FMCG *Express*

Suppliers:
Help! I think my customer is going broke

Sponsored posts on social media:
being insta-famous and not infamous!

COVID Casual Chaos –
Casual confusion yet again

October 2020 Edition

gadens

Welcome to the October 2020 Edition of

FMCG *Express*

Welcome to our latest edition of FMCG *Express*! 2020 continues to be an eventful year, although we are cautiously optimistic that we may be turning a corner in Australia. While COVID-19 continues to cast a shadow over our lives, our cities are starting to show green shoots of life, which is welcome news. Our thoughts are with our families, clients, associates, friends and colleagues in countries where numbers are at very concerning levels.

In this edition, we have some useful COVID-19 reading. Siobhan Mulcahy considers the ongoing issues of JobKeeper with casual workers. Breanna Davies discusses what to do if your customer is unable to meet its payments, which is happening all too often at the moment. Dudley Kneller examines privacy and cyber security issues and includes a handy table on contact tracing obligations throughout each State and Territory.

One of our favourite British comedians, serial prankster and champion of the underdog, Joe Lycett shone the spotlight on corporate bullying in letters of demand earlier this year, taking on Hugo Boss. We look closer at this case and give some top tips on IP letters of demand. One size certainly does not fit all!

There is a lot happening in the consumer law world, including the upcoming changes to the definition of 'consumer' under the Australian Consumer Law and the new disclosure obligations to consumers in New South Wales. With Black Friday around the corner, we provide some guidance on online sales and promotions, as a result of the recent Kogan decision.

If you have any queries on any articles in this edition, or have any other feedback, please get in touch.

Hazel McDwyer
Editor

In this issue

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Suppliers: Help! I think my customer is going broke

Breanna Davies (Special Counsel)

2020 has evolved in a way no-one could have predicted, and there is still much uncertainty as to what the future looks like (particularly as a result of Government stimulus payments and rent freezes varying or coming to an end, and newly announced insolvency law reforms that will affect businesses with liabilities of less than $1 million). While the outlook is not entirely pessimistic, suppliers should be preparing themselves for all scenarios. This means suppliers should now be considering options where their customers are not in a financial position to meet contractual payments, or in more drastic circumstances, face potential insolvency. We have set out below some options should you wish to be relieved of your obligations to continue to supply customers, or what to do if such debts are incurred and your customer cannot pay.

Termination for insolvency

Historically, contracts (particularly supply agreements) would often include provisions that would permit a party to terminate in the event of the insolvency of the counterparty. What was considered to be an insolvency event was usually defined in the contract (i.e. it could simply be 'not being able to pay debts when they fall due', or more specifically upon the 'appointment of external administrators'). However from 1 July 2018 legislative changes were introduced to limit the ability of a party to terminate an agreement in such circumstances. Where a contract triggers a termination right upon the entry of a party into or commencing certain insolvency or restructuring procedures, the ipso facto stay prevents the non-defaulting party exercising such termination or other rights. There were a variety of reasons for this, one being that it would allow the insolvent company to continue to trade with its contracts in place and hopefully assist in the company being salvaged once debts were restructured.

These laws apply to contracts entered into on and from July 2018. If a contract was entered into before that date and contains such a right, then the termination option would still apply now. We often see contracts entered into post-1 July 2018 which still contain such a termination right on insolvency, but the ability to utilise it is likely now compromised.

As at the time of publication of this issue, the Treasurer had recently announced substantial insolvency reforms in response to COVID-19, including the introduction of a debt restructuring process and liquidation path for smaller businesses with debts under $1 million which is intended to be simpler and more efficient than existing structures. These reforms are expected to commence on 1 January 2021 and Gadens will provide updates when further information is available.

Other options

Termination for convenience: If you want to terminate arrangements with your customer you may be fortunate and find that your contract contains a right to terminate for convenience. Terminating a contract for convenience is often not as simple as it may appear, so we recommend that you seek legal advice before exercising (or purporting to exercise) such a right.

Termination for breach: When a customer is teetering on the verge of insolvency they may have delayed payments to you in breach of contractual payment terms. Such a situation may provide you with the opportunity to terminate for breach of contract. Again it is very important to seek legal advice as termination rights can be particularly drafted (with a specific legal consequence) and may not be as straightforward as they appear. Someone in your organisation may have agreed to a variation to the contract to provide for a longer period to meet payments and in those circumstances you may not be able to make a case for breach of contract.

Reliance on contract terms: If you are not in a position to terminate the agreement itself, consider what your obligations are as a supplier to maintain ongoing supply. For example, the provision could state that you 'may' provide the goods or services meaning that it is optional, or there may be no minimum requirements. When entering into a supply agreement you should always seek that title to the goods does not pass until those goods have been paid for in full. Again we suggest seeking legal advice so that appropriate provisions are included in the agreement and to ensure you have registered any security interest on the PPSR appropriately and on time. Timing is critical as delays could result in the registrations being ineffective which could jeopardise your ability to recover what is owed.

Statutory demands: Assuming that your customer owes you a certain amount of money, ordinarily you would likely have issued a statutory demand. Please be aware that until 31 December 2020 the minimum threshold to issue a statutory demand has been increased to $20,000 (from $2,000) and the time to respond to a statutory demand has been increased to six months (from 21 days). If you wanted to commence proceedings for unpaid invoices you would now need to bring debt recovery proceedings through the Courts (subject to Court hearing procedures and availability, which have also been impacted).

Next steps:

- Firstly, where appropriate, you should seek payment upfront and not extend payment terms.
- Keep open lines of communication with your customer.
- Consider if a short-term price reduction will keep your customer in business.
- Consider ability to register a security interest on the PPSR to ensure your interest in the goods is noted (e.g. where you retain title in the goods until payment is received). The timing of this is critical and generally must be done at the outset.
- Speak to a legal advisor before varying, terminating or purporting to terminate a contract.
- Keep up to date with constant changes at State and Federal level in response to COVID-19.

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

Sponsored posts on social media: being insta-famous and not infamous!

Antoine Pace (Partner) and Lisa Haywood (Associate)

In light of COVID-19 restrictions, more people than ever are turning to online stores and their favourite insta-famous celebrities to help them decide what to buy. Influencer marketing is a powerful way for businesses to engage with their existing and potential customers and create an air of excitement for their products and services. However, often businesses and influencers forget that they need to comply with relevant laws and codes when delivering promotional content on social media. There can be significant penalties for failing to comply with legal obligations but also other potential implications including reputational damage.

Does the Australian Consumer Law apply to advertising and marketing on social media?

Yes. As with all other forms of advertising, advertisers and social media users (e.g. influencers) can fall foul of the Australian Consumer Law (**ACL**) if representations they make to the public amount to or contain misleading and deceptive claims.

