

# April 2020

## LawSight





# Feature Articles

- 4 Foreword
- 6 What is Intellectual Property in Australia?
- 10 How has COVID-19 affected foreign investment transactions?
- 12 Debt Recovery during COVID-19: Is there a better way?
- 13 Changes to insolvency and bankruptcy in response to COVID-19?
- 14 COVID-19 and Recent Changes to the Modern Awards?



# Foreword

**Fresh thinking and a focus of energy.** This year has already been a big year for our firm and I am delighted to be part of our first eMagazine.

Not only have we experienced a period of consolidation, but also a new period of exciting expansion, having partnered with historic Ballarat firm Nevett Wilkinson Frawley to bridge the gap between our two cities.

Within a few weeks, a global healthcare crisis fundamentally changed the way we live and work in ways that were previously unimaginable. Our people at DSA Law have been adjusting to new ways of doing business and helping our clients. Our team is always a source of huge pride. They are fantastically talented, motivated and collaborative, and even more so since the virus.

Over the coming months our goal is to deepen our teams' collaborative approach and work even closer with our clients.

These times have elements that challenge us – uncertainty, unpredictability and economic consequences.

As we work through these issues, we will continue to provide a series of fact-based articles that are current and relevant, with resources to help guide you.

Amidst it all, please take the time to check in on your own wellbeing and those around you. Kindness makes a difference.

**Litsa Pillios**  
Chief Executive Officer



# What is Intellectual Property in Australia?

**When operating a business, particularly in this digital age, intellectual property (IP) remains a crucial element that should be understood and appreciated. This is because IP is what distinguishes your version of a business from that of your competitors.**

## What is intellectual property?

IP is an asset, first and foremost. You can buy it, sell it, build it and destroy it. Unlike the company car or furniture however, you can't touch it. In this way, it's known as an intangible asset.

There is no conclusive definition of what IP is. The common characteristics tend to be:

- intangible value; and
- independent intellectual effort.

Some simple examples include:

- your logo, business name and anything else you use to distinguish your business; your standard operating procedures; or
- the content of your product designs.

Further below we explain what category of IP these examples fall into.

## Why intellectual property is important?

When developing a strategy for your business, it is important to think about:

- which part of your business involves or relies upon intellectual property;
- how to protect your intellectual property; and
- how to maximise your intellectual property to give you the best outcome.

## What common forms of intellectual property should you look out for?

The commonly recognised categories of IP are:

### Trade Marks (aka Trademarks)

A 'trade mark' is exactly that, a mark, i.e. a sign, that represents your trade, i.e. your business. It is the concept that recognises your distinct branding used to distinguish your goods or services from those of another.

In Australia, you can register a trade mark with the government department called "IP Australia", which is the authority vested with the powers under the *Trade Marks Act 1995* (Cth). While registration is not necessary to claim rights over your brand, it certainly helps and ensures your brand's protection is available for all to see and much easier to enforce if someone tries to misuse it.

#### Example 1

*While one shoe manufacturer might have a tick shaped logo on its product, another might have three stripes down the side. Both are shoes but their respective logos and business names are their trade marks, and by those trade marks, customers can differentiate their product from that of their competitors.*



## Copyright

Copyright is a legal right, that cannot be registered in any database unlike trade marks but is able to be protected.

Generally, copyright arises automatically for:

- works (including literary, dramatical, musical and artistic works); and
- other subject matters (including film, sound recording, broadcast or published editions).

For example, if you are the author of a published book, copyright of the literary work within that book almost always arises.

### Example 2

*While our shoe example doesn't really fit this category, if our 'ticky' manufacturer wanted to put out a guide on the best running style to use for their shoe, they could potentially claim copyright over the content of that guide. If 'stripey' copied the content of the guide and just put their logo on it, Mr Ticky could sue Mr Stripey for breach of copyright.*

## Patents

A patent is a legal right to a patentable invention that is disclosed to the public.

Generally, for a patent to be obtained for a manufactured product or idea, the product or idea:

- should be a 'manner of manufacture', that is, something that provides a material advantage in a field of economic endeavour;
- be novel;
- involve an inventive step;
- useful; and
- not be secretly used.

