DWFoxTucker Lawyers

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The Hardest Steel is Forged in the Hottest Fire

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CLIENT PROFILE

Food And Beverage Australia Limited (FABAL)

From grapevine to glass. Meet the expert innovators who make sure Australian wine walks the talk.

In 1982, a group of wine-loving Australian legal students had an idea. Now, as it nears the end of its fourth decade, Food And Beverage Australia Limited (FABAL) is a national treasure, as one of the country's leading vineyard management companies with a reputation for top-shelf viticulturists. As the FABAL Group continues to grow and diversify, developing its own tourism-focused agribusinesses supplying premium wine, chocolate and skincare, CEO of FABAL Operations Ashley Keegan shows how they kept achieving in an extremely challenging year and shares some futuristic insights.

Firstly, what does FABAL do exactly? Where does the organisation fit in the big picture of how grapes find their way into our glass? *"We provide a full range of technical and commercial vineyard management services to a wide range of wine clients"*, Ashley explains. *"Our services range from being a simple 'second set of eyes' onsite for growers as they troubleshoot technical problems, through to a comprehensive turnkey operational service for international owners, enabling them to do business with their hands-off'."*

FABAL has spent a quarter of a century working very hard to build long-term strategic relationships with most Australian wine companies. The wine industry is by its very nature cyclical, and Ashley strongly believes that understanding the importance of longer-term goals in the supply chain is critical. *"Viticulture has a relatively long cycle to production, and it's imperative for all stakeholders that there is clearly communicated commitment to underpin all capital investments. At the same time, we need to be ready and able to adapt in an increasingly dynamic marketplace, with variables at every stage of the supply chain. Ultimately, FABAL sees ourself as supply chain partners, and we take a long-range, generational approach to strategic alliances – we think as much about our customers' commercial position as we do our own."*

Saving the 'pay day' in the pandemic

As you would expect, the COVID-19 pandemic has impacted the vineyard industry in many ways. As the initial stages of the pandemic evolved, FABAL was in the midst of the 2020 harvest, their single most pivotal time of the year, which delivers what Ashley calls their *"one annual paycheck"*. In the face of immense uncertainty about the rapidly changing commercial

conditions and ramifications of lockdowns, like most businesses, FABAL had to put in place significant contingencies.

However, as Ashley explains, FABAL was relatively lucky compared to most during that tense time. *"Agriculture was very fortunate to be afforded an 'essential service' status, a fact that I know the entire industry was grateful for, and we were all focused on respecting that good fortune as we watched a huge array of businesses in other industries simply grind to a halt. At a practical level, we had to focus first and foremost on keeping our teams safe. Really rigid hygiene protocols were immediately implemented, and critical machinery was introduced to minimise risks."*

"Our teams understood that an incident on one of our sites would put the entire crop at risk. So we asked them to tighten up their personal bubbles as tight as humanly possible to help us mitigate the risk and get the fruit off the vines. At the same time, we put protocols in place where teams from different regions were rigidly contained in 'pods', not interacting at all, so that if one region experienced a cluster, other regions would be isolated and could easily provide back up."

The success of the FABAL approach to the pandemic is evident in the numbers, with the harvest period being negotiated successfully without incident. What's more, the business now has new, highly adaptable ways to do things in the future, mitigating risk along the way.

"As agronomists, we are used to riding the rollercoaster of nurturing a single annual crop through whatever Mother Nature presents us", adds Ashley, *"but COVID-19 really tested us and added an unprecedented variable to our business model. Again, we were very fortunate to be afforded 'essential service' status."*

China problems present positives for committed growers

Ashley says there is no doubt that trade challenges with China *"represent one of the single most acute shocks the industry has experienced in modern times"*. Indeed, the relatively rapid rise in the importance of China for the Australian wine sector in just a decade means that overnight cessation of trade will have a significant flow-on effect, with ramifications that will become clearer over time.

In spite of those uncertainties, Ashley's view on the future with China is surprisingly positive. *"The Australian wine industry was prospering prior to the China growth phase, and our stakeholders are always rapidly adapting their market focus and exploring alternative domestic and international options. We have a well-deserved global reputation for innovation, resilience and adaptability. Of course, the China trade issues are extremely disappointing, but for those organisations with a truly long-term commitment to the sector, this situation actually represents fertile hunting ground for new opportunities."*

Innovative sustainability & massive piles of mulch

FABAL has a long history of innovating in the sustainability space. The organisation continues to regard

sustainability as critical across all its agricultural operations, recognising that its principal assets are the natural resources of soil, water, and plants. As a true leader in this field, the company has been utilising remote sensing satellite imagery mapping and monitoring its vineyards for more than 20 years.

"In 2003, we undertook one of the largest single composted mulching programs ever seen in Australia," Ashley reports proudly. *"By utilising composted green organic mulch from the kerbside"* - in other words, from green wheelie bins – *"we mulched over 600 hectares of vineyards, saving 30% of water input and diverting over 33,000 cubic metres of material away from landfill. And we continue to use this material on an ongoing basis to help improve soil biology, increase water holding capacity, and reduce reliance on supplementary irrigation and inorganic fertilisers."*

All FABAL managed sites are members of Sustainable Winegrowing Australia, an industry sustainability program that helps meet the increasing global demand for produce grown in a sustainable way. *"At FABAL, we think as much about what we don't do to our vineyards as what we do",* adds Ashley. *"With an increasing focus on sustainability, we critically analyse and vet all our decisions. We thoroughly review all products for human health implications, staff safety and environmental fate before use on our paddocks."*

At the forefront of Australia's 'big' issues

When asked about the organisation's headline achievements, Ashley shares a couple of flagship moments that show how intrinsic the FABAL operation is to the Australian wine story.

In 2006 the country was sliding into the worst drought in 1000 years, the so-called 'millennial drought'. FABAL was at the pointy end of the stick when it came to managing exposure to the drought, with large holdings and many clients on the River Murray system in Langhorne Creek. The company embarked on a range of innovative and rapidly deployed projects to sustain over 900 hectares of vineyards, which were completely exposed to the devastating failure of Lake Alexandrina. The projects included one of the country's most extensive Managed Aquifer Storage and Recovery schemes, construction of what was at the time South Australia's largest desalination facility, and a 42km freshwater pipeline across from the River Murray.

One of the organisation's greatest lessons in the power of relationships involved seeking approval for an infrastructure project on Aboriginal Heritage land. FABAL engaged directly with the local Elders of the Ngarrindjeri Nation before undertaking a heritage survey, with members of the team spending three weeks walking the 42km route with the Elders – *"it was an amazing learning experience for us all",* says Ashley. Unfortunately, the installation process disturbed a significant heritage site, despite the best efforts of FABAL experts, in a *"crucible*

moment" that could have easily derailed the project entirely. But instead, the Elders took the most humbling approach, thanking the FABAL team for the way they communicated and offered to work with them on a solution. The project succeeds to this day, as does the great relationship between FABAL and its indigenous neighbours.

A future of 'hard steel forged in hot fires'

Ashley says that after more than a quarter of a century in agriculture, the FABAL team believes more than ever in the old adage that 'the hardest steel is forged in the hottest fire'. *"Agriculture is tough, Mother Nature can be both majestic and cruel all in the same season"*, observes Ashley, *"and in reality, we have only a limited ability to impact on the seasonal vagaries. However, irrespective of the industry you operate in, one of the things you can control is the relationships you foster and the commitments you keep."*

There's no doubt that FABAL is passionate about being a great vineyard manager and a great business partner in equal measure, in good times and tough times. And while the concept of a perfect supply chain partnership might be difficult to quantify, Ashley concludes by letting us in on a little secret about how FABAL gauges its own performance:

"We know we are on the right track when our customer's natural instinct is to pick up the phone and ask for our help. It's heart-warming reactions like this which show us we're creating truly sustainable relationships."

At DW Fox Tucker, we raise our glasses to such dedication to customer satisfaction, and we look forward to helping FABAL work the land for many years to come.

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F·A·B·A·L

INSIGHT | **By Patrick Walsh**

Lessons Learned From the Sexual Assault/ Misconduct Revelations in Federal Parliament

The recent revelations of alleged criminal conduct and misconduct in the Federal Parliament directed towards women has had devastating ramifications for those involved.

Timing is always crucial, and the timing of these revelations in the context of the recognition of the work done by Grace Tame (as an activist and advocate for survivors of sexual assault) and Chanel Contos (whose work has highlighted the prevalence of sexual assault in our schools) has brought into renewed national focus issues such as gender equality and the safety of women in our society.

The extent of the issues revealed in the Federal Parliament highlights the important role that businesses will play in this national discussion. Not just because of the amount of time that people spend in their workplaces, but also because of their ability to set the standard of how we expect people to interact in our society.

By paying close attention to the national conversation about these issues, businesses can learn some fundamental lessons about how to address these behaviours in the workplace.

Implement an egalitarian workplace culture

Workplace culture is a very abstract concept that can be very difficult to measure and change in a meaningful way.

In the context of the risk that an employee is subjected to a form of sexual assault or harassment, it's critical to consider whether the management structure and workplace culture encourages or discourages workers from coming forward and making a complaint.

Our Federal Parliament is a very hierarchical workplace. Broadly speaking, the Prime Minister occupies the highest position in the hierarchy, followed by cabinet ministers and then backbenchers.

Ministerial staff are employed pursuant to the *Members of Parliament (Staff) Act 1984* (Cth) ('**the MOP Act**'). In accordance with section 5 of the MOP Act, the terms and conditions of an engagement of a person under the act are determined by the Prime Minister. However, as a matter of practice, it is usually the minister who elects to employ the person who determines the nature and conditions of their employment.