The ACL generally prohibits businesses from making false, misleading or deceptive claims or representations about their products or services.

TIPS

Make sure you don't make any false or misleading claims as part of your marketing and promotional activities. Ensure that any statement you make can be justified or substantiated if you are called upon to defend these statements by regulators. If you're not sure if your advertisement or content is misleading, consider seeking independent legal advice, or change it to minimise risk.

The ACL will apply to advertising and marketing on Instagram, Facebook, Twitter, YouTube, TikTok and all other social media channels.

If the Australia Competition and Consumer Commission (**ACCC**) takes the view that a representation by an advertiser or influencer is false or misleading in breach of the ACL, it can issue proceedings against the advertiser or the influencer, or, if applicable, issue an infringement notice.

The ACCC will be more likely to investigate cases involving false or misleading or deceptive conduct if:

- it is likely that widespread public detriment would result if the statement were relied on;
- the conduct is 'particularly blatant'; or
- the statement relates to a business that has previously been under scrutiny by the ACCC.

There are significant penalties for making false or misleading representations in contravention of the ACL. Advertisers and influencers should also remember that consumers and even competitors can sue under the ACL for misleading or deceptive content.

Can you be liable for false or misleading claims made on your social media page by third parties?

Yes. Businesses can be liable for posts or public comments made by third parties on their social media pages which are false or likely to mislead consumers, if they are not removed promptly.

TIPS

Take active steps to monitor your social media pages and ensure that any third party comments made on your page that are false or likely to mislead consumers are immediately removed.

Establish codes of conduct for your social media page which make it clear to consumers the types of behaviours that are and that are not acceptable.

Do influencers need to put #ad or #spon next to their posts on social media?

Strictly no, but it is recommended. The Australian Association of National Advertisers (**AANA**) Code of Ethics (**AANA Code**) (available here) is the overarching document that sets out standards across any medium for advertising or marketing communications, including social media.

The AANA Code has been adopted by the AANA as a means of self-regulation in advertising and marketing, and its purpose is to ensure that advertising and marketing communications are legal, and have been prepared with a sense of fairness and responsibility to consumers, competitors and society.

The definition of the term 'advertising and marketing communication' is very broad and has two main requirements:

1. Does the advertiser or marketer have a reasonable degree of control over the material?
2. Does it draw the attention of the public in a manner calculated to promote a product or service?

Sponsored social media posts will often fall within this definition.

The AANA Code will apply regardless of:

- whether or not payment has been made; and
- the form of incentive (if any) that has been provided in connection with the advertising or marketing communication.

The Code includes a requirement that advertising and marketing communications be clearly distinguishable.

However, strictly speaking, this **does not require** sponsored posts to be labelled as such. The following examples should be acceptable:

- a brand name or logo that appears prominently within the advertisement;
- a slogan or hyperlink directing consumers to the business or the product;
- including a legal disclaimer.

TIPS

Despite there being no formal requirement to label an advertising or marketing communication as such, the AANA recommends that sponsored posts on social media should use the hashtags **#ad** or **#spon**, as it is a clear and simple way of identifying to the public that the post is an advertising or marketing communication.

If creating and posting influencer content overseas, consider the legal requirements in that country.

What is the Australian Influencer Marketing Code of Practice?

In July 2020, the Australian Influencer Marketing Council (**AIMC**) released the Australian Influencer Marketing Code of Practice (**AIMC Code**) (available here).

The AIMC Code provides guidance regarding influencer marketing requirements, and sets out what is considered to be 'best practice' for advertising disclosure pertaining to influencer content.

The following practices are suggested in the AIMC Code:

- Advertising disclosure is required when there is a 'contracted engagement' (i.e. any engagement (written, verbal or otherwise) between an influencer and client/ brand).

- The **#Ad** and **#Sponsored** hashtags should be used as minimum requirements. Others such as **#Ambassador**, **#Collab** or **#PaidPartner** can be used as well (but not in substitution).
- If social media platforms have specific advertising disclosure requirements, they should also be complied with.
- For platforms where video is used, the required disclosure is:
  - short-form videos – brand associations should be declared at the start of the video or in the post caption copy, where applicable; and
  - long-form videos – brand associations should be declared at the beginning of the videos and included on captions and pull-throughs.
- Gifts or 'value in kind' (including product placement) are considered equivalent to payment in advertising engagements, meaning advertising disclosure **is** required, even where the products or services are given as free of charge or at a significant discount.
- The declaration regarding marketing or sponsorship should be easy to understand, unambiguous and timely.

Under the AIMC Code, the AIMC considers that **disclosure is not required if**:

- there is no contracted engagement; or
- the brand has no input or 'control' over the influencer content or outcome.

Are there other codes you may need to consider when advertising products and services?

Depending on what you are marketing or advertising there may be other codes, schemes or legislation you need to consider. A few examples include:

- ABAC Scheme;
- Therapeutic Goods Advertising Code;
- AANA Code for Advertising and Marketing to Children;
- ASIC Advertising Financial Products and Services Guide; and
- Children's Online Privacy Protection Act (USA).

Key takeaways

If you are an influencer or a brand, you should familiarise yourself with the advertising and marketing requirements before posting content on social media. There can be significant legal penalties if you fail to comply:

- Brands and influencers must be aware of the legal requirements when posting marketing and advertising material on social media.
- As with other forms of advertising, advertisers and social media influencers can fall foul of the ACL if statements make or contain false or misleading claims.
- **Whilst it is not strictly required under the AANA Code for influencers to use distinguishing hashtags such as '#ad', '#spon' or '#sponsored' on their posts, using them is the simplest way to distinguish posts on social media as advertising and ensure compliance with the Code.**

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

COVID Casual Chaos – Casual confusion yet again

Siobhan Mulcahy (Partner)

Casual calamity? Could be. Certainly a casual conundrum for many in the FMCG industry!

Casual employees and how you manage them in respect of JobKeeper has emerged as the biggest grey area for employers as they work hard to manage their workforces through this pandemic. Sadly, those in hospitality who most need the sustenance that JobKeeper can provide, in terms of financial support and flexibility while they weather the COVID-19 storm, are also those who often have large low income earning casual workforces. For many, the JobKeeper scheme, rather than providing a haven in the storm, is proving a cashflow and logistical headache.

There has been much confusion around who is 'in' and who is 'out' of the scheme in addition to what casual employees do and don't have to do in terms of work while they are receiving JobKeeper payments. The inconsistent concepts of 'casualness' and being regular and systematic with an ongoing expectation of employment are uncomfortable bedfellows and it all adds up to suggest that you can be a little bit pregnant – or at least a little bit casual!