Registration of a patent is a complex process and, in Australia, can provide protection for between 8 and 25 years depending on the type of patent.

If you think you have a patentable product or idea, you should be very careful with whom you share it and what obligations they have to you when you do. If you don't have the right protections in place and someone else decides to copy your work, there's little you can do.

### Example 3

*Carrying on the shoe analogy, the shoe is a concept that has been in vogue for thousands of years. As technology has improved, so have the shoes.*

*Therefore it is unlikely an entire shoe is able to be patented, but parts of the shoe, such as the material used in the sole to create more traction with the ground, or the particular weave of the fabric, might be patentable if it is sufficiently inventive and novel. Mr Ticky secured 867 patents in 2018 alone.*

## Confidential Information

Confidential information is another category of IP that cannot be registered but is recognised at law. It also encompasses some of the other forms of IP, such as the details of a patent application are inherently confidential.

Generally, information takes a confidential character when:

- the information has the necessary quality of confidence;
- the circumstances surrounding the information creates a duty of confidence; and
- the person who acquires that information.

Therefore, part of your business planning should involve making sure any employees are aware of their confidentiality obligations to the business.

### Example 4

*Mr Ticky and Mr Stripey would both have significant confidential information in their business.*

*While the name of their new shoe might not be confidential once launched, up until that point it absolutely would be. An employee that obtains that information would be obliged to keep it 'confidential' until authorised otherwise.*

## What you should also consider?

In addition to the above most prominent examples, you can register a design for a product packaging and for a new type of plant bred by you. There are also rights known as moral rights arising for those that created the intellectual property, whether it's owned officially by them or not.

So now that you know IP is more than just a catchphrase used by smart people to describe their ideas, and that you have your own, what should you do?

When planning a new business, have a think about which part/s of your business might be considered intellectual property. If you have any doubts, research, and consider whether seeking legal advice is necessary to help you organise, plan and position your business's intellectual assets.

Obtain advice as to an appropriate business structure that will protect your IP assets from the risks of trading.

If you're buying someone else's business, you should make sure you're buying as many of their IP assets as possible and ensuring they commit not to use that IP moving forward.



# How has COVID-19 affected foreign investment transactions?

Effective from 29 March 2020, the Federal Treasurer announced temporary changes to the foreign investment review framework, in light of the COVID-19 pandemic.

These measures have been supported by the Foreign Investment Review Board (FIRB), who are an advisory body to the Government in relation to foreign investment policy and act as the examining body for proposals by foreign interests to undertake investment in Australia.

## What are the key changes?

### Reduction of monetary screening threshold

All proposed foreign investment into Australia subject of the Foreign Acquisitions and Takeovers Act 1975 (Cth) will require approval, regardless of the value or nature of the foreign investor.

Some of the key changes can be summarised as follows:

#### Non-Land Proposals

Investor	Action	Pre-March 2020 Threshold	Temporary Threshold
Private Investors of Free Trade Agreement Partner	Acquisitions in non-sensitive business	\$1,192 million	\$0
	Acquisitions in sensitive business	\$275 million	\$0
	Agribusiness	\$1,192 million	\$0
Other Private Investors	All acquisitions in business	\$275 million	\$0
	Agribusiness	\$60 million	\$0

#### Land Proposals

Investor	Action	Pre-March 2020 Threshold	Temporary Threshold
Private Investors of Free Trade Agreement Partner	Acquisitions land	\$1,192 million	\$0
	Developed commercial land	\$1,192 million	\$0
	Mining and production tenements	\$1,192 million	\$0
Other Private Investors	Agricultural land	\$15 million	\$0
	Developed commercial land	\$275 million	\$0

The Foreign Acquisitions and Takeovers Regulations 2015 provides that a business is sensitive if the business is carried on wholly or partly in:

1. the media, telecommunications or transport sectors;
2. the supply of military goods, equipment or technology for a military purpose; or
3. the extraction of uranium or plutonium or operation of a nuclear facility.

However, not all foreign investment will be impacted by the changes. It will remain business as usual for all foreign government investment and investment in residential land, which have always been subject to a \$0 threshold.

### Extended deadline for case processing

Given the expected increase in the number of proposed foreign investment requiring approval, the FIRB is extending timeframes for reviewing new applications from 30 days to up to six months. This extension will apply to new and existing applications alike.