The fact that a ministerial advisor's employment is so dependent on the minister they work for serves as a significant disincentive to make a complaint about other persons conduct in the workplace.

Hierarchical structures also tend to encourage poor behaviour towards persons considered to be "lower" in the structure.

By moving towards a "flat" management structure, workplaces can encourage a collegiate and egalitarian workplace culture in which people feel confident to be able to speak up when they observe misconduct or are subjected to it.

Diversity matters

The cornerstone of any work health and safety strategy is to be able to identify risks in the workplace.

At the moment, only about 25% of Liberal party MPs across state and federal parliaments are female. No statistics are available in respect of the diversity of ministerial staff, but it is widely accepted that it is a "male-dominated" workplace. Even taking into account that other parties might have achieved a greater level of gender parity, Federal Parliament is clearly not representative of the broader community in this regard.

The issue with having a "homogenous" leadership group is that a business has a less diverse range of expertise, qualifications, and experiences to draw on in identifying risks to the business and developing strategies to manage those risks.

It wouldn't make sense for a large publicly listed corporation to only appoint directors with accounting experience because it would leave the board devoid of any legal, business management, or industry-specific expertise. Clearly a leadership group that lacks any meaningful contribution from female leaders will not be as effective in identifying and managing risks to its female workers.

Suppose a business's leadership group does not adequately reflect its workforce. In that case, the business should identify whether any barriers exist that prevent the business from cultivating a more diverse leadership structure.

Be accountable

It is trite to point out that when people engage in misconduct and don't face any consequences, they are more likely to continue to exhibit those behaviours.

As more and more allegations of sexual misconduct in the Federal Parliament come to light, it is clear that there has been an abject failure to hold people accountable for misogynistic behaviour and/or sexual misconduct.

Failing to address misconduct creates a further issue that when a business finally does address the misconduct, it can be seen as capricious and unfair. So not only does the business have a culture that condones this behaviour, but the longer it takes to address the behaviour, the harder it can be to address it.

Misconduct has serious consequences

Willett v State of Victoria

The worker, a police officer, alleged she was bullied after being moved into a new unit. The alleged conduct included:

- conversations concerning the manner in which the police officer was successful in obtaining the position and about her pregnancy;
- the use of the 'black widow' epithet and other offensive conversations;
- requirements to carry out alternative duties while pregnant, which the police officer did not agree to;
- exclusion from social club activities;
- disadvantageous workstation and rostering arrangements and requirements to 'act as messenger'; and
- being ostracised in the workplace.

The Court found that the police officer suffered an injury due to the employer's negligence and awarded her damages in the amount of $250,000.

Full Bench of the Fair Work Commissioner orders reinstatement of employees found to have disseminated pornography in the workplace!

Although the decision was later quashed in the Full Court of the Federal Court, the decision of the Full Bench of the Fair Work Commission in *B, C, and D v Australian Postal Corporation t/as Australia Post* to order the reinstatement of employees despite finding that they had engaged in misconduct, illustrates the difficulties that can arise when employees are not held accountable for their behaviour.

In this case, three employees admitted to using their work email accounts to receive, store, and send pornographic photos and videos. This conduct came to Australia Post's attention due to the installation of new software to monitor the use of the business IT systems.

Australia Post conducted a disciplinary process involving 40 employees for inappropriate use of the business's IT systems. A range of sanctions were used, including termination of employment depending on the identified misconduct's seriousness.

The Full Bench went on to state that:

"*A large volume of material of the sort subsequently identified as unacceptable had been circulating among a large number of employees including, as the Commissioner found, "individuals who fell within a very broad categorisation of those with managerial or supervisory positions". As recipients, those individuals could see that the emails they were receiving were, more often than not, being copied to other employees. Over an extended period, no action was taken by any of those individuals.* ***The primary facts found by the Commissioner call for a finding that the DLC was a workplace where there was a culture of toleration***."

"*The issue was whether the "culture", in combination with the other mitigating factors applicable to each of the Appellants rendered the dismissal harsh, unjust or unreasonable –* ***whether the culture, and the historical absence of monitoring and enforcement of policy within the DLC, rendered it harsh to dismiss an employee without any specific warning for breaches of policy of a type that had been widespread and unaddressed for an extended period***."

Have a robust complaints procedure

Workers need to have confidence that any complaint will be dealt with expeditiously and fairly. Having an appropriate policy in place and sticking to that policy is the best way to create this confidence.

In circumstances where the complaint is more serious or involves someone in a more senior position, it is important to consider whether the business needs to engage a third-party expert to investigate the complaint. This is something that should be set out in the policy.

While any decision regarding the outcome of the investigation will need to be made by the business, when it's reasonable to do so, arranging for an independent third party to investigate the complaint and present the findings to an appropriate decision-maker will assist the process.

Implementing and reviewing such a policy also forms an important part of officers' due diligence obligations under the model work health and safety legislation.

Insecure employment

Consider whether the employment conditions of your workers act as a disincentive to make a complaint.

Pursuant to section 9 of the MOP Act, a consultant will lose their employment if the relevant minister dies, ceases to hold office as a minister, or ceases to administer the relevant Department. This creates a very significant disincentive to make a complaint about a minister, as a ministerial staff member's employment is directly connected to the success (or lack thereof) of the minister they are employed to serve.

Allowing an employee to confront their accusers publicly is not best practice!

Jenny Yang v FCS Business Service Pty Ltd

The Applicant (Ms Yang) was employed as a managing accountant by the Respondent.

The Respondent's director Mr Shen was allegedly told by staff at the workplace Christmas Party that the Applicant had circulated rumours that he was having an affair with one of his employees.

Mr Shen discussed this rumour with several other employees and, in order to determine if the Applicant had spread the rumours, decided to have a meeting with the Applicant.

The Applicant denied spreading the rumours and requested that a meeting be held with all staff present, where she hoped to confront her accusers. During the meeting, the staff were asked to raise their hands if they heard the rumours spread by the Applicant. No hands were raised. The staff were then required by secret ballot to answer YES or NO to the same question. The ballot indicated that 3 staff members had heard the alleged rumours.

Likewise, in the broader workforce, workers in insecure employment are less likely to make complaints or raise issues if they feel it will place their employment at risk. For example, a highly casualised workforce presents a risk to the business. Due to the very nature of the employment relationship, any mistreatment may go unnoticed by the business because the worker fears losing their job if they make a complaint.

If the officers in the business do not know there is an issue, then the issue cannot be addressed and may ultimately result in a significant or catastrophic outcome.

Conclusion

By following recent events in Federal Parliament, and more broadly in the community, there are salient lessons out there for businesses about the risk of a workplace culture developing that is permissive of misconduct.

The ramifications for both the business and the individuals involved can be catastrophic when misconduct is not addressed.

For large businesses with sophisticated HR and WHS expertise in-house, it is well worth requesting a review of the relevant policies and procedures to determine whether they are capable of dealing with the kind of conduct that has been alleged in the Federal Parliament. In particular, any policy regarding complaints of serious misconduct will need to consider what ought to occur when the conduct is of a criminal nature.

For smaller businesses, it can seem overwhelming trying to manage the business and compliance with WHS and HR issues. If your management team does not have the experience and/or expertise to address these issues, consideration must be given to seeking assistance from an expert.

Getting advice from a WHS/HR expert should be viewed no different to seeking expert advice from an accountant about your tax obligations!

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DISSECTING DECISIONS | **By Debra Lane**

An Insurer's Duty of Utmost Good Faith

Australian Securities and Investments Commission v Youi Pty Ltd [2020] FCA 1701

The Chief Justice of the Federal Court of Australia (Allsop CJ) recently added to the growing weight of jurisprudence on breaches by insurers of the duty of utmost good faith. In the decision of *Australian Securities and Investments Commission v Youi Pty Ltd* [2020] FCA 1701 (delivered on 26 November 2020), his Honour was called upon to adjudicate on an application by ASIC seeking declaratory relief against the insurer, Youi, in respect of various alleged breaches of the duty of utmost good faith in contravention of section 13 of the *Insurance Contracts Act 1984* (Cth) (**ICA**).

The application related to Youi's handling of a particular claim first made in January of 2017 under a Home, Building and Contents Policy of Insurance in relation to damage suffered to the insured's property in Broken Hill in November of 2016.

ASIC alleged that Youi had failed to handle the insured's claim with full and frank disclosure, fairness, and in a timely manner.

A statement of agreed facts and admissions was submitted to the Court, by which Youi essentially conceded various breaches of the duty owed.

It was admitted that:

- the ICA applied to the policy;
- a breach of the implied term of utmost good faith constituted a breach of the ICA; and
- Youi had failed to act consistently with commercial standards of decency and fairness and with due regard to the interest of the insured, thereby breaching the implied term of utmost good faith in contravention of section 13 of the ICA.

As a result of the statement of agreed facts and admissions, the scope of the dispute between the parties lay within a narrow compass, and ultimately the trial only addressed the number and precise terms of the declarations to be made by the Court.

