FMCG *Express*

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Welcome to the September 2019 edition of

FMCG *Express*

With a wide range of FMCG clients, Gadens has the knowledge, expertise and most importantly the 'know how' across all areas of law relevant to the sector that are of interest to our clients. Our expertise encompasses all aspects of corporate advisory, mergers and acquisitions, intellectual property, technology and property law, and covers branding strategies, supply, distribution and licensing agreements, outsourcing, manufacturing, management of IP portfolios, funding and product packaging and associated advice.

2019 has been a very busy year in the FMCG space to date. The recent acquisition by global investment firm KKR of the Arnotts biscuit company from Campbell Soup Company along with the rest of its international divisions for $3.14bn and the $16bn takeover of Carlton & United Breweries by Asahi are testament to the largescale movement and consolidation that dominates the market. We understand that Campbell and KKR will enter into a long-term licensing arrangement for certain Campbell brands. Hopefully they have read and taken note of the Kraft v Bega case, which we discuss in this edition.

We also cover off topics such as the ACCC's interim report into the wine industry in Australia, the importance of investigating and clearing security interests in transactions, and privacy issues to name but a few.

This has also been a busy and exciting year for Gadens. Our Sydney office continues to grow from strength-to-strength with the new addition of a Disputes partner, Edward Martin as well as IP partner, Hazel McDwyer, who joined the firm in April and Banking and Finance partner Renae Suttor, who joined in February. In our Melbourne office, our Intellectual Property & Technology (IPT) team has been further bolstered by the promotion of Kerry Awerbuch to partner in the area of IP.

FMCG transactions are on the increase at Gadens and we hope to continue to keep our FMCG clients informed of industry and legal issues which may be of interest.

Please get in touch if you have any feedback or would like any further information on any issues discussed in this edition or what you might like covered in future editions.

Hazel McDwyer
Editor

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The peanut butter wars:
What we can learn from the Kraft vs. Bega dispute

Hazel McDwyer, Partner and Aya Lewih, Lawyer

The Federal Court of Australia's (the Court) recent decision in Kraft Foods Group Brand LLC v Bega Cheese Limited (No 8) [2019] FCA 593 (the Case) has settled the dispute between food giants Kraft and Bega on who owns and is entitled to use the iconic peanut butter trade dress (PBTD) recognised by many Australians.

A "trade dress" also known as "get up" refers to the appearance of a product's packaging. In this Case, the trade dress was a jar with a yellow lid and a yellow label with a blue or red peanut device, with the jar having a brown appearance when filled. The PBTD was an unregistered trade mark, and at the time of the dispute, both parties were using it on their peanut butter products.

In a lengthy judgment handed down by O'Callaghan J on 1 May 2019, his Honour ruled in favour of Bega, finding that it was assigned all rights to the PBTD as part of its acquisition of the Mondelez Australia Foods Ltd (**Mondelez**) (previously known as Kraft Foods Limited) grocery business. In this article, we discuss the key lessons from the Case. To make the article more digestible, we have simplified the complex contractual arrangements between the Kraft group of companies.

Background

Kraft Foods Group Brand LLC in conjunction with H.J Heinz Company Australia Limited (collectively, **Kraft**) sued Bega Cheese Limited (**Bega**) for misleading and deceptive conduct in connection with its use of the PBTD, which Kraft claimed was not assigned to Bega. Bega counter sued claiming that Kraft was engaging in misleading and deceptive conduct by using the PBTD, which Bega argued was assigned to it as part of the goodwill of the peanut butter business it acquired. The case also concerned additional claims by both parties, but for the purposes of this article, we will focus on the main claim associated with the PBTD.

The acquisition

In July 2017, Bega acquired (by way of an asset sale) most of the Mondelez grocery business, which included the assets and goodwill of Mondelez. The acquisition saw Bega secure iconic products and brands, including the Kraft peanut butter business, Zoosh salad dressings and Vegemite.