### Applications that support Australian businesses and jobs to be prioritised

Notwithstanding the extension of timeframes for reviewing new applications, the Government has stated its intention to prioritise urgent applications for investments that protect and support Australian businesses and jobs.

### Will I be affected by these changes?

The changes will directly affect all foreign persons, entities and government investors, regardless of their country of origin.

Failure to adhere to the temporary changes can have significant consequences, including, but not limited to, civil and criminal penalties, so it is essential that all foreign investors pay attention to the current changes.



# Debt Recovery during COVID-19: Is there a better way?

*The novel Coronavirus (COVID-19) has had a profound impact on our economy and businesses. Even though we are wading through unprecedented times, businesses are still trading, and businesses need to generate cash flow in order to keep doing so.*

## How can I get my debtors to pay?

Ordinarily, if your debtor is not paying within ordinary business terms, you could turn to us, as your lawyers, to commence the legal recovery process. Whilst letters of demand are often effective, it is fair to say that they may not be the best tool to use during these unprecedented times. These letters are blunt, devoid of understanding, and always threaten legal action. We expect many debtors will simply see such an approach as the last straw and the actions of a business that does not wish to assist the recovery of their business in the interests of a future relationship. If they can pay you in due course, they might, but it won't likely be as a priority.

The key to recovering debts during this time of uncertainty is to be flexible and, if possible, understanding. If you are willing to be flexible, solutions can be designed. For example, this may include, reaching out to your debtors by sending a special letter, which does not demand money, nor does it threaten legal action. The letter will touch on the unprecedented times we are all facing, the need for us all to support each other, and will invite your debtors to get in contact to negotiate a settlement or payment plan.

Many debtors may avoid you for fear that you will not accept any payment but the

debt that is owed, in full. If debtors know that you are open to negotiation and alternative payment arrangements, it may open the lines of communication and could ultimately result in the debt being paid in a manner that suits you, your business needs and those of your debtors.

However, if you have exhausted the options available to you, then legal action may be necessary. With the various COVID-19 protocols giving debtors more time to pay, you don't want to be last in line either.

## Do you need help paying your creditors?

If you find that your business has been left with a list of creditors, and you are struggling to pay them, you are not alone. We understand that times are tough and that you need to not only pay your creditors, but also your staff.

For our clients in this situation, we have found ourselves crafting letters, to be sent to our client's creditors. The idea behind such a letter is to redirect their focus away from you so that you can focus on alternative income streams and/or recovery of your income streams and grant you extra time to pay your debts. If your creditors demand money, effective procedures can be created to negotiate settlements on your behalf so that, in the end, you save money.

# Changes to insolvency and bankruptcy in response to COVID-19?

In late March 2020 the Government enacted the Coronavirus Economic Response Package Omnibus Act 2020 (the Act) to provide an economic response, and deal with matters relating to COVID-19.

This article summarises some of the changes introduced by the Act relating to personal bankruptcy, company insolvency and directors' duties relating to insolvent trading.

## Personal Bankruptcy

The Act amends the Bankruptcy Act 1966 (Cth) and Bankruptcy Regulations 1996 to provide temporary relief for individuals at risk of bankruptcy by providing temporarily for:

1. an increase in the minimum amount of debt required to be owed before a creditor can initiate bankruptcy proceedings against an individual from \$5,000 to \$20,000; and
2. an increase in the time to respond to a bankruptcy notice from 21 days to six months.

The changes affect bankruptcy notices issued on or after 25 March 2020. If the bankruptcy notice was issued before 25 March 2020, the old regime applies, and the debtor has 21 days to comply with the bankruptcy notice.

## Corporate Insolvency

The Act amends the Corporations Act 2001 (Cth) and Corporations Regulations 2001 to provide temporary relief for business at risk of insolvency by providing temporarily for:

1. an increase to the statutory minimum for a creditor to issue a statutory demand to a debtor from \$2,000 to \$20,000; and
2. an increase in the time to respond to a statutory demand from 21 days to six months

The amendments only apply to statutory demands served after 25 March 2020 and will only apply for six months unless that period is extended.