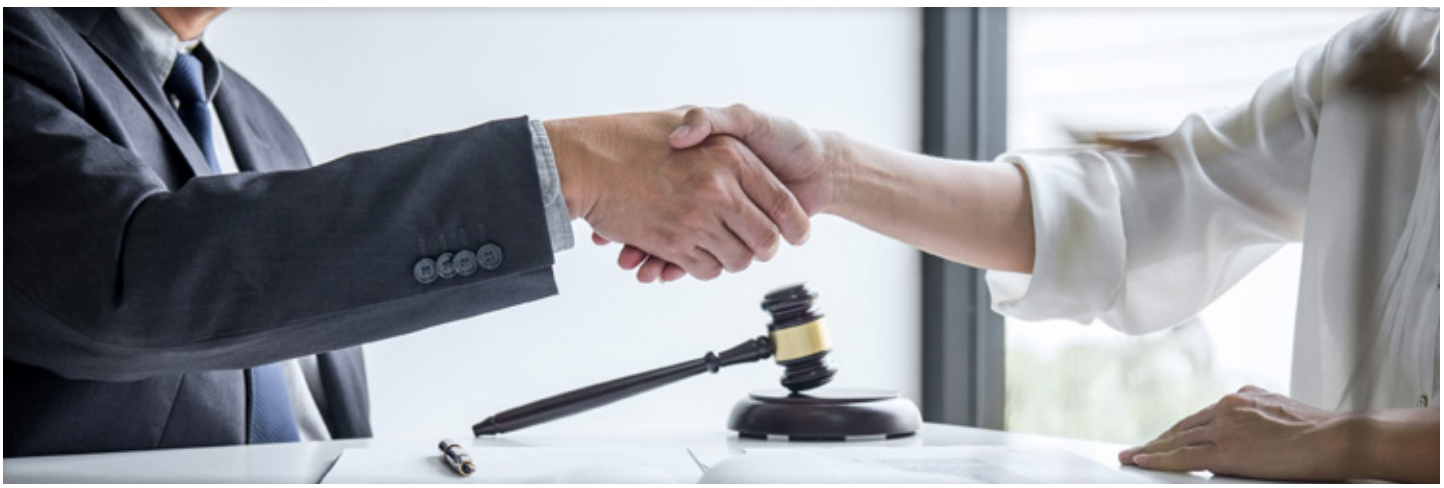
With the parties' agreement, the Judge determined the matter on the papers.

His Honour referred to the application of section 13 (as regards the conduct of an insurer), reported in *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd (No 2)* [2020] FCA 588; 379 ALR 117 and *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36; 235 CLR 1.

Quoting from the *Delor Vue v Allianz* **decision,** His Honour noted:

> "… the obligation of good faith is at the statute says the "utmost good faith". A lack of honesty is not a prerequisite…"

Whereas the classic example of an *insured's* obligation of utmost



"… while a want of honesty will constitute a failure to act with the utmost good faith, want of honesty is not necessary in order to establish a failure to act with the utmost good faith in the context of a contract of insurance. The notion of acting in good faith entails acting with honesty and propriety. Lack of propriety does not necessarily entail lack of honesty."

good faith is a requirement of full disclosure to an insurer (that is to say, a requirement to pay regard to the legitimate interest of the insurer) "*conversely an insurer's statutory obligation to act with utmost good faith may require an insurer to act consistently with commercial standards of decency and fairness, with due regard to the interests of the insured*."

It was noted in *CGU v AMP* that:

> *"… while a want of honesty will constitute a failure to act with the utmost good faith, want of honesty is not necessary in order to establish a failure to act with the utmost good faith in the context of a contract of insurance. The notion of acting in good faith entails acting with honesty and propriety. Lack of propriety does not necessarily entail lack of honesty. Further, the concept of utmost good faith involves something more than mere good faith.*
>
> *…*
>
> *The precise content of the concept of utmost good faith depends on the legal context in which it is used. In the context of insurance, the phrase encompasses notions of fairness, reasonableness and community standards of decency and fair dealing. While dishonest conduct will constitute a breach of the duty of utmost food faith, so will capricious or unreasonable conduct.*
>
> *…*
>
> *utmost good faith involves more than merely acting honestly: Otherwise, the word "utmost" would have no effect. Failure to make a timely decision to accept or reject a claim by an insured for indemnity under a policy can amount to a failure to act towards the insured with the utmost good faith, even if the failure results not from an attempt to achieve an ulterior purpose but results merely from a failure to proceed reasonably promptly when all relevant material is at hand, sufficient to enable a decision on the claim to be made and communicated to the insured."* (See, e.g., *Gutteridge v Commonwealth* unreported, Supreme Court of Queensland, Ambrose J, 25 June 1993).

Factual background

In November of 2012, the insured (Ms Sacha Murphy) took out a policy for home, building and contents insurance with Youi in respect of her home in Broken Hill. The policy was renewed annually thereafter. On 14 October 2015, Youi sent to the insured a letter confirming that the policy would be renewed with an effective renewal date of 16 November 2015 and an expiry date of 15 November 2016. A policy schedule and PDS dated 1 July 2015 were enclosed with the letter. The following was contained in the PDS under the heading "Choice of repairer":

> *"If your claim is accepted and your item can be repaired, at our option, we will arrange repairs with a repairer who is acceptable to us.*
>
> *Wherever possible, we will offer you a choice of repairer from our network of recommended repairers.*
>
> *You may choose another repairer; however we may not authorise repairs. If we do not authorise repairs we will pay you for the fair and reasonable cost of repairs as determined by us, considering a number of factors, including comparison quotes from an alternate repairer we choose and our Quality Guarantee will not apply.*
>
> *You must choose a repairer that is appropriately licensed and authorised by law to conduct the required repairs."*

Meanwhile, on 11 October 2016, Youi entered into a service agreement with a company called

ProBuild Australia Pty Ltd (PA), pursuant to which PA agreed to provide (as a member of Youi's network of "recommended repairers") services including home building repairs, home building replacement assessments, inspections, re-inspections, re-assessments, rectifications and catastrophic damage repairs. The service agreement was for 12 months commencing on 5 October 2016.

On 11 November 2016, the Broken Hill area was hit by a severe hailstorm that damaged the insured's home and, in particular, the roof, an air conditioning unit, the veranda and some contents items.

An estimated 52,387 claims were made across parts of New South Wales, Victoria and South Australia arising from the same hailstorm, with an approximate loss value of $597,000,000; this was subsequently characterised by the Insurance Council of Australia as a catastrophe.

As at 11 November 2016, Youi had two active builder service providers in the Broken Hill area, and PA was added to Youi's list as a third builder service provider in that area.

The insured lodged a claim under the policy on 25 January of 2017 in response to which (on 27 January 2017), Youi requested PA to assess the damage and provide a quotation to rectify the damage. PA inspected the insured's property on 2 February 2017 and emailed its inspection report to Youi on 10 February 2017. Various communications between PA, the insured and Youi followed, and by 5 May 2017, the insured had returned a signed copy of the scope of works provided and remitted the excess due under the policy to PA.

Around that time, Youi commenced an investigation into the claims allocated to PA in the Broken Hill area. That investigation was initiated following Youi's receipt between 6 February 2017 and 3 May 2017 of three complaints from other insureds regarding the quality of PA's workmanship and delays in repairs being carried out by them in the Broken Hill area.

On 5 May 2017, Youi communicated with PA in the following terms:

> *"…YOUI has a number of concerns in relation to repairs being carried out in Broken Hill by ProBuild. Feedback being received is of poor communication and delays in repairs…*
>
> *Please find attached a questionnaire including a list of authorised claims in the region. Please complete the questionnaire providing detailed feedback."*

PA completed and returned the questionnaire.

Around a fortnight later, Youi decided to suspend PA as a service provider in the Broken Hill area. That decision was communicated to PA on 19 May 2017. At that time, Youi communicated internally with its staff, requesting current and new claims not be allocated to PA.

A consequence of Youi's decision was that on 23 May 2017, PA was suspended from Youi's network of recommended repairers for the Broken Hill area for the purposes of the "recommended repairer" term in the PDS. Following PA's

suspension, Youi received a further letter of complaint from another insured in Broken Hill regarding PA's poor communication, lack of professionalism, inadequate supervision and substandard workmanship.

As a result of PA's suspension, Youi gave direction to its staff that no new work was to be allocated to PA and any existing work where repairs had not been commenced by PA would be reallocated (as much as possible) to another contractor, The Roof Company Pty Ltd (**RC**).

On 1 June 2017 a direction was given by Youi to ascertain whether PA had ordered materials for the repairs to the insured's property or started work on the job. If that was not the case, the authority to PA was to be cancelled and reallocated to RC.

Youi communicated with PA in relation to the insured's claim on 6 June 2017 and was advised that PA's site manager had attended the insured's property on 2 June 2017 to check measurements. Youi asked PA to refrain from ordering any materials. The next day, PA emailed Youi, indicating that materials had been ordered but not yet delivered. On 28 June 2017, Youi received from PA a spreadsheet with details of PA's outstanding work in the Broken Hill area.

The insured contacted Youi on 29 September 2017 to advise that PA had still not commenced work and she was unhappy with the continued delays. On enquiry by Youi, a representative of PA advised that the repairs to the property would be commenced on 3 October 2017. That same day, Youi advised PA it would not be extending or renewing PA's service provider contract beyond the current period.

On 4 October 2017, the insured emailed Youi stating that she had been waiting almost 12 months for the work to begin and that the $775 excess had been paid 7 months previously, *expressly* so the repair work could commence.

On 5 October 2017, the insured informed Youi by phone that part of the roof of her home was open to the elements and rain was forecast. Youi contacted PA and asked them to send someone to the insured's property to undertake make-safe works by covering the roof with a tarpaulin to prevent further damage. PA did not, in fact, undertake the make-safe works and did not inform Youi that it had not covered the roof. Youi made no enquiries as to whether the make-safe work had been performed.

