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This publication does not constitute legal advice and should not be relied upon as such. It is intended only to provide a summary and general overview on matters of interest to clients in the Consumer Good sector, and it is not intended to be comprehensive. Careful consideration should be given to specific factual circumstances and the resulting legal implications. You should seek legal or other professional advice before acting or relying on any of the content.

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Welcome to the sixth edition of FMCG *Express*.

Thank you to all our readers who have provided such wonderful feedback on our last edition. We had record numbers reviewing our that publication and we are delighted that so many people had the opportunity to learn about what's happening in the consumer, retail and hospitality sectors in Australia.

This is our final edition for 2022 and it is certainly an interesting one. George Haros and his team explore issues surrounding positive obligations to eliminate sexual harassment in the workplace, and consider what this could mean for employers and franchisors. Matt Lunney looks at risks and solutions when dealing with commercial contracts that have expired. We also have articles examining the developing issue of supply chain responsible sourcing, the growth in the use of facial recognition technology and battery safety reform, all of which have received widespread coverage.

Maria Anenoglou provides an update on some important recent changes to Victorian liquor licensing laws. Maria has extensive knowledge of the hospitality industry and can provide critical support to our clients in the liquor and gaming industries, particularly in regards to licensing, regulation and compliance.

We hope you enjoy this edition of FMCG Express. Please reach out if you have any questions or feedback – we love hearing from you.

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Preventing sexual harassment in retail settings – The customer is not always right

By George Haros, Partner, Diana Diaz, Special Counsel and Sarah Saliba, Associate

In 2021, the Victorian Equal Opportunity and Human Rights Commission (Commission) commenced an investigation under section 127 of *Equal Opportunity Act 2010* (Vic) (Act) into Bakers Delight.

The investigation considered whether Bakers Delight complied with its positive duty under section 15 of the Act to take reasonable and proportionate measures to eliminate workplace sexual harassment as far as possible. In this article we consider the outcome of this investigation, and provide some recommendations for employers.

What is the 'positive duty' under the Act?

Victorian employers have a positive duty to take reasonable and proportionate measures to eliminate workplace sexual harassment, discrimination and victimisation as far as possible. This positive duty requires employers to take action to prevent sexual harassment and not to simply just respond to sexual harassment when sexual harassment occurs in the workplace.

In addition to employers, the positive duty under the Act also extends to providers of accommodation, education, or goods and services, as well as clubs and sporting organisations.

In some circumstances, a head franchisor may also have a positive duty to eliminate sexual harassment in its franchise network. We discuss this further below.

Why was Bakers Delight investigated?

It was recognised that, like many other retail environments, bakeries can be high-risk workplaces for sexual harassment. However, the investigation was not commenced in response to complaints of sexual harassment occurring at Bakers Delight.

The Commission explains in its investigation report[1] (**Investigation Report**) that it chose to investigate sexual harassment at Bakers Delight because:

1. Bakers Delight bakeries are part of the retail industry, which is a high risk industry for sexual harassment. The retail industry employs a large number of workers that are more vulnerable to experiencing sexual harassment such as casual workers, young people and workers new to Australia who may fear losing work if they make a complaint or may be less likely to understand their workplace entitlements or recognise sexual harassment in the workplace; and
2. Bakers Delight is a franchise and franchise arrangements can pose complexities for the prevention and response to sexual harassment in the workplace.

[1] Victorian Equal Opportunity and Human Rights Commission, *Preventing sexual harassment in retail franchises: Investigation under the Equal Opportunity Act 2010* (August 2022), Victorian Equal Opportunity and Human Rights Commission, https://www.humanrights.vic.gov.au/static/0e635cd9874d974bcae48ecfecab4215/Resource-Investigations-Preventing_Sexual_Harrassment_in_Retail_Franchises.pdf

The Investigation Report also noted that retail bakeries have other specific high risk factors in terms of sexual harassment in the workplace including isolated early morning work, barriers to complaining particularly for apprentices, the gendered nature of the work, and staff demand.

What did the investigation consider?

The investigation examined whether Bakers Delight's frameworks were sufficient to prevent and respond to workplace sexual harassment in its:

1. company owned stores in Victoria;
2. head office; and
3. Victorian franchise bakeries.

More specifically, the Commission considered the extent to which Bakers Delight complied with its positive duty under the Act and with the standards set out in the Commission's guideline on Preventing and Responding to Workplace Sexual Harassment (**Guideline**).[2]

What did the investigation find?

Findings for Bakers Delight as an employer

Bakers Delight employs workers both in its corporate office and company owned bakeries. It therefore must comply with the positive duty to eliminate sexual harassment in its workplaces in accordance with the Act.