## Insolvent trading

The Act amends the Corporations Act 2001 (Cth) to provide temporary relief for directors from their personal duty to prevent insolvent trading. This is achieved by introducing a new temporary safe harbour from the duty to prevent insolvent trading.

The changes provide that a director may rely on the temporary safe harbour in relation to a debt incurred by the company if:

1. the debt is incurred in the ordinary course of the company's business;
2. the debt is incurred during the six month period starting on 25 March 2020, or a longer period as prescribed by the regulations; and
3. the debt is incurred before any appointment of an administrator or liquidator of the company during the temporary safe harbour application period.

Directors will be taken to incur a debt in the ordinary course of business if they can show that the debt is necessary to facilitate the continuation of the business during the six month period. The explanatory memorandum for the Bill provides examples of debts incurred in the ordinary course of business such as:

- loans to move some business operations online; or
- debts incurred through continuing to pay employees during the Coronavirus pandemic.

Any debts incurred by the company will still be payable by the company.

It is important to note that the Act does not provide for any change in regards to directors' duties, voidable transactions (inc. preference payments) or voluntary administration/liquidation appointments.



# COVID-19 and Recent Changes to the Modern Awards?

*In response to the declaration of COVID-19 as a pandemic and subsequent state government mandated shut-downs of some non-essential industries, the Fair Work Commission approved various amendments to a number of Modern Awards.*

*The intent of the amendments is to provide greater workforce flexibility in the face of substantial changes to industries as a result of COVID-19.*

*Interestingly, these amendments appeared to have been largely supported by both business and employee groups, including unions, marking a welcome change from usual adversarial approach that accompanies Modern Award amendments.*

In this article, we summarise the most widely applicable variation, being pandemic leave, before exploring more specific amendments to the Hospitality Industry (General) Award 2010, the Restaurant Industry Award 2010, and finally, the Clerks - Private Sector Award 2010.

## **Pandemic Leave**

On 8 April 2020, the Fair Work Commission varied 99 Modern Awards (there are 122 in total) to include two weeks of unpaid pandemic leave (or more by agreement between the employer and employee), if the employee is prevented from working:

- as a result of being required to self-isolate by government or medical authorities, or acting on the advice of a medical practitioner, or
- by measures taken by government or medical authorities in response to the pandemic (for example, an enforceable government direction restricting non-essential business).

Importantly, pandemic leave is available in full immediately to full-time, part-time and casual employees. In other words, employees do not need to accrue it and it is not pro-rated for employees who do not work full-time.

In addition, employees do not have to use all their accrued paid leave before accessing pandemic leave.

Finally, employees need to commence their pandemic leave before 30 June 2020, but can finish it after that date.

## **Hospitality Industry (General) Award 2010**

The amendments to the Hospitality Industry (General) Award 2010 commenced in late March 2020 and were approved following an application to the Fair Work Commission by the Australian Hotels Association. The amendments are temporary and will remain in place until 30 June 2020.

In summary, the amendments are as follows:

### ***Employee Duties***

An employer may direct employees to perform any duties within their skill and competency levels, regardless of the employee's usual classification under the Modern Award, provided that those additional duties are safe and the employee is qualified to perform them.

In the event an employee is directed to perform duties that carry a higher rate of pay than the employee's ordinary classification, the employer must pay the employee the higher applicable rate.

### ***Hours of Work***

Employers can now direct full-time employees to work an average of between 22.8 to 38 ordinary hours per week (with employees to be paid on



a pro-rata basis). However, the employer must first consult the affected employee, prior to implementing such a change.

With respect to part-time employees, employers can now direct that they work an average of between 60% to 100% of their guaranteed (i.e. as per their contract of employment) hours of work per week. As with full-time employees, the employer must first consult with affected part-time employees.

### ***Annual Leave***

Employers can now direct employees to take annual leave with 24 hours' notice, subject to the employee's personal circumstances.

In addition, employees can now take twice the amount of annual leave at half pay.

### ***Close Down***

The notice period for an enforced close down in operations, during which an employer can request that an employee take annual leave, has been reduced to one weeks' notice, or shorter (if mutually agreed). If the employee does not have enough accrued annual leave to cover the close down period, the employee may take unpaid leave.