On 6 October 2017, the insured phoned Youi and advised that lead contamination from the damaged property was exposing her to a serious health risk as she was by then pregnant. She said PA had "packed up and left".

The Insured emailed Youi a formal letter of complaint on 2 November 2017. This complaint detailed over six pages of various grievances with Youi's handling of the Claim. One particular matter raised was that the delays in the completion of the repairs to the roof meant that the remediation works at the Property recommended by the EPA to remove the lead contamination were consequently delayed.

Eventually, on 15 February 2018, Youi appointed another authorised repairer (RC) to proceed with the repair work to the insured's property. RC produced a scope of works which the insured informed Youi was inadequate to cover the original damage and the subsequent issues which had arisen as a result of PA's delays.

In response, the Insured emailed both Youi and RC in identical terms on 20 February 2018 and noted that they were "still in different ballparks in regards to the damage now relevant from both the initial incident and further in-competencies". The 20 February 2018 email set out the Insured's concerns as to various deficiencies in the RC Scope of Works such that it was in her view insufficient to rectify all of the damage that the Property had sustained and which needed to be repaired in fulfilment of the Claim.

RC then issued a revised scope of works to the insured on 13 April 2018, which was signed and returned to RC that same day. RC commenced the repairs to the roof of the property in early May 2018, and the majority of the works were completed on about 18 May 2018. However, repairs to the bathroom damaged by water ingress as a result of PA's failure to undertake make-safe works were not completed until around 8 November 2018.

Various failings were admitted by Youi, and it further admitted that the policy was a contract of insurance to which the ICA applied and that, pursuant to section 13 (2) of the ICA, a breach of the implied term of utmost good faith constituted a breach of the ICA.

Youi admitted the following

breaches of the duty of utmost good faith:

a. Failure to handle the claim with full and frank disclosure and with fairness.

b. Failure to handle the claim in a timely manner.

c. Failure to handle the claim in a timely manner as regarding the make-safe issue.

d. Failure to respond to the 2 November 2017 complaint with clarity and candour and in a timely manner and failed to handle the claim in a timely manner.

e. Failure to act consistently with commercial standards of decency and fairness with due regard to the interest of the insured and in each case, Youi thereby breached the implied term of utmost good faith in contravention of section 13 of the ICA.

His Honour considered declaratory relief to be appropriate and that it was unnecessary to decide whether power existed under section 1101B of the *Corporations Act 2001* (Cth) as ample power existed from section 21 of the *Federal Court of Australia Act 1976* (Cth) to make orders.

His Honour also agreed that as the statutory regulator, noting ASIC was the appropriate party to seek the declarations.

He said that the form of declaratory relief should identify for the purposes of both the defendant and others in the industry that conduct of this character is a breach of the important duty of utmost good faith and will be exposed to the community as such.

His Honour considered that a single declaration was sufficient to express the different occasions and different conduct that amounted to the contravening conduct.

The declaration made was in the following terms:

a. From 19 May 2017 to on or about late December 2017 or January 2018, Youi failed to take reasonable steps to:

   i. Inform the insured that the contractor it proposed to carry out repairs to the insured's property had been a subject of numerous complaints to Youi in respect of delays and the quality of its work;

   ii. Inform the insured that PA was not a repairer acceptable to Youi and/or a repairer from Youi's network of recommended repairers for the purposes of and as required by the policy;

   iii. Afford the insured an opportunity to request the appointment of a repairer (other than PA) from Youi's network of recommended repairers, as required by the policy; and

   iv. Seek to terminate the engagement of PA notwithstanding the matters in sub-paragraphs i. – iii. above.

b. From 24 May 2017 to about 29 September 2017, Youi failed to take reasonable steps to ensure that any builder commenced repairs to the property.

c. From on or about 4 October 2017 to at least 15 November 2017, Youi failed to take reasonable steps to effect make-safe works to the property.

d. From 2 November 2017 to at least 18 May 2018, Youi failed to take reasonable steps to consider and respond to the formal complaint made by the insured on 2 November 2017.

e. From 20 February 2018 to 5 April 2019, Youi failed to take reasonable steps to respond to the email the insured sent Youi on 20 February 2018, thereby further delaying the completion of the repairs.

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INSIGHT | **By Navar Amici**

NFT's Explained: The Intellectual Property Implications of Licencing Digital Assets Through Blockchain

On 11 March 2021, digital artist Beeple sold a Non-Fungible Token (**NFT**) of his artwork for $69 million USD.[1] According to Christie's, the auction house behind the sale, Beeple, is now among the top three most valuable living artists.[2] But what is an NFT? And what has the purchaser actually bought?

An introduction to NFTs

An NFT is a unit of data on a digital ledger called a blockchain. A blockchain is a list of records or "blocks" containing encrypted information about the previous block, including a timestamp and transaction data. That data is, in theory, immutable. The blockchain is distributed through the internet on a peer-to-peer network to blockchain users, referred to as nodes. Each node adheres to a protocol for internode communication. This has the effect of totally decentralising the storage of the blockchain and makes editing the ledger impossible because each node is coded to cross-check and authenticate each block in the chain. The cryptographic securitisation of the blockchain is a significant factor in why the technology has enjoyed its rapid rise to prominence as the backbone of various digital currencies (like Bitcoin and Ethereum). The Hedge Fund Research's Blockchain Composite Index recorded that on average crypto-currency hedge funds gained 194% in 2020 and 48% in January 2021 alone.[3] Even more staggering, according to Forbes, within less than three months, the combined market cap of major NFT projects in 2021 has increased by 1,785%.[4]

Unlike crypto-currencies, NFTs are unique, and as such, are not interchangeable. It is this quality that has led to the use of NFTs as a means to commodify digital creations, such as digital art, video games, and music files. An NFT is created by uploading a file, such as an artwork, to an NFT auction market, such as KnownOrigin, Rarible, or OpenSea. The market then creates a hash of the file, which is recorded on the blockchain as an NFT. The NFT can then be bought and resold on the digital market with crypto-currency.

Buying an NFT

In its most basic form, an NFT's relationship to digital media is similar to the relationship between a certificate of title and real property. In that respect, an NFT is not the digital asset itself, but an electronic record representing ownership of rights in relation to the asset. Thus, just like Land Services SA keeps certificates of title and a record of property ownership in South Australia, the blockchain will maintain a record of ownership and authorship of the NFT.

1 https://www.nytimes.com/2021/03/11/arts/design/nft-auction-christies-beeple.html
2 https://www.businessinsider.com.au/art-auction-nft-beeple-top-selling-most-expensive-sale-millions-2021-3
3 https://www.hedgeweek.com/2021/02/12/295867/cryptocurrency-hedge-funds-stratospheric-rise-continues-more-managers-join
4 https://www.forbes.com/sites/youngjoseph/2021/03/29/nft-market-rages-on-nfts-market-cap-grow-1785-in-2021-as-demand-explodes/?sh=29a5575f7fdc

However, owning an NFT does not necessarily mean that you own the asset underlying the NFT. NFTs typically have associated smart contracts which govern the use of a given asset and the respective rights granted to the NFT owner. The extent of the rights granted by the NFT is a matter for the owner of the intellectual property in the asset. As such, contracts for the sale of NFTs and the variance between them tend to resemble commercial licencing contracts more closely than contracts for real property.

Without an express term in the contract, the NFT owner does not acquire a right to reproduce, make derivative works of, perform, display or distribute copies of the underlying asset. These activities remain the exclusive domain of the owner of the copyright.

Below are two examples of how NFTs have been used so far:

1. The NBA has sold NFTs of particular highlights they call 'moments' on its own proprietary blockchain.[5] The associated NFT contracts grant licences to the owner of the 'moments' for the "use, copy, and display" of the asset solely for "personal, non-commercial use" or "as part of a third-party website or application".

2. On 5 March 2021, Kings of Leon became the first band to release an album as an NFT.[6] The contract for that album provides that the owner has a right to display the art and included merchandise, but only for personal purposes, and expressly prohibits the album's use in third-party products or within movies and other media.

Why not just licence?

As can be seen from the above, NFT contracts share very similar terms to that of standard licencing agreement – so why use NFTs? One major reason to use NFTs is that they allow for new avenues of commodification. For example, the NBA 'moments' (referenced above) are widely available video files that can be accessed on YouTube or a host of other websites. As the owner of the intellectual property in the videos, the NBA can commodify it by making licences in respect of the video available for purchase. This generates an additional income stream for the NBA and allows fans to "own" a collectable item - trading cards for the digital age.

From another perspective, while traditionally, artists who create physical art would be able to hand over tangible, non-replicable property at the point of sale, the purchase of digital art is constrained by the inability to verify the purchase of infinitely replicable art. NFTs go some way to resolving that problem by creating a means to verify the owner (or owner of a licence) of a digital asset. Additionally, a smart contract can be written into the NFT itself, which can guarantee certain rights in respect of the digital asset in perpetuity. For example, the NFT may guarantee that a portion of any subsequent sale is paid to the original NFT creator.

5 https://www.cnbc.com/2021/02/28/230-million-dollars-spent-on-nba-top-shot.html

6 https://www.rollingstone.com/pro/news/kings-of-leon-when-you-see-yourself-album-nft-crypto-1135192/

"...where traditional breaches of copyright tend to have a limited chain of affected people, the owner, the breaching party and (in some cases) the third party purchaser, the consequence of the emerging market for trading NFTs could result in repeated on-selling by purchasers, creating a massive flow-on effect."

IP implications

NFTs are still very much a new use of blockchain technology, and there remains significant uncertainty around the practicalities of their use as an alternative to traditional licensing arrangements for digital assets.