The Investigation Report stated that employers must:

1. develop a plan which outlines the measures they will take to prevent and respond to workplace sexual harassment which must be underpinned by an assessment of risks in the workplace and data around the reported prevalence of sexual harassment occurring;
2. have sexual harassment policies in place that contain all of the elements listed in the Commission's Guideline. These policies must be easily accessible by all employees and must be regularly communicated by senior leadership. Notably, Bakers Delight is currently updating its policies to ensure that amongst other things, the policies are clear that they cover sexual harassment from customers and that they outline that sexual harassment against a child may constitute child sexual abuse and may require disclosure of information in compliance with the mandatory reporting requirements in Victoria; and
3. provide all employees with sexual harassment prevention and response training (including annual 'refresher' training which contains the elements listed in the Commission's Guideline). Employees responsible for receiving reports of sexual harassment must also receive training to assist them in this role.

The Investigation Report also found that Bakers Delight did not have a central register to record employee reports of sexual harassment which would assist with understanding the prevalence of sexual harassment in the workplace.

Findings for Bakers Delight as a head franchisor

The Commission determined that it is likely that Bakers Delight has a positive duty to take reasonable and proportionate measures to eliminate sexual harassment in its franchise network because it:

1. has a high level of control over its franchise network. For example, it controls the e-learning training system, designs the training available and requires all franchise workers to complete the training. Franchise workers are also told that they can contact Bakers Delight for advice if they experience workplace sexual harassment and that Bakers Delight may also investigate incidences of sexual harassment that occur in a franchise bakery; and
2. provides services to franchise bakery owners and workers including:
    a. maintaining an online Operations Manual that provides guidance and requirements for running a bakery business;
    b. delivery of a 16-week training program for prospective franchise bakery owners;
    c. access to an Employee Assistance Program to support the social and psychological wellbeing of workers; and
    d. advice on request if workers experience inappropriate workplace behaviours, including sexual harassment.

[2] Victorian Equal Opportunity and Human Rights Commission, Guideline: Preventing and responding to workplace sexual harassment - Complying with the Equal Opportunity Act 2010 (August 2020), Victorian Equal Opportunity and Human Rights Commission, https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/

Importantly, the Investigation Report notes that all franchise arrangements are different, with varying levels of involvement and control from head franchisors and that there is not a prescribed set of measures that would be considered 'reasonable and proportionate' for every head franchisor to take to prevent sexual harassment in its franchise network.

The Guideline does not outline measures for head franchisors to take to prevent workplace sexual harassment like it does for employers and at this time, the Commission's report highlights there is no case law around the application of the positive duty in a franchise environment.

Separately, head franchisors must also consider their compliance with the relevant occupational health and safety legislation. For example, in Victoria, under the *Occupational Health and Safety Act 2004* (Vic) a person who has, to any extent, the management or control of a workplace, must ensure, so far as reasonably practicable, that the workplace is safe and without risk to health, which includes psychological health which may be impacted by sexual harassment.

What was the outcome of the Investigation Report?

On 2 August 2022, Bakers Delight entered into a compliance agreement with the Commission.

In summary, amongst other things, Bakers Delight has agreed to:

1. develop a sexual harassment prevention plan;
2. develop sexual harassment training for all Bakers Delight employees and training to assist managers to respond to reports of sexual harassment;
3. update sexual harassment policies and procedures for responding to sexual harassment;
4. regularly communicate with its employees about how they can make a complaint of sexual harassment; and
5. develop a central register of reports of sexual harassment.

A full copy of the Compliance Agreement can be located on the Commission's website.[3]

One of the practical measures being considered by Bakers Delight in implementing the above steps whether to issue customers with social media or in-store communications about appropriate customer behaviour.

What does this mean for employers and head franchisors?

Victorian employers have a legal obligation under the Act to eliminate sexual harassment from their workplaces as far as possible. However, if a workplace is part of a franchise, an employer may also look for support and assistance from the head franchisor. This conduct is not limited to sexual harassment between co-workers, it extends to the conduct of customers towards employees.

Every franchise is different and has its own contractual and operational arrangements, so it is important that the roles and responsibilities between the head franchisor and its franchisees are clearly understood when it comes to preventing and responding to sexual harassment in the workplace. Understanding these arrangements will highlight whether a head franchisor has responsibility for some elements of sexual harassment prevention within its wider network.

[3]Victorian Equal Opportunity and Human Rights Commission, *Compliance Agreement Between Victorian Equal Opportunity and Human Rights Commission and Bakers Delight Holdings Ltd* (August 2022), Victorian Equal Opportunity and Human Rights Commission, https://www.humanrights.vic.gov.au/static/84cb6838ada5044e97ed346fb940b233/Resource-Investigations-Compliance_Agreement-BDH-2022.pdf

For example, it is important to have a clear understanding of the following:

1. Who is responsible for providing sexual harassment training to workers?
2. Who will investigate if sexual harassment occurs in a franchisee's store?
3. Are workers able to make complaints of sexual harassment to the head franchisor?

