EMERGING ISSUES

Technology, Media & Telecommunications

Lawyers | McCullough Robertson

- Mandatory vaccinations: key considerations for the Technology, Media & Entertainment, and Telecommunication (TMT) sector
- Voller Decision
- ACCC AdTech inquiry report
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- Incentivising and retaining key talent – a new era for Employee Share Schemes in Australia?
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- The designs, they are a changin' – what you need to know about the amendments to the Designs Act 2003
- The launch of .au direct: an entirely new domain

We are pleased to bring you our Emerging Issues, December edition for the Technology, Media and Telecommunications (TMT) sector.

As we near the end of another year, we reflect on what has been a particularly unusual 12 months. The spectre of COVID-19 has continued to loom large, as many Australians were subject to lengthy lockdowns to address the threats of the Delta strain and now we face and begin to tackle Omicron. Emerging from those lockdowns, we are seeing the start of the reversal of the work from home arrangements that prevailed over the last couple of years, (as explored in the July 2020 edition), and accordingly our lead article talks about the employment issues surrounding mandatory vaccination.

But that hasn't slowed the developments across the sector. The defamation jurisdiction is a high profile and busy one in Australia, and we had a decision from the High Court in the Voller proceedings that found media organisations can be liable as publishers of third party defamatory comments on their social pages. This wasn't the only development in the media space, the Online Safety Act was enacted, which imposes positive obligations on social media platform providers to provide a suite of safety mechanisms in connection with their platforms from January 2022. We also had the Australian Competition and Consumer Commission (ACCC), hand down its final report in the AdTech Inquiry, confirming its view that Google has significant market power, and suggesting a range of remedies and increased regulatory powers to address that sector specifically, above and beyond the existing competition law principles and powers.

While the media sector has been particularly busy, there have been further developments in Artificial Intelligence, with a key decision in connection with patents being handed down.

Further on the Intellectual Property front, there have been changes to our domain registration system, with the introduction of the new '.au' domain, and changes to our Designs Act. On the tax front, Parliament has been reviewing the tax treatment of a favourite of the tech sector, employee share schemes.

So as ever, there's plenty going on in the TMT sector and the rate of change seems to be ever-increasing. To that end, on the date this was submitted for publication, the federal government issued an exposure draft of changes to the Privacy Act to address online safety. We'll bring you more on that in the next edition, but it goes to show, things are evolving daily.

With a focus on the future, and as we scan the horizon of what's to come in the TMT sector, we predict that 2022 will bring a wall of regulation. We can see this trend emerging from the challenges arising in 2021 and foresee further regulatory developments and a greater impact on compliance. We are constantly monitoring the regulatory landscape to inform our clients prior to changes occurring so that we can support you through this evolution.

For further insights, or to discuss how these changes may impact your business, connect with our team here.

Alex Hutchens
Lead Partner, Technology, Media and Telecommunications

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Mandatory vaccinations: key considerations for the Technology, Media & Entertainment, and Telecommunication (TMT) sector

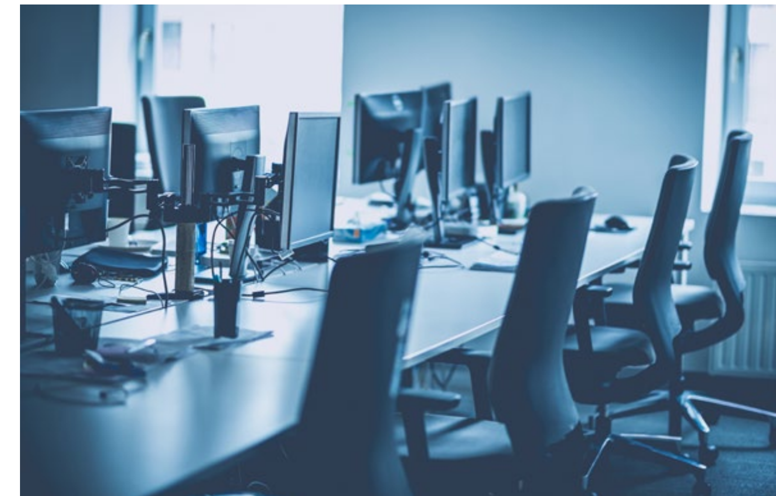
With the recent exception of Victoria and particular high-risk industries, decisions on implementing a mandatory vaccination policy have largely been left to employers, creating confusion as to whether an employer is permitted to implement a mandatory vaccination policy, whether it should and, if so, how?

Over recent months, "no jab, no job" and "no jab, no office" policies have become increasingly popular, particularly in New South Wales and Victoria, with businesses seeking to ensure the health and safety of their workers, and respond to employee and community concerns.

Whether a mandatory vaccination policy can be implemented remains a question of whether it is lawful and reasonable. Given the abundant evidence that COVID-19 vaccinations reduce the likelihood of transmission and the seriousness of any illness in the event of transmission, and the developing community attitude to vaccination, a requirement that a worker be vaccinated against COVID-19 as a condition of attending a workplace (other than home), is becoming increasingly reasonable.

Given the prevalence in the Technology, Media and Entertainment, and Telecommunication sector of working from home, particularly in the past 18 months, a "no jab, no office" policy is more likely to be considered reasonable. The other option, being the "no jab, no job" policy, as seen in some other sectors (such as aged care), is less likely to be considered reasonable.

In light of recent cases and updated public health orders, we explore the key matters for TMT companies to consider when determining whether to introduce a "no jab, no office" policy.



What is the current situation?

Public Health Orders

Unless a public health order specifically refers to an industry, occupation or location, an employer cannot rely on a public health order to authorise a COVID-19 vaccination requirement at work.

In New South Wales, for example, mandatory COVID-19 vaccination has been introduced for workers who are unable to work from home, including residential aged care facility workers, health care workers, early childcare workers and school staff. This will capture some workers in the TMT industry engaged in those sectors, but they will be in the minority.

By contrast, Victoria has recently introduced obligations on a broader range of employers to ensure that unvaccinated workers do not work outside of their ordinary place of residence after 15 October 2021, and for those employers to collect, record and hold vaccination information of their staff. Although the COVID-19 Mandatory Vaccination (Workers) Directions has a short shelf-life (which could be extended), it required "authorised workers" (including public sector employees and professional service workers) to receive their first dose by 15 October 2021 and a second dose by 26 November 2021.

At this juncture, and in circumstances where it is unlikely that all TMT sector employees will be captured by these public health orders, we recommend that TMT sector employers implement their own policies that encourage or incentivise employees to be vaccinated, including by providing paid leave.

What have other sectors done?

The aged care sector has seen three main decisions that have shed light on the issues faced in relation to mandatory COVID-19 vaccinations.

Guidance materials

From a national perspective, and on 11 October 2021, the Fair Work Ombudsman (FWO) updated its guidance on COVID-19 vaccination. This followed the Delta outbreak in Victoria to deal with the Victorian Government's announcement, to make COVID-19 vaccination requirements for authorised workers in Victoria who can't work from home, and the lifted restrictions in NSW. That guidance is here.

These changes do not amend the Fair Work Ombudsman's position published in September that employees in high risk industries, who dealt with vulnerable cohorts and who were required to interact with others at work, could be subject to a COVID-19 vaccination requirement in the workplace.

Given the TMT sector is unlikely to be considered a "high risk" industry, we recommend that employers within the TMT sector seek legal advice to ascertain whether or not a policy would be considered reasonable in the circumstances.

