cessation of employment from being an automatic trigger for taxing employees on employee shares and options that are subject to deferred taxation.

The change will only be of practical benefit where the employee is entitled to keep their shares or options when they cease employment, which is often not the reality. A much more effective change to encourage employee share ownership would be the application of the CGT discount concession to the deferred gain, similar to the treatment available for start-ups.

The Good – new opportunities to top up your super

Two new measures will allow many Australians to ensure that their superannuation balances are as healthy as possible before commencing to draw a tax free income stream.

The eligibility age to make downsizer contributions has been reduced from 65 to 60, likely with effect from 1 July 2022. The 60+ group will be able to make a one-off, post-tax superannuation contribution of up to $300,000 from the proceeds of selling their home ($600,000 per couple). Importantly, contributions do not count towards non-concessional contribution caps.

In addition, the 'work test' requirement has been partially removed for the 67 to 74 age group, meaning that likely from 1 July 2022 they will no longer have to work at least 40 hours over a 30 day period in order to make some voluntary contributions. Unfortunately this opportunity applies only to non-concessional and salary sacrifice contributions, the work test will still apply to deductible contributions.

The Bad – not-for-profits

The Australian not-for-profit sector is set for a shake-up, with not-for-profits that are not charities required to lodge an annual substantiation with the Australian Taxation Office from 1 July 2023 to support the self-assessment of their tax exempt status.

Historically it was intended that all not-for-profits would come under the regulation of the Australian Charities and Not-for-profits Commission (**ACNC**), however at this stage only not-for-profits that are also charities remain being regulated by the ACNC numbering some 60,000 or so registered charities. Not-for-profits that do not fall within a charitable category have been left alone to continue self-assessing their eligibility for income tax exempt status without an obligation to report to the ATO.

This budget measure will mean a dramatic change for non-charitable not-for-profits who have an active ABN (which is compulsory where turnover exceeds $150,000). The change will result in a significant compliance burden across this segment of the not-for-profit sector, with many participants potentially set to lose their tax exempt status.

The Ugly – tax residency for individuals

The Government has embarked on a complete replacement of the rules which govern individuals becoming and ceasing to be residents for Australian tax purposes, likely effective from 1 July 2022. This has the potential to affect countless prospective individuals planning to arrive or depart Australia and requires careful planning consideration.

The redesign is so pervasive it will result in many winners and losers from the reforms. Australian citizens who populate the tax havens of the world in vast numbers appear set to reconnect substantially with Australia without jeopardising their prized non-resident status.

On the other hand prospective departees from Australia appear to have a minimum two year gap from departure before they can achieve non-resident status. This would disadvantage those who can currently qualify for non-resident status immediately on departure, potentially leading to a perverse acceleration of the outward migration of Australia's entrepreneurial talent in the lead up to the new regime.

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