Bega and Kraft's use of the PBTD

Following the acquisition, Bega began selling peanut butter in the below depicted packaging:

Kraft, having sold the rights to use the iconic recipe, spent almost 12 months trying to develop a recipe that resembled the one used by Bega. Up until the hearing, Kraft sold its own peanut butter in the below depicted packaging:

The similarity between the products is glaringly obvious. In fact, by using the PBTD and the Kraft recipe, Bega was able to obtain almost the whole of Kraft's peanut butter market share, which is more than $60 million in annual sales. The major retailers refused to range Kraft's product due to concerns that the similar labelling might confuse consumers. While Kraft was able to range its products with independent retailers, it lost its significant market share as a result of Bega entering the market.

Kraft's argument

Kraft argued that Mondelez could not have assigned or sold to Bega the PBTD as it was licensed to it by Kraft under a licence that expired on 31 December 2017 (the **Mondelez Licence**). Bega's rights to use the PBTD therefore expired when the Mondelez licence ended. Kraft produced substantial evidence demonstrating the level of control it exerted over Mondelez pursuant to the Mondelez Licence and argued that the goodwill in the PBTD inured to the benefit of the licensor, Kraft and not Mondelez who was a mere licensee at the time of the acquisition.

Bega's argument

Citing the key authorities on goodwill, Bega argued that goodwill is inseparable from the conduct of the business and that it is derived from identifiable assets of the business. Bega submitted that the PBTD was part of the goodwill of the peanut butter business and that it could only be assigned by selling that business. Bega contended that the owner of the PBTD was Mondelez as it was the entity that used the PBTD in the conduct of the peanut butter business in Australia.

The Court's decision

His Honour accepted Bega's submissions that the assignment or licensing of unregistered trade marks is not possible without assigning the underlying goodwill of the business. Accordingly, the ownership of the PBTD resided with Mondelez as part of the goodwill of the Australian peanut butter business which it had operated for many years. As such, only Mondelez could assign the PBTD, which it did in the 2017 acquisition by Bega.

His Honour concluded that Kraft engaged in misleading and deceptive conduct by using the PBTD and adding the phrase "*Loved since 1935*" on its packaging, which suggested that it was the same product when the recipe had in fact changed.

Key lessons

(1) Unregistered trade marks are assigned with the goodwill of the business.

The Case has confirmed that unregistered trade marks cannot be assigned unless the goodwill in the business is also sold. The owner of the unregistered trade mark is the business using that mark. Only registered trade marks can be assigned without the goodwill.

(2) Businesses should ensure their trade dress is adequately protected.

The Case serves as an important reminder for businesses to ensure they register all features of their brand including their trade dress. The PBTD was an important aspect of Kraft's branding of its peanut butter product – and perhaps in this Case, more important than the Kraft brand itself. Bega's use of the PBTD substantially diluted Kraft's market share which it had dominated for many years. Bega would not have been able to use the PBTD if Kraft had registered its key aspects as a trade mark.

(3) Contracts should reflect the intention of the parties.

The Sale and Purchase Agreement between Mondelez and Bega stated that Bega would acquire all of Mondelez's goodwill associated with its peanut butter products business – a rather broad description of the assets sold to Bega. The Court's finding that the PBTD formed part of the goodwill ultimately meant that Bega as part of the acquisition had acquired it. This serves as an important lesson to ensure that contracts purporting to assign or licence IP are drafted to reflect the intention of the parties.

For more information, please contact Hazel McDwyer on +61 2 9163 3052.

Through the grapevine: The ACCC's foray into the vineyard

Richard Partridge, Partner and Christopher Borghesi, Lawyer

The ACCC has its eye on wine.

The competition regulator released the Interim Report into its wide-ranging study into Australia's wine grape market on 3 June 2019, after 12 months of surveys and discussions with the industry. The Report identifies a number of areas of concern for the Australian Competition and Consumer Commision (**ACCC**), and puts forward a suite of recommendations to increase competitive practices.

Among its findings, the ACCC has identified a high prevalence of supply agreements being entered in to in circumstances characterised by a significant imbalance between the negotiating power of growers and winemakers. This is illustrated in particular by the lack of bargaining power wielded by growers in warm climate regions. The regulator has flagged that it considers certain aspects of the supply contracting regime and pricing mechanisms to be potentially problematic and encouraging of anti-competitive behaviours.