In the most recent decision, Jennifer Kimber v Sapphire Coast Community Aged Care Ltd [2021] FWCFB 6015, the majority of the Full Bench of the Fair Work Commission found that, in the circumstances, the vaccination direction by Sapphire Coast Community Aged Care Ltd was both lawful and reasonable, and the employee's refusal to be vaccinated rendered her unable to perform the inherent requirement of the role. The decision at first instance, that her dismissal was for a valid reason, and not otherwise harsh, was upheld on appeal.

As has been made plain in this decision, amongst other decisions in the aged care space, the consideration of implementing a mandatory vaccination requires a balanced approach of what is reasonable – this is likely informed by community standards and expectations.

Similar to the aged care sector, other sectors which require, by virtue of their businesses, employees to be on the "front line" have mandated vaccinations against COVID-19.

In August 2021, SPC was the first to mandate COVID-19 vaccinations in what seems to be a "no jab, no job" policy for all staff including casuals, permanents and contractors. Since then, many companies, such as Telstra, have followed suit. Specifically, Telstra has required all staff working in frontline, business critical and customer facing roles to be vaccinated with first dose by October 15 and second dose by November 15, except for those with a medical contraindication.

For other sectors, there has been a slightly different approach to "no jab, no job". BHP has recently confirmed its policy which requires employees to be vaccinated against COVID-19 as a condition of entry to its Australian sites and offices by the end of January, 2022. Similarly, "white collar" firms such as Deloitte requires its Australian staff to have received both doses of the COVID-19 vaccination before returning to the office or attending Deloitte events. This approach has been followed by a number of law firms in Australia.

Through the use of staff surveys, a trend can be seen amongst Australian's where there is a growing community expectation leaning towards accepting vaccination against COVID-19 to be required in order to return to the office. Of course, there have been challenges, but the statistics remain clear: the overwhelming majority is on-board with vaccination.

Use and disclosure of vaccination information is permitted, but only if there is express consent to the person's information being used in this way. There may be additional obligations on workplaces who captured vaccination information of third parties, such as contractors or visitors.

Given the enforcement of COVID-19 vaccine requirements in workplaces is a complex and evolving issue, we encourage employers to seek legal advice.

Things to consider when drafting a mandatory vaccination policy

When drafting a policy, we recommend that you consider:

- who the policy applies to (e.g. employees, contractors and/or supply chains etc.);
- any applicable exemptions from being vaccinated (e.g. medical contraindication, religious or political reasons);
- what systems are in place for dealing with the collection of information that may be covered by privacy laws;
- staggering the timing of the two doses of the vaccination to ensure adequate time for persons to receive both doses;
- providing alternate mechanisms to encourage take-up of the vaccine including paid leave to attend appointments during work hours, additional paid personal leave if employees experience illness in the 48 hours following the jab and communications to employees about the benefits of vaccination; and
- consequences for failing to receive the vaccination (e.g. suspension with (or without) pay, restricted access to the office and/or termination.

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Voller Decision

High Court confirms social media page operators liable for third party defamatory comments on their pages following highly anticipated Voller decision.

On 8 September 2021, the High Court of Australia ruled that media organisations are liable as publishers for defamatory third-party comments left by users in response to posts on their social media pages.

Given the strict interpretation of publication, the decision of Fairfax Media Publication Pty Ltd v Voller [2021] HCA 27 will have far-reaching implications for not just media outlets, but any organisation or person using social media platforms to publish content in Australia where users can comment on those publications. All organisations at risk of hosting defamatory comments on their social media pages, irrespective of how swiftly those comments are removed, should consider the defamation liability risks of enabling or continuing to use open comment functions on their social media pages.

The case (a quick refresher)

Dylan Voller was a former Don Dale Youth Detention Centre inmate. In 2016, three media outlets, Fairfax Media Publications Pty Ltd, Nationwide News Pty Ltd and Australian News Channel Pty Ltd, posted stories about Voller on their social media pages. The stories themselves were not defamatory, however a number of allegedly defamatory comments were left by third parties in response to the media outlets posting the stories to their respective Facebook pages. Instead of suing the individuals who made the posts, Voller sued the media outlets who, Voller argued, were also publishers of that defamatory content by virtue of facilitating and inviting the comments. The Supreme Court of New South Wales agreed with Voller as to the publisher element, and in September this year, so too did the High Court of Australia.

If you would like a further refresher on the issues relevant to defamation via social media, you can read our article Defamation – the social media, social-distancing edition.

The Impact of the decision

While the Voller defamation case itself is yet to be decided, the High Court has held in a 5:2 decision that a person who operates a social media account is a 'publisher' of third-party comments and therefore liable for their defamatory content. In this particular decision, the appellant media companies were held to be publishers because they "facilitate[ed], encourage[ed] and thereby assist[ed] the posting of comments by third-party Facebook users". Gageler and Gordon JJ went on to note that "having taken action to secure the commercial benefit of the Facebook functionality, the appellants bear the legal consequences". This was despite the fact that, at the time, the appellants were unable to disable user comments or require pre-moderation-since that functionality was not yet available within Facebook.

Given the adherence to the traditional interpretation of what it means to 'publish' – being 'a bi-lateral act where the publisher makes the defamatory material available and a third party has it available for their comprehension' - this decision has implications for all organisations and individuals that operate websites and social media accounts which allow user generated content to be shared. While using social media, open comment functions is a great way to generate discussion and interest about a publication and to increase its visibility within the relevant social media platform, however, the liability risks can no longer be ignored.

The impact of the decision has been almost immediate. Some international media companies such as CNN have ceased operating their Australian-targeted Facebook pages. Many have now disabled comments on their Australian Facebook pages. Others such as The Guardian, have announced that they are changing the types of content that they will post on their Australian Facebook pages. Within hours of the decision, NSW Health appeared to have changed its approach to allowing Facebook comments as it closed comments on posts on its page overnight (presumably while there is no-one to moderate the page). Further high-profile individuals (including politicians) and organisations are expected to follow suit in the coming weeks and months.

For those who want to continue to reap the benefits of social media engagement, there are less drastic (albeit more time-intensive) options available. For example, businesses can reduce the risks by:

- having social media policies and procedures for their business development, marketing and social media teams. These policies and procedures should include:
  - a clear moderation policy, including:
    - any restrictions on times when user generated content can be posted to pages (e.g. by closing comments overnight or on posts which are likely to be rife for defamatory responses);
    - how often content should be reviewed (including whether it is pre-or-post-moderated);
    - information about any filters which have been automatically applied, or should be manually applied by reviewers. These filters could include key words or phrases which are high risk;
    - guidance for identifying other defamatory (or potentially defamatory) material; and
    - steps to be taken when that material is identified – whether that means immediate removal of the potentially defamatory material, or escalation to a member of the legal team for prompt further investigation.
- keeping the moderation policies refreshed. For example, if defamatory material which is identified relates to a 'hot topic', consider whether additional filters and key words should be added to your moderation policy (either temporarily or on a longer-term basis). Policies will also be able to be adapted over time as we see how the courts implement the Voller decision. Keeping policies refreshed will ensure that they remain as easy to implement as possible; and
- providing regular training to ensure that the application of the policy is clearly understood, and consistently applied. This should include training for new team members and refresher training to reflect nuances in court decisions to come.

It's also worth remembering that the defence of innocent dissemination still applies (and so not all is lost), but only after the defamatory statement has been found to have been imputed and both time and costs have been incurred in defencing the claim rather than having it struck out much earlier in proceedings.

