

# Commercial insights

## Commercial insights Editors – November edition:



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In this edition of *Commercial insights*, we consider a recent decision of the Queensland Supreme Court and the importance of a shareholders' agreement to protect minority shareholders, and we examine the newly increased powers of the Fair Work Ombudsman regarding franchises. We also provide some handy tips on entering into individual flexible working arrangements with award employees; how to avoid copyright infringement when using another person's publicly available material; tips for sole traders on how to better protect yourself and your business, and some insights into the value of having and maintaining an up-to-date partnership agreement.

Put it in writing: Tools to protect and enforce minority shareholder rights (Part 2)	1
How to Avoid Copyright Infringement	3
Increased Powers of the Fair Work Ombudsman – Is your Business Vulnerable?	5
How fit are you, legally?	7
Partnership Agreements – do you have one and is it up to date? Is it a dispute waiting to happen?	9

### SHAREHOLDERS' AGREEMENTS

## Put it in writing: Tools to protect and enforce minority shareholder rights (Part 2)

### The Importance of a Shareholders' Agreement

In the August issue of *Commercial insights* we wrote about the utility and importance of a shareholders' agreement in protecting the rights of a minority holding, as illustrated by the recent case of *SDW2 Pty Ltd v JLF Corporation Pty Ltd & Ors*<sup>1</sup> in the Supreme Court of Queensland.

In that case, without the option rights in the shareholders' agreement, the minority shareholder would not, in the event of anti-competitive behaviour by other shareholders, have a contractual right to exert control over the ownership of the



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company or otherwise restrain anti-competitive conduct of other shareholders, other than by utilising the minority shareholder oppression provisions in the Corporations Act.

## A shareholders' agreement is a separate contract

A shareholders' agreement is a private contract **between the shareholders** of a company under which they agree to regulate their rights as owners and shareholders of the business.

It is distinct from the company's constitution which is regulated by the Corporations Act. In the absence of a shareholders' agreement, minority shareholders are at risk that, pursuant to the constitution, the majority of shareholders constituting 75 per cent or more of voting rights, may amend the rights of all shareholders.

If there is a conflict between the shareholders' agreement and the constitution then it is common for the terms of the shareholders' agreement to provide that the terms of the shareholders' agreement prevails.

A shareholders' agreement, is an enforceable contract agreed between all shareholders and which can generally only be varied with the consent of all parties. Therefore, it operates to protect shareholders by creating contractual rights particularly in the case of minority shareholders.

It can deal with a range of issues **relating to 'control'** for example upon the transfer or issue of shares by giving existing shareholders an equal right of pre-emption or an option to purchase the shares of an existing shareholder.

## The Shareholders' Agreement

A shareholders' agreement is an important tool which can be used by the owner/shareholders to regulate and control the ownership of the company and management of the directors.

Importantly, it is a contractual mechanism which can be utilised to protect shareholders interests. In this regard, its terms can also deal with a range of other matters such as:

- shareholder exit strategy and events of death or incapacity of a shareholder
- entry of a new shareholder and share issues
- non-compete and restraint of trade
- non-dilution of shareholder interests
- dividend distribution policy
- directors meeting procedures, rights to appoint directors and operating procedures and approvals
- events of default giving rise to share transfers and right of pre-emption
- dispute resolution

Even though there are 'generic' or 'boilerplate' terms which can be instituted in a standard shareholders' agreement, the document should be thought of as a **specific contract** which forms the basis and which services the operational needs of the business and should thus reflect the commercial ownership requirements of the shareholders.

It is therefore to the advantage of the shareholders and the business that a shareholders' agreement is **specifically tailored** to satisfy specific expectations and requirements of the shareholders.

<sup>1</sup> [2017] QSC 001 (16/7342)

**SHOULD YOU REQUIRE ASSISTANCE OR ADVICE ON THE PREPARATION OF A SHAREHOLDERS' AGREEMENT, STRATEGIES REGARDING OWNERSHIP AND CONTROL OF YOUR BUSINESS OR PROTECTION OF SHAREHOLDER'S RIGHTS SUCH AS A MINORITY SHAREHOLDING OR ANTI-DILUTION OF A MAJORITY SHAREHOLDING, PLEASE CONTACT OUR COMMERCIAL AND CORPORATE ADVISORY PRINCIPALS MICHAEL BRACKEN OR MARK FITZGERALD.**

COPYRIGHT INFRINGEMENTS

## How to avoid copyright infringement

With so much information publicly available, you must be careful not to infringe copyright when you use another person's material.