Casual chaos compounded

Casual employment has been in the spotlight for a number of years now, with a spate of recent cases in which 'casual employees' have argued they are in fact correctly legally categorised as permanent employees and entitled to the benefits of permanent employment such as annual leave and personal leave.

Long term casuals have also long had access to the unfair dismissal jurisdiction.

The Federal Government's introduction of the JobKeeper scheme, which has seen 'long term casuals' eligible for the $1,500 per fortnight payment, continues this trend and has raised a range of novel issues for businesses – particularly in the FMCG space.

What is a casual?

Unlike full-time and part-time employees who have clearly defined hours of work, and only take time off when on leave or otherwise permitted to do so, casuals are employed on a per engagement basis and can accept and reject shifts as they wish. In most cases a casual employee is defined as one who is 'engaged and paid as such'.

The nature of casual employment was considered by a Full Court of the Federal Court in May this year, in the much anticipated case of *WorkPac Pty Ltd v Rossato*. In that case the court confirmed that the indicia of casual employment included irregular work patterns, uncertainty as to the period over which the employment is offered, discontinuity and intermittency of work, and unpredictability. This collection of indicators is referred to as the 'essence of casualness'. This is somewhat difficult to reconcile with the concept of a long term casual under the JobKeeper scheme in the context of employee eligibility and even more difficult to manage on the ground in terms of allocation of work. Practically, while hospitality or retail employees are often engaged as casuals over long periods of time and have the ability to accept and reject shifts as it suits them, those employees often work with a degree of regularity or according to a system that is anything but casual. Hence the chaos and confusion!

When is a casual eligible for JobKeeper?

The JobKeeper scheme legislation and rules (**Rules**) provide that 'long term casual employees' are eligible for the JobKeeper scheme. An employee will be a long term casual where they have been employed on a regular and systematic basis for the 12 months preceding 1 March 2020 for JobKeeper 1.0 and prior to 1 July 2020 for JobKeeper 2.0. To be eligible for payment, casuals must also remain employed by their employer and not be nominated by another employer (where they have more than one employer).

An Explanatory Statement issued with the Rules provides that a casual employee is likely to be employed on a regular and systematic basis where the employee has a recurring work schedule or a reasonable expectation of ongoing work. However, this is about as far as the guidance on regular and systematic casual employment under the scheme goes.

The concept of regular and systematic casual employment is already contained in the *Fair Work Act 2009* (Cth), for example regular and systematic casuals can have access to the unfair dismissal jurisdiction where they have a reasonable expectation of employment continuing on that basis.

One of the leading cases on the meaning of regular and systematic casual employment, *Yaraka Holdings Pty Ltd v Giljevic* [2006] ACTCA 6, held that the term 'regular' implies a repetitive pattern and does not mean frequent, often, uniform or constant. It also found that the term 'systematic' requires that the engagement be something that could fairly be called a system, method or plan. This will involve considering matters such as actual shifts worked across the prior 12 months, rostering arrangements and how casuals accepted/rejected shifts. This needs to be assessed on a case-by-case basis, which is difficult administratively en masse for a large casual employer.

Businesses may have casuals that clearly fit within the category of regular and systematic casual employment and others who fall into more of a grey area. Ultimately, it has been a question of judgement for employers, but in the context of JobKeeper being a 'one in, all in' scheme it is incumbent upon employers to get this right. This has been an area that has been ripe for significant disputation, albeit that the Fair Work Commission does not have jurisdiction to resolve these eligibility disputes and there is not at present a ready forum to do so.

Most in the FMCG space have adopted the general rule of thumb that if a casual employee is actively 'on the books' and has been for over 12 months, and is part of the system for consideration for shifts, they are considered a long term casual for the purposes of this legislation.

This has meant for some employers that they have been obligated to nominate casual employees and pay them a sum of $1,500 gross per fortnight as a minimum when the employee has previously worked a low number of hours generally earning substantially less. Where a significant number of employees are in this category this has caused some employers a perverse cashflow issue whereby their wage bill increased dramatically from the pre-JobKeeper period – albeit that this has been ultimately reimbursed. To some degree these issues will be abated as JobKeeper 2.0 introduces a two tier payment system for eligible employees, creating a distinction between those employees who previously worked on average less than, or more than, 20 hours per week.

What if a casual employee refuses to work?

The biggest issue that has arisen is what happens where a casual for whom you receive JobKeeper refuses to work. What if you want them to work more to get the most productive 'bang' for your JobKeeper buck?

Casual employment is by its very nature, engagement by engagement, therefore casuals as a general principle are entitled to reject shifts. However, in our view, long term casuals should continue to make themselves available to work the regular and systematic casual employment they had prior to the JobKeeper scheme being introduced, unless they have a good reason not to do so. That is, if a casual usually worked 20 hours a month across varying days, this arrangement should continue while the JobKeeper scheme is in place and the JobKeeper wages subsidy should be applied to the casual's wages. An employer could always request a casual employee to work more than their usual hours (subject of course to payment of the higher of $1,500 (or lower amount under JobKeeper 2.0) or the employee's usual hourly rate) but in our view could not direct this.

But what if a casual refuses to work those shifts? If a casual was to become ill, needed to care for an immediate family member or member of their household who was ill, or wanted to stay away from the workplace for legitimate precautionary health reasons, then a refusal to work casual hours could be legitimately explained. In this case, the casual would continue to receive the JobKeeper payment and it would be risky for an employer to take any steps to end the casual employment while such legitimate reasons persisted.

However, where a casual does not have any legitimate reason not to work, in our view it would be open to an employer to engage in a process whereby they look to terminate the casual engagement. While an employer most likely cannot direct a casual to work, it can look at terminating their employment if they are no longer willing to make themselves available (and those employees would cease to receive JobKeeper payments).

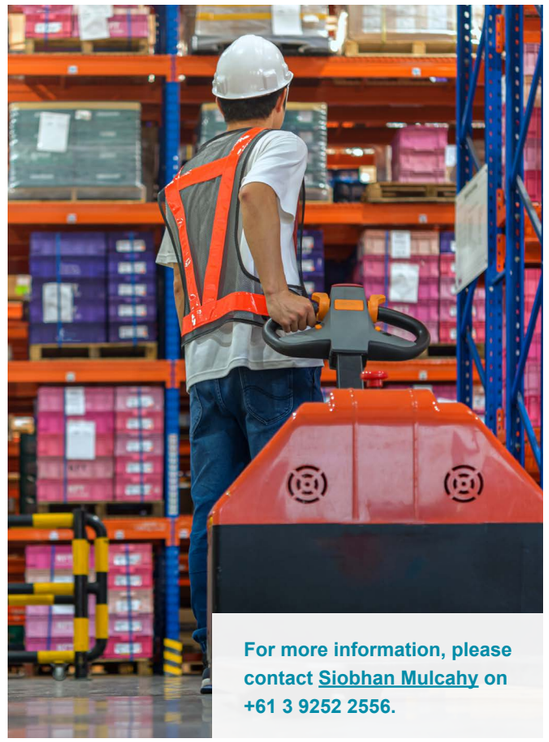
Importantly though, 'long term casuals' under the JobKeeper scheme will most likely be eligible to make an unfair dismissal claim. Therefore, employers need to ensure that they have a 'valid reason' for dismissal and that the dismissal is effected in a procedurally fair manner. This would involve putting a casual on notice that a failure to accept shifts may result in termination of employment. The best rule of thumb is really to treat your casual like you would a permanent employee in the same or similar circumstances. As we said – it seems you can be a little bit casual!