The takeaways

This decision will not just affect media companies, but any organisation or person who runs a social media account and invites open third-party commenting on that organisation or person's posts.

It remains to be seen in exactly what circumstances the Voller-type publication will arise. For example, Edelman J, who would have allowed the appeal in part, noted that in his view, a media company who posted an innocuous story, such as about the weather, which attracted third party comments should not be held liable for that third party commentary unless the link between the comment and the store was more than remote or tenuous. For now, it's a case of wait-and-see, particularly to see how the decision will be applied to non-profit making page operators (e.g. local community pages) and also whether legislative reform on this specific issue will follow in the next phase of long-awaited defamation reforms.

In the meantime, if you run a social media account accessible by Australians, you should take steps as soon as possible to limit the risks arising out of the Voller decision, particularly where you suspect users might make public defamatory comments in response to your posted content or otherwise on the pages you facilitate.

If you require further guidance on operating a social media account in Australia, please contact a member of our Technology, Media and Telecommunications team.

Rebecca Lindhout
Special Counsel

ACCC AdTech inquiry report

On 10 February 2020, Treasurer Josh Frydenberg directed the Australian Competition and Consumer Commission (ACCC) to hold an inquiry into the digital advertising technology services (ad tech services) sector. Underlying his Ministerial Direction were concerns about the complexity and opacity of the ad tech services market, particularly the dominance of digital advertising behemoth Google.

Fast-forward to 28 September 2021, the ACCC released the product of its inquiry: a 200-page final report concluding that enforcement action under Australia's existing competition laws is insufficient to address the competition issues in the ad tech sector. The report noted that an estimated 90% of all ad impressions traded via ad tech solutions passed through at least one Google service in 2020 – and in many cases, Google acted on behalf of both the buyer and seller of a digital advertisement, and operated the ad exchange connecting these two parties.

The report goes on to make six recommendations, which are aimed at increasing transparency in relation to the ad tech market and curbing anti competitive conduct which it considers is harmful to publishers, advertiser and consumers. The impact is also significant for ad tech providers, who do not have access to significant 'first-party data' generated by consumer-facing services and vertical integration like Google does.

This inquiry is significant for data regulation in Australia because it specifically acknowledges the link between access to and control of data, and 'market power', both in a competition law sense and more generally as a source of commercial value and advantage. Regulators the world over are discussing and investigating this, and certainly the ACCC is one of the main authorities taking the most activist of roles.

The Report's findings and recommendations

Issue	Key findings	Recommendation
Self-regulation of the ad tech market, including: • market dominance; • conflicts of interest; and • lack of transparency, leading (among other things) to high fees and keeping publishers and advertisers in the dark.	• The market has been too slow to self-regulate, particularly given Google's market dominance. • Australia's current competition laws are insufficient to combat this unique problem, as these laws focus on discrete breaches, rather than the systemic behaviours in this niche and complex area. • Google's vertical integration creates harms, including for publishers and advertisers, since Google can act for both of them as well as for the service connecting them, even though they have competing interests (one in selling the inventory at a high price, one in purchasing it at a low price and the other in making the sale). • The fact that Google keeps under lock and key its methods of targeting and pricing advertisements is a significant issue. For example, the fees charged by ad tech providers, and particularly the amount reserved by providers (the take rate) are not known and publishers also do not receive sufficient information to compare bids received from different advertisers so they can confirm they collect the best price.	**Recommendation 2:** The ACCC should be given powers to develop rules specific to the ad tech sector, which would ensure competition among ad tech providers and address conflict of interest concerns. These would be developed in consultation with the industry and contain penalties for non-compliance. **Recommendation 4:** Industry should establish standards which: • require ad tech providers to publish average fees and take rates for ad tech services to allow ad tech customers to meaningfully compare providers and services; and • renable verification of demand-side platform services. • If voluntary standards are not sufficiently effective in achieving transparency, or are not made promptly, the rules proposed by Recommendation 2 or Recommendation 6 could be extended to address these issues. **Recommendation 6:** The ACCC should be given powers to develop (in consultation with industry) and enforce industry-wide rules to increase transparency of both pricing and performance of ad tech services, such as through requirements to publish prices and take rates in a standard, comparable, form. These rules would have application to a broader group of participants *than those proposed under Recommendation 2 but would be more limited in their scope to issues of transparency.* *Recommendation 5: Google should provide publishers with additional information about the operation and outcomes of its publisher ad server auctions to enable bids to be compared (including those received through Google's Ad Exchange against those received outside of Google's services). Publishers should also be able to match information to the price payable for an impression.* *If Google's information is insufficient, the ACCC could introduce additional measure as part of the rules proposed in Recommendation 2.*
Use of consumers' data, including: • non-aggregated first-party data about a single consumer; and • aggregated first-party data which combines data from multiple consumers. Google has access to more than 60 consumer facing services as well as data from third party sites and services. This provides it with access to significant first-party data.	• Ad tech providers have broad powers to collect and use consumers' data. • Consumers generally have insufficient information or understanding to make informed decisions about their preferences regarding the use of their data by ad tech services. • Beyond consumer choice concerns, targeted ads rely on invasive data practices (including through the use of sensitive information), which particularly expose vulnerable groups to exploitation, such as children and online gambling addicts. This raises privacy and safety concerns. • There is a significant competitive advantage to vertical integration in terms of access to first-party data, even if this is more perception than reality.	**Recommendation 1:** Google should amend its public material so that it clearly describes how it uses first-party data to provide ad tech services. Public materials include terms of service and privacy policies with consumers and also business users of ad tech services. **Recommendation 3:** Similar to recommendation 6, the ACCC should also be given power to implement measures to address competition issues arising from an ad tech provider's data advantage, including an ability to break-up sets of data or a requirement that market players share data to create more transparency and competitiveness. These enforcement powers should apply to ad tech providers who meet a market power and strategic position test, who have an advantage arising from that power or position, where that data advantage has increased and has the potential to increase the ad tech providers' market power.

Where to from here?

What is different about this inquiry is that the ACCC makes precise, positive recommendations about introducing sector-specific rules to address issues that it considers are not adequately covered by general competition law. What is specifically different about this inquiry is that the ACCC makes specific, positive recommendations about introducing sector-specific rules to address issues that it apprehends, which general competition law in Australia (as it currently stands both statutorily and judge-made) is currently ineffective in addressing.

This industry-specific targeting feeds into a larger theme here in Australia, with the ACCC taking on a more active and perhaps even interventionist role in regulating specific industries in the digital domain. For example, it follows the introduction last year of the mandatory media bargaining code (which made the ACCC a de facto press council, and forced Facebook and Google to negotiate payments with traditional news providers for local news content, or face mandatory, annual arbitrations to determine those payments).

This course was set as a result of the 2019 release of the Digital Platforms Inquiry – Final Report , which recommended far reaching changes to competition law, privacy law, intellectual property law, media regulation (and recommended the conduct of the Ad Tech inquiry) in response to the finding that both Google and Facebook in particular had significant market power.

While the specifics of how these recommendations would be implemented will not be known until a further report (due in September 2022), it is likely that this will drive greater transparency in the disclosure of data handling practices in the ad tech sector. In the meantime, as all players grapple with increasing consumer awareness of privacy issues, increasing disclosure obligations under GDPR (and its increasing analogues around the world), impending evolution of Australia's Privacy Act for the digital environment - in light of a current Attorney-General's review, and no doubt some interim response from the industry's biggest player here.