How can you better comply with Australian copyright laws?

### What is copyright?

Copyright is protection over the way an idea or information is **expressed**. It is not the idea or expression that is protected, meaning you will not be infringing copyright if you use the same idea or information as another person **and** use your own expression to convey the idea or information.

For copyright to subsist in a literary work (e.g. publication or seminar notes) under the *Copyright Act 1968* (Cth):

- the owner must be an Australian resident or citizen;
- the work be made or first published in Australia; and
- it must be original (including original compilations of another person's work).

In Australia, copyright protection is automatic from the time the original work is created and usually exists from the date of publication until 70 years after the author's death.

Copyright owners have **exclusive rights** to reproduce, publish, perform the work in public, communicate the work to the public and make an adaptation of the work, grant permission for others to use the work, among other things.

Copyright owners also have **moral rights**. That is, they have the right of attribution of authorship, the right against false attribution of authorship and the right of integrity of authorship.

You are infringing copyright if you exercise any of the above rights without the copyright owner's permission. For example, copying a substantial part of the owner's work, or even photocopying and distributing the work.

#### Tips:

**Key questions that will help you whenever you are using another person's material:**

- **Does copyright subsist in the literary work I intend to use in my material?**
- **If so, have I sought permission from the copyright owner to reproduce, publish, perform, communicate or adapt the work?**
- **If I do have permission, have I correctly attributed the work to the author?**



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## What if I inadvertently infringed copyright?

Copyright infringement occurs regardless of whether it is intentional or not. A copyright owner who issues court proceedings against you is entitled to seek a court order for an injunction to restrain you from infringing copyright and an account of profits.

The court will not award damages against you if you were not aware or had no reasonable grounds for suspecting that you were infringing copyright. However, the defence for innocent infringement is viewed narrowly in court. In one case, a defendant who made an error in identifying the copyright owner relied on this defence, but a defendant who was mistaken about the scope of copyright law could not rely on the same defence.

**Tip: Seek help if you do not know whether you will be, or are, infringing copyright.**

## What if there was no copyright notice on the work?

Copyright may still subsist in the literary work even if it does not have the copyright notice (“© [name of owner] [year]”). So if you are referring to another writer’s work, the fact there is no copyright notice does not mean it is not protected.

**Tip: If there is no copyright notice on a work, still seek permission from the copyright owner to reproduce or publish the work.**

## What if I only copy less than 10% of the work?

Depending on the circumstances, unless you have copied the work for research and study purposes, copyright infringement can occur even if you have copied a small part (section 40, *Copyright Act 1968*).

Copyright infringement occurs if an act is carried out in relation to a **substantial part** of the work or other subject matter (section 14, *Copyright Act 1968*).

This does not necessarily mean it is the **quantity** of the work – copying a small portion does not mean your act does not constitute copyright infringement. The courts will consider the **quality** of the work taken. That is, how important it is, and the extent of author’s effort and level of skill taken to create it.

In one case, the court held that 20 seconds of a four minute musical work is copying a substantial part of the work because the excerpt was easily recognisable by the public.<sup>2</sup>

**Tip: When you decide to copy a work without the author’s permission, look at the quality and quantity of the work copied.**

## What if I use a YouTube video clip during my presentation?

A video clip posted on YouTube does not automatically mean you can use it without permission from the copyright owner.

Generally, you will need permission from the copyright owner to use the YouTube video clip.

However there are some exceptions. Most common exceptions that may apply in this situation are if:

- the clip is marked with a ‘Creative Commons BY Licence’;
- your use of the clip is less than a substantial part of your presentation (see response to Question 4 above); or

- your use of the clip is 'fair' and for the purposes of research or study, criticism or review, parody or satire, or reporting news.

