

Inspire



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Welcome

Much of the world of intellectual property is based on the work of those seeking to make improvements but sometimes such efforts can lead to unexpected outcomes.

In this edition of Inspire, we look at the ups and downs of trying to effect change. It was hoped that the much anticipated High Court decision in *Aristocrat v Commissioner* would provide clarity as to the patentability of computer implemented inventions. However, as Helen McFadzean explains, rather than improve the situation, the split decision has perhaps left us with more questions than answers.

Matthew Overett discusses the efforts being made by Monash University and Jupiter Ionics to improve the efficiency of ammonia production. While ammonia is critical to the world's food production, its manufacture

is a significant contributor to global carbon dioxide emissions, demonstrating the potential importance of this exciting research.

Engaging third party expertise to improve systems and software may seem like a great idea, but as the decision in *Campaigntrack v Real Estate Toolbox* shows, care must be taken to ensure that you don't become liable for the wrongdoing of an agent. Mellissa Wingard reviews how the Full Federal Court found liability for authorising copyright infringement where parties had been put on notice of the risk of infringement but took no reasonable steps to prevent it.

Also in this edition, Anita Brown provides some special comments on USGA's swing and miss, Peter Wassouf considers the significance of defining the technical field of an invention, and Russell Waters warns of the dangers of not complying with court orders.



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Phillips Ormonde Fitzpatrick acquires Brand Haven

Phillips Ormonde Fitzpatrick is pleased to announce the strengthening of its Trade Marks practice team with the acquisition of NSW-based IP firm, Brand Haven.

Brand Haven will be fully integrated into Phillips Ormonde Fitzpatrick. Director and Principal of Brand Haven, Philip Macken, will be joining Phillips Ormonde Fitzpatrick on 1 November as Special Counsel. Phil is a registered patent and trade mark attorney with over 30 years' experience in the field of intellectual property.

Brand Haven was formed at the start of July 2017 and has specialised in assisting clients to create, protect and maintain all rights relating to trade marks. The ongoing management and care of matters handled by Brand Haven will be conducted by Phillips Ormonde Fitzpatrick. Phil will continue to perform, manage and supervise work carried out on for Brand Haven's clients, as part of Phillips Ormonde Fitzpatrick.

Ross McFarlane Managing Principal said: "Phil is an outstanding addition to the Phillips Ormonde Fitzpatrick team, bringing with him a depth of experience and client focus that is so important. I am excited that he and the Brand Haven practice are to become part of Phillips Ormonde Fitzpatrick and contribute to our growth."



Golfing body lands in the rough



The United States Golf Association (USGA) has been left to green and bear a decision from the Australian Trade Marks Office.

The Office ruled that its Australian trade mark application for HANDICAP INDEX was not up to par, with the term found not to be capable of distinguishing USGA's claimed services, "handicapping for sporting events, namely golf."

The USGA had not struck any trouble registering the same mark in the UK, the US and Canada. But just like golf courses, each trade marks office has its own hazards and requires a different strategy to avoid the rough. It's fair to say though that the USGA found itself stuck in a sand trap that it could not chip its way out of; an experience most golfers can relate to.

Initially, the trade marks examiner found the mark lacked sufficient distinctiveness and rejected registration of the mark under s 41(4) of the *Trade Marks Act*, stating in the first report that:

"HANDICAP in relation to sport, including golf, refers to disadvantages or advantages, while INDEX refers to a detailed list. As a whole, this indicates that your services related to an index of player handicaps."

For the non-golfers among us, a handicap is a numerical measure of the golfer's ability that is used to enable players of varying abilities to compete against each other. The lower your handicap the better the golfer you are.

The USGA's attorney responded to the examiner by arguing that the ordinary signification of the trade mark was not directly descriptive of the services. Then, in a blow to the USGA, the examiner raised a ground of rejection under s 41(3), on the basis that the mark was in common generic use by other traders to indicate goods or services relating to calculating handicaps for golfers.

This meant any evidence the USGA put before the examiner to establish that the mark had acquired distinctiveness had to be dated prior to 10 May 2019, the application filing date.

Historically, rules for calculating handicaps have varied from country to country. However, the USGA introduced a global system, the World Handicap System. The trade mark HANDICAP INDEX is used by USGA to denote a standardized calculation of a golfer's demonstrated ability against a golf course of standard difficulty. It licenses the use of the trade mark to various golfing associations globally. The system was not introduced into Australia until January 2020 after the application filing date.