It is also likely that market participants, including Google, will be keen to design their own rules of the kind proposed by the report, in the hopes of avoiding extensive ACCC imposed rules. This would be similar to the approach taken by Apple and Google in relation to the media bargaining code, where they strongly resisted an ACCC mandated code.

One thing is clear, especially for tech giants: this is not the end of the story.

Alex Hutchens
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Online Safety Act

A new 'single up-to-date' Online Safety Act regime to come into force in Australia in 2022

From the beginning of 2022, Australian end users and those operating online platforms and services in Australia, will be subject to a new and updated online safety regime. The *Online Safety Act 2021* (Cth) aims to provide a single up-to-date safety Act to address gaps in current legislation and modernise online content schemes.

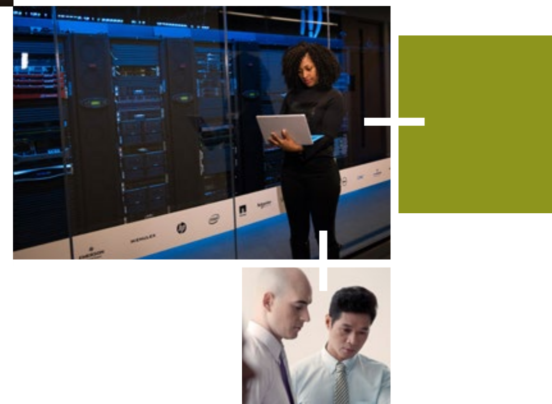
Amongst notable updates, the Australian Government has created a core set of basic online safety expectations which will apply to social media services and other online platforms, reduced content removal response times, updated legislation to clearly capture app distribution services and online search engines by regulation and created a power for the eSafety Commissioner to require Internet Service Providers (ISPs) to remove harmful content.

The updates will come into force thanks to the *Online Safety Act 2021* (the Act) passing Parliament on 23 July 2021, with an effective date of 24 January 2022 (unless proclaimed earlier). The Act, together with the *Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021*, aims to create a fit for purpose regulatory framework for online safety in the digital age.

Core updates

The Act will:

- retain and replicate certain provisions of the *Enhancing Online Safety Act 2015* (Cth) (EOSA) that are working well, for example the non-consensual sharing of images scheme;
- create and articulate a core set of basic online safety expectations, along with reporting requirements associated with these;
- replace the existing online safety schemes in the *Broadcasting Services Act 1992* (Cth) to address harmful content;
- create a new complaints-based, removal notice scheme for cyber-abuse against Australian adults;
- broaden the cyber-bullying scheme to capture harms occurring on services other than social media services;
- reduce the time frame for service providers to respond to removal notices from the eSafety Commissioner from 48 hours to 24 hours;
- clearly capture app distribution services and internet search engine services in the new online content safety scheme; and
- establish a specific and targeted power for the eSafety Commissioner to request or require Internet Service Providers (ISPs) to disable access to material depicting, promoting, inciting or instructing abhorrent violent conduct.



Basic online safety expectations and social media services

As part of its investigation into Australia's online safety regime, the Australian Government noted that few online safety requirements existed in legislation for online service providers. The Enhancing Online Safety Act 2015 (Cth) did contain a number of basic online safety requirements for social media services regarding cyberbullying, however these were limited in scope in terms of the services Australians are using, and on which harmful material is being encountered.

In response, the Australian Government has introduced the concept of 'Basic Online Safety Expectations' (BOSE), which will establish a high benchmark for the online services sector to take proactive steps to protect Australians from abusive conduct and harmful content online.

Under the Act, the Minister for Communication, Cyber Safety and the Arts, now has the power to make a set of BOSE. Each BOSE will apply to social media services, relevant electronic services or designated internet services, as determined by the Minister.

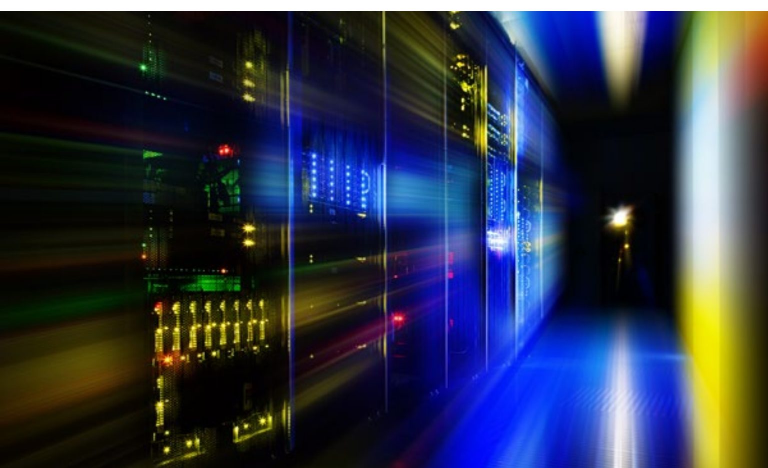
The Minister will have the power to:

- prepare and publish a statement on the Commissioner's website naming and shaming online services who have contravened one or more BOSE for that service. The statement can also list services who have complied with the BOSE;
- require a provider of a social media service, designated internet service or relevant electronic service, to prepare and provide reports to the Commissioner about the extent to which that provider has complied with a specified BOSE. A failure to comply with a report request may result in a civil penalty.

Complaints-based, removal notice scheme for cyber-abuse against Australian adults

The Act also establishes a scheme for the removal of cyber-abuse targeted at an adult.

While previous online safety legislation was largely aimed to protect children, under the new scheme, social media services, relevant electronic services, designated internet services, hosting services or relevant end-users who posted the abusive material will be responsible to take all reasonable steps to ensure cyber-abuse material is taken down within 24 hours, or a longer timeframe determined by the Commissioner.



Capturing of online search engine providers

Under the new scheme, the Commissioner will also have the power to issue a link deletion notice to internet search engine providers, such as Google, to cease providing a link to Class 1 Material within 24 hours.

This is provided that the Commissioner is satisfied that:

- on two or more occasions within the last 12 months end users could access Class 1 Material using a link provided by that service; and
- during those 12 months the Commissioner had given at least one removal notice in relation to the material that was not complied with.

A failure by a search engine provider to remove a link when requested may result in a civil penalty.

Capturing of app distribution services

Similar to the above, under the new Scheme, the Commissioner can also issue an app removal notice to an app distribution service, forcing them to remove the ability for Australians to download infringing apps that facilitate the posting of Class 1 Material within 24 hours.

This is provided that the Commissioner is satisfied that:

- on two or more occasions within the last 12 months Australian end users could access Class 1 Material by downloading an app provided by that service; and
- during those 12 months the Commissioner had given at least one removal notice in relation to the material that was not complied with.

A failure by an app service provider to block the download of an app by Australian users when requested may result in a civil penalty.

Additional rules for social media and online service providers

In addition to the above, the Commissioner also now has the power to determine additional legislative rules that apply to providers of social media services, relevant electronic services, designated internet services, hosting services and internet service providers in relation to each respective service.

If you operate an online platform or service and would like further information about the updated Online Safety Act Scheme, please contact a member of McCullough Robertson's Digital and IP team.

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Incentivising and retaining key talent - a new era for Employee Share Schemes in Australia?

With the war for talent across a range of industries increasing both competition and remuneration, many businesses – particularly those in the tech space - are looking to maximise alternative methods of providing value to their employees, in addition to more traditional forms of remuneration - such as salary and cash incentives. Coupled with the current social trend of employee engagement and transparency, and the fact that employees are increasingly looking to participate in the company they work for, many companies are looking to incentivise their staff via the use of equity incentives.