**Tip: A video clip posted on YouTube does not automatically mean you can use it without infringing copyright.**

Copyright law is a technical and complex area of law. If you do not know if you are infringing copyright, seek legal advice.

**Final tip: Keep abreast of any changes in copyright law.**

On 20 December 2016, the Productivity Commission reviewed the intellectual property system at the request of the Australian Government and recommended Australia adopt the broad and open-ended "fair use" exception, which currently exists in America. Broadly, infringement will be allowed if it is fair, and will be determined on a case-by-case basis.

This is likely to impact on your use of another person's material.

<sup>2</sup>Hawkes and Son (London) v Paramount Film Service [1934] Ch 593.

**SHOULD YOU REQUIRE ADVICE ON ISSUES RELATING TO COPYRIGHT IN MATERIAL PUBLISHED BY YOU OR ANOTHER PERSON OR ENTITY, PLEASE CONTACT OUR IP SPECIALISTS, ASSOCIATE JANETTE LI OR PRINCIPAL MARK FITZGERALD.**

## EMPLOYMENT

# Increased Powers of the Fair Work Ombudsman – Is your Business Vulnerable?

New legislation has recently been introduced which was sparked by the discovery of a number of large organisations found to have engaged in systematic underpayments and exploitation of workers.

The Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 provides the Fair Work Ombudsman with greater investigative and enforcement powers, introduces penalties for providing false or misleading information to inspectors and sees **penalties increase** tenfold. Corporate entities found to have seriously contravened a civil remedy provision can face maximum financial penalties of \$630,000 while individuals can face a maximum of \$126,000.

**Franchise operations** are clearly in the FWO's sights with new provisions meaning franchisors and holding companies can be found liable for the conduct of its franchisees and subsidiaries. A franchisor or holding company that knew, or ought reasonably to have known, about serious contraventions such as underpayment of wages by the franchisee or subsidiary entity could face crippling **compensation orders**.



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A number of factors will determine whether a franchisor or holding company has taken reasonable steps to identify and rectify non-compliance by its franchisees and subsidiaries. In order to avoid scrutiny by the FWO, all employers, franchisors and holding companies should review their operations and ensure adequate measures are in place.

If you would like more information about the new legislation or steps that you can take to protect yourself and your business please contact our Employment Team.

## Are you flexible?

We continue to see an increase in the request by employees for flexible working arrangements. Although a Modern Award provides for the minimum terms and conditions of employment, it is a collective arrangement that applies to a large number of employees and may not effectively cater for the **specific circumstances** of individual employees and employers.

An employer can mutually agree to enter into an Individual Flexibility Arrangement (IFA) with an Award covered employee which has the effect of varying certain terms of a Modern Award. An IFA for an Award covered employee can vary:

- Arrangements for when work is performed;
- Overtime rates;
- Penalty rates;
- Allowances; and
- Leave Loading.

An IFA will only be enforceable if it:

- is in writing signed by both the employee and the employer;
- is limited to variation of the above provisions;
- is entered into after employment commences; and
- means that the employee is 'better off overall'.

Ensuring an IFA is made properly can be difficult and requires a thorough review of the variations requested. An employer that fails to ensure that an IFA is made properly and in accordance with the *Fair Work Act 2009* can be **liable to penalties** of up to \$54,000 if the employer is a body corporate or \$10,800 for an individual.

IFA's are able to be terminated and are not a substitute for and do not replace employment contracts.

**IF YOU WOULD LIKE ASSISTANCE WITH IFA'S EMPLOYMENT CONTRACTS OR UNDERSTANDING AWARD OBLIGATIONS, PLEASE CONTACT A MEMBER OF OUR EMPLOYMENT TEAM, PRINCIPAL SHARLENE WELLARD, SENIOR ASSOCIATE JESSICA LIGHT OR ASSOCIATE LEANNE DEARLOVE.**



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SOLE TRADERS, FITNESS

## How fit are you, legally?

Working as a Fitness Professional (**FP**) can be a rewarding career in helping others achieve their health and fitness goals, but the responsibilities also carry a number of substantial and potential legal and business risks, so it is always a good idea to check that you, and your business, are as well protected as you can be.