## **Restaraunt Industry Award 2010**

These amendments have also been largely incorporated into the Restaurant Industry Award 2010. As with the Hospitality Industry (General) Award 2010, variations to the Restaurant Industry Award 2010 are temporary and will remain in place until 30 June 2020.

## **Clerks – Private Sector Award 2010**

Amendments to the Clerks – Private Sector Award 2010 were approved in late March 2020 following an application by the Australian Chamber of Commerce and Industry, with support from the Australian Services Union. Amendments to this Modern Award are temporary and will remain in place until 30 June 2020.

In summary, the amendments are as follows:

### ***Employee Duties***

An employer may direct employees to perform any duties within their skill and competency levels, regardless of the employee's usual classification under the Modern Award, provided that those duties are safe and the employee is qualified to perform them. Employees must not suffer a loss in pay if directed to perform alternative duties.

In addition, the minimum period of engagement for part-time and casual employees is reduced from three hours to two hours.

### ***Hours of Work***

Where an employee is working from home, the period in which ordinary hours of work may be performed is now 6:00 am through to 11:00 pm, Monday to Friday (it was previously 7:00 am through to 7:00 pm) and 7:00 am through to 12:30 pm on Saturday.

### ***Reductions in Hours of Work***

Subject to the approval of 75% of employees in the workplace (or a defined section/department of the workplace), the employer can reduce the ordinary hours of work for full-time and part-time employees. However, the reduction in ordinary hours must not exceed 75% of the full-time or part-time (i.e. as per their contract) hours.

Where a reduction in hours has been implemented, the employer cannot unreasonably refuse an employee's request to take up alternative/secondary employment.

### ***Annual Leave***

Employers can now direct employees to take annual leave with one weeks' notice, subject to the employee's personal circumstances. Employees must have two weeks annual leave remaining following a period of directed leave.

Employers and employees can also agree to take up to twice as much annual leave at a proportionately reduced rate for all or part of any agreed or directed period away from work (e.g. during any shut-down).

### ***Close Down***

An employer may require an employee to take annual leave by giving at least one week's notice as part of a close down of its operations (previously four weeks), or any shorter period of notice that may be agree

If the employee does not have enough accrued annual leave, the employee may take unpaid leave.

## **Are further alterations possible?**

In short, yes. In response to the large number of applications seeking variations to Modern Awards, the Fair Work Commission recently announced its intent to vary Modern Awards at its own initiative.



# Our People



Joseph Alesci  
Partner  
jalesci@dsalaw.com.au



Joseph Di Mauro  
Partner  
jdimauro@dsalaw.com.au



Kimble Stynes  
Partner  
kstynes@dsalaw.com.au



Dan Nestel  
Executive Counsel  
dnestel@dsalaw.com.au



Natalie Greenberg  
Senior Associate  
ngreenberg@dsalaw.com.au



Philip Heaven  
Associate  
pheaven@dsalaw.com.au



Jonathan Hancock  
Associate  
jhancock@dsalaw.com.au



Sahar Derakhshan  
Lawyer  
sderakhshan@dsalaw.com.au



Vivee Low  
Lawyer  
vlow@dsalaw.com.au



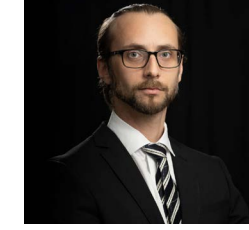
Frank Starvaggi  
Lawyer  
fstarvaggi@dsalaw.com.au



Benjamin Franklin  
Senior Associate  
bfranklin@dsalaw.com.au



James Marks  
Senior Associate  
jmarks@dsalaw.com.au



Oren Polichtuk  
Associate  
opolichtuk@dsalaw.com.au



Che Behrsin  
Lawyer  
cbehrsin@dsalaw.com.au



Mitchell Hickey  
Lawyer  
mhickey@dsalaw.com.au



Cameron Gould  
Lawyer  
cgould@dsalaw.com.au



Matthew Tran  
Lawyer  
mtran@dsalaw.com.au



**[www.dsalam.com.au](http://www.dsalam.com.au)**

**Melbourne**

Level 2  
180 Queen Street  
Melbourne  
VIC 3000  
P: 1300 060 510

**Mornington**

7 / 234 Main Street  
Mornington  
VIC 3931