For multinational corporations and overseas-based talent, it is often routine that equity incentives will comprise part and parcel of an employee's remuneration package. However, whilst commonplace internationally, Australia has a chequered history when it comes to the ability to offer employees equity incentives, offering employees an ability to take advantage of meaningful tax concessions. This often comes to the surprise of businesses, with employees working across multiple jurisdictions who look to implement arrangements similar to those offered overseas to their employees in Australia.

In recognition of the need to make Australia more globally competitive, there have been multiple iterations of the ESS legislation over the last decade. These include a range of proposals to change the ESS landscape in order to align Australia with other jurisdictions. Most recently, in recognition of the fact that employee share schemes and other equity incentives were not widely used in Australia, due to their cost and complexity, in 2015 the Federal Government announced a raft of much anticipated changes to the taxation of ESS interests in Australia. Taking effect from 1 July 2015, the changes largely focused on bolstering entrepreneurship in Australia and supporting innovative start up companies.

Almost six years after those changes took effect, a new parliamentary inquiry has undertaken a review of the tax treatment of Employee Share Schemes in Australia, with a focus on increasing competitiveness, releasing a report titled 'Owning a Share of Your Work: Tax Treatment of Employee Share Schemes' (Report) on 23 August 2021.

The Report confirms the view that employee share schemes will be critical to Australia's ability to attract, incentivise and retain key talent. Further, new business, innovation and start ups are recognised as the 'engine' of higher productivity in Australia and it is recognised that such businesses often have ESS as a core feature.

However, as expected, Australia's current legislation relating to the use of employee share schemes falls far short of expectations with complex rules and a comparatively low take up of such arrangements in the Australian market – particularly compared with other economically similar countries such as the United Kingdom and the United States. As a result, a number of suggested reforms aimed at increasing the attractiveness of incentive arrangements in Australia have been proposed.

Taxation treatment of employee share schemes in Australia

The employee share scheme rules in Division 83A of the *Income Tax Assessment Act 1997* **(ESS Rules)** apply in all circumstances where individuals (including prospective and former employees, directors and consultants) are offered shares or rights to acquire shares **(ESS Interests)**, in respect of their employment or services, for a price less than the market value of the ESS Interests.

The underlying concept of the ESS Rules is that the value of any right or share received under an employee share scheme is property received for services provided by the participant and should therefore be fully assessable as ordinary income. Generally, this means that a participant will be required to include any 'discount' (i.e. to market value) on the shares or rights they receive in the year of issue, subject to three commonly used concessions:

1. **Start up Concession** – Introduced as part of the 2015 amendments, for certain qualifying share or option plans which qualify for the 'start up' concession, employees are not required to pay tax unless and until they dispose of their 'ESS Interest';
2. **Discount Concession** – For certain share plans which are widely available to employees of the company, a reduction on the amount included in each participant's assessable income of up to $1,000 each year is available; and
3. **Deferral Concession** – For plans where there is a real risk that the Participant will forfeit the shares or rights before they vest, the taxing point is deferred for up to 15 years. That is, rather than paying tax in the year the ESS Interests are issued or granted, the taxing point will be deferred until a later time.

However, importantly each of these concessions carries with it a raft of legislative requirements which must be satisfied in order for a participant to access the relevant concession.

For example, the introduction of the Start up Concession meant that the tax consequences of the issue of ESS interests on or after 1 July 2015, differentiate as between those issued by 'start ups' and those issued by other companies.

A 'start up' company is one which:

i.) is unlisted, and holds no interests in listed entities;

ii.) is an Australian resident company, with aggregated (i.e. group) turnover of less than $50 million;

iii.) has been incorporated for less than 10 years at the time the ESS interest is granted;

iv.) is not part of a group which includes entities more than 10 years old; and

v.) further, the participant's employer must be an Australian resident company in order for the participant to access the Start up Concession.

It is also a requirement of accessing the Start up Concession that:

i.) the shares or options issued to employees carry a minimum holding period – which generally expires on the earlier of three years after the date of acquisition, or the time the employee ceases employment with the relevant business; and

ii.) for shares granted under a start up concession scheme, the 'discount' provided in respect of the acquisition of shares must be no more than 5%. For options granted under a start up concession scheme, the option exercise price must be at least equal to the market value of shares in the company at the time the options are granted.

The criteria for a plan to access the Deferral Concession differs again, depending on whether shares, or rights, will be issued to Participants. However generally, the legislative requirements which must be satisfied for the scheme to be eligible for the Deferral Concession include the following:

i.) the Participant must be employed by the issuing Company or a wholly owned subsidiary; and

ii.) the ESS interests must relate to ordinary shares;

The Participant must not hold a greater than 10% beneficial interest in shares or voting rights in the Company at the time (including any shares or voting rights which are attached to unexercised rights or options);

where the interest granted is a share, then:

i.) at least 75% of the permanent Participants with more than three years of service that are Australian residents have acquired, or at some earlier point been entitled to acquire, ESS interests in the employer or holding Company; and

ii.) the shares must be subject to a real risk of forfeiture.

Where the interest granted under the scheme is a right to acquire a share (e.g. options):

i.) the ESS Interests must be subject to a real risk of forfeiture; or

ii.) the Plan Rules must state that the Deferral Concession applies to the scheme and participants must be prevented from immediately disposing of the rights they acquire.

The ESS deferred taxing point will then arise at the earliest of the following times:

i.) the time when there is no longer a real risk of forfeiture under the scheme for the shares and any restrictions on sale of the shares under the scheme no longer apply;

ii.) the time when the employm :nt or other relationship ends; or

iii.) fifteen years after acquisition of the interest.

In addition to managing the tax complexity associated with the offer of ESS to employees, companies in Australia must also navigate the regulatory environment. The offer of securities (such as shares and options) and other financial products to investors, including to employees, is regulated under Chapter 6D (for securities) and Chapter 7 (for other financial products) of the Corporations Act 2001 (Cth) (Corporations Act).

The Corporations Act requires that, unless an exemption applies, such offers must be made under a disclosure document (e.g. prospectus). In the context of employee incentives, there are a number of exemptions that may apply. The most relevant of these exemptions will often be:

- the 'small scale offering' exemption – under this exemption, a personal offer of securities does not need disclosure if, by making the offer, the number of people to whom securities have been issued within Australia will not exceed 20 in any 12-month period and the amount raised by issuing the securities within Australia will not exceed AUD$2 million in any 12-month period; and
- the 'senior manager' exemption – under this exemption, an offer of securities does not need disclosure if it is made to:

i.) 'senior managers' (defined as people who are concerned in, or take part in, the management of the body, regardless of the person's designation and whether or not the person is a director or secretary of the body) of the body or a related body, or their spouse, parent, child, brother or sister; or

ii.) a body corporate controlled by a person referred to above.

There is also supplementary relief available for certain incentive schemes in the form or ASIC Class Order CO 14/1001 (Class Order). The relief provides the employer with relief from the prospectus requirements (as well as certain hawking and advertising restrictions) and also provides the employee with relief from the 'on-sale' restrictions in the Corporations Act. However, the class order itself carries with it a range of key criteria that must be satisfied and, in our experience, is often not relied upon by private companies.

Key recommendations

The Report contains comprehensive and common-sense recommendations to promote employee ownership in Australia – each of which is aimed at simplifying the operation of the concessions outlined above, as well as the operation of the rules more broadly.