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### Am I at Risk as a Sole Trader?

It is not uncommon for FPs to operate their business as a sole trader as this structure has a number of advantages, being relatively cheap to establish, offering autonomy in decision making and it is easy to administer which makes it an attractive option for FPs.

However, a sole trader business structure also carries with it the obligation of unlimited personal liability and it also lacks of some of the benefits of other corporate structures in circumstances where your business or sources of income grow.

Corporate or company structures can otherwise provide an opportunity to **limit some legal liabilities** and by not having the benefit of limited liability a sole trader is personally responsible, without a limit, for the debts of the business and any claims made against the business. This means that all of your personal assets, including any assets jointly-owned with another person, such as a house, may be at risk should a claim be made against you.



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### Lawsuits and Personal Liability Exposure (Sole Trader)

Unfortunately there are a range of business and legal risks which FPs must navigate.

In one example which occurred in 2017, a personal trainer, and franchise gym where he worked, made news headlines when the gym was sued for \$200,000 by a client who had to spend a week in hospital after being injured during his first training session, despite complaining about feeling unwell during his PT session.

To make matters worse, the gym claimed that the **uninsured** personal trainer was not its employee, and therefore the trainer could be personally liable for any damage.

This example and other similar cases, illustrate how important it is to take precautions to protect yourself, and to be proactive about it, as good intentions will not be enough.

## You can take some simple steps to help lower your risk

- 1 Prevention: Assess and be aware of the legal risks, know **your legal responsibilities**, and the legal standard to which you are required to perform including professional standards and guidelines. Overall, know your client and manage the legal risk having regard to the client profile.
- 2 Use a **simple written contract** containing terms and conditions which clearly describe your services, responsibilities and the limits. Do not rely on unstructured or verbal assurances to determine your obligations.
- 3 Ensure that all agreements or arrangements you have with others (partners, employees and contractors, franchisees) are **properly documented**; and before signing anything, make sure that written documents accurately represent any verbal agreement reached.
- 4 Keep **accurate records** of all correspondence, documentation and agreements.
- 5 Be **vigilant** with your clients on an ongoing basis – keep monitoring and ensure you stay informed.
- 6 Be adequately covered for your business and personal risk by taking out the **appropriate insurances**, such as professional indemnity and public liability insurance.
- 7 When in doubt, seek **legal assistance and advice**. Just like people seek your help with their health and fitness needs and goals, referring to experts is always advised.

Fitness industry professionals have a duty of care to their clients and must follow professional standards and guidelines. Meridian Lawyers can help you to manage the risks, understand the regulations that may apply to your fitness business and when considering your business structure and contracts underpinning the operation of your business.

Meridian Lawyers' corporate and commercial legal team has dedicated **expertise in the health and fitness** industry and regularly advises gym businesses and fitness professionals on, a range of matters such as:

- professional negligence and public liability claims
- complaints and demands for compensation
- business restructures and advice on business and asset protection
- regulatory issues relevant to fitness professionals and businesses
- franchise and employment agreements and other contractual matters

**SHOULD YOU REQUIRE ADVICE ABOUT PROTECTING YOUR FITNESS OR PERSONAL TRAINING BUSINESS OR RESTRUCTURING, PLEASE CONTACT OUR COMMERCIAL AND CORPORATE PRINCIPAL MICHAEL BRACKEN OR SPECIAL COUNSEL GEORGINA ODELL.**



DISPUTE RESOLUTION

## Partnership Agreements – do you have one and is it up to date? Is it a dispute waiting to happen?

Most business partnerships do not last forever. Each year Meridian deals with many disputes between business partners.

Disputes often happen because the relevant documentation is unsatisfactory or out of date, resulting in the partners having different views on how to deal with commercial matters.

Business partners part company for many reasons. They could simply wish to retire, have a change of career, cash in on the fruits of their labours or just change focus. Parting ways does not mean business partners need to fall out and end up in a costly dispute. However, in reality this is **often what happens**.