Genuine casuals

The associated sleeper issue with classifying casual employees as 'long term casuals' for the purposes of the JobKeeper scheme is that they may later seek to argue that they are in fact permanent employees entitled to permanent employment entitlements.

It remains to be seen whether classifying employees as long term casuals for the purposes of JobKeeper flushes out misclassification cases but it is as important as ever for employers to ensure they are properly classifying employees and that employment is underpinned by robust employment contracts including casual loading offset clauses.

This article deals with a range of complex, and in some cases novel, issues and employers are encouraged to seek tailored legal advice for their individual circumstances.



For more information, please contact Siobhan Mulcahy on +61 3 9252 2556.

Joe Lycett makes it known who is BOSS – Considerations when making and receiving demands in a cease and desist letter

Hazel McDwyer (Partner) and Teresa Elmey (Trade Mark Attorney)

Earlier this year, comedian Joe Lycett made a strong stand against what he considered bullying and intimidation tactics by well-known fashion label Hugo Boss, when the fashion empire sent a cease and desist letter to a relatively small craft brewing company in Wales called Boss Brewing Company Limited (Boss Brewing).

In its letter, Hugo Boss made demands that Boss Brewing cease selling two of its beers named BOSS BLACK and BOSS BOSS to avoid consumers mistakenly believing the beverages may be associated with Hugo Boss.

While Hugo Boss owns a large portfolio of trade marks for the single word BOSS, it does not appear, in the UK at least, that it has any rights to the name BOSS in relation to beverages or hospitality services.

Boss Brewing did not have unlimited resources to take on Hugo Boss, but still ended up spending thousands of dollars trying to negotiate with Hugo Boss.

Enter Joe Lycett. Advocate for the little guy and big fan of a Boss Brewing beverage. Joe caused a complete nightmare for Hugo Boss when he went about legally changing his name by Deed Poll to Hugo Boss.

Joe, who then became known as Hugo, appeared on many media shows and in articles with the story, which resulted in the story going completely viral on social media.

But Joe didn't stop there. He proceeded to register the trade mark 'Boss La Cease en Desiste' in his own name as Hugo Boss for a range of bandages in class 10 – a class of goods in which fashion brand Hugo Boss does not have any registered rights. He then manufactured a wrist brace and held his launch party directly outside Hugo Boss' store on Regent Street in London.

The fashion billionaire brand tried to save face by tweeting that it welcomed Joe to the Hugo Boss family, but as Joe correctly pointed out, this was not fun for any third party that was forced into changing its brand when it may not be doing anything legally wrong but didn't have the resources to take on a multi-billion dollar empire.

Perhaps large corporations will think twice next time before trying to enforce rights they may not have simply because they have all the resources, however in this tale even with Joe Lycett taking such a stand, Boss Brewing could hardly be seen as winners after having to spend so much money. In the end Boss Brewing agreed to change the name of the beers in question to BOSS BREWING BLACK and BOSS BOSSY as well as agreeing to cease all sales of clothing merchandise. On the flip side, a lot of people now know about Boss Brewing and hopefully they can make some of that money back in beer sales.

What are your rights in Australia?

Under the *Trade Marks Act 1995* (Cth) (**Act**), business owners such as Boss Brewing have a defence to behaviour that is seen as unjustified. While business owners have always been able to make a claim of unjustified threats, in 2019 important changes were made to the Act meaning that a trade mark owner such as Hugo Boss could not simply avoid an unjustified threats action simply by bringing an action for trade mark infringement.

In addition, the Court can also now award additional damages for a range of reasons under new s129(2A) taking into consideration:

- the flagrancy of the threat;
- the need for deterrence;
- the conduct of the defendant after the threat was made;
- any benefits accrued to the defendant because of the threat; and
- any other relevant matters.

Sending and receiving letters of demand

If you consider your trade mark rights have been infringed, important considerations should be taken into account, when sending a letter of demand to a potential infringer.

One size does not fit all and careful consideration should be given to the content and tone of your letter. Some matters to think about are:

- the relative size and bargaining power of the parties (could your business be appearing to be a bully?);
- whether the infringement is quite blatant, or more likely to be due to ignorance on the part of the infringer. If the latter, a more educative style letter, while asserting your rights, could be more appropriate;
- taking care not to overstate your rights (as this may not be looked on kindly by a court, if it came to that); and
- the likelihood of the party receiving the letter publishing it, or commenting on it, on social media or the like.

Keep it simple. All too often we see extensive, over complicated, letters of demand from businesses and lawyers, which can sometimes be contradictory and confusing.

It is also important to consider what it is you want, along with what is practical and realistic. Is it enough for the infringing conduct to cease, or is it important that the infringing product is delivered up and damages sought. If you want delivery up, where is it to be delivered to?

Unless there is a blatant infringement and the concern is about possible confusion in the market, a less aggressive tone may be appropriate to engage in negotiations. As noted above, it is extremely important to consider whether statements and demands being made could be considered as unjustified threats.

When negotiating for an amicable resolution, consideration should be given to what demands are the most important and what demands you could let go that would still mean an overall win if ultimately the infringing conduct ceases.

If you are on the receiving end of a letter of demand, consider what you are willing to agree to which would give the other side a win, but doesn't have a large impact on your business.

As an aside, Mr Lycett has now officially changed his name back. It is also important to note that despite Joe legally changing his name to Hugo Boss, this could hardly be said to have been done in good faith and had he attempted to trade off the name for any of the registered goods and services, or something similar, he could still have been up for trade mark infringement.

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

The definition of ‘consumer’ is changing under the Australian Consumer Law. Are you ready?

David Smith (Partner) and Zein Jomaa (Lawyer)

The definition of ‘consumer’ under the Australian Consumer Law is changing and will have significant commercial implications for businesses in the FMCG industry.