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It's fair to say that the USGA found itself stuck in a sand trap that it could not chip its way out of; an experience most golfers can relate to.

Despite filing two rounds of evidence to try to demonstrate that the mark had acquired distinctiveness, including that Australian golfers would understand the mark as referring to its handicap system, the examiner would not budge so USGA sought a hearing before the Registrar. Under Australian law, there is a two step test for distinctiveness:

- > establish the ordinary signification of the trade mark in Australia to those concerned with the relevant goods or services;
- > consider whether other traders may legitimately desire to use the word in respect of their goods or services.

The Registrar's view was that members of the public engaging in handicapping services or golf services would understand the term as a measure or rating of a golfer's handicap, or alternatively as an index or list of golf players' handicaps. Further, it found that other traders would want to use the term in connection with such a system or list.

Turning to the evidence of acquired distinctiveness, the Registrar found it was lacking for various reasons including that there was no evidence of the advertising or promotional activities undertaken either before or after the filing date in Australia, and that despite USGA's assertion of its extensive use overseas, there was minimal supporting evidence. The evidence was also said not to show sufficient use of the term as a badge of origin.

The upshot was the mark was rejected for registration. Perhaps, the USGA will take another swing at registering it once it has used it more extensively in Australia.

Bad puns aside, for those competing globally where trade mark protection across various jurisdictions is required, this decision is a reminder that the assessment of the distinctiveness of a mark may differ between offices. When devising a filing strategy, the nature of the mark, the applicable test for distinctiveness and any requirements to show acquired distinctiveness should be borne in mind.


Sometimes it may be appropriate to seek registration for a mark in a distinctive form, at least to provide an interim level of protection. This might include for example, applying for the non-distinctive mark with a house mark, or as part of a logo, particularly, if there is not sufficient evidence

of use that can be demonstrated. Otherwise, the path to registration may be, well, rough.



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A Cliffhanger with No Sequel – Australia’s Apex Court Divided on Patentable Subject Matter

In a surprising turn of events, the High Court has handed down an evenly split decision in the highly anticipated case *Aristocrat Technologies Australia Pty Ltd v Commissioner of Patents*¹. This was the first time that Australia’s apex court has considered the issue of patentable subject matter for computer implemented inventions.

In 2010, the Australian Patent Office issued a decision in *Invention Pathways*², refusing a patent application for a computer implemented business method on the ground that the claimed subject matter was not patentable subject matter or a “Manner of Manufacture” (MoM) as defined in the legislation. The *Invention Pathways* decision was one of the first of many adverse decisions against computer implemented inventions issued by the Australian Patent Office.

The issue of patentability of computer implemented business methods has also been debated in several subsequent Federal Court and Full Federal Court decisions, which set out different considerations and assessment criteria. The patentability of computer implemented inventions in Australia has been a difficult and unsettled area of law for some time. After over a decade of debate and confusion, it was hoped that the High Court would bring some clarity to this challenging area of law. Instead, the opposite has happened.

Background

Aristocrat manufactures electronic gaming machines (EGMs). Aristocrat owns four divisional innovation patents derived from common parent application no. [2015210489](#), directed to a gaming system and method for providing a feature game. The question central to the judgement is whether the claims of the innovation patents are directed to patentable subject matter. In the Full Federal Court decision reported [here](#), their Honours proposed two questions for consideration:

- > Is the invention claimed a computer-implemented invention?; and if so
- > can the invention claimed broadly be described as an advance in computer technology?

The majority in the Full Court considered that the answer to the second question was ‘no’, meaning that Aristocrat’s claim was not a manner of manufacture.

In their separate reasonings, all Justices of the High Court ultimately rejected the suitability of the questions proposed by the Full Court, noting that the two-step test unnecessarily complicated the analysis. The High Court agreed that the crucial issue is the characterisation of the invention.

The threshold requirement for ‘an alleged invention’

Under the Patents Act, a “*patentable invention*” is defined as an invention that is “*any manner of new manufacture the subject of letters patent and grant of privilege within section 6 of the Statute of Monopolies, and includes an alleged invention*”. All Justices of the High Court generally agreed that a threshold requirement must be satisfied for there to be an “*alleged invention*”. The threshold requirement is separate to the consideration of novelty and inventive step, which must be assessed based on prior art. The threshold is low and requires only a minimal level of ‘newness’ and ‘inventiveness’. This threshold is to be assessed by reference to the face of the claim in the context of the specification rather than with reference to the prior art base. As such, it should be less stringent than the independent requirements

for novelty and inventiveness.