The wine grape market at a glance

The wine grape market is comprised of a large number of small scale growers, a heavily concentrated group of large winemakers who purchase grapes from growers, and a small number of vertically integrated grower-winemakers. The ACCC is particularly concerned about the power imbalance present in supply agreement negotiations, which tend to heavily favour the winemaker. These issues are particularly prevalent in the 'warm climate' grape growing regions – Riverina, Riverland and the Murray Valley (encapsulating the Murray-Darling/Swan Hill).

Grape growing and winemaking operations in warm climate regions tend to exist independently from one another. While some major winemakers in these regions have partially integrated vertical supply chains into their operations, most if not all continue to source a large portion of their grapes from independent growers. This is in contrast to cool climate operations, where the proportion of vertically integrated grower-winemaker operations is much higher.

Sour grapes – The ACCC's concerns

Amongst the ACCC's many observations regarding the wine grape market in warm climate regions is a concern that growers have very little agency to negotiate terms of supply agreements (particularly price and payment schedules), and are often subjected to unfair contract provisions. The Report identifies a number of factors to which this imbalance can be attributed, including the perception that grapes grown in warm climate regions are of inferior quality and largely homogenous, the lack of consistent indicative pricing practices across regions, and the narrow window in which grapes are able to be harvested.

Additionally, the industry is haunted by memories of a decade-long oversupply which put significant downward pressure on prices. This period still weighs heavily on growers' minds, and has had a noticeable effect on industry practices. Many growers are willing to accept any agreement, including those setting a variable price, rather than risk missing out altogether. Further complicating things is a culture which heavily emphasises loyalty, and discourages growers from seeking alternative buyers, either through contractual restrictions, or fear of retribution or winding up without a buyer.

As a result of the imbalance in bargaining power, the ACCC's view is that there is little to deter winemakers from setting the terms of supply agreements on a 'take it or leave it' basis with growers. Many of these agreements contain terms which the ACCC is concerned may amount to unfair contract terms, including price uncertainty and payment schedules which heavily favour the winemaker and can drag out for as long as 18 months.

Broader ramifications for the FMCG sector

The Interim Report is key reading for more than just those at the Cellar Door. It comes as part of a broader assessment by the ACCC of the agricultural industry. Proceedings launched in 2018 against Australia's largest potato wholesaler, Mitolo, resulted in a pecuniary penalty of $240,000 being handed down by the Federal Court in early August for the use of unfair contract terms in supply agreements between Mitolo and potato growers. In particular, terms which allowed Mitolo to unilaterally set and vary the price paid to farmers, and those restricting farmers from selling their crops to other purchasers were found to be unfair. Both examples directly reflect terms which the ACCC has found to be in widespread use in the wine grape market.

The findings presented in the Interim Report and the Mitolo decision provide valuable insight as to how the ACCC might approach supply agreement regimes in other FMCG markets. In particular, markets characterised by a large number of small producers selling raw materials in bulk to a small group of purchasers, and those where the perishability of the materials being sold adds an element of time sensitivity, should be paying close attention to the ACCC's next move. Parties operating in those markets should assess whether potential efforts by the regulator to correct imbalances in the wine grape market might impact their own supply chains.

The ACCC's final report is due to be released in September, at which point we can expect to gain a clearer understanding of the regulator's position in light of reaction to the Interim Report and further discussion with industry players. The Final Report will also provide a strong indication of the ACCC's willingness to pursue and penalise alleged anti-competitive practices and arrangements in the wine grape market and the agricultural supply industry more broadly.

For more information please, contact Richard Partridge on +61 3 9252 2527.

New advertising campaign by Ad Standards to promote advertisements that foster positive social change

Antoine Pace, Partner

How many times have we rolled our eyes at an advertisement that plays on gender or other stereotypes? Something like the idiot father at the washing machine, or the woman standing by her smoking vehicle – in each case looking confused…

In response, Ad Standards (the Australian body that administers the national system of advertising self-regulation and adjudicates advertising complaints) has launched its own advertising campaign to point out various social issues that cause concern in advertising campaigns, including sexism, racism, misguided claims and advertising to children, and instead promoting advertisements that are a little kinder, as a means for positive social change.