Regardless of the level of control taken by a head franchisor, workplace sexual harassment poses a significant risk to retail franchise workers and poses a threat to the franchise's reputation.

We recommend that employers consider whether they need to make their workplaces safer from sexual harassment in light of the Commission's report. This may include an update to your policies and procedures to ensure they comply with the relevant sexual harassment and occupational health and safety legislation in your State and/or Territory and the Guideline (if your business is located in Victoria) or the offering of policy and procedure training sessions.

Although the Commission's report was based on Victorian legislation, national head franchisors should consider whether their wider franchise network would benefit from a consistent national approach which ensures the network's overall compliance. This of course needs to be balanced against the need to ensure that the head franchisor does not take on unnecessary responsibility for each franchisee's responsibilities as an employer in their own right.

Please contact us should you require any advice or assistance with updating your policies and procedures or if you would like further information on the training packages we offer.

Facial recognition technology: What you need to know

By David Smith, Partner and Brittany Dorney, Lawyer

In the last few years some retail and hospitality venues across Australia have rolled out facial recognition technology (FRT), citing theft prevention and staff and customer safety amongst the benefits. However, the use of FRT by private sector organisations has come under scrutiny from the Office of the Australian Information Commissioner (OAIC) in recent months.

Following concerns from consumer group Choice that various Australian retailers were using FRT without clearly having customers' consent, the OAIC recently announced investigations into Kmart and Bunnings to determine if their use of FRT in stores complies with Australian privacy laws.

The legal position

The *Privacy Act 1988* (Cth) (**Privacy Act**) regulates the collection, use, storage and disclosure of personal information by Commonwealth Government agencies and many private sector organisations. 'Personal information' is information or an opinion about an identified individual, or an individual who is reasonably identifiable. It includes an image of a person's face.

Under the Privacy Act, biometric information (such as a facial image) used for the purpose of automated biometric verification or biometric identification is deemed to be 'sensitive information', which is given an extra level of protection compared to other personal information.

The Australian Privacy Principles, which are given effect by the Privacy Act, state that unless certain narrow exceptions apply an entity must not collect sensitive information about an individual without the individual's consent. The collection of the information must also be reasonably necessary for the entity's activities.

What does a valid consent look like?

Consent for the purposes of the Privacy Act can be express or implied, and requires the following in order to be valid:

- the individual being adequately informed before giving consent;
- the individual gives consent voluntarily;
- the consent is current and specific; and
- the individual has the capacity to understand and communicate their consent.

The placement of discreet signage at store entrances has received public criticism for arguably being inadequate to properly inform consumers of the use of FRT. Choice has stated that the Kmart and Bunnings signage is "small, inconspicuous and would have been missed by most shoppers".

The investigations into Kmart and Bunnings

We expect the OAIC's investigations to focus on whether the signage that has been deployed is sufficiently prominent, whether the wording in the signage sufficiently discloses the use of FRT and whether the mass collection of facial images for the purposes of the FRT is 'reasonably necessary'.

On the last point, the Privacy Commissioner has stated that:

> **"While deterring theft and creating a safe environment are important goals, using high privacy impact technologies in stores carries significant privacy risks. Retailers need to be able to demonstrate that it is a proportionate response to collect the facial templates of all of their customers coming into their stores for this purpose… In line with community attitudes, retailers should consider whether they can achieve their goals in a less privacy intrusive way..."**

Legislative reform is coming

The new Commonwealth Attorney-General, Mark Dreyfus, has flagged that the Government will seek to make 'sweeping reforms' to privacy law in its first term of office. These reforms are likely to tighten aspects of the existing regulatory regime. This may well include imposing further limitations on the use of FRT.

Consequences of breaching the law

Under the Privacy Act, the consequences of a serious or repeated privacy breach can include being taken to court by the OAIC and potentially facing penalties in the hundreds of thousands of dollars. Significantly greater penalties may apply if the Australian Competition and Consumer Commission pursues the matter in court on the basis of 'misleading or deceptive conduct' under the Australian Consumer Law.

So can we use FRT in our business or not?

As FRT becomes more accurate and readily available, organisations may wish to deploy it – particularly if they see their competitors using it. It may be possible to use FRT within the scope of the current law, however we recommend proceeding carefully and being prepared to change tack if the law changes.

Expired contracts: What happens now?