To illustrate this point, Keifel CJ, Gageler and Keane JJ referred to the ball point pen argument that “*whilst a claim for the ball point pen now would fail for anticipation and obviousness, it would still be a claim for a manner of manufacture*”. Their Honours explained that the ball point pen would not meet the threshold requirement that it be an alleged invention today because it is not new.

Moreover, Gordon, Edelman, Steward JJ noted that the threshold should not be assessed in hindsight. Their Honours also cautioned that when assessing the threshold question without the benefit of expert evidence as to prior art, the Court should avoid assuming technical expertise it does not have.

However, when considering the question of how the invention should be characterised, their Honours reached entirely different outcomes.

Team ‘Not MoM’

Keifel CJ, Gageler and Keane JJ reiterated that the claimed invention was to be characterised by reference to the terms of the specification having regard to the substance of the claim and in light of common general knowledge. In order to characterise the invention, their Honours considered that it was first necessary to separate out the elements of the claim which are not common general knowledge.

To illustrate this point, their Honours referred to a card game example [30]:

“...[T]he facilitation of card games by the use of packs of cards bearing visible symbols and values has for so long been part of common general knowledge that no one would suggest that a new variation of the rules of a game such as poker is patentable

¹ [Aristocrat Technologies Australia Pty Ltd v Commissioner of Patents \[2022\] HCA 29](#)

² [Invention Pathways Pty Ltd \[2010\] APO 10](#)

subject matter. In such a case, the well-known pack of cards is put to a different use for the purpose of the new game; but no one would suggest that there is an invention because the only difference from the common general knowledge lies in the idea of the new game."

Consequently, their Honours determined that without any changes to generic computer technology in the implementation of the new game, Aristocrat's invention should be characterised as "a claim for a new system or method of gaming, in which the claimed invention only subsists in the feature game, which is not patentable subject matter". Their Honours reasoned that if this was not the case, every EGM conforming to the generic physical and hardware components would be patentable simply because it allowed a new game to be played. As set out in paragraphs 76 of the judgement:

"Neither the primary judge nor the Full Court made any finding that any of the integers of claim 1 addressed the exigencies of the physical presentation of the operation of the game devised by Aristocrat. And it is not apparent from the terms of the specification of the 967 patent or claim 1 itself that there is a basis for such a finding. In the absence of such a finding, there is no basis for concluding that the claimed invention is patentable subject matter. It is no more than an unpatentable game operated by a wholly conventional computer, using technology which has not been adapted in any way to accommodate the exigencies of the game or in any other way."

Team 'MoM'

Gordon, Edelman and Steward JJ took an entirely different approach and considered that the characterisation of the invention requires consideration of all the integers of the claim in light of the relevant facts and matters in the specification. An artificially specific characterisation could confine any claim to a mere intellectual idea, and an artificially generalized characterisation could remove the element of novelty or inventiveness from any claim.

Their Honours cautioned against the risk of artificially characterising a claim, noting that the risk is particularly

pronounced where the claim contains interdependent integers:

"Unless a claim asserts a monopoly 'in any integer by itself', it is 'only necessary that each integer form part of a full description of the invention'."

Their Honours considered that although the rules of a game alone are not the proper subject matter of a patent, they may be the proper subject matter when combined with physical materials used for playing the game. To illustrate the point, their Honours referred to Re Cobiانchi's Application, in which an idea for a new way of playing the game of 'Canasta' with differently marked cards was held to be a manner of manufacture. At paragraph 119 it was therefore said that:

"In the 21st century, it would be absurd if the application of this principle were any different where the idea of the game is combined with a digital representation rather than a cardboard representation of the game. For instance, as senior counsel for the Commissioner properly accepted on this appeal, the game of Monopoly is patentable subject matter where it is embodied in a physical form such as a designed cardboard board, dice, and playing characters. It could not possibly be the case that the game of Monopoly ceases to be patentable subject matter if the graphics are displayed on a machine rather than on cardboard. To treat the two differently on the basis that the digital representation does not involve a physical transformation of something would plainly be to allow form to triumph over substance. As Heerey, Kiefel and Bennett JJ said in Grant v Commissioner of Patents, '[a]n application is not limited to a physical transformation'. Rather, the requirement of a 'physical effect' includes 'a concrete effect or phenomenon' and extends to 'a change in state or information in a part of a machine'."