Consumer guarantees

Under the Australian Consumer Law (**ACL**), in Schedule 2 to the *Competition and Consumer Act 2010* (Cth), goods and services supplied to a consumer automatically come with specific guarantees. These guarantees include, among others, that:

- goods are of acceptable quality and are reasonably fit for any purpose represented by the supplier or disclosed by the consumer; and
- services will be provided with due care and skill, will be reasonably fit for any purpose made known (expressly or impliedly) by the consumer and will be provided in a reasonable timeframe (when no time is set).

Failure to meet consumer guarantees

Failure to meet the consumer guarantees means the consumer can claim a range of remedies under the ACL. Depending on the circumstances, these remedies can include:

- repair;
- replacement;
- refund; or
- compensation for damages and loss.

Who is a consumer?

Consumer guarantees are only imposed by the ACL when goods or services are acquired by a ‘consumer’.

As it stands under section 3 of the ACL, generally a good or service is taken to be acquired by a consumer if the:

- amount paid or payable is $40,000 or less; or
- goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

Businesses as well as individuals can be considered consumers in many cases. However, a person is generally not a ‘consumer’ if they acquire goods for re-supply or to be used up or transformed in trade or commerce in a production process.

Changes to who is a consumer

From 1 July 2021, the monetary threshold for the definition of ‘consumer’ will increase from $40,000 to $100,000, by way of the *Treasury Laws Amendment (Acquisition as Consumer - Financial Thresholds) Regulations 2020* (**Regulations**). These changes were introduced following the recommendations of the Australian Consumer Law Review (**ACLR**).

The ACLR determined that inflation had diminished the level of protection afforded to consumers by the consumer guarantees.

It is important to note that technically, the definition of ‘consumer’ in relation to a supply of services is not currently covered by these changes. This is an oversight however as it was clearly intended that changes would apply to both goods and services. We expect that this will be corrected before the Regulations take effect from 1 July 2021.

Commercial implications

Businesses that were previously not deemed to provide consumer guarantees under the ACL are likely to find themselves subject to the consumer guarantee regime if their goods or services are valued between $40,000 and $100,000, even though the goods or services are not of a kind ordinarily acquired for personal, domestic or household use or consumption.

Businesses must carefully consider if these changes will require them to:

- provide higher quality goods or services to ensure they meet the guarantees;
- train their staff to understand the new requirements; and
- amend their terms and conditions and sales and refund policies.

The Australian Competition and Consumer Commission (**ACCC**) has made it very clear that *“…given the long lead time before the reform takes effect, businesses should expect the ACCC to take a more aggressive approach to enforcement of any non-compliance”*. Businesses should take the time now to *“…update their compliance programs and ensure their staff understand that a wider range of goods and services will be captured by the consumer guarantees regime come 1 July 2021”.*

Conversely, businesses may also find themselves enjoying the protections afforded by the ACL in the form of consumer guarantees. This will assist if there is a dispute with a supplier about the supply of sub-standard goods or services.

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

Navigating the post-pandemic privacy and cyber security landscape

Dudley Kneller (Partner) and Raisa Blanco (Associate)

As Australia progresses towards easing COVID-19 pandemic restrictions, the transition period following the lifting of COVID-19 restrictions will no doubt bring about further challenges for retail businesses particularly in relation to privacy compliance and cyber security risks. Complexities will likely arise, with restrictions lifting in different States and Territories at different times, workforces distributed between onsite and remote environments, and efforts to assist with contact tracing.

Contact tracing records, remote working arrangements and the use of technology to manage workplace health and safety will likely be workplace mainstays in the medium to long-term, and will be critical considerations for the retail sector moving forward.

Contact tracing records

Collection

A number of the States and Territories have in place directives or orders requiring businesses to keep a register of contact details for all attendees on premises to assist with contact tracing efforts (**contact tracing records**). Retail businesses should be aware of the different requirements in the States and Territories they operate in to ensure compliance (refer to table). Businesses should not 'over-collect' personal information and limit the types of personal information collected to what is strictly necessary for contact tracing. The method of collection of personal information for contact tracing records should also be considered carefully. There are risks associated with both manual and automated collection. Businesses should consider using State or Territory endorsed applications (e.g. Australian Capital Territory's Check In CBR or New South Wales's Service NSW) to assist with collection.

Businesses that are covered by the *Privacy Act 1988* (Cth) will also need to ensure that privacy collection notices are provided to guests or staff for compliance with APP 5, such as through physical displays or on appropriately visible sections of sign-in pages.

Use and disclosure

Contact tracing records should only be used and disclosed for the purpose of assisting public health officials with contact tracing efforts. There may be other circumstances where use or disclosure is permitted or authorised by law, including a permitted general situation under section 16A of the *Privacy Act*.

Storage and retention

Businesses should also store such contact tracing records securely, with access limited to staff who have a 'need to know'. This could mean keeping manual records locked and separated from other records or putting in place technical measures to limit access to electronic records. Further, contact tracing records should only be appropriately destroyed or de-identified after the retention period required under the relevant directive or order, or where silent, until the purpose for which the records are collected are no longer relevant.

Employee monitoring

Employee monitoring activities

Retail businesses should be aware that the use of employee monitoring technologies (e.g. recording sign in and sign out times, desktop keystrokes, or email usage), or technologies leveraging off CCTV and sensors (e.g. tools for social distancing or detection of temperatures), raise issues around privacy and workplace surveillance.

Privacy

Where a business is covered by the *Privacy Act*, the APPs could apply where these monitoring activities involve personal information. It is strongly recommended that a privacy impact assessment be used to document the business' assessment of its privacy compliance in respect of the proposed employee monitoring activities and application of the employee records exemption.

Workplace surveillance

Currently, only NSW and the ACT have dedicated workplace surveillance legislation. Other States and Territories rely on general privacy and surveillance laws. In the case of NSW (*Workplace Surveillance Act 2005* (NSW)) and ACT (*Workplace Privacy Act 2011* (ACT)), an employer is required to give employees notice with prescribed information prior to conducting surveillance.

While there are no similar requirements in other States and Territories, employers should adopt the same level of transparency required in the NSW and ACT legislation as a matter of good practice.

Due diligence on technology suppliers

Due diligence

Retail businesses may rely on applications and tools provided by technology suppliers for business critical operations including stock management, procurement and resource management. Following the warning in June 2020 that Australian businesses were on the receiving end of a number of escalating cyber attacks from state-based actors, it is critical that businesses conduct an assessment of the handling of confidential information, personal information and other data by technology suppliers.

A business should consider conducting due diligence on new and existing technology suppliers to assure itself that there are sufficient contractual measures with its technology suppliers, and that technical measures and controls being used by technology suppliers to handle data are adequate; and whether data will be transferred overseas (and whether data should be moved back onshore).

