

Corporate & Commercial Newsletter

August 2015

Holman Webb's Corporate and Commercial practice is dedicated to achieving commercially effective results for all our clients and that starts with a commitment to understanding each client's business and the industry in which they operate.

The team provides a broad range of corporate and commercial legal advice (including mergers and acquisition, incorporation and management of corporations and other businesses, joint ventures, commercial agreements and corporate governance) and advises multi-national corporations, SMEs, start-ups, government and not-for-profit organisations.





Wearable Technology

By Tal Williams, Partner and
Lucy Williams (Paralegal)

The evolution and expansion of wearable technology has given rise to a more pervasive and ubiquitous form of computing which is set to revolutionise society and the way in which people interact.

Wearable technology encompasses any sort of monitoring device that an individual can wear on their clothing or body. Analysts predict that the market for wearable technology is going to surpass \$70 billion USD by 2024. The market is largely dominated by a small number of devices, including smart watches and fitness bands. These will often interact with smartphones to track various health and environmental variables.

In light of recent developments in wearable technology, and considering the personal nature of these devices and the data they collect, it is prudent to investigate a number of potential legal concerns. These relate to privacy, data control, 'hands free' driving, use of listening and surveillance devices and use of GPS data to track individuals. Questions of ownership and sale of data are also likely to arise in the not too distant future.

Collection of Information

The majority of wearable technologies are capable of recording, processing and sharing copious amounts of data:

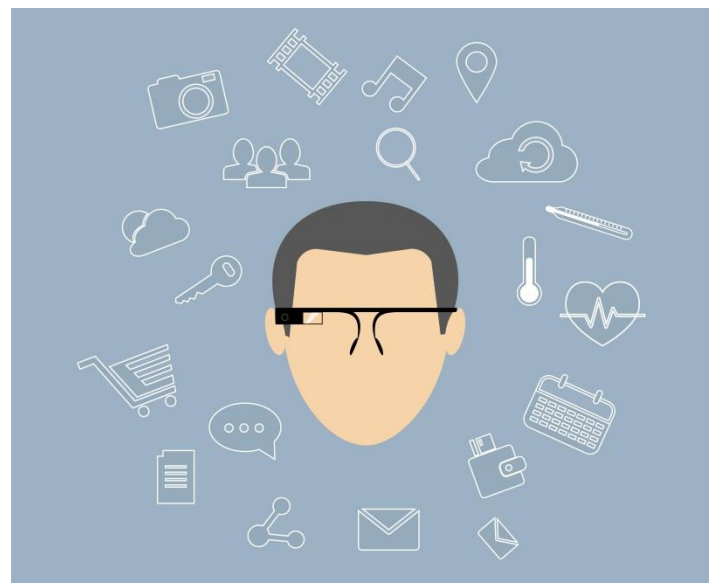
If the data collected falls within the definition of Personal Information under the Privacy Act, 1988 (Cth) (Act) then the Australian Privacy Principles would apply. This creates particular obligations relating to the collection, use and disclosure of that data. Corporations and individuals can be fined for breaches under that Act. At a state level, in New South Wales workplace-specific legislation, an employer cannot commence surveillance of an employee unless the employee has been notified in writing.

Consider Google Glass, a prototype smart glasses which can take photos and project information from the internet onto a tiny display. Google glass had to introduce a small red light on the eyepiece which lights up to alert surrounding individuals that the device was recording. D

Despite this, privacy campaigners have highlighted the privacy breaches resulting from the use of such devices. The concept seems to have been shelved for the moment. But there are still video recording glasses, button cams and watch camera's on the market for as little as \$25.00.

Despite regulation, the public remain mistrustful of wearable technology. In January this year Homeland Security agents in the US removed a man from the cinema after it was reported that he was wearing google glasses whilst in a film. Despite informing fellow cinema goers when asked that he only wore the glasses as they had been fitted with prescriptions, he was detained and questioned for several hours before being released.

In driving situations, the same rules which prohibit the use of mobile phones are likely to apply to iWatches. In terms of glasses, a woman in America was recently pulled over for wearing glasses that played videos and TV programs when driving. While she was released, it resulted in an outcry to have the devices likewise prohibited when driving.



Supposing that the information collected by wearable technology was done lawfully, the next question plaguing the wearable technology sector is 'who owns the information?' Consider the case of Germany's national football team who used this technology when training for the 2014 World Cup. Speculation as to the ownership of the information arose, is it the players who provided the statistics, or the club who collated, organised and analysed the information?. No definitive answer was reached and there remains doubt about the use of wearable technology and the collection and use of data in a sporting context.