Reverting to the principals set out in National Research Development Corporation, their Honours noted that it would not be enough for the scheme to merely involve the use of a machine to manipulate abstract ideas [120]:

"Where the manner of manufacture relies upon some change in state or information in a machine, then that

change must produce an artificial state of affairs and a useful result."

Considering the above, their Honours determined that the best characterisation of Aristocrat's claim 1 is "an EGM incorporating an interdependent player interface and a game controller which includes feature games and configurable symbols". As set out in paragraph 154:

"In the characterisation of Claim 1, the operation of the game controller cannot be severed from the interdependent player interface in the EGM. The claimed operation of the game controller, displayed through the player interface, is an altered EGM involving an artificial state of affairs and a useful result amounting to a manner of manufacture."

What Now?

With the Court evenly split as to whether the appeal should be allowed, the decision of the Full Federal Court was affirmed. The outcome in this greatly anticipated High Court decision is almost like making it to the end of a long movie only to be greeted with a cliffhanger. Except in this case, there may not be a sequel, at least any time soon.


Perhaps one useful takeaway is that whilst the Justices characterised the invention in different ways, the High Court was in general agreement that the requirement of an "advance in computer technology" previously proposed by the Full Court was incorrect, and that the threshold requirement in determining an "alleged invention" should be a low one.

If nothing else, it is clear that the patentability of computer implemented inventions is a complex area of law that even Justices of the High Court find challenging. Unfortunately, this area of law is likely to remain unsettled for some time.



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Can an idea to make an obvious improvement be enough for an Inventive Step?

The Federal Court recently deliberated on a patent infringement and validity dispute¹ between Global Tech Corporation Pty Ltd (Global Tech) and Reflex Instruments Asia Pacific Pty Ltd (Reflex). In arriving at its decision that infringement had occurred, the Court had to consider what technical field the patent belonged to, and then weigh up arguments around the inventiveness of the disputed patent. In doing so the Court gave weight to the thought process and method behind arriving at what appeared to be an obvious invention. On this basis, the Court ultimately found that the patent was inventive and valid.

¹ *Globaltech Corporation Pty Ltd v Reflex Instruments Asia Pacific Pty Ltd* [2022] FCA 797

The decision highlights:

- > The importance of defining the technical field of a patent when construing the patent claims and the effect it has on analysis of novelty and inventiveness; and
- > even though an improvement may seem obvious or simple, arriving at the idea to make that improvement may require much thought and skill, and can of itself constitute an inventive step.

The Patent

Global Tech is the owner of Australian Patent 2012297564, which protects a method of obtaining data from or providing data to electronic units of downhole equipment for mineral exploration without having to disassemble that equipment. The Patent describes an optical device capable of altering the direction of signals travelling to or coming from an electronics unit. The optical device is able transfer data even when it is located inside of downhole equipment by using apertures which maintain a line of sight to the optical device.

The invention is an improvement on previous models of downhole equipment, in that it does not have to be taken apart to obtain access to a data transferral port to enable data transfer. This allows for a much quicker data retrieval process. This advantage was critical in the Court's finding that the invention of the patent involves an inventive step.

Global Tech alleged that Reflex had infringed its patent by selling downhole equipment which fell within the scope of the claims. Reflex admitted its products were within the claims, but challenged the validity of the patent, alleging that it lacked novelty and an inventive step in light of three publications available before the Global Tech patent was filed.

Novelty – The Importance of Defining the Technical Field of your Patent

The Court followed a fairly standard process in assessing the novelty of the patent. This involved construing the terms used in the patent and assessing whether the features of the patent were disclosed in the earlier publications. The interesting aspect of the novelty assessment was how the court adopted a narrower construction of the terms used in the patent.

The three publications Reflex relied on to argue that the Global Tech patent lacked novelty related to wireline telemetry and oil and gas exploration and production. Although these technical fields share similarities with mineral exploration, the Court found that the field of mineral exploration was distinct and construed the terms of the Patent within this technical field. This narrowed the scope of the features claimed in the patent and supported Global Tech's arguments that the features were not disclosed in the three publications relied on by Reflex. Ultimately, the Court found that the features of the patent were not disclosed in the earlier publications, and that the patent was novel.

Inventive Step

As with the novelty assessment, the Court conducted a standard inventive step analysis seeking to determine whether the invention was obvious in light of publicly available information.