The campaign is a call to action for the community to identify advertising that promotes social good. Over the next few weeks you will see advertising on TV, newspapers, billboards, in-building facilities and out-of-home advertising that will challenge you to think, with headlines like "If you're a woman don't bother reading this ad" or "This ad is for white people only" (but not to fear, as each is then followed by commentary on the headline). The advertisements are intended to challenge perceptions and remind the audience that discriminatory and offensive advertising is prohibited by the existing advertising standards.

Fiona Jolly, CEO of Ad Standards, says that the advertisements are intended also to remind the general public and advertisers that advertising codes of conduct exist, and that if a member of the public (or a competitor in the market) has concerns, they can raise them with Ad Standards, who will consider and if appropriate, act on their concerns.

> *"The fact is, while the advertising Codes set high standards, we can encourage brands to exceed these to create positive change in the world. The public should be aware of the standards in place and be encouraged to value socially progressive advertising."*
>
> *Fiona Jolly, CEO, Ad Standards.*

Ad Standards is also encouraging members of the public to nominate their favourite advertisement, - something creative, clever, and promoting social good, via this link.

For more information, please contact Antoine Pace +61 3 9612 8411.

Personal Property Securities Register: The basics

Breanna Davies, Special Counsel, Clementine Woodhouse, Associate and Kevin McVeigh, Lawyer

What is the PPSR?

The Personal Property Securities Register (**PPSR**) is the Australian public register on which details of security interests in personal property can be registered by secured parties, and searched by others.

The PPSR covers most personal property (i.e. property other than real estate). The security interests covered by the PPSR include all interests in property which secure payment or performance of an obligation (e.g. mortgages over motor vehicles, charges in company property, or retention of title arrangements) as well as certain leases, bailments and consignments of property.

The register is used by secured parties to register notices to show they have rights over personal property which secure debts or obligations owed to them.

The PPSR can be searched (for a small fee) to research:

- whether particular property (e.g. a car, truck or boat) is subject to a security interest which has been registered on the PPSR; and
- what registrations have been made against a person (e.g. an individual or company) – known as a 'grantor'.

Despite the PPS regime reaching its 7 year milestone earlier this year, we find that there is still a great deal of uncertainty and confusion surrounding it. It is common for secured parties to make incorrect PPS registrations or fail to register at all. It is also common for secured parties to fail to remove PPS registrations in a timely fashion when required to do so. Our experience is that issues with PPS registrations can cause significant delays and complications during transactions for the sale of businesses, sale of assets, and mergers and acquisitions generally. These issues are exacerbated where third parties with PPS registrations do not understand their obligations under the PPS regime and do not respond promptly to requests to remove their registrations (when they are obsolete or incorrect).

Improper PPS registrations can also be an issue for any finance arrangements you may have. If the terms of your finance arrangements prohibit you from granting further security interests, improper registrations made by other counterparties may create an impression that you have breached your finance arrangements. Regular PPS searches may assist with monitoring this and addressing any incorrectly registered security interests early, before they become an issue with your financier or with any other transactions you wish to complete.

We therefore recommend you conduct PPSR searches of yourself on a regular basis – for example, annually.

How do I search the register?

You can search the PPSR here.

You can search:

- yourself - to identify whether there are registrations which are no longer current or incorrectly registered and should be removed;
- your counterparties - to understand whether they have granted security interests over some or all of their personal property which may affect you (e.g. if you are acquiring a business or asset); and
- specific items of serial numbered property (e.g. motor vehicles, patents, trade marks and designs) – to understand whether the property is subject to a security interest (e.g. if you are acquiring a truck or intellectual property).

The table below sets out the identifiers you can search against (depending on the type of grantor you are searching for or the type of property you are searching for):

Entity type	Details
Company	ACN
	ARBN (if any)
	Name
	ABN
	Former names
Corporate trustee of trust	ACN of corporate trustee
	ABN of corportate trustee
	ARBN (if any) of corporate trustee
	Name of corporate trustee
	ABN of the trust (if it has one)
	Name of the trust
Individual trustee of trust	Surname, given names and date of birth of individual trustee
	ABN of the trust (if it has one)
	Name of trust
Individual	Surname, given names and date of birth
Managed investment scheme	Registered scheme's ARSN

What do the different registrations mean?