One significant issue that has not been widely addressed is the enormous potential for creators to have their work converted into an NFT (or 'tokenised') without their permission. In that circumstance, traditional copyright laws will likely apply to allow the copyright owners to pursue an action in damages and a remedy in equity for an account of profits. However, where traditional breaches of copyright tend to have a limited chain of affected people, the owner, the breaching party and (in some cases) the third party purchaser, the consequence of the emerging market for trading NFTs could result in repeated on-selling by purchasers, creating a massive flow-on effect.

While the law may provide a means to claim damages for breach of copyright, blockchain transactions are anonymous and irreversible; without proper verification measures being taken, actually locating a perpetrator may prove impossible. Some platforms have implemented steps in an attempt to combat this issue, including through manual verification. For example, marketplace SuperRare requires that artists seeking to sell their work on its platform submit an application form with their name, email, selection of artworks and social network presence.[7] While not foolproof, this is at least a positive step in ensuring that purchasers receive authentic assets from people who own the appropriate rights.

The creation of enforceable contracts which attach to NFTs is another complex issue, particularly given the anonymity of crypto-currency transactions. This is notwithstanding the uncertainty as to the application of current laws surrounding when alterations can be made to licenced assets and at what point alterations are so substantial that they constitute the creation of a new asset. Additionally, the implications of how the blockchain itself would be affected in these instances remains completely untested.

Lastly, it is currently unclear how NFTs will account for moral rights in the creation of digital assets. For example, how co-contributors to works or derivative works will be credited with authorship.

Conclusion

As with any new technology, the law is often faced with the complicated task of playing catch-up. While this is not ideal and leads to significant uncertainty for early adopters, it is often impossible for the law to stay ahead of innovation. Given the explosion of NFTs in the past six months, we consider that the potential for exploitation is severe. Therefore, we strongly recommend seeking legal advice if you are planning to enter the NFT sphere.

7 https://superrare.co/about

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INSIGHT | **By Joe De Ruvo & Navar Amici**

Jurisdiction Clauses: A Primer

It's an all too common scenario:

1. Company A is based in South Australia;
2. Company B is based in Queensland;
3. Company A provides services to Company B in Victoria under a contract;
4. Company A breaches the contract.

In which state should Company B bring their claim? It's a straightforward question, but the answer isn't always so simple.

Jurisdiction clauses

As the claim is for a breach of contract, the first port of call will be to look at the contract itself to see whether it contains any dispute resolution clauses.

Typically, a dispute resolution clause will contain subclauses relating to jurisdiction and the choice of law. A choice of law clause specifies the law and rules which are to be followed in any dispute resolution process arising out of the contract. A jurisdiction clause specifies where that dispute will be heard. However, a dispute resolution clause is capable of being as complex or simple as the parties desire. As President of the NSW Court of Appeal, Justice Bell stated:

> "*Dispute resolution clauses may be crafted and drafted in an almost infinite variety of ways and styles. The range and diversity of such clauses may be seen in the non-exhaustive digest of dispute resolution clauses considered by Australian courts over the last thirty years": Inghams Enterprises Pty Ltd v Hannigan* [2020] NSWCA 82.

Generally, there are two types of jurisdiction clauses: exclusive and non-exclusive. As the name suggests, a non-exclusive jurisdiction clause provides a potential forum to hear the dispute but does not limit the claim being brought in other jurisdictions; alternatively, an exclusive jurisdiction clause purports to limit the claim being brought to the place specified in the contract. It goes without saying that it is incredibly important when drafting a contract that due consideration is given to these clauses, as an inconvenient forum can be costly, and an unfavourable choice of law can be fatal.

An exclusive jurisdiction clause may specify that disputes under the contract are to be heard at arbitration or in public courts. Pursuant to s 7(2) of the *International Arbitration Act 1974 (Cth), where proceedings are instituted by a party to a mandatory arbitration agreement, and the matter in question is "capable of settlement by arbitration", the court will stay proceedings and refer the parties to arbitration: Roy Hill Holdings Pty Ltd v Samsung C&T Corporation [2015] WASC 458. The arbitration clause will usually specify a particular set of arbitration rules to be applied, the arbitration centre which will hear the dispute, whether that decision will be binding on the parties, and any appeal rights.*

Changing forums

In cases where no exclusive jurisdiction clause applies, even after a claim has been brought, an application can be made to transfer proceedings to the Supreme Court of another state or territory under section 5(2)(b) of the uniform cross-vesting

"a properly drafted dispute resolution clause can help prevent jurisdictional disputes from arising."

jurisdiction legislation (**CV Acts**). In such an application, the Courts will consider a variety of factors in determining whether the proposed transfer of jurisdiction is "more appropriate" for the relevant proceedings.

The "more appropriate" forum will ordinarily be the jurisdiction "with which the action has the most real and substantial connection", having regard to objective factors: *BHP Billiton Ltd v Schultz (2004) 221 CLR 400*; [2004] HCA 61 at [170] per Kirby J. Those factors include:

1. the location where the parties reside and carry on business: *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400; [2004] HCA 61 at [19]; *British American Tobacco Australia Ltd v Gordon* [2007] NSWSC 230 at [69];

2. the location where the cause of action arose: *British American Tobacco Australia Ltd v Gordon* [2007] NSWSC 230 at [69];

3. the law governing the relevant transaction and any choice of jurisdiction by the parties: *Asciano Services Pty Ltd t/as Pacific National v Australian Rail Track Corp Pty Ltd* [2008] NSWSC 652 at [18]–[19]; *Taurus Funds Management Pty Ltd v Aurox Resources Ltd* [2010] NSWSC 1223 at [38]–[39];

4. the disparity in the financial resources of the parties and the potential for the conduct of hard-fought interstate commercial proceedings to exacerbate the existing imbalance of financial resources between these two litigants: *Plantagenet Wines Pty Ltd v Lion Nathan Wine Group Australia Ltd* at 82; and

5. the location and availability of witnesses: *Bourke v State Bank of New South Wales* (1988) 22 FCR 378 at 394; *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at [170], [256].

The decision in *Santos Ltd v Helix Energy Services Pty Ltd* [2009] VSC 282 provides an example of how the Court weighs these competing interests. In that case, the court balanced the effect of a non-exclusive jurisdiction clause with the location of the parties, the location of the lawyers, the location of the documents, the location of the events, and the location of the witnesses.

Ultimately, a properly drafted dispute resolution clause can help prevent jurisdictional disputes from arising. However, in circumstances where the jurisdiction of disputes has been left open by a contract, it's important to remember that it is possible to change the forum even after proceedings have commenced.

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NEWS & VIEWS | **By Patrick Walsh**

Safety Requirements for "General Use" Quad Bikes

The *Consumer Goods (Quad Bikes) Safety Standard 2019* ('**the Standard**') commenced operation on 11 October 2019. This much-debated standard placed a range of safety requirements on the operators and manufacturers of quad bikes and persons importing second-hand quad bikes in Australia.

From 11 October 2021, quad bikes that meet the definition of a "*general use quad bike"* will need to meet further conditions in order to be used, purchased, or imported into Australia. Any quad bike used in a farming operation will meet the definition of a *general use quad bike.* Such vehicles will:

1. require a specified operator protection device (rollover protection); and
2. be required to meet performance standards in respect of:
    a. lateral roll;
    b. forward pitch; and
    c. rearward pitch.

As the Standard has been made under the *Australian Consumer Law*, a lot of the focus has been on the manufacturers of quad bikes and whether they will continue to produce vehicles for the Australian market. Honda has recently confirmed its decision to exit the Australian market on 10 October 2021.

It will be important that any persons or businesses operating quad bikes that meet the definition of *general use quad bike* **but do not currently meet the higher requirements of the Standard** modify their vehicles or purchase replacements that meet the Standard before 11 October 2021.

Although the Standard is not a code of practice approved by the relevant Minister under the *Work Health and Safety Act 2021* (SA) ('**the WHS Act**'), it is also likely that any persons who continue to operate unmodified *general use quad bikes* will be at significant risk of being found to be in breach of the WHS Act by doing so.

If, for some reason, you are not able to retrofit your existing quad bike(s) to meet the Standard, or purchase a suitable quad bike, consider whether another vehicle might be more suitable for your operation, such as a side by side vehicle.

Anyone that is unsure about what their obligations are, or if they are meeting them, should seek advice from an expert. While it may be frustrating and costly to act now, failing to meet the Standard could well be a far more expensive exercise.

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DISSECTING DECISIONS | **By Sandy Donaldson & Amy Bishop**

When are Directors Liable for Misleading or Deceptive Conduct, Passing off, Trade Mark Infringement or Unconscionable Conduct?

"What is the line between inspiration and appropriation?"

This is how Federal Court Judge the Honourable Justice Katzmann began her 75-page judgment on the case of IN-N-OUT Burgers, Inc v Hashtag Burgers Pty Ltd, Benjamin Mark Kagan and Andrew Saliba.[1] Messrs Kagan and Saliba were the sole directors and sole shareholders of Hashtag Burgers Pty Ltd (**Hashtag Burgers**).

Her Honour's judgment was later appealed by the Hashtag Burgers, Kagan and Saliba, to the Full Court of the Federal Court (**Appellate Court**) with a cross-appeal by the IN-N-OUT Burgers Inc (**INO Burgers**).[2] While it is the appellate judgment of Justices Nicholas, Yates and Burley that is of most interest here, it is necessary first to understand the background of the original proceeding.