Reflex argued that Global Tech's improvement to downhole equipment which allowed for a quicker data retrieval process was obvious in light of the common general knowledge, and even more obvious when one is presented with the disclosures of the three publications they relied on.

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Even though an alteration/improvement may seem obvious, the idea to make it can of itself constitute an inventive step.”

Global Tech and their expert, Professor Dupuis, argued that the prior art documents raised by Reflex lay beyond the field of the patent. The patent was argued to be directed to a downhole tool to be used in mineral exploration.




Regarding what was disclosed in the three publications, the Court found that any reader reviewing the prior art documents would find no path to developing a downhole tool for use in mineral exploration, as they related to different fields. The three publications related to wireline tools or the exploration of oil and gas and were considered not suitable for use in mineral exploration. This finding is a reminder of the value of clearly defining the technical field an invention relates to in a patent specification.

The Court also found that although the downhole tool improvement seemed obvious, the determination of the scope for or the need for the improvement was not obvious. At the time the patent was filed, it was established that there was no need to alter the existing products on the market, and to do so required an inventor to take an inventive step. The inventive step discussion in this decision serves as timely reminder that the concept of inventiveness extends beyond what seems to be in hindsight an obvious improvement to existing products. Even though an alteration/improvement may seem obvious, the idea to make it can of itself constitute an inventive step.



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Watching your step –

How to avoid unintentional infringement while working with third parties

The factual situation in *Campaigntrack v Real Estate Tool Box*¹ is not an uncommon one. Wanting a better software program for its operations, a business enters into an arrangement with a software developer who has experience in that area to develop a new program with reference to a competitor program’s functionality. What was interesting and should encourage businesses and individuals to consider their actions when faced with allegations of copyright infringement, was the Full Federal Court’s opinion on what constitutes authorisation of infringement of copyright.

Background

In this case, Biggin & Scott Corporate Pty Ltd (Biggin & Scott), a real estate agent, had been using Campaigntrack software until May 2015, when it transitioned to using DreamDesk (at that time also owned by Campaigntrack) for running its marketing campaigns for the sale of real estate.

Mr. Semmens had previously developed DreamDesk in competition with Campaigntrack and admitted he had knowingly included third-party IP that he was not authorised to use. Campaigntrack subsequently bought DreamDesk in July 2016.

When Biggin & Scott wanted an enhanced marketing campaign tool in August 2016, they entered into an arrangement with Mr Semmens to build Real Estate Tool Box (RETB Software). As part of that arrangement, they set up a joint venture company, Real Estate

Tool Box Pty Ltd (RETB), with Ms Bartels, a director of Biggin & Scott, as Company Secretary. Mr Stoner, another director of Biggin & Scott, instructed Mr Semmens to build marketing campaign software “*that does not breach any other [company’s] IP or ownership, particularly DreamDesk or Campaigntrack*”. To make the point again, Mr Stoner further wrote in the same letter, “*In simple terms, we do not want [anything] used that can be claimed as owned by the two companies above*”.

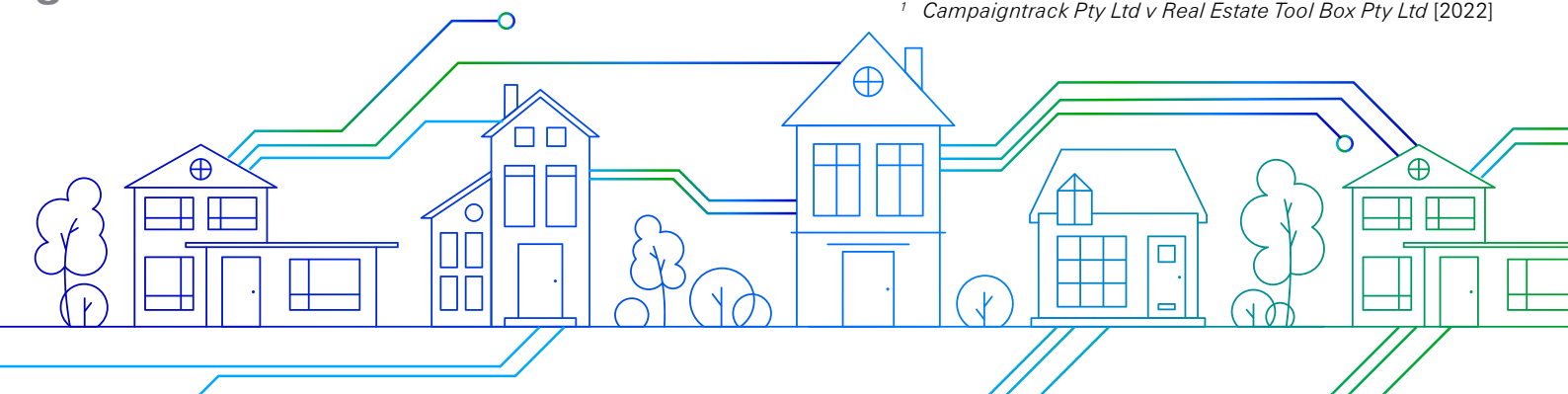
In late September 2016, Campaigntrack became aware that the RETB Software potentially reproduced the DreamDesk source code, and on 29 September 2016, Campaigntrack’s lawyers put Biggin & Scott on notice that they were aware of “*improper access*” and “*duplication of [DreamDesk] code*”. Campaigntrack sought undertakings from Biggin & Scott and all relevant parties that any