A PPSR search for a corporate grantor can yield a huge range of results. Common registrations include:

- Registrations in respect of "All Present and After-Acquired Property" of the grantor (AllPAP Registrations) – these registrations are often made by banks or other financial institutions or lenders which have taken security over all the assets of a grantor under a general security agreement (formerly a fixed and floating charge);
- Registrations against the VIN of a motor vehicle – these registrations are often made by financiers or vehicle lessors and indicate that the relevant vehicle is subject to finance or it is leased by the grantor;
- Registrations in respect of "other goods" – these registrations relate to the specific property identified in the registration and can relate to a wide variety of transactions. The property covered by the registration may be leased, mortgaged, or may be property supplied to the grantor to which the which the supplier retains title;
- IP / trade mark registrations – the registrations cover trade marks, patents and designs.

How can I remove registrations made against me which I don't think should be there?

If you do not understand why a registration has been made against you, or hasn't been removed, or don't believe it should have been made you can contact the secured party using their details supplied on the PPSR registration. If you are not able to resolve the issue with the secured party, it is possible to follow an administrative process through the PPS Registrar to remove registrations or alternatively apply to the Court. We can assist you with either or both these avenues.

For more information, please contact Breanna Davies on +61 2 9163 3017.

Authorised use of a Trade Mark, explained by a motorcycle club and an asian food giant

Kerry Awerbuch, Partner and Tristan White, Lawyer

Trade marks, much like leftover pizza in a sharehouse fridge, need to be used or controlled in order to not be lost to a competitor (or a flatmate). But not every trade mark owner necessarily uses its trade marks itself; some instead authorise another person to do so on its behalf (we often see this within corporate families for example). This is called 'authorised use' and, thanks to a pair of recent judgments out of the Federal Court, trade mark owners can now take definite steps to correctly authorise use of trade marks and protect them from invalidity.

The two recent judgments have further refined how much control a trade mark owner must exercise over its 'authorised user' in order for that use to be valid. Let's discuss each in turn.

Hells Angels Motorcycle Corporation (Australia) Pty Limited v Redbubble Limited [2019] FCA 355 involved two chapters of the Hells Angels Motorcycle Club: the original American chapter, which owned the trade mark rights in the club's logo, and the Australian chapter, which was licensed to use that logo in Australia. In finding that the owner exercised sufficient control over the authorised user, the court looked kindly on the standards and controls written into the licence agreement between the two chapters. For example, the Australian chapter was only entitled to use the logo exactly as it appeared on the trade mark registration and without alteration. Somewhat unique to this case, the court also found that the relationship between the two chapters involved a level of obedience so intuitive and complete that any ongoing formal instruction from the trade mark owner in this case wasn't necessary.

In *Trident Seafoods Corporation v Trident Foods Pty Ltd* [2019] FCAFC 100, a subsidiary company in a corporate group authorised its parent company to use its trade mark (an uncommon situation, but certainly legitimate). Here, there was even less formal instruction from the owner to the authorised user, but for a very good reason – the directors of the owner and authorised user were the same people. Again, the court found a significant level of control inherent in the relationship between the parties.

Both of Hells Angels and Trident Foods were able to keep their trade marks because of the control inherent in the relationship between them and their authorised users, but these cases really turned on their facts and should not be taken as the norm. The nature of the relationship between two parties does not often provide the same level of control, such as when two parties deal in a licensing relationship at arms' length. In those more common situations, it is better to take pre-emptive action rather than rely on a court's final (and unpredictable) assessment of the relationship.

So, we would like to take this opportunity to advise trade mark owners of what they can actually do to correctly authorise use of their trade mark to others. Allow us to headline it in the form of a tempting pop-up click bait ad: "4 GROUNDBREAKING ways to establish a PROPER authorised use relationship – what the courts don't want you to know!"

Four groundbreaking ways to establish a proper authorised use relationship.