The original proceeding

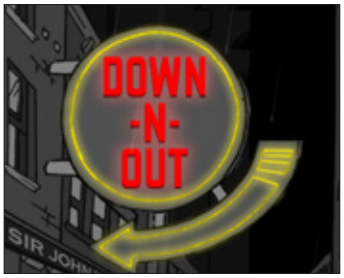
INO Burgers commenced legal action against Hashtag Burgers and Kagan and Saliba for trade mark infringement, misleading or deceptive conduct contrary to the *Australian Consumer Law* (**ACL**) and the tort of passing off.

INO Burgers is a company in the United States of America with over 300 restaurants in that country by May 2016. Each restaurant sells burgers and familiar accoutrements at fast-food restaurants such as French fries and drinks. Each restaurant was branded with the composite trade mark (**INO logo**) below.

INO Burgers has registered trade marks in Australia for the INO logo in classes for restaurant services and goods such as hamburger and cheeseburger sandwiches. It also has word marks for INNOUT BURGER, PROTEIN STYLE and ANIMAL STYLE for similar goods and services.

Although INO Burgers does not have permanent brick and mortar stores in Australia, since 2012, it has been regularly hosting pop-up restaurants in Australia, which are usually sell-out events.

In May 2016, Kagan and Saliba started personally using the name DOWN-N-OUT (**DNO**) to promote their restaurant services for the sale of fast food, including burgers, French fries and drinks using the logo below on an Instagram page and a Facebook page.



They started with pop-up events around Sydney, then a pop-up restaurant in Sydney, which they announced with a media release entitled "Sydney's Answer to In-N-Out Burgers Has Finally Arrived".

In June 2016, Kagan and Saliba used the following logos to promote the DNO restaurants:

1 *In-N-Out Burgers, Inc v Hashtag Burgers Pty Ltd* [2020] FCA 193.
2 *Hashtag Burgers Pty Ltd v In-N-Out Burgers, Inc* [2020] FCAFC 235.

It was also relevant that the similarities between DNO and INO Burgers did not end at the logo. Like INO Burgers, DNO featured a "*secret menu*" and also offered burgers in "ANIMAL STYLE" and "PROTEIN STYLE".

On 23 June 2017, Kagan and Saliba incorporated Hashtag Burgers and became its sole directors and sole shareholders. Following that, Hashtag Burgers operated a growing number of burger restaurants with the same name, DNO.

Later the name was changed to omit hyphens and appeared as DOWN N' OUT and later D#WN N' OUT.

Judgment in original proceeding

In the original proceeding, the trial judge found that Kagan and Saliba and Hashtag Burgers went beyond simply having been inspired by INO Burgers. All three were found to be jointly and severally liable for trade mark infringement, passing off and misleading or deceptive conduct in contravention of the Australian Consumer Law (**ACL**), specifically:

- before the incorporation of Hashtag Burgers, Kagan and Saliba were jointly and severally liable for this conduct; and
- after the incorporation of Hashtag Burgers, liability rested with Hashtag Burgers, and Kagan and Saliba were knowingly concerned in, and liable for, its contraventions of the ACL that took place after that date. However, her Honour was not satisfied that Kagan and Saliba were also jointly and severally liable with Hashtag Burgers for trade mark infringement or passing off.

The appeal

Hashtag Burgers and Kagan and Saliba appealed against her Honour's findings that they were liable for trade mark infringement, passing off and misleading or deceptive conduct in contravention of the ACL.

INO Burgers cross-appealed against her Honour's finding that Kagan and Saliba were not jointly and severally liable for Hashtag Burgers' conduct of trade mark infringement and passing off while acting as directors and sole shareholders of Hashtag Burgers.

On appeal, the Appellate Court found no reason to depart from the trial judge's findings that Hashtag Burgers and Kagan and Saliba were liable for trade mark infringement, passing off and misleading or deceptive conduct in contravention of the ACL. The appeal was accordingly dismissed.

"All three were found to be jointly and severally liable for trade mark infringement, passing off and misleading or deceptive conduct in contravention of the Australian Consumer Law (ACL)"

On the cross-appeal by INO Burgers, the Appellate Court firstly summarised the trial judge's relevant findings of fact and conclusions as follows:

1. Kagan and Saliba were the sole shareholders of the company and also its sole directors.
2. They alone made decisions as to its management.
3. They alone were entitled to any profits that might be derived from the company's torts.
4. The company was the vehicle through which the business they ran continued to be conducted. It was, in effect, their alter ego.
5. There was no evidence to indicate that incorporation of the company made any significant difference to the way the business was run or business decisions made.
6. It was possible to infer that they were not only closely involved in the operation of the business of Hashtag Burgers, but they were also the only people involved.
7. Kagan and Saliba decided to continue to use the "Down-N-Out" name in its various iterations, which her Honour found "*to be the essence of the torts*".

Despite the above, the primary

"If a director deliberately takes steps to procure the commission of an act which the director knows is unlawful and procures that act for the purpose of causing injury to a third party, then plainly it is just that liability should be imposed upon him."

judge found that Kagan and Saliba were not joint tortfeasors in respect of the trademark infringement or passing off by Hashtag Burgers. As noted above, this was the subject of the cross-appeal.

Liability of directors

The Appellate Court applied the authority of *JR Consulting & Drafting Pty Ltd v Cummings*,[3] citing paragraphs 350 and 351 of that case in relation to determining whether a director of a company will be jointly liable as a tortfeasor with that company:

> [350] … the director must be shown to have directed or procured the tort and the conduct must, clearly enough, go beyond causing the company to take a commercial or business course of action or directing the company's decision-making where both steps are the good faith and reasonable expression of the discharge of the duties and obligations of the director, as a director. The additional component required is a "close personal involvement" in the infringing conduct of the company and inevitably the quality or degree of that closeness will require careful examination on a case by case basis. That examination might show engagement by the director of the kind or at the threshold described by Finkelstein J in Root Quality at [146] (as earlier discussed) which would undoubtedly establish personal liability in the director or a less stringent degree of closeness (perhaps described as "reckless indifference" to the company's unlawful civil wrong causing harm), yet sufficiently close to demonstrate conduct of the director going beyond simply guiding or directing a commercial course and engaging in (perhaps vigorously) decision-making within the company as a director.
>
> [351] Ultimately, the question, on the facts, is what was the conduct of the director said to go beyond the proper role of director so as to descend into the realm of "close personal involvement"?

The Appellate Court also cited paragraph 342 of JR Consulting, in which the Full Court cited *Root Quality Pty Ltd v Root Control Technologies Pty Ltd*[4]:

> [146] The director's conduct must be such that it can be said of him that he was so personally involved in the commission of the unlawful act that it is just that he should be rendered liable. If a director deliberately takes steps to procure the commission of an act which the director knows is unlawful and procures that act for the purpose of causing injury to a third party, then plainly it is just that liability should be imposed upon him. [emphasis added]

The Appellate Court went on to say (at paragraph 138) that "*plainly enough, to incur personal liability for a tort committed by a company, a director must be acting beyond their proper role as a director.*" and applied the statement of Besanko J in a case of *Keller v LED Technologies Pty Ltd*[5] where his Honour said that:

> …A "close personal involvement" in the infringing acts by the director must be shown before he or she will be held liable. The director's knowledge will be relevant. In theory, that knowledge may range from knowledge that

"...plainly enough, to incur personal liability for a tort committed by a company, a director must be acting beyond their proper role as a director."

3 *JR Consulting & Drafting Pty Ltd v Cummings* [2016] FCAFC 20;116 IPR 440.

4 *Root Quality Pty Ltd v Root Control Technologies Pty Ltd* [2000] FCA 980 at [146].

5 *Keller v LED Technologies Pty Ltd* [2010] FCAFC 55.

"A director's close personal involvement can not only lead to liability as a joint tortfeasor (as was the case with the directors of Hashtag Burgers) but can also give rise to liability under specific provisions of the ACL for compensatory damages and penalties as well as being subject to disqualification as a director."

the relevant acts are infringing acts to knowledge of an applicant's registered designs to knowledge of acts carried out by others.

The Appellate Court found that Kagan and Saliba were in fact joint tortfeasors to Hashtag Burgers' conduct following incorporation based on the following findings by the trial judge:

1. they were sole directors of Hashtag Burgers;
2. they alone made decisions as to its management;
3. they alone received the profits derived from it;
4. there was no significant difference between the way that they operated the business before incorporation and the way in which they operated it through the corporate vehicle after it was formed; and
5. they were knowingly involved in the company's wrongdoing.

The Appellate Court found that these five matters taken together demonstrated that Kagan and Saliba had a sufficiently close personal involvement with the actions of Hashtag Burgers as to attract liability as joint tortfeasors and *"that their conduct as individuals went beyond the threshold of performing their proper roles as directors"*.

ACL liability

A director's close personal involvement can not only lead to liability as a joint tortfeasor (as was the case with the directors of Hashtag Burgers) but can also give rise to liability under specific provisions of the ACL for compensatory damages and penalties as well as being subject to disqualification as a director. This was recently borne out in Australian Competition and Consumer Commission (ACCC) v Quantum Housing Group Pty Ltd (No 2).[6]

In the course of its business of arranging investments, Quantum Housing Group Pty Ltd (**QHG**) sent rounds of correspondence to investors containing purported requirements for their continued access to incentives under the government funded National Rental Affordability Scheme (**NRAS**). QHG was an 'Approved Participant' of the NRAS and, on that basis, had entered agreements with private investors who would purchase properties from QHG in circumstances where the private investors would receive part of the NRAS incentive. The correspondence sent to investors was part of a plan devised by QHG, at a time when Ms Cheryl Howe was QHG's sole director and sole secretary, in conjunction with a Mr Ashley Fenn. The plan's main aim was to have the private investors change managers of their investment properties to entities controlled by Mr Fenn, under the guise of these entities being 'QHG approved property managers'. The representations made to the investors included telling them they would be in breach of their agreement and not entitled to the NRAS incentive if they did not make the switch, which was untrue, and requiring payment of a security deposit to protect their interests, which in fact only served to protect QHG interests.