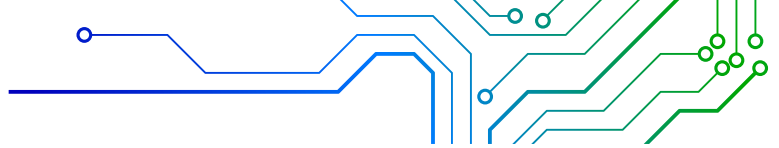
intellectual property already obtained would not be used for any purpose and would be destroyed. Mr Semmens did not sign the undertaking. On 10 October 2016, Campaigntrack terminated Biggin & Scott’s access to DreamDesk. The RETB Software went live on 10 October 2016 and continued to be used by Biggin & Scott until June 2018.

First Instance Decision

At first instance, Campaigntrack was only partially successful. Justice Thawley found that Mr Semmens, as the primary developer of the RETB Software, had directly infringed copyright in the DreamDesk source code and had authorised the infringing acts which other developers carried out under his supervision. However, Justice Thawley did not find against the other parties RETB, Biggin & Scott, DreamDesk, Mr Stoner and Ms Bartels.

¹ *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* [2022]





Appeal Decision

On appeal, Campaigntrack was successful in showing that Biggin & Scott, RETB, Mr Stoner and Ms Bartels had authorised Mr Semmens's direct infringement as they had received specific notice of the risk of infringement and took no action despite having the power to prevent the continued violation.

Authorisation as infringement

The *Copyright Act 1968* (Copyright Act) provides copyright owners exclusive rights to carry out certain acts with their copyright works. Section 36(1) states that infringement occurs when another person carries out those acts exclusive to the copyright owner without a licence from said owner or where *someone else authorises the infringing act*.

The Court considered section 36(1A) of the Copyright Act, which specifies the matters that need to be taken into account when considering whether someone has authorised copyright infringement, namely:

- (a) *the extent (if any) of the person's power to prevent the doing of the act concerned;*
- (b) *the nature of any relationship existing between the person and the person who did the act concerned;*
- (c) *whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.*

In this case, the Court looked at the steps taken by Biggin & Scott to prevent the direct infringement by Mr Semmens and found that Biggin & Scott failed to take sufficient steps to prevent or avoid the infringement, even after being put on notice by Campaigntrack of the alleged infringement.

The letter from Campaigntrack putting Biggin & Scott on notice was the turning point in determining whether Biggin & Scott, RETB, Mr Stoner and Ms Bartels had authorised the infringement by Mr Semmens. Before that, Biggin & Scott had said that it trusted Mr Semmens to develop the RETB Software without infringing any other third party's intellectual property. Once Biggin & Scott were put on notice of the possibility of Mr Semmens directly infringing the DreamDesk code, rather than taking reasonable steps to determine whether the RETB Software did infringe and take actions necessary to prevent further infringement, Biggin & Scott continued to use the RETB Software for commercial purposes and continued to engage with Mr Semmens.

As part of its decision, the Court considered the role of knowledge in determining whether a party has authorised infringement as Campaigntrack had argued that authorisation does not require specific knowledge of the infringement. The Primary Judge had reasoned that authorisation connotes a mental element, in that in order to authorise an act comprised in copyright it must be known about. His Honour found in the first instance decision, that Biggin & Scott, RETB, Mr Stoner and Ms Bartels did not have the requisite knowledge.