The first group of recommendations would see the Government proceeding to tax all ESS interests as capital for the purposes of taxation – with a recognition that adoption of this treatment would see many of the other impediments businesses face in implementing ESS in Australia fall away. This approach would be accompanied by the removal of impediments to the issue of ESS under the current regulatory regime.

However, given the Morrison Government's refusal to date to engage in meaningful tax reform, it can only be assumed that Treasury will not proceed with an overhaul of the ESS rules to allow such interests to be regarded as being held on capital account (and subject to the capital gains tax regime).

In this case, the Report also includes a number of recommendations which, whilst adopting a similar taxation treatment, are aimed at reducing conflict between the tax legislation and Corporations law and encouraging the use of ESS by reducing the cost and complexity associated with doing so – with the following key amendments proposed:

In relation to the Start up Concession:

i.) The definition of 'start up' should be made so as to extend to listed companies the ability to access the concession (subject to satisfaction of the other criteria);

ii.) The 'aggregated' turnover test should be removed so as to relate only to wholly owned groups (or entities that can be seen to be controlled by the company within the meaning of control under the Corporations law; and

iii.) The requirement to offer no more than 15% discount on the value of shares offered under a start up scheme should be removed.

In relation to the Discount Concession – the existing $1,000 limit should be extended to $50,000.

In relation to the Deferral Concession – the 'real risk of forfeiture' requirement and 75% offer requirements for shares should be removed.

It was also recommended that the safe harbour valuation methodology (which currently provides private companies relying on the start up concession with a safe harbour valuation methodology in relation to the shares in the company) be extended to apply to all unlisted companies.

A recommendation to remove the cessation of employment as a taxing point under the deferral concession was already announced in the Federal Budget in May of this year.

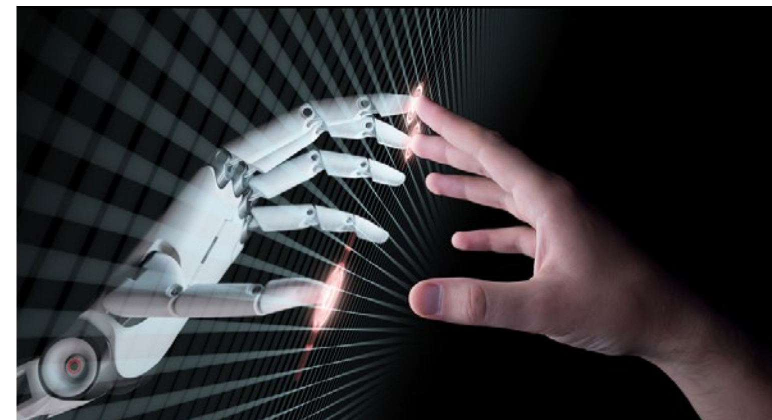
The remainder of the committee's recommendations will be considered by the Government in the coming months as part of the overall ESS tax reforms. Whilst it remains to be seen which of the recommendations will be implemented, the review (commissioned by Treasurer Josh Frydenberg) is certainly recognised as a step in the right direction. Any measures aimed at simplifying the regime and offering an ability to increase Australian competitiveness with international markets will be warmly welcomed by the business community.

Melinda Peters
Partner

Australian appeal to determine future of global relationship with AI

In a world-first decision handed down on 30 July 2021 (Thaler v Commissioner of Patents (2021) FCA 879), the Federal Court of Australia has recognised that an AI system can be listed as an inventor for the purposes of obtaining a patent under the Patents Act 1990 (Cth) (the Act).

The Commissioner of Patents appealed the decision to the Full Court of the Federal Court of Australia on 27 August 2021, and we await the results of the appeal.



Created by Dr Stephen Thaler, DABUS is an AI machine that generates new ideas on its own. The device uses vast datasets and neural networks to gain an in-depth understanding of the world, and then conducts multiple cycles of independent experimentation and idea generation to produce valuable insights and inventions.

In this case, Dr Thaler filed patent applications for two inventions: the first was for a food and beverage container that used 'fractal geometry' to minimise friction, and the second was for a device that flickers light to correspond with human neural activity to attract attention. Both inventions were claimed to have been independently generated by DABUS and the patent applications listed DABUS as the inventor.

Facts

While DABUS was named as the inventor on the application, the Deputy Commissioner held that an AI system was incapable of being considered the inventor for the purposes of 3.2(C)(2)(aa) of the Patents Regulations 1991 (Cth), and therefore no inventor had been named.

The question faced by the Court was whether a valid application had been lodged, not whether the application should be approved. To answer this, the Court spent substantial time considering section 15(1) (below) which prescribes who may be granted a patent, and particularly sections 15(1)(b) and (c) with respect to granting a patent to a person where the inventor is not themselves a natural person.

Who may be granted a patent?

1. Subject to this Act, a patent for an invention may only be granted to a person who:
   - ii.) is the inventor; or
   - iii.) would, on the grant of a patent for the invention, be entitled to have the patent assigned to the person; or
   - iv.) derives title to the invention from the inventor or a person mentioned in paragraph (b); or
   - v.) is the legal representative of a deceased person mentioned in paragraph (a), (b) or (c).
2. A patent may be granted to a person whether or not he or she is an Australian citizen.'

The word 'inventor'

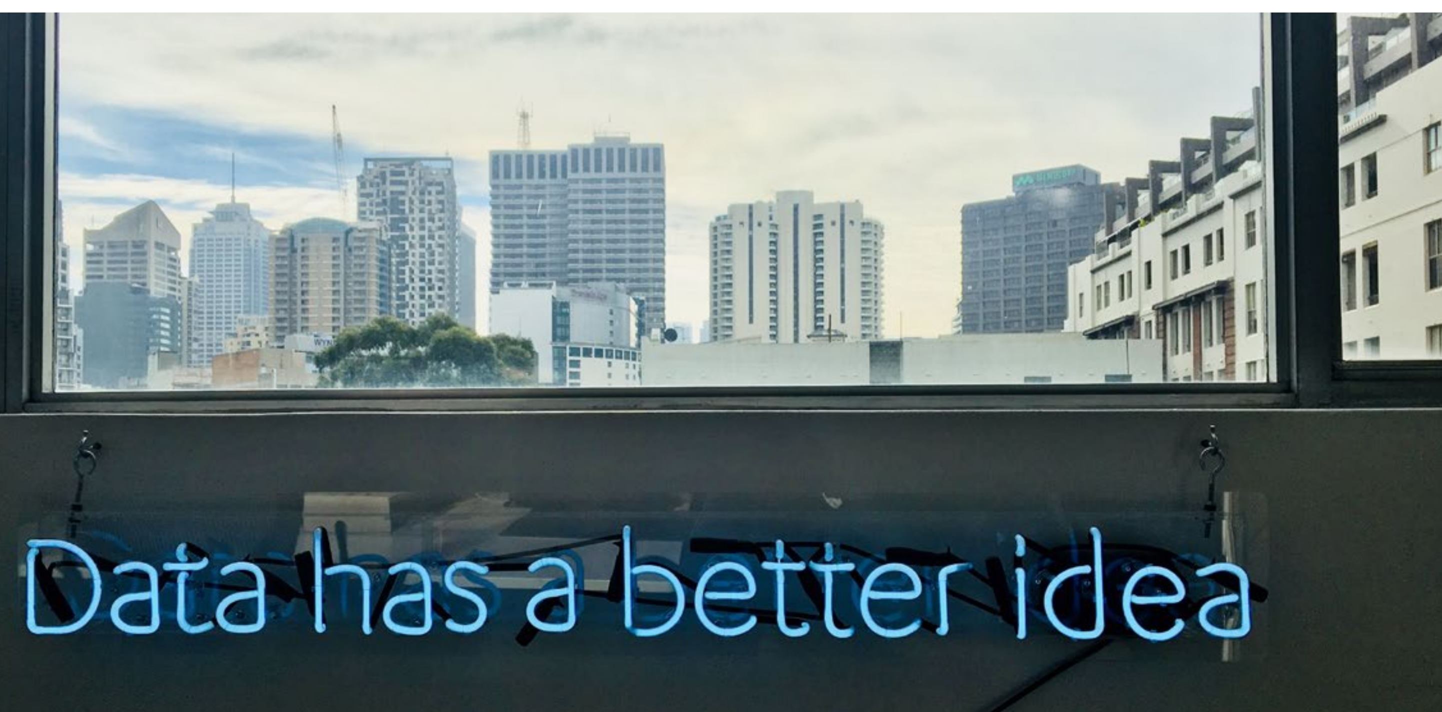
Australian patent legislation does not define the term "inventor'. In arguments, the Commissioner of Patents referred to dictionary definitions and asserted that 'inventor' should be interpreted to mean a natural person. Justice Jonathan Beach disagreed with this method of analysis, placing emphasis on the need to consider the evolving nature of patentable inventions and their creators. His Honour said '"inventor" is an agent noun...the suffix "or" or "er" indicates that the noun describes the agent that does the act referred to by the verb'. In other words, if something invents, it is an inventor. His Honour held that an agent could be a person or a thing, and cited similar linguistic constructions, including terms like 'dishwasher', 'lawnmower', and 'computer'.