We deal with many disputes between business partners and we have noticed that there are some recurring factors that are the catalysts for conflict. There are relatively simple measures that can be put in place in order to limit the risk of costly disputes in the future.

### Common causes of partnership disputes

Disputes among partners are often caused for the **following reasons**:

- a lack of an appropriate and well drafted **partnership agreement**. In Meridian's experience we often see circumstances in which partners enter into a partnership on good terms where trust and the representations of fellow partners are relied upon, but the partners omit to reduce critical terms of their agreement to writing which is signed by the partners;
- the partners have an existing partnership agreement but it has **not been updated** to reflect the changes that have occurred to the partnership over time. We often see partnership agreements which have not been updated since the parties first went into partnership notwithstanding the fact that there have been significant changes over time to the way in which the partnership is conducted;
- the **uncertainty** of respective rights and obligations of each partner as a result of not having a well drafted partnership agreement;
- the **underperformance or breach** of an obligation of a partner;
- one or more partners have contributed financially to the partnership but there has been **no documented agreement** as to how this financial contribution is to be treated: is it a loan or is it a purchase of further equity in the partnership. If it is a loan, when is it repayable and does interest accrue on the loan?
- management and personality **conflicts** between partners; and
- unforeseen **changes to the dynamics** of the partnership.



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## Safeguards to prevent a partnership dispute

There are a few simple steps that business partners can undertake in order to limit the risk of becoming engaged in a costly partnership dispute. It is important to remember that it is much easier to update a partnership agreement when the partnership is going well. If partners have already started to fall out with each other, it is then often too late to try to update the partnership agreement.

Ensure that you have a well drafted and up- to-date partnership agreement that accurately reflects the business relationship between the partners.

A well written partnership agreement should **at a minimum**:

- clearly articulate the ownership interests of each partner, should specify any commitment that has been made by a partner such as capital investment and should set out a process for the control of any business loans to or from a partner;
- provide simple procedures for partnership meetings to take place, the number of partners necessary for the meeting to go ahead and for decisions of the partnership to be made and should provide a mechanism for dealing with the decision making process when not all partners agree;
- clearly state the basis for partner remuneration and profit distribution;
- detail what commitments are required from partners. For example, are all partners required to work in the business for the same amount of time? Do certain partners have particular obligations that are different to others?
- clearly detail a process for when a partner decides to leave the partnership;
- deal with any restrictions that are to be imposed on retiring partners;
- have a clear and workable dispute resolution clause.

The best time to review your partnership agreement and business structure documents is when things are going well.

## Resolving a Partnership Dispute

Every partnership agreement should include a dispute resolution clause which details how the partners are to go about resolving any dispute that arises. Nevertheless, if a dispute ensues, it is recommended that you seek **legal advice** as soon possible to ensure you understand the processes and implications of any decisions made.

When partnership disputes occur there will be things that you should do and things that you should not do. It is for this reason that you should seek legal advice early.

Court litigation is an **expensive and time consuming** option and should not be commenced without careful consideration. In the interests of saving our clients significant costs and time, we recommend that partners firstly consider alternative dispute resolution avenues such as arbitration, mediation or negotiations before commencing court proceedings. However, we appreciate that not all disputes can be resolved through alternative dispute resolution and relief from the Court is sometimes more suitably sought.

Meridian Lawyers' commercial litigation team can assist you in undertaking any alternative dispute resolution, and if necessary, can represent you throughout the court litigation process.

**FOR MORE INFORMATION REGARDING PARTNERSHIP DISPUTES OR FOR ASSISTANCE IN RESOLVING A DISPUTE, PLEASE CONTACT OUR COMMERCIAL LITIGATION PRINCIPAL DOUGLAS RAFTESATH.**

Find out more about Meridian Lawyers at [www.meridianlawyers.com.au](http://www.meridianlawyers.com.au) – our team's contact details are provided on the following page.

Disclaimer: This information is current as of November 2017. These articles do not constitute legal advice and do not give rise to any solicitor/client relationship between Meridian Lawyers and the reader. Professional legal advice should be sought before acting or relying upon the content of these articles.

# Meet our team

Commercial, commercial litigation and employment team



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