Noting that knowledge is relevant to determining whether someone had the power to prevent the doing of the act comprised in the copyright, the Full Federal Court held that it is necessary to prove on the balance of probabilities that the person either had:

- > Express knowledge of the act of infringement ;
- > Constructive knowledge of the of the act of infringement, as a *"matter of inference or implication drawn from conduct amounting to a "general permission or invitation"..."*
- > Wilful blindness to the infringing acts taking place *"the conduct is of the character of.....indifference or wilful inactivity to the doing of the....act comprised in copyright."*

to establish that they had authorised the infringement.

The Court held that Biggin & Scott knew, or ought to have known, Mr Semmens would copy the DreamDesk code or had already copied the DreamDesk code. Further, in considering the application of section 36(1A), the Court found that Biggin & Scott, who had the power to prevent the act due to both a contractual relationship and a business relationship (through the joint venture) with Mr Semmens, failed to take any reasonable steps to prevent him from engaging in conduct that infringed copyright.

Key Takeaways

When engaging third-party developers, it may not always be possible to know what code they are using or how they are developing new software. This case has shown that even an agreement between the parties as to the use of other's intellectual property will not be sufficient to protect against a claim of authorising copyright infringement if there is reason to suspect that third-party code is being copied.


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This case has shown that even an agreement between the parties as to the use of other's intellectual property will not be sufficient to protect against a claim.



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The transformative potential of the technology was recently recognised when Jupiter Ionics was named as one of the Top 25 Deep Tech start-ups for 2022.

Monash University and Jupiter Ionics seek to turn ammonia green

Ammonia (NH₃) is a commodity chemical essential to human civilization. Ammonia-based fertilizers are necessary to produce sufficient food for the world's population, and ammonia may also play a future role in replacing fossil fuels as a carbon-free fuel or carrier of renewable energy. However, almost all ammonia is still produced as it has been for over a century: by catalytically reacting nitrogen (N₂) and hydrogen (H₂) gases at high temperatures and pressures in the Haber-Bosch process. Due to the extreme reaction conditions and use of fossil fuel-derived H₂, ammonia production is currently responsible for about 2% of global carbon dioxide emissions.

What if there was a way to produce ammonia without these serious problems? This is the challenge that Monash University and its spin-out company [Jupiter Ionics](#) are tackling head-on. The goal is to produce green ammonia by electrochemical reduction of N₂, using water as the source of hydrogen atoms and renewable (e.g. solar) electricity to power the electrolytic process. This has previously been considered extremely challenging to do efficiently: N₂ is a very inert molecule and most of the electrical current is misdirected to producing H₂ and other unwanted by-products rather than ammonia. In a recent paper in [Nature](#), the Monash research team led by Prof Douglas MacFarlane and Dr Alexandr Simonov have shown that near-quantitative current-to-ammonia efficiencies are indeed

possible in a lithium-mediated electrochemical ammonia synthesis – provided that the right electrolyte system is used. By using fluorinated lithium salts more commonly found in battery electrolytes, the Monash team was able to control the properties of the electrode-electrolyte interface and suppress undesirable side-reactions. Ammonia could thus be produced continuously, selectively and at excellent reaction rates over multiple days in a simple electrolytic cell. The commercialisation of this green ammonia technology – initially for sustainable on-farm fertilizer production – is being led by Jupiter Ionics in collaboration with partners such as Fortescue Future Industries and Wesfarmers Chemicals, Energy and Fertilizers. The transformative potential of the technology was recently recognised when Jupiter

Ionics was named by Germany's Falling Walls Foundation as one of the [Top 25 Deep Tech start-ups](#) for 2022. We look forward to further successes from the Monash and Jupiter teams as they seek to reimagine ammonia production for a sustainable future.

POF is proud to work with Monash University and Jupiter Ionics to protect green ammonia-related intellectual property.



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A word to the wise – Don't Disobey Court Orders!

It might seem obvious that if a judge issues an order, you are likely to get into trouble if you then ignore that order.

Earlier this year, Ozcare took action¹ against Auscare Home & Community Care Limited and Auscare Foundation Limited (collectively, Auscare) for infringement of Ozcare's trade marks. That action was settled on 27 April 2022 on the basis of orders that included the following:

"With effect from 26 June 2022, each of the Respondents/ Cross-Claimants, by its officers, employees, servants, agents and otherwise, be permanently restrained from using in Australia each of the Auscare Trade Marks and Foundation Trade Marks, or any mark which is substantially identical to or deceptively similar with any of the Ozcare Trade Marks or Foundation Trade Marks, in respect of the Infringing Services."