QHG's conduct was found to be misleading or deceptive conduct in breach of Section 18(1) of the ACL and to also have made false or misleading representations in breach of Sections 29(1)(l) and 29(1)(m). On appeal, the Full Court of the Federal Court[7] also found that QHG engaged in unconscionable conduct. Specifically, the appeal Court held that unconscionable conduct for the purposes of Section 21 of the ACL should not be limited to taking advantage of consumers

6 *Australian Competition and Consumer Commission (ACCC) v Quantum Housing Group Pty Ltd* (No 2) [2020] FCA 802

7 *Australian Competition and Consumer Commission (ACCC) v Quantum Housing Group Pty Ltd* [2021] FCAFC 40

who are in a vulnerable or disadvantaged position, but has a broader scope applying to situations that essentially are against conscience.

Although the appeal is of most importance for its determination of the scope of unconscionable conduct under Section 21 of the ACL, it also makes it clear that a director's liability, when he or she is knowingly concerned in the conduct of the company, can apply to a company's unconscionable conduct. This has significance for directors because, under the ACL, where a person is knowingly concerned or otherwise involved[8] in offending conduct, the Courts' power to impose pecuniary penalties[9] and disqualify persons from acting as directors[10] does not apply to a breach of Section 18 for misleading or deceptive conduct, but they do apply to unfair practices, such as false or misleading representations about goods or services, and, relevantly, a situation where there has been unconscionable conduct.

Ms Howe was found, at first instance, which was not altered on appeal, to have been knowingly concerned in the conduct of QHG. She was required to pay $50,000 in penalties, plus $10,000 towards costs, and was disqualified from managing a corporation for 3 years.

Justice Colvin made note of the following in finding that Ms Howe was knowingly concerned in QHG's conduct:

1. she was the sole director and secretary of QHG and controlled QHG;

2. she was involved in the implementation and execution of the arrangements for sending the correspondence;

3. she directed and was in control of the employees of QHG for the period of its offending conduct and, in particular, directed the staff who sent out the correspondence; and

4. it was her role to ensure the conduct of the company conformed with the law and appropriate standards of commercial behaviour.

Ms Howe was held responsible and incurred significant penalties even though it was recognised that someone else, namely Mr Fenn, was deriving and benefitting from QHG's conduct and that Ms Howe did not gain any personal benefit from the conduct.

How this may be relevant to you

The ways in which Kagan and Saliba ran Hashtag Burgers may not be dissimilar to how many small businesses are run. Businesses that wish to emulate the business model of another successful business need to be careful and obtain timely and competent advice to ensure that there is not likely to be an infringement of rights of the other business or misleading or deceptive conduct. Business should, obviously, also be conducted honestly and in good conscience.

Directors of companies need to be aware that if they substantially control a company they may be personally liable for infringements or torts of the company. Directors may also, where they are sufficiently involved in a company, be disqualified as a director or incur penalties in relation to any unconscionable conduct or unfair practices instigated by the company. However, even having regard to the matters listed by the Appellate Court in *In-N-Out Burgers*, just when the *"threshold"* between acting merely as a director and being personally involved is reached may not be clear.

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8 which has a specific meaning, as set out in Section 2 of the ACL.
9 Section 224 of the ACL.
10 Section 248 of the ACL.

NEWS & VIEWS | **By John Walsh & Tiffany Walsh**

Workers Compensation, Health and Safety and COVID-19

The *Work Health and Safety Act 2011* (Cth) ("**the WHS Act**") and, in South Australia, the *Work Health and Safety Act 2012* (SA) ("**the SAWHS Act**") exist to ensure the health and safety of people in the workplace. Both the WHS Act and the SAWHS Act create offences with respect to the breaching of duties in relation to health and safety, and the maximum penalties include significant financial penalties and imprisonment.

We have previously written about the duties that the harmonised Work Health and Safety legislation (which operates in all Australian jurisdictions other than Victoria and Western Australia) could potentially impose on any entity that meets the definition of a *person conducting a business or undertaking* ("**PCBU's**").[1] It is arguable that PCBU's could even be held liable for outbreaks of COVID-19 in their workplaces under the WHS Act or the SAWHS Act, as they currently are for other breaches of their health and safety duties.

This is particularly significant as we approach the middle of Winter in Australia and because of the recent emergence of the highly transmissible Delta variant. The concerning outbreaks in NSW and Victoria recently have reminded us of the ever-present danger we face from COVID-19. Despite the fact that the Australian rollout of the COVID-19 vaccination has begun, the stuttering nature of the rollout means that not enough people have been vaccinated to offer widespread community protection. As such, we expect that COVID-19 will continue to be a significant threat for some time yet.

Under the *Return to Work Act 2014* (SA) ("**the RTW Act**"), a 'disease' can be considered an injury.[2] A 'disease' is further defined to include "*any physical or mental ailment, disorder or morbid condition, whether of sudden or gradual development*".[3]

An injury is only compensable under the RTW Act if it has arisen from employment, and the employment must have been a significant contributing cause of the injury.[4] The test for this is the "*balance of probabilities*".[5]

In *Ward v The State of SA (Department for Primary Industries and Regions SA (PIRSA))* [2016] SAET 28 ("***Ward***"), the use of the word "significant" was examined. His Honour Deputy President Judge Gilchrist stated that:

> *"The word 'significant' as it appears in s 7 of the [RTW] Act is not a term of art. It is an ordinary word that requires a trier of fact to make an evaluative judgement as to whether or not there is a sufficiency of a connection between the worker's employment and the injury to permit the conclusion that the worker's employment was a significant contributing cause of the injury.*
>
> *The use of the indefinite article 'a' is important. It means there can be multiple contributing causes to an injury, and that one or some can be very important, yet some other cause that is*

1 https://www.dwfoxtucker.com.au/2020/05/work-health-and-safety-during-a-pandemic-the-issue-of-vaccination-for-businesses

2 *Return to Work Act 2014 (SA), s 4(a)(ii) (definition of 'injury').*
3 *Return to Work Act 2014 (SA), s 4(a) (definition of 'disease').*
4 *Return to Work Act 2014 (SA), s 7(1), (2).*
5 *Return to Work Act 2014 (SA), s 9(1).*

less important can nonetheless still be a significant contributing cause."

In Roberts v State of South Australia (TAFE SA) [2016] SAET 58 ("***Roberts***"), His Honour Deputy President Calligeros considered Ward and stated that:

"Ultimately, whether employment is a significant contributing cause of an injury is a question of fact which will be determined by the facts of each case."

The authorities lend to the proposition that, regardless of whether an employer has stringent or lax safety standards and whether or not they are complying with their obligations under the WHS Act and/or the SAWHS Act, if an employee contracts COVID-19 and the employment is found to be a significant contributing cause of them contracting COVID-19, the employee will have entitlements pursuant to the RTW Act.

For instance, if an employee at an aged care facility contracts COVID-19 shortly after a number of residents are also diagnosed, then it would be very easy to argue (and have it found) that the employment was a significant contributing cause to their injury.

A Safe Work Australia report published in November 2020 disclosed that at 31 July 2020, there had been a total of 533 workers' compensation claims lodged across Australia. Of those claims, 253 were accepted, 95 were rejected (for a range of reasons, including cases where the worker ended up testing negative for COVID-19, or where evidence showed that the virus was not contracted as a result of employment), and 185 claims were pending. The claims were not all necessarily made by people who had contracted COVID-19, either. A portion of the claims related to mental health impacts related to the virus, and a portion were related to people who were required to submit to a COVID-19 test or isolate. Only four of these claims were from South Australia.

The extent of the entitlements that flow will obviously vary depending on the severity of the illness experienced by the employee. However, given that there is a risk of death, as well as reports that people are suffering long-lasting side effects of the disease, the entitlements could be extensive.

If an employer has strict safety standards in place and ensures that they are complying with their obligations under the WHS Act and the SAWHS Act, then this would be of assistance in making an argument that the employment was not a significant contributing cause in the event that an employee was to contract COVID-19 (obviously though, this would all come down to the individual facts in each case).

Genomic sequencing testing allows the source of exposure to be identified. This testing would provide scientific evidence that employment was (or was not) a significant contributing cause of the injury and makes it even more important for employers to have strict safety standards in place.

While we note that South Australia is extremely well positioned compared to other parts of the world when it comes to managing and preventing the spread of COVID-19, the recent clusters linked to medi-hotels in Adelaide, Sydney, Perth and Melbourne are timely reminders of the risk of liability under the RTW Act, and the need for employers to have appropriate policies in place to protect their employees (and, in turn, themselves). Significantly, the clusters have shown the sophistication of the genomic sequencing testing, which allowed the sources of the infections to be definitively identified.

Regardless of the size of your organisation, we recommend that you contact us to discuss whether your organisation has an appropriate work health and safety policy with respect to COVID-19 and if you need any assistance in developing your own policies.