Importantly, it was not suggested that DABUS itself could be granted a patent under section 15(1)(a) of the Act, given the introductory wording that the patent be granted to a person.

Proprietary rights and title

The Commissioner argued that to be an inventor, one needed to have the capacity to hold and enforce proprietary rights because any entitlements of a patentee must flow from the inventor. Accordingly, the Commissioner concluded that because DABUS was incapable of having proprietary rights – because it is a machine – there was no way for any entitlements to flow to Dr Thaler in accordance with sections 15(1)(b) and (c).

Justice Beach stated that section 15(1)(b) only required the applicant be entitled to have a patent assigned to them, in the event that there was a grant. Consequently, this section did not require an inventor to be involved in the assigning process, let alone that the inventor be a human one. His Honour offered real-world examples of arrangements where the inventor is not involved in the assigning process, including employment relationships and contractual agreements where the assignment happens automatically. Accordingly, the Court held that Dr Thaler could be assigned title under section 15(1)(b) should the correct circumstances arise.



Justice Beach spoke broadly about section 15(1)(c) and concluded that because proprietary rights exist in an invention before applying for a patent, and that inventions are capable of being possessed, Dr Thaler could derive title from DABUS. His Honour explained the chain of connection as such:

> '[i]n my view, Dr Thaler, as the owner and controller of DABUS, would own any inventions made by DABUS, when they came into his possession. In this case, Dr Thaler apparently obtained possession of the invention through and from DABUS. And as a consequence of his possession of the invention, combined with his ownership and control of DABUS, he prima facie obtained title to the invention. By deriving possession of the invention from DABUS, Dr Thaler prima facie derived title. In this respect, title can be derived from the inventor notwithstanding that it vests ab initio other than in the inventor. That is, there is no need for the inventor ever to have owned the invention, and there is no need for title to be derived by an assignment' (at [189]).

Object of the Act

The object of the Act is set out at 2A:

> 'The object of this Act is to provide a patent system in Australia that promotes economic wellbeing through technological innovation and the transfer and dissemination of technology. In doing so, the patent system balances over time the interests of producers, owners and users of technology and the public.'

The Commissioner argued that by requiring inventors to be human, it created a system that balanced the interests of producers, owners and users of technology and the public. The Commissioner acknowledged a possible future where AI systems would be recognised as inventors by legislative developments, but reasserted that the Commissioner's interpretation gave effect to the current statutory purpose.

His Honour criticised the Commissioner's approach on this issue and went as far as to call it the 'antithesis to the object' of the Act. In Beach J's view, it was consistent with the object of the Act to construe the term 'inventor' so as to promote innovation and reward it irrespective of whether that innovation was made by a human.

His Honour also stated that his decision reflects the current reality in terms of the many otherwise-patentable inventions where it could not be said that a human is the inventor – for example, where the pharmaceutical industry uses AI technologies to guide drug development, yet pharmaceutical companies themselves claim to be the inventors.

Finally, His Honour observed there were no specific provisions in the Act expressly refuting that an AI machine could be an inventor, and that there is no specific aspect of patent law (unlike copyright) that excludes non-human inventors.

For the purposes of the patent applications, the Court found DABUS could appropriately be named as an inventor and that Dr Thaler could acquire title to the inventions. Beach J ruled the applications to be valid and remitted the decision to the Commissioner for further consideration.

The Commissioner of Patents filed an appeal to the Full Federal Court of Australia on 27 August 2021. We await the decision from the Full Federal Court.

What have other jurisdictions decided?

Thaler filed similar patents in the UK, US and EU, which were rejected in those jurisdictions. In 2020, the Intellectual Property Office in the UK rejected the applications on the grounds that DABUS was not a natural person and therefore could not be an inventor. The UK High Court agreed with this decision and went one step further saying that because of its non-person status, DABUS was incapable of passing the proprietary rights of the inventions to Dr Thaler for the purposes of the patent.

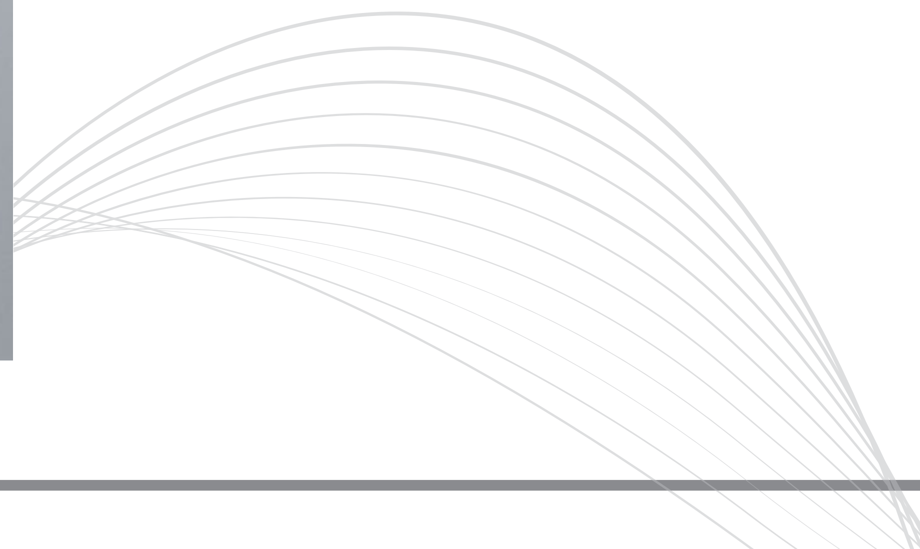
In South Africa, the decision was made to allow the patent application with DABUS as the inventor; however South Africa does not conduct formal reviews of applications until the application is granted. Allowing the application in this case was essentially an administrative decision which may be challenged in the future. Accordingly, the Australian case is the first in the world to judicially consider and rule that AI systems can be inventors.