1. **Sign a licence agreement.** This is the bare minimum. Whenever use of a trade mark is being licensed to another person, get it in writing. Specifically, consider including clauses relating to the below, which will help establish the requisite level of control:

   a. How the trade mark can be used, including what products it can and can't be applied to.

   b. How the trade mark must be presented. Can the authorised user make slight alterations to it, or must it be applied exactly as it appears on the trade mark registration? Must the authorised user include a ® with every use of the trade mark?

   c. Obligations on the authorised user to periodically report back to the owner in relation to the mark. This can include production or sales figures, or occurrences of infringing marks from competitors.

   d. Obligations on the authorised user to comply with any future direction the owner gives in relation to the trade mark.

2. **Create formal controls**. The Federal Court specifically noted that Hells Angels failed to show it created any manuals, policies or guidelines in relation to the trade mark – this was bad. Documents such as these make it clear that the owner is only authorising use of its trade mark in the way it wants it to be used, meaning the owner sufficiently controls it – this is good.

3. **Exercise 'actual control' over the user's use of the mark.** The level of control required to establish 'actual' control is going to depend on the circumstances of each individual case. As a starting point, a trade mark owner will have to do more than simply establish a possibility of exercising control (hence the term 'actual' control). Rather, by completing points 1 and 2 above, then giving ongoing directions and instructions in relation to the trade mark, a registered owner is much more likely to be seen as exercising actual control over an authorised user.

4. **Keep records!** Agreements, notices, instructions – a copy of all of these should be kept somewhere. When a competitor wants to challenge a trade mark's validity by claiming it hasn't been used, these are the documents the owner will need to use in order to defend itself against the challenge.

The takeaway for trade mark owners is to be proactive in the protection of trade marks. Comprehensively setting up relationships involving sufficient control will generate benefits equivalent in value to the joyous surprise of finding that delicious slice of leftover pizza left exactly as it was the night before.

For more information, please contact Kerry Awerbuch on +61 3 9252 2573.

Why you need to bolster your privacy compliance program

David Smith, Partner

There are a number of factors pushing changes to privacy law so as to impose ever-increasing compliance requirements on Australian FMCG companies (and others).

At the “big picture” level, companies and government agencies are collecting ever-increasing amounts of data about individuals. These databases are increasingly valuable, and increasingly subject to data breaches – either deliberate breaches by malicious actors, or breaches resulting from human error. And when breaches occur, their adverse implications are tending to increase with the size, complexity and value of the data involved.

Globally, lawmakers are making changes with the aim of forcing companies to take privacy compliance seriously. Most notably, the European Union’s *General Data Protection Regulation* took effect in May 2018 and imposes potentially massive fines for privacy breaches. The GDPR can apply directly to Australian companies, for example if they process personal data about individuals located in the EU.

Before the recent Commonwealth election in Australia, the Government announced that it would make some significant changes to privacy law. It expressed the view that existing protections and penalties for misuse of Australians’ personal information fall short of community expectations.

Now that the Government has been returned, we can expect that:

- The maximum civil penalties for a serious privacy breach, or repeated privacy breaches, will be vastly increased to (for a company) the higher of:
  - $10 million;
  - three times the value of the benefit obtained from the breach(es); or
  - 10% of the company’s annual domestic turnover in the last 12 months.
- The Office of the Australian Information Commissioner will be allocated significantly more funding to bolster its enforcement capability.
- The OAIC will also receive further enforcement powers including the ability to issue infringement notices.

Further, the ACCC recently published the final report on its Digital Platforms Inquiry. The report recommends significant changes to the *Privacy Act 1988* (Cth) including:

- Changing the definition of “consent” to require express, opt-in consent.
- Giving individual consumers a direct right of action for breach of privacy under the Act. This could open the door to class action litigation in many data breach scenarios.

Upon the release of the ACCC’s report the Federal Treasurer, Josh Frydenberg MP, stated that the Government “… accepts the ACCC’s overriding conclusion that there is a need for reform”. The precise reforms required will be informed by a public consultation process that will run for 12 weeks. After that, the Government will finalise its response to the ACCC’s report by the end of 2019.

While the precise detail of any changes remains to be seen, it is clear that Australian companies, particularly in the FMCG space where companies often hold large quantities of customer data, will have a strong business incentive to take privacy compliance much more seriously. Now is the time to engage with us for a review of your privacy compliance program.

For more information, please contact David Smith on +61 3 9252 2563.