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DISSECTING DECISIONS | **By Navar Amici**

Two of a Kind: Federal Court Refuses to See Double in Case of Identical Pharmaceutical Products

Australian Competition and Consumer Commission v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd (No 2) [2020] FCA 724

In 2016, the Federal Court ordered Reckitt Benckiser to pay a revised penalty of $6 million for making misleading representations about its Nurofen Specific Pain products. In that case, the Court found that Reckitt Benckiser had marketed each of the different products in the range as having a specific quality which made them more suitable to a particular kind of ailment. However, in reality, each product contained the same active ingredient in the same amount.

In their joint decision, Jagot, Yates and Bromwich JJ found:

> *"The objective of any penalty in this case must be to ensure that Reckitt Benckiser and other 'would-be wrongdoers' think twice and decide not to act against the strong public interest in consumers being able to making decisions about buying non-prescription medicines free from representations that are liable to mislead and thereby distort their decision-making processes."*

Australian subsidiaries of global pharmaceutical giants GlaxoSmithKline (**GSK**) and Novartis have recently been hit with a collective $4.5 million penalty for, materially, the same offence.

This time, the pain relief products in question were Voltaren Osteo Gel and Emulgel, which GSK acquired from Novartis in March 2016. Between January 2012 and March 2017, Emulgel was marketed for temporary relief of local pain and inflammation, while Osteo Gel was marketed for relief of osteoarthritis symptoms. The recommended retail price for the Osteo Gel product was 16% higher than Emulgel, despite the products containing the same amount of the same active ingredient. The one material difference between the products was the cap on the Osteo Gel product was designed to be easier to open for a person with osteoarthritis.

GlaxoSmithKline and Novartis apparently learnt from Reckitt Benckiser's refusal to admit its liability until the 11th hour. They quickly conceded that their conduct was in breach of sections 18, 29(1)(g) and 33 of the Australian Consumer Law (**ACL**).

Consequently, all that was left for the Court to determine was the penalty. The Court held that as 1.4 million units of Osteo Gel were sold in the relevant period, there were, at a minimum, 1.4 million contraventions, with a theoretical maximum penalty at the time of each contravention of $1.1 million.

The Court accepted that the maximum penalty was so large as to be meaningless, instead, considering the following factors to be relevant in formulating an appropriate figure:

1. which of the contraventions relate to the same conduct;
2. whether there were courses of conduct, and if so, how many;
3. comparative penalties; and
4. to the extent it is needed, totality.

In respect of point three, Justice Bromwich drew the following distinctions from the *Nurofen* case:[1]

1. GSK had already begun assessing its entire product range and was in the process of changing its Osteo Gel packaging prior to the ACCC first raising its concerns in June 2016;
2. in the *Nurofen case*, there was no difference whatsoever between the five products, four of which were marketed as the contravening "*specific pain"* representations, whereas there was at least the

1 *ACCC v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd (No 2)* [2020] FCA 724, *at [37]*

material difference of the easy-to-open cap for Osteo Gel;

3. in the *Nurofen* case, the four contravening products sold for double the standard Nurofen, whereas the markup for Osteo Gel was 11.5% to 16%;

4. consumers were much more likely to be misled by the overtly and expressly false representations in the *Nurofen* case, compared to the implied representations about Osteo Gel;

5. consumers were at a greater risk of double-dosing in the *Nurofen* case by using the same product, labelled differently, to treat more than one pain condition at the same time;

6. 5.9 million units of the four contravening products were sold in the *Nurofen* case with revenue of about $45 million, compared to 1.4 million units of Osteo Gel with a combined revenue of about $20 million;

7. the likely loss to consumers in the *Nurofen* case was in the order of $26.25 million, much more than for Osteo Gel, with at least some of the sales in the latter case reasonably attributable to the real difference of the easy-to-open cap – there is nothing inherently misleading in charging more for a product that has an identified difference, even if it is not as to the active ingredient;

8. the admissions were made at a much earlier stage in relation to Osteo Gel, compared to the admission on the eve of the trial in the Nurofen case.

"...damages may be significantly reduced where the party in breach takes swift proactive steps to mitigate the consumer loss, rectify its conduct, and resolve litigation."

His Honour found that despite those distinguishing features which would each contribute to a lesser penalty for GSK and Novartis, "Reckitt Benckiser in the *Nurofen* case ended up being fortunate that it was dealt with at the tail end of a period of relative penalty leniency for this sort of conduct both by this Court and on the approach then taken by the ACCC. The penalty imposed in that case would probably be considerably greater if it came before this Court now".[2]

The Respondents jointly submitted that they should be ordered to pay a pecuniary penalty of $4.5 million in relation to the admitted contraventions of the ACL. They further submitted that this amount should be apportioned between the respondents to reflect the differences in their responsibility for what took place, especially as to duration, volume of sales, number of consumers likely to have been affected, and the overall circumstances in which the conduct took place.

Bromwich J accepted that $4.5 million was a fair penalty and apportioned that amount as follows:

1. Novartis to pay $2 million in respect of the product packaging conduct and $1 million in respect of the conduct on the Voltaren Website and the MyJointHealth Website; and

2. GSK to pay $1 million in respect of the product packaging conduct and $500,000 in respect of the conduct on the Voltaren Website.

There is a significant range of factors that the Court is willing to consider when determining an appropriate penalty for misleading consumers. In particular, damages may be significantly reduced where the party in breach takes swift proactive steps to mitigate the consumer loss, rectify its conduct, and resolve litigation.

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2 *ACCC v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd (No 2)* [2020] FCA 724, *at [38]*

SUITS OFF | **Staff Profile**

Our Intellectual Property Specialist, With a Penchant for People, Water & Words...

Amy Bishop Senior Associate

Although Amy Bishop always wanted to be a lawyer, that she ended up as a business lawyer specialising in copyright and trademarks is pure chance. The first signs from her legal study was that Family Law might be Amy's bag, but then a big door opened at a small boutique firm and it's been all business – plus a bit of balance – ever since.

Amy elaborates, *"I wanted to be a lawyer from when I was quite young – at least since I started high school, if not younger. When I was studying at Uni I did really well in Family Law and my thought was to perhaps go into that area. I started in that direction, with a casual position at the Legal Services Commission, which did deal with a lot of family law issues, but that role also gave me exposure to a very broad area of legal matters. People could call and ask anything, I even had to help someone accused of importing counterfeit goods once. I loved the work but it was casual, and my search for a full time role led me to a boutique tax firm, Rankine Tucker & Associates. This began what is now, almost to the day, a 20 year career in the legalities of business, working with one John Tucker."*

It was more than a liking of working with DW Fox Tucker founding partner John that kept Amy so keen to stay on the business side of law. *"Although tax was a main focus at Rankine Tucker & Associates, it was a small firm so we multi-tasked and helped our clients with other legal issues their businesses were facing. I found small and medium business owners to be good people, hard-working and down to earth. Their dedication to building their business was inspiring, so I enjoyed helping and being involved with them. I still really enjoy this side of the job to this day, and my clients are still largely in this category."*

"Over the years I discovered the Intellectual Property (IP) law area and was increasingly being asked to help manage new trademark applications, disputes and other IP and copyright issues. I enjoyed working in this space so much that I undertook further study and became a registered trademark attorney. I feel like I've really found my calling."

One of the lucky ones during the pandemic

As Amy is the first to admit, she and her family were among the 'lucky ones' in terms of the effects of the COVID-19 pandemic and lockdowns. *"My family is not particularly young anymore", explains Amy, "with two teenage girls my 'home schooling' just involved making sure they'd logged off Netflix and logged*

into the school platform – although I'm not sure that much schooling occurred! As far as my own work is concerned, I was very fortunate that I could do everything from home."

Although it wasn't such a smooth ride for Amy's clients during the pandemic. *"My clients and I found the inconsistent treatment really challenging"* reports Amy. *"Of course we realise that legislation and directions were drafted necessarily in haste, but all the confusion and all the errors highlight the dire need to have carefully drafted - and highly scrutinised - pandemic plans in place ready for next time."*

Balance is the name of the game

Amy is a big believer in striving to achieve a good balance between all that you want from life, and by anyone's standards she seems to be incredibly good at it. Her busy work days and nights caring for her clients are nicely equalled by an incredible family and social life, featuring lots of weekends away, water sports and fishing with husband Matt and their two teenage girls, plus plenty of exercise and cuisine-focussed catch-ups with a much loved circle of close friends.

"We have a place on the Yorke Peninsula and get away there as often as we can, going out on the boat for fishing and water sports, and spending time at my in-laws farm. It is great fun! I love that the girls get the best of both worlds – city and country life. Like most lawyers, I'm an avid reader too, and love a good book when relaxing."

"But it wasn't always that easy to achieve this balance" admits Amy. *"Balancing work and family when the kids were younger was really hard - much harder than many of us working parents make it look – and I certainly didn't always get it right. I admit, I had to give up some professional control at the office to make it all work initially, and it was really difficult to accept that you can only do so much. Thankfully things have turned around now, my children are now quite supportive and they'll often take on household responsibilities when things at work are keeping me occupied. Although they still need a lot of nagging sometimes, too!"*

Any alternatives to law in your life?

When asked what she loves about being a lawyer, one of Amy's responses gives a clue to what she might be doing to earn a crust in another life that didn't involve law: *"I find it really satisfying to complete a good piece of writing, like a letter or a document on behalf of one of my clients, informing and defending in the name of their successful business building journey."*

And what might that alternative profession be? *"Well, I do have the odd daydream about being a Pulitzer prize winning journalist"*, says Amy with a smile, *"but to be honest I think I enjoy making a tangible difference to my clients' lives much more than I'd enjoy a front page scoop – so I think I'll stay where I am."*

Which is great news for us of course, because we're really keen to hang onto one of our best business lawyers – and one of our best writers – for many more years to come.

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