Disclosure of Information

The use of this information once it is gathered is likewise a matter of controversy and has risen to the forefront of technological debate.

Surveillance and privacy legislation exists at state and federal level regulating the use of information obtained by technological means. The need for this legislation has grown over the years with the introduction of health monitoring devices which are able to monitor an individual's temperature, sleep patterns, heart rate, calorie intake and speed, amongst other things.

While most apps claim that this type of data will not be used or sold without consent, this is often conditional. Indeed, in 2014 the United States Federal Trade Commission found that upwards of 12 popular fitness apps provided a range of sensitive user information, including names, email addresses, GPS location of exercise routes. This was permitted as users had clicked "I agree" to the associated terms and conditions that gave their consent to such an activity. But were they fully aware of what they had just agreed to?

Not only is the use of information by companies a concern, but with personal data now being used on external networks such as social media, the privacy of individuals is being compromised. More and more information is uploaded to the cloud and is both accessed and distributed largely without the knowledge of the individual.

In a more legal sense, information gained by wearable technology has been found to be admissible in court. Indeed, in 2014, a legal case in Canada made history by allowing a plaintiff to use data collected from a Fitbit as defence in court.

The law must keep up with the fast moving nature of technology. As time goes on, the law will begin to address the issues that arise out of the use of such technologies. As such, wearable technology is both a matter of great potential and great uncertainty with many legal challenges likely to arise with its continual development.

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#icanuseyourbrandthisway

Protect your brand-hashtag by trademarking it

By Louise Bavin, Solicitor

That familiar whistle peaks your interest. You check your tweets. To your horror there it is, *your* brand, being used by someone who is not authorised to do so. How can this be? You are aware a licence agreement will include a licence to use your intellectual property in order to promote and run the business (this is usual in franchise agreements, for example). You have even taken the time to have the IP licence clause in your agreement carefully drafted so that it is seemingly watertight.

However, have you checked your trademark(s) and exactly what you have trademarked? The tweet is certainly using the words of your brand, but is it breaching your rights?

Your rights as the owner of a registered trade mark include:

- the use by you of the trade mark as a “brand” for your goods or services in Australia and overseas (should you apply to do so);
- licensing others to use your trade mark;
- the sale of the trade mark;
- notifying Customs to object to the importation of goods infringing your trade mark.

It is important to protect these rights and it is vital, when considering your trade mark(s), that you consider whether or not to apply for applicable word trade marks in addition to your logo trade mark.

It is possible to trade mark a hashtag-linked phrase (as a word mark) and that phrase could be your brand. It is a good idea to take the step to trade mark your brand-word with a hashtag prefix in order to fully protect your intellectual property. As you would be aware your brand is your badge of origin which allows consumers to efficiently identify the nature, quality and origin of your products or services and is therefore a valuable asset of your business. With technology expanding your opportunities to

promote your business, thought should be given to keeping up with the ever broadening platforms which are available to you.

Word trademarks, including hashtag trademarks, can be more difficult to obtain than logo trademarks especially if they are descriptive. In addition, a trade mark which is deceptively similar to another, or does not distinguish your goods or services, will be rejected. If other traders are likely to need to use the same or a similar trade mark in relation to their goods or services in the ordinary course of business (without improper motive) then your mark will be refused. If, however, you can prove that you have sufficient evidence of use of your trade mark then this may sway an examiner that it does indeed serve as your badge of origin and to therefore accept your mark.

Use it or lose it. The importance of using your hashtag in your advertising cannot be overstated. Stick it on banners, fliers, letterheads, business cards, signage, brochures and the like. The more people you reach the better. You want the world to see your hashtag. This evidence of use may well be persuasive enough to convince an examiner to accept your hashtag trade mark.

If you do not want people wrongfully using your hashtag or to use it in a way that damages your business, restrict the use by trade marking it.

Holman Webb Lawyers were the first to have success in Australia in registering a hashtag trade mark for a corporate entity.

The next time you hear that familiar whistle, let it be the sound of *your* tweet reaching your customers.

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Was your NSW business ready for 6 July?

By Dr Tim Smyth,
Special Counsel

New outdoor smoking bans came into effect in New South Wales on **Monday 6 July 2015**. Under the *Smoke-free Environment Act 2000*, smoking is now banned in commercial outdoor dining areas. A **commercial outdoor dining area** is an outdoor seated dining area in which businesses supply food to be eaten.