Key considerations for your website

Donna Bartlett, Partner and Aya Lewih, Lawyer

If you are in the business of selling goods online, you should ensure that your website complies with the laws affecting e-commerce businesses. Your website contains important contractual terms and representations which inform and ultimately influence a visitor's purchasing decision.

At its core, your website operates as an invitation to treat.

This checklist outlines some of the key legal considerations for your e-commerce website to help you assess your website's legal health.

Is information consistent across your website?

The Australian Consumer Law (ACL) requires businesses to not engage in misleading or deceptive conduct or make false or misleading claims or statements. Websites may fall foul of the ACL due to inconsistent information across the site. For example, if your terms and conditions state a certain shipping timeframe but your shipping information section on the website states a different timeframe. It is vital that all information across your website is consistent.

Do you use the word "free"?

Businesses should use the word "free" with caution. A free offer can create a keen interest with customers to purchase your goods. Free must be absolutely free and the use of disclaimers may not be sufficient to overcome the risk of misleading consumers. For example, offering a buy one get one free promotion is likely to be misleading if you increase the costs of the goods during the promotion.

Do you offer gift vouchers?

250$

New laws concerning gift vouchers were recently introduced. Under the *Treasury Laws Amendment (Gift Cards) Act 2018* (Cth), gift vouchers must now be redeemable for a minimum of 3 years and display certain information (e.g. the date the gift card ceases to be redeemable). The associated regulation sets out some exceptions to the 3 year redemption period so it is important to check whether these exceptions apply to you.

Is your pricing displayed as a single figure?

When selling goods to consumers (as opposed to businesses) you should state the total price of the goods to consumers as a single figure which includes any tax, duty, fee, levy or additional charge. The price does not need to include optional charges or extras (such as delivery charges). You can display the pricing of separate components but the total price must also be displayed at least as prominently.

Do you make claims about your products?

You should ensure that there is a basis for and evidence to support each claim made on your website. A business making claims about the future (including predictions and projections) must have reasonable grounds for doing so at the time of making the claim. Note that claims that your goods are "premium" will require extra care.

Are there specific laws and regulations governing the sale of your goods?

When selling goods online, you need to ensure that your advertising, selling and delivery practices comply with the laws and regulations applicable to your specific goods. For example, specific laws and regulations govern the promotion, sale and delivery of alcoholic beverages, food items, therapeutic goods and cosmetics and dietary supplements.

Do you have a privacy collection notice?

Every contact point on your website where someone can submit their personal information should have a Privacy Collection Statement and a link to your privacy policy. The requirements for a Privacy Collection Statement are covered in Australian Privacy Principle 5. Your Privacy Collection Statement will make users aware of your collection of their personal information at that contact point and the purpose for which you are collecting the information.

Does your website have reviews and testimonials?

Reviews and testimonials should reflect the genuine opinion of the person making the review or testimonial. Businesses risk contravening the ACL if they use strategies to influence a consumer to publish a positive review or if they selectively delete and edit reviews, particularly those which are negative.

For more information, please contact Donna Bartlett on +61 2 9163 3025.

A hairy situation: managing the risk of adverse publicity relating to influencer marketing

Hazel McDwyer, Partner and Raisa Blanco, Associate

On 14 May 2019, CNN ran a story about YouTube influencer James Charles (**Charles**) and his falling out with his mentor and fellow YouTube influencer, Tati Westbrook (**Westbrook**). Before the dispute, Charles, a beauty blogger who is notably Covergirl's first male spokesperson, had around 16 million subscribers to his YouTube channel. On the other hand, Westbook had a more modest subscriber count of 6 million subscribers to her YouTube channel.

The dispute was triggered when Charles published a post on Instagram endorsing Sugar Bear Hair supplements, which is a direct competitor of Westbrook's own supplements brand, Halo Beauty. Westbrook shortly published a video on YouTube accusing Charles of being unsupportive, which resulted in significant reputational damage to Charles and the loss more than 3 million subscribers. Meanwhile, Westbrook's following increased to over 9 million subscribers.

- restrictions regarding the influencer's appearance (for example, no substantial changes to weight, hairstyle or clothing style).

The contract should also be drafted to enable the business to keep the influencer liable for a breach of these agreed requirements and restrictions.