Incident response planning

In addition to obtaining professional advice around recommendations for 'security hardening' activities or recommended investment, businesses should also develop a robust incident response plan. Whilst a growing number of businesses have taken this step, the retail sector is particularly vulnerable and many may not have actually tested their incident response plan to see if it works. An effective plan should be regularly updated, improved upon and tested on an annual basis.

Privacy and cyber considerations moving forward

While we all look forward to the continuation of the lifting of restrictions, this is likely to occur on an ad hoc and piece-meal basis, and businesses who continue to assess, respond and mitigate new and evolving privacy and cyber risks will be best placed to bounce back into a post COVID-19 world.

For more information, please contact Dudley Kneller on +61 3 9252 7748.

	Directive or Order	Collection	Retention Period
ACT	*Public Health (Restricted Activities – Gatherings, Business or Undertakings) Emergency Direction 2020 (No 12)*	Businesses must collect the following personal information of all guests and staff: • time and date of attendance; • name; and • phone number. Alternatively, guests and staff may use the Check In CBR application to record their attendance.	28 days
NSW	*Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020*	Occupiers of a premises must collect the following personal information of all guests and staff: • name; and • phone number or email address. Alternatively, guests and staff may use the Service NSW application to record their attendance.	28 days
NT	*COVID-19 Directions (No 36) 2020*	-	-
QLD	*Restrictions on Businesses, Activities and Undertakings Direction (No 7)*	Restricted businesses must collect the following personal information of all guests and staff: • name; • phone number; • email address; and • date and time period of patronage.	56 days
SA	*Emergency Management (Public Activities No 10) (COVID-19) Direction 2020*	Restricted businesses must collect the following personal information of all guests and staff: • name; • phone number or email address; and • date and time period of attendance. A person may refuse to provide their name or phone contact details.	Not specified
TAS	*Direction under Section 16 of the Public Health Act 1997 (Tas) (Workplace COVID Plan – No. 1)*	Businesses must collect personal information that would assist in notifying persons who enter and leave the premises of any potential exposure to COVID-19.	21 days
VIC	*Workplace Directions (No 4)*	Businesses must collect the following personal information of all guests and staff that attend the premises for longer than 15 minutes: • name; • phone number or email address; • date and time period of patronage; and • the areas of the premises which the person attended.	28 days
WA	COVID Safety Guidelines, Phase 4	Collection of personal information of guests and staff is not mandatory. If a business decides to maintain attendance records: • records could be physical or electronic, and contain relevant information (name and contact details); • it is not recommended to collect personal information who visit the premises for a short period of time and have minimal face-to-face interaction; and • the records must not be used for purposes other than contact tracing.	Not specified

Supplying to consumers in NSW? You have new disclosure obligations

Adam Walker (Partner) and Zein Jomaa (Lawyer)

In a reform passed in 2018, but only having taken effect on 1 July this year, suppliers of goods and services to consumers in New South Wales, whether from a physical location or online, are now obliged to take reasonable steps to ensure that, prior to the supply of the goods or services, a consumer is aware of the substance and effect of certain terms that may substantially prejudice the interests of the consumer.

NSW Fair Trading is adopting an educational approach to compliance until the end of 2020. It is therefore a critical time for traders selling to consumers in NSW to ensure that their contractual and disclosure practices are reviewed for compliance.

What's the new law?

In 2018, the NSW Parliament passed a suite of reforms, known as the 'Better Business Reforms', through amendments to the fair trading legislation. These have steadily been implemented from late 2018.

One of these reforms is the introduction of section 47A to the *Fair Trading Act 1987* (NSW) (**Act**), which obliges a supplier, before supplying a consumer with goods or services, to take reasonable steps to ensure the consumer is aware of the substance and effect of any term or condition relating to the supply of the goods or services that may substantially prejudice the interests of the consumer. At a minimum, such terms will include any terms that:

- exclude the liability of the supplier;
- provide that the consumer is liable for damage to goods that are delivered;
- permit the supplier to provide data about the consumer, or data provided by the consumer, to a third party in a form that may enable the third party to identify the consumer; and
- require the consumer to pay an exit fee, a balloon payment or other similar payment.

If I am not in NSW but supply to customers in NSW, does this law apply to me?

Very likely, yes. The Act is intended to have extraterritorial application, and extends to conduct either in or outside NSW that:

- is in connection with goods or services supplied in NSW;
- affects a person in NSW; or
- results in loss or damage in NSW.

These provisions will also extend to, for example, online subscription services where a consumer is located in NSW.

What are the implications of non-compliance?

Contravention of this provision can attract a maximum financial penalty of $110,000 for corporations and $22,000 for individuals. In addition, a court has other broad powers, including many of the powers afforded to it under the Australian Consumer Law (**ACL**) as well as the power under the Act to make compensation orders.

Alternatively, NSW Fair Trading can utilise the penalty notice regime to issue a penalty notice of, for a corporation, $1,100 per offence or, for an individual, $550.

How to comply

Despite the serious consequences for non-compliance, the drafting of this new law leaves significant uncertainty on two fronts:

- Besides the four types of terms expressly mentioned in the legislation, what else may be regarded as a term or condition that may substantially prejudice the interests of the consumer?
- What does it mean to take 'reasonable steps'?

While it is open to the Government to include binding guidance in the Regulations, it has not done so to date.

Other substantially prejudicial provisions

While the concept of 'substantially prejudicial' should imply a relatively high threshold, what is substantially prejudicial is likely to differ depending on a person's point of view. Further, the regulator will have its own view. Indeed, it is possible for a clause not to be an 'unfair contract term' under the ACL but still be a 'substantially prejudicial' provision under this regime.

In the absence of concrete points of reference, many will choose to adopt a prudential approach. Other provisions that could be caught by this regime may arguably include:

- automatic rollover clauses;
- minimum notice provisions for termination; and
- clauses prescribing a jurisdiction outside of the state.

Taking reasonable steps

In the absence of binding guidance from the Regulations, there is limited guidance as to the Government's expectations of what will amount to 'reasonable steps'. Examples given by NSW Fair Trading include:

- using short, plain English summaries on the front page of a contract;
- providing information in short chunks at key times for the customer (e.g. at relevant stages of an online transaction);
- when online, making information appear on screen in a scrollable text box;
- using comics, illustrations or icons to highlight and explain relevant information.

Businesses should reflect both on their hard copy terms and conditions and their online terms as to whether they adequately call out those terms and conditions that may substantially prejudice the interests of consumers.

Concluding comments

The Better Business Reforms had been promoted as reducing costs and complexity for small businesses without reducing consumer protections, as well increasing transparency and protections in consumer transactions without overly burdening businesses.