This order was made with the consent of the parties, and effectively granted relief to prevent Auscare from continuing to infringe Ozcare's trade marks.

Despite having consented to this order and being allowed two months in which to cease use, Auscare continued to use the marks – particularly in the domain names auscare.org.au and auscareservices.com.au, which were redirected to other websites controlled by Auscare.

On 30 June 2022 Auscare was put on notice of their breach of the earlier orders, following which Ozcare sought an injunction at a hearing on 15 July 2022 to prevent

the continuing infringement. In particular, Ozcare sought to prevent Auscare from redirecting from the domain names and sought deregistration of the domain names.

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Justice Perram's orders included a Penal Notice, advising that refusing or neglecting to do any act within the time specified or disobeying the order would result in imprisonment, sequestration of property or other punishment.

Justice Perram found that, considering the continued infringement of Ozcare's trade mark, it was appropriate to grant both an injunction against maintaining a redirection from the domain names to any websites operated by Auscare, and an order requiring Auscare to deregister each of the domain names within two days. Counsel for Auscare argued that two days was insufficient time to deregister the domain names, but Justice Perram noted that Auscare had already had 11 weeks to comply with the initial orders. However,

given that the actual deregistration would be in the hands of the domain name registrars, Justice Perram modified the order to require Auscare to "take all reasonable steps" to deregister the domain names within the specified time.

Because Auscare had already been in breach of the initial orders, Justice Perram's orders included a Penal Notice, advising that refusing or neglecting to do any act within the time specified or disobeying the order by doing a prohibited act would result in imprisonment, sequestration of property or other punishment. This Notice extended to any person who, knowing of the order, helped or permitted a breach of the orders – thereby catching the companies' directors. In addition, Ozcare's costs of \$10,400 were awarded in full against Auscare on an indemnity basis.

The moral of the story? If a court orders you to do something, do it! Or if it orders you not to do something, don't do it! *Especially* if you consented to the orders!



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¹ *Ozcare v Auscare Home & Community Care Limited (Further Orders)* [2022] FCA 835

Our recent recognition as a leading firm

We're delighted that the firm, and our practitioners, have been continually recognised as leaders in the Australian IP industry. Through both the IAM Patent 1000, and MIP IP Stars awards, we have managed to accumulate several rankings and recognitions that reflect the quality of work and commitment to our clients that we demonstrate throughout every year.

In the IAM Patent 1000 directory for 2022, we again achieved a Tier 1 ranking – making this our 8th year in a row as a Highly Recommended firm. To quote IAM's researchers, we achieved this ranking for "[having] their customer in their heart and show their genuine interest to help their customer succeed not only in securing the IP protection but also in commercialisation of the IP." We were further commended for our focus on client relationships, resulting in long-standing cooperation with our clients. In addition to this ranking, several POF attorneys were recognised for their contributions over the past year, including Managing Principal **Ross McFarlane**, along with Special Counsels **Saskia Jahn** and **Mark Williams**, Consultant **Ray Evans**, and Principals **Edwin Patterson** and **Matthew Ford**.

From Phillips Ormonde Fitzpatrick Lawyers, Deputy Managing Principal **Chris Schlicht**, and Principal **David Longmuir**, were commended for their work in IP litigation. Part of this recommendation was given for Chris and David's work in representing Meat & Livestock Australia in their case that will constitute the very first consideration of the Full Court's power under Section 105(1A), introduced by the Raising the Bar Act. Within the MIP IP Stars Awards and Directory, we were further recognised as a leading Australian IP Firm, being awarded a Tier 1 ranking in both Trade Mark and Patent Prosecution – another reflection of our quality of work and commitment to client service.

In addition, POF Principals **Michael O'Donnell**, **Russell Waters**, **Edwin Patterson**, **Alyssa Telfer** and **Ross McFarlane**, as well as Special Counsel **Saskia Jahn**, were all named as IP Stars for their leading IP work over the last year. Principal **Helen McFadzean**, alongside Senior Associates **Michelle Blythe** and **Dr Annabella Newton**, were also named among this year's "Rising Stars" within the MIP Awards, highlighting the continuously high quality of their work throughout their careers. We're very proud to have so many of our practitioners showcased for their work in major leading directories. These rankings are a fantastic achievement for all our attorneys, and we'd like to congratulate them on their well-earned recognition.



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