Conflict of interest

A business may also seek to define 'conflicts of interest' more broadly to cover any interest or relationship that may adversely impact an influencer's ability to perform its obligations under the contract fairly and independently. As illustrated by the Charles and Westbrook dispute, an adverse publicity event may still occur despite the fact that there is no particular contractual relationship between the influencers involved.

"From a legal perspective, there was no clear impediment to Sugar Bear Hair offering sponsorship to Charles and Charles accepting sponsorship from Sugar Bear Hair. However, this dispute highlights the potential reputational risk that businesses face when engaging with influencers, and the considerations influencers need to take into account when accepting sponsorships."

Hazel McDwyer, Partner

Managing personalities

A way to manage risk that an influencer may go 'rogue' would be to include certain clauses in the contract with the influencer setting out the business' expectations of an influencer's behaviour and conduct during the course of the relationship. This could mean including a clause to ensure that an influencer's behaviour, conduct, and content produced will be consistent throughout the term of the contract.

Where a business is engaging with a particularly 'high risk' personality, such a clause could be drafted to be fairly prescriptive, including:

- requirements regarding the influencer's position or tone in relation to the business, products or services;
- any subjects to avoid in relation to the business, products or services (for example, barring any discussion regarding politics or religion); and

Conversely, influencers should consider any issues that may arise from their acceptance of a sponsorship (including any informal arrangements or understanding with other influencers in their network), and whether such issues are significant enough that they would be prevented from performing their obligations under a contract with a business.

Monitoring reach

A business may consider including termination or suspension rights in the contract in cases where an influencer experiences a drop in subscribers or followers by a certain percentage or number, or within a certain time period. This could address issues that arise in situations such as the Charles and Westbrook dispute, where an influencer experiences significant reputational damage and a sudden drop off in subscribers or followers.

Content

Other than ownership rights, businesses may consider including a right to have content removed from the influencer's social media account following termination or expiry of a contract to mitigate the impact of any reputational damage from being associated with an influencer.

On the other hand, influencers may wish to limit a business' right to use content after the relationship ends, including for how long and in what context.

Further guidance

Businesses should also have regard to unfair contracts terms legislation when using standard form contracts to engage influencers as many influencers would be likely to be considered as small businesses in Australia.

While Charles' subscriber count on YouTube has been steadily climbing since the dispute was resolved, and he has maintained approximately 15.7 million followers on Instagram, the dispute between Charles and Westbrook illustrates how the influencer community and influencer marketing can deal significant reputational damage within a very short timeframe.

Many influencer agreements amount to not much more than names, number of required posts, basic content and payment provisions. While influencer marketing laws continue to be an area in flux, businesses should ensure that effective contractual provisions are in place with influencers to mitigate the potential reputational risks that could arise from their engagement.

For further information, please contact Hazel McDwyer on +61 2 9163 3052.

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Key Contacts

Kerry Awerbuch
Partner
Intellectual Property & Technology

T: +61 3 9252 2573
E: kerry.awerbuch@gadens.com

Donna Bartlett
Partner
Intellectual Propery & Technology

T: +61 2 9163 3025
E: donna.bartlett@gadens.com

Hazel McDwyer
Partner
Intellectual Property & Technology

T: +61 2 9163 3052
E: hazel.mcdwyer@gadens.com

Antoine Pace
Partner
Intellectual Property & Technology

T: +61 3 9612 8411
E: antoine.pace@gadens.com

Richard Partridge
Partner
Corporate Advisory

T: +61 3 9252 2527
E: richard.partridge@gadens.com

David Smith
Partner
Intellectual Property & Technology

T: +61 3 9252 2563
E: david.smith@gadens.com

With special thanks to our other contributers:

Breanna Davies, Special Counsel, Corporate Advisory

Clementine Woodhouse, Associate, Banking & Finance

Raisa Blanco, Associate, Intellectual Property & Technology

Christopher Borghesi, Lawyer, Corporate Advisory

Aya Lewih, Lawyer, Intellectual Property & Technology

Kevin McVeigh, Lawyer, Corporate Advisory

Tristan White, Lawyer, Intellectual Property & Technology

Design: Hannah Manoylovic, Business Development & Marketing

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