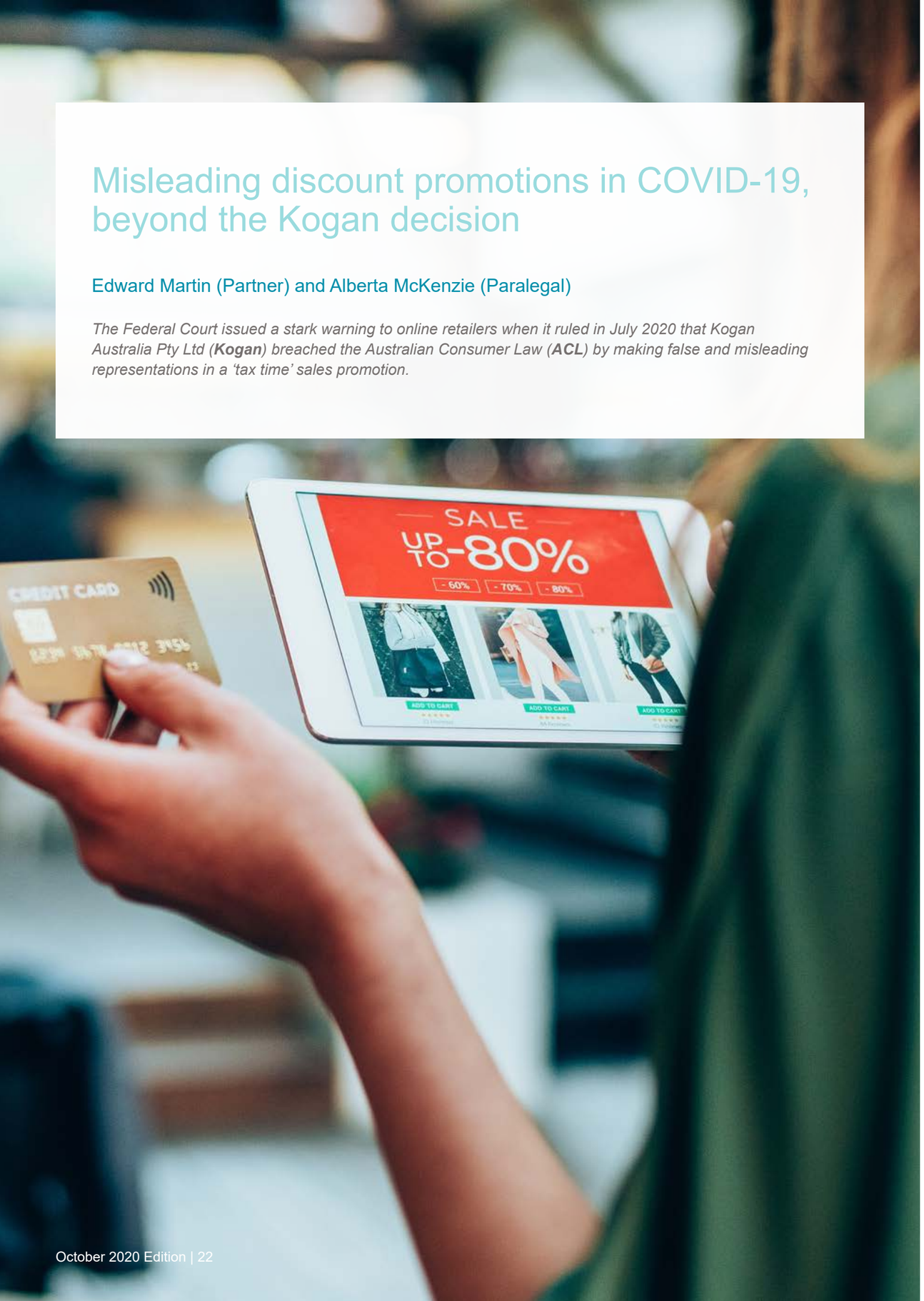
While the principle of this particular aspect of the Reforms may be laudable, one could appreciate many businesses lamenting its execution as increasing cost and complexity.

For more information, please contact Adam Walker on +61 3 9252 2515.

Misleading discount promotions in COVID-19, beyond the Kogan decision

Edward Martin (Partner) and Alberta McKenzie (Paralegal)

*The Federal Court issued a stark warning to online retailers when it ruled in July 2020 that Kogan Australia Pty Ltd (**Kogan**) breached the Australian Consumer Law (**ACL**) by making false and misleading representations in a 'tax time' sales promotion.*



Background

Kogan's promotion ran online in June 2018 and, with online sales currently front of mind for many sales teams facing the impact of the COVID-19 pandemic, this ruling is a timely reminder that care needs to be taken when strategising online sales, especially those pushing heavy, time-sensitive discounts for consumers purchasing through a website.

From 27 to 30 June 2018, Kogan offered customers a 10% discount on selected items by entering the code 'TAXTIME' at checkout. It was advertised with website banners, electronic direct marketing by email and SMS messages all of which used variants of 'use code TAXTIME to reduce prices by 10% at checkout' and some of which said '48 hours left' and 'Ends midnight'.

The ACCC alleged that the statements represented to consumers that if they used the code they would receive a 10% discount off the price products were available for sale for a reasonable period before the promo started and that the discount was available for a limited time.

Kogan had increased the prices on affected products immediately before the promotion started and decreased prices immediately after it finished. Kogan argued that the promotion was a coupon code promotion that applied to the price displayed 'at checkout', rather than a discount on historical or future prices.

Justice Davies focused on the context of the promotional statements – in particular that Kogan's online checkout showed a two-price comparison, which compared an item's sale price with a higher price (either a prior price or recommend retail price (**RRP**)) and referred to 'EOFY deals'. Some emails and SMS claimed this allowed a further 10% reduction on 'Already Huge Discounts'.

It was found that the time-specific and time-limited theme of the promotion would have led consumers to understand that there was a limited opportunity to obtain the reduced price.

The decision

In the result, the Court agreed with the ACCC's argument that the tax time price reduction was not a genuine sale, and that therefore the promotions were 'misleading or deceptive' (s 18 of the ACL) and 'false or misleading' (s29(1)(i) of the ACL).

The ordinary reasonable consumer, it was held, would have understood that this promotion offered a 10% discount on past or future prices.

How much this conduct will cost Kogan is due to be determined at a separate hearing in November 2020 and is set to be the subject of some argument, with both the ACCC and Kogan having filed a number of further affidavits on the question.

In any event, this case highlights that promotions for online sales must offer genuine savings to consumers as advertised and manipulation of prices in and around such promotions is inherently risky.