Smoking is now also banned within 4 metres of an outdoor seated dining area at a licensed venue, restaurant or café. Food includes plated food and food packaged for eating such as sandwiches, hot chips, burgers and soup.

The bans apply to any form of smoking, including cigarettes, cigars, pipes and water pipes (shisha). Penalties under the Act for non-compliance include on the spot fines of \$300 for individuals and up to \$5,500 for business owners.

It will be mandatory to have approved **No Smoking signage** in the outdoor dining areas. The fines for business owners can apply if the mandatory signage is not in place or a customer is found smoking in the outdoor dining area.

The NSW Ministry of Health has plenty of resources (including checklists, staff training and signage) to assist food businesses with the changes – see www.health.nsw.gov.au.

NSW Health also has a public information campaign to help prepare your customers for the change.

Business owners should ensure that they have designated an appropriate manager to take responsibility for training staff and to liaise with landlords on appropriate signage being in place.

The bans apply to footpath areas leased from councils when food is being consumed in these areas (including the area within 4 metres of an entry or exit to a nearby licensed venue, café or restaurant). Smoking is already banned within 4 metres of the entrances to public buildings.

While the bans do not apply to outdoor seating areas where eating is not permitted, the Act will require approved 'no food to be consumed in this area' signage for these areas to be exempt.

The law does not ban outdoor smoking areas. However these areas must be at least 4 metres from an outdoor dining area or a pedestrian entrance or exit to a licensed venue, restaurant or café.

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NO SMOKING!



**SMOKING
AREA**



When your distribution model may avoid price-fixing concerns

By Jonathan Casson, Partner

Late last month the Full Federal Court emphasised the need to determine the correct characterisation of the market to determine whether there has been any collusion, or any attempt to collude in price-fixing between competitors in a market. In a decision which reversed the imposition of an \$11 million fine on Flight Centre the Full Court emphasised that defining the relevant market appropriately can make or break allegations of price-fixing.

A lower court had found that Flight Centre attempted to induce three airlines to collude in setting airfares with national air travel. The unusual aspect was that Flight Centre – which might otherwise have been thought of simply as the travel agent for the airlines – had a "Price Beat Guarantee" of always beating a cheaper price of a ticket by \$1 plus a \$20 voucher. Every time an airline reduced its direct online fare Flight Centre would have to meet it and thus lose margin. It was alleged that Flight Centre asked the airlines to agree to stop booking their own airfares at prices cheaper than those offered by Flight Centre. The lower court decided that there is a market for booking and distribution services, and this meant Flight Centre was in fact competing in that market for margin with the airlines, and the collusive activities were in breach of the Act.

The Full Court found that there is no separate market for booking and distribution services to consumers: rather the supply of booking and distribution services is an ancillary part of the supply of international passenger air travel. This put Flight Centre squarely back in the position of an agent for the airlines, rather than competing with them. As it was an agent in the "strict or core sense", and therefore not a competitor, there could be no breach of section 45A.

But the Court emphasised that because of the broad range of commercial relationships that are sometimes referred to as agency, the existence of an agency relationship does not preclude the possibility that the parties are also competitors. It said, "*if the so-called agent was in fact no more than a distributor or re-seller of the other party's product, there may well be competition between parties to such an agreement in relation to the supply of the product.*"

Flight Centre Limited v Australian Competition and Consumer Commission [2015] FCAFC 104

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MEET THE TEAM



Dr Tim Smyth

With degrees in medicine, law and business administration, Dr Tim Smyth is well known in the Australian health industry, having worked as doctor, Director of Medical Services, hospital manager, Area Health Service Chief Executive and Deputy Director General in the NSW Department of Health. Building on over 25 years of experience, he has an in depth understanding of the health industry and government. This experience is complemented by his previous corporate and commercial legal practice at DLA Phillips Fox. Tim's legal clients have included health services, government agencies, professional associations, health funds, research bodies, Divisions of General Practice, small and medium enterprises, service providers to the health sector and Australian subsidiaries of multinational companies.



Louise Bavin

Louise has experience in corporate and commercial transactions, structure advice including IP protection strategies, governance and compliance issues. She has assisted a range of clients including multinational software houses in trade mark defence and opposition matters, as well as advising on compliance issues regarding constitutions and the holding of general meetings

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