What this means

While academic notions such as the definition of AI and questions of self-awareness and Turing tests were expressly left aside, the Court's finding has given rise to criticism and headlines around the world.

Industry commentators and academics have noted wide-ranging negative implications, including:

- This decision may impact the relevant concepts of 'inventive step' and 'person skilled in the relevant art'. By ruling that an AI can be an inventor, AI's computational processes are arguably put into the same category as human ingenuity and creativity. How will human inventions compare, or compete, against those of an AI machine?
- Given complex AI machines and supercomputers are largely accessed by corporations and governments, the decision may lead to inequalities and monopolies in the IP sector. Relevantly, what formula would be used for assigning rights for things part-invented by a human and part-invented by a machine?
- Due to the sheer computational power of AI machines, it is possible to imagine a future where any invention conjured by humans may have already been invented by an AI. This future presents a risk that human-driven innovation may become disenfranchised by lack of incentive, or indeed by risk of infringement, as patent infringement does not rely on a person having knowledge of an existing invention;
- On the other hand, there are several arguments in favour of recognising AI systems as inventors, including:
- Recognition facilitates the disclosure of AI-created inventions. Without such a mechanism, creators of AI systems may be inclined to claim these inventions themselves, which could lead to complicated and expensive disputes about inventorship and patent eligibility, which places additional burden on the court system;
- The decision (if it stands) may encourage an increase in investment and interest in the AI industry in Australia;
- In a world-first decision handed down on 30 July 2021 (Thaler v Commissioner of Patents (2021) FCA 879), the Federal Court of Australia has recognised that an AI system can be listed as an inventor for the purposes of obtaining a patent under the Patents Act 1990 (Cth) (the Act); and
- The Commissioner of Patents appealed the decision to the Full Court of the Federal Court of Australia on 27 August 2021, and we await the results of the appeal.



If you have questions about the issues discussed in this article, please get in touch with a member of our Digital & IP team:

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The designs, they are a changin' – what you need to know about the amendments to the Designs Act 2003

The Designs Amendment (Advisory Council on Intellectual Property Response) Act 2021 (Cth) received Royal Assent on 10 September 2021, and introduces key changes to designs law in Australia. In particular, a 12 month "grace period" will be introduced, which protects applicants who use or publish their design before filing. The majority of the amendments commence on 10 March 2022, and we outline in detail below the key changes and what you need to know.

12 month grace period

Key change: the introduction of a 12 month grace period brings the Australian designs system in line with the patents system. The change means that Australian design applicants can file their design application within 12 months of use or publication, without it affecting the "new and distinctive" requirement.

While a grace period is common practice internationally and already applies to patents in Australia, the Australian Designs Act has trailed behind. It is a welcome change for applicants, many of whom may have assumed the grace period existed and unknowingly jeopardised their application through use or publication.

What this means: commencing on 10 March 2022, the grace period will allow designers to test their design in the market, before committing to design protection over other forms of protections such as copyright, and before products are industrially applied. Importantly for foreign applicants, while the grace period applies from the priority date, there are certain exemptions, such as publication of the design by overseas foreign designs offices so claiming priority will be important.

Infringement exemption – prior use

Key change: a new infringement exemption will be introduced to protect third parties from infringement if they use a design after disclosure, but before an application for that design has been filed. This comes off the back of the newly introduced grace period, in an effort to balance the rights of designers and third parties.

What this means: a designer may disclose their design during the grace period but a third party might not be aware that the designer intends to file an application to register the design. If the third party starts to use, make, import or sell the product before the filing date, they will be exempt from registered design infringement during that period.

Innocent infringement defence

Key change: an innocent infringement defence is currently available under the Design Act, where a third party was unaware, or could not reasonably be aware a design is registered. This defence will be expanded to include the period of time between the design filing date and registration, where the design is not published on the register and available for the public to search.

What this means: a successful application of this defence can result in a refusal to award damages, a reduction in the damages awarded, or a refusal to award for an account of profits, in respect of an infringement occurring before the date the design was registered.

Exclusive licensees

Key change: an exclusive licensee who has licensed all rights in Australia to a design, will now have standing to commence infringement proceedings and enforce their rights. However, the licensee must make the registered owner of the design a defendant in the proceedings, unless the registered owner is a joint plaintiff.

What this means: as the one who is exploiting and using the design, this brings licensee rights under the Designs Act in line with that of trade marks and patents.

Removal of publication option

Key change: from 10 March 2022, we will also see the removal of less commonly used option to publish a design without registration (often used to place the design into prior art).

What this means: moving forward, if registration is not requested at the time of filing, the design application will automatically be registered after six months, unless the applicant expressly withdraws the application. A design application will also be kept confidential until registration occurs.

Other amendments

We will also see changes to:

- **Formal requirements:** the process for updating formal requirements will be improved so the Registrar can easily change what must be included in an application and how drawings are presented. This is to bring the rules up to speed with new technologies, as they continue to develop for designs.
- **Standard of the informed user:** this has now been amended from an "informed user" to "familiar person", when considering whether designs are substantially similar in overall impression. The change will remove the necessity to be a "user" of the design, and is expected to reduce expert witness costs in infringement matters.
- **Revocation of registration:** this amendment clarifies the grounds for revocation, expressly including acts of fraud, false suggestion or misrepresentation, and that they apply to both registration and examination stage of the design.
- Renewal of registration status: this amendment clarifies that during the six month renewal period available for payment, the registration will not cease.

Belinda Breakspear
Partner

The launch of .au direct: an entirely new domain

auDA recently announced that a new domain namespace will become available on 24 March 2022 for .au direct. This new extension will allow you to register your domain name directly preceding .au, for example: mycompany.au or newdomain.au.

What is the benefit of .au direct?

The new .au direct namespace is shorter, cleaner and likely to be more memorable. Domain names represent your company on the internet, they are often the first place a customer will look, and they can be a valuable asset to your business and brand identity. The new .au direct domain name will also have greater availability to more businesses than before.

Who can apply?

Anyone who has an Australian presence or local connection to Australia will be eligible to registrar. The eligibility criteria is more relaxed than the .com.au or .org.au eligibility requirements, which have a specific allocation criteria. This means that a wider choice of domain names will be available to a broader group of applicants.

If you already hold a .com.au namespace (e.g. yourcompany.com.au), you will be eligible to claim priority on the .au direct equivalent to your current name space (e.g. yourcompany.au), during the first six months from 24 March 2022 (known as the Priority Allocation Period). This means that the equivalent .au direct namespace will be reserved and not available to the public during the Priority Allocation Period, to allow the current owner first chance to register.

If more than one person is eligible to register the .au direct (e.g. one person owns the .com.au, and another the .net.au) there will be a conflict, and priority for registration will be determined by the earliest domain creation date – prior to 4 February 2018 (Category 1 – first priority), or after 4 February 2018 (Category 2 – second priority). If a conflict still remains (e.g. there are two Category 1 applicants), the parties will need to resolve this through agreement or negotiation.

You will be able to apply for priority status as soon as the new application process opens on 24 March 2022 and we can assist you with that process. In the meantime, we recommend checking that your current domain name registration details are up to date, especially if you are looking to claim priority on the .au direct namespace. We also recommend you obtain trade mark protection for your brand, as this locks up exclusivity in the name, and is a useful tool in domain name disputes.

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