Key takeaways

With the Kogan ruling in mind, retailers focusing on online sales and promotions should also note the ACCC's published enforcement priorities for 2020. With respect to the ACL, the ACCC is keeping an eye on: consumer guarantees, misleading or deceptive conduct, and unconscionable conduct, with a particular focus on price-gouging and misleading advertising.

In addition, the ACCC has subsequently announced that their specialist 'COVID-19 Taskforce' will focus on issues affecting consumers during the pandemic. For example, the ACCC engaged with Amazon, Facebook, eBay and Gumtree to understand what measures, if any, these companies have in place to monitor and prevent price-gouging, particularly in respect of personal protective equipment like face masks and hand sanitiser.

The ACCC have demonstrated that its enforcement priorities are anything but lip service. In a pandemic economy where online sales have become increasingly important, retailers should be particularly alive to the potential pitfalls of online price promotions.

For more information, please contact Edward Martin on +61 2 9163 3086.

So, so, so scandalous – trade mark considerations in a changing world

Hazel McDwyer (Partner), Alana Long (Senior Associate) and Stephanie Manatakis (Lawyer)

*Congratulations, you've created your own brand! You've spent countless hours formulating a brand; invested time, energy and money on your packaging design and you've even applied to register your brand name as a trade mark. Wait a minute…the Trade Mark Office (**TMO**) thinks my brand name is scandalous? What a scandal! Now what…?*

In this article, we offer some insights into how to avoid major branding faux pas and explore what actually happens when your risqué little trade mark makes its way to the TMO.

Early considerations

There's an old saying that if you fail to prepare, prepare to fail. The same notion can be applied when you are adopting a brand.

Brand owners can spend days, weeks, sometimes years, in the concept phase of creating their brand – from selecting a brand name, creating a brand aesthetic, designing product packaging and developing a social media strategy. Imagine investing all that time and money but failing to consider the potential societal, cultural and linguistic implications of the brand. Now, that is a scandal. Your brand may be the longest lasting asset in your business. In the same way you would engage experts to help with fundamental aspects of your business, such as product development, manufacturing, and advertising for example, investing in a great marketing and legal team at the outset, is worth its weight in gold.

Kia Ora, Mate

The objective is to create a unique and lasting brand name that doesn't have negative connotations or that could be considered 'scandalous'. Consider the recent marketing fail of Coca-Cola who wrote 'Kia Ora, Mate' which translates to 'Hello, Death' in Te Reo Maori, on vending machines stocked with their drinks across New Zealand. And that is just an example of what could happen across the ditch…

Meaning in non-English speaking markets

You must scrutinise every aspect of your brand, particularly your brand name. When expanding into non-English speaking markets, engage a language expert to advise on your brand and proposed translations. For example, Chinese consumers typically won't refer to your brand by its English name, but will adopt a Chinese language version of your brand. Don't rely on osmosis here – it is fraught with problems.

Importantly, ensure that you have a reliable language expert assisting you with translations. Remember the controversy associated with KFC's 'Finger Lickin' Good' slogan? Let's just say it was misinterpreted to mean something more cannibalistic in Chinese. Work with experts to ensure that your proposed brand (and any translation) will be culturally appropriate and that it will reflect your desired brand values and aesthetic.

Whether global domination is in your current or future business plans, ensure that your brand name is timeless and one that will continue to resonate with your target market and cultural and societal norms.

So…what is a 'scandalous' trade mark?

Scandalous is defined as something that is 'shameful or shocking; offensive to a sense of decency or shocking to the moral feelings of the community'.

Section 42 of the *Trade Marks Act 1995* (Cth), provides that an application for registration of a trade mark must be rejected if:

a. the trade mark contains or consists of scandalous matter; or
b. its use would be contrary to law.

The goal posts for assessing what is 'scandalous matter' are constantly changing as shifts in societal, cultural and even language norms, raise more questions than answers. What once was considered acceptable could now be considered offensive to a particular group or community.

For example the brand 'Coon', named after an American cheesemaker and at one point considered acceptable (at least by TMO standards when registered in 1964), has for some time been considered a highly offensive racial slur used to refer to a dark skinned person. After years of scrutiny, Saputo, the dairy company that owns 'Coon', announced that it will be rebranding its iconic cheese products, and is *"working to develop a new brand name that will honour the brand-affinity felt by our valued consumers while aligning with current attitudes and perspectives"*.

There is little legislative or judicial guidance on what the TMO should consider when determining if a mark is scandalous or not. The Registrar is required to perform the difficult task of 'not remain[ing] isolated from the day-to-day world, frozen in outdated moral principles, but not presume to set the standard, not act as a sense of morals but not a trendsetter [either], not lag behind and…. be out of touch but at the same time not be so insensitive to public opinion'. That is no small task! The assessment requires a fine balancing act of the mark itself against the context of the use of the mark, the evolution of contemporary language and how the ordinary person will react to the mark. While it has been suggested that 'only a proportion of Australians need to be offended for grounds of rejection to be raised under section 42', determining what should or should not be regarded as scandalous is very much a subjective process.

How do I handle a situation where my brand has become scandalous over time?

It is important to regularly review and consider your trade mark portfolio to ensure that it reflects your brand values, but also that it aligns with current consumer and societal expectations. If you think your brand name or another trade mark in your portfolio could be considered scandalous, control the narrative – get ahead of the headlines and rebrand on your own terms.

We are currently seeing a number of brands, in Australia and internationally, rebranding in the wake of the Black Lives Matter movement.

For example, Colonial Brewing Co, a brewery in Western Australia, is reviewing its name after feedback from concerned customers and distributors about the use of the word 'colonial'. While the name was originally adopted to celebrate the fact the brand was the first of its kind to establish a brewery in the Western Australian wine region, the brand acknowledges that its name may carry different connotations for certain groups of people. Similarly, Mars is removing the black farmer image on its Uncle Ben's rice packaging after publicly acknowledging that the use of the character was *"out of step with times"*. Mars has also pledged to completely overhaul the brand following calls for racial equality.

If your brand fails to stay connected with consumers and cultural and societal expectations, this can translate into a PR nightmare and potentially revocation of your trade mark registration. If you decide to proceed with a brand that could be or is considered scandalous by the TMO, including an endorsement with your application may help you to achieve registration (e.g. the trade mark 'Nuckin Futs' is accompanied by an endorsement on the Trade Marks Register that the mark will not be marketed to children). While this option is useful from a registration perspective, it will not avoid the practical challenges associated with the choice of brand, importantly the PR implications outlined above.

We understand the challenges that come with subjective decision making. If you would like to workshop a branding concept or would like a second opinion with respect to an existing brand in your trade mark portfolio, please let us know.

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

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