By Matthew Lunney, Senior Associate and Alistair MacLennan, Lawyer

Contract management for busy commercial entities can be challenging. Depending on where the business sits on the supply chain, any given entity could have contracts with numerous parties, including subcontractors, suppliers, distributors, and retailers. There is a significant workload in just keeping track of all of these contracts, and the situation may arise where a contract expires because the parties have failed to renew or extend on time. But what does the expiry of a commercial contract mean for the legal relationship of the parties? And what are the key risks?

Status after Expiry

If the parties cease commercial relations upon expiry of a contract's term, there can be little doubt that the contract has ended. That said, where the parties continue their commercial dealings, a fresh contract may be implied – for example, it is not uncommon for contracting parties to continue to operate on substantially the same terms of the expired written agreement. The test for determining whether this is the case was re-stated in *CSR Limited v Adecco (Australia) Pty Ltd* [2017] NSWCA 121 (**CSR v Adecco**) as whether:

> **"…a reasonable bystander would regard the (objective) conduct of the parties, including their silence, as signalling to the other party that their relationship continued on the term of the expired contract."**

Determining the terms of an implied contract in these circumstances is a question of fact. It is not necessary, and indeed may be impossible, for a contract to continue on all of its expired terms. Much will depend on the parties' intentions as borne out in the prior contract and in their performance, as well as the parties' conduct post expiry of the original written agreement.

Example – CSR v Adecco

CSR v Adecco provides a useful example of how the courts will approach this issue. In its judgment, the NSW Court of Appeal considered whether an indemnity within a contract could be implied after a commercial arrangement between CSR and Adecco for the provision of truck drivers to an industrial enterprise had expired. In coming to its decision, the Court held that the parties had conducted themselves consistently with the contract after its expiry and, save for the duration of the contract which was fixed, that a contract on largely the same terms as the original agreement should be implied.

Risks and Mitigation

There is an obvious risk in continuing a commercial relationship post the expiry of a written agreement without clearly documenting the agreed terms. In the event a dispute were to arise, the Court would be required to form a view on terms of an agreement, in circumstances where the terms are not clearly defined via the terms of a current contract. This risks an unfavourable or adverse finding that has the potential to harm either or both of the parties' respective business interests in addition to the time, expense and interruption that litigation can have on a business and its employees.

To mitigate against this risk, some suggestions we have are for businesses to:

1. maintain an up to date contracts register detailing key contractual dates, including any termination and renewal dates, and any applicable notice periods;
2. if the intention is for a written agreement to terminate on the stated expiry date, clearly communicate that intention and cease the commercial relationship on that date; and
3. in the event that the intention is for a written agreement to terminate or have a run-off period after the express expiry date, clearly communicate that intention in writing, ideally via the execution of a written variation to the contract.

Victorian Liquor Licensing Update

By Maria Anenoglou, Senior Associate

The liquor and gaming industries are not only one of the most regulated industries in Australia, but have also been significantly impacted by the COVID-19 pandemic.

As hospitality operators continue to bounce back from extended lockdowns and restricted operations, this article provides an update on developments in the law and changes to legislation.

New Liquor and Gambling Regulators

Following the Crown Royal Commission, the operations of the state's liquor and gaming watchdog were heavily criticised so much so, that the Victorian Government announced it would break up the Victorian Commission for Gambling and Liquor Regulation (**VCGLR**) and split the regulation of the liquor and gaming industries.

On 1 January 2022 the Victorian Gambling and Casino Control Commission (**VGCCC**) was established to regulate Victoria's gambling industry. Following this, on 1 July 2022, Liquor Control Victoria (**LCV**) became responsible for the regulation of liquor licensing and compliance.

Amendments to Liquor Control Reform Act

The *Liquor Control Reform Act 1998* (Vic) (**Liquor Act**) regulates the supply and consumption of liquor in Victoria.

On 9 November 2021, the *Liquor Control Reform Amendment Act 2021* (Vic) (**Amendment Act**), which varies the Liquor Act, was given Royal Assent.

The changes proposed by the Amendment Act largely respond to industry trends, advancements in technology, reduction of red-tape and minimisation of harm.

The commencement of the various provisions of the Amendment Act have been in stages – from December 2021 to March 2022. Some of the most notable amendments that have come into operation are:

- the abolition of the dry areas in the City of Whitehorse and City of Boroondara;
- the ability for licensees of restaurant and café licences to supply 1 x 750 ml bottle of wine or one six-pack of 375 ml cans / bottles of beer, cider or pre-mix with a takeaway or home-delivered meal intended for consumption by an adult. This may be subject to planning permission depending on the wording of any permit granted in respect of the individual premises; and
- the permitted trading hours for the on-premises supply and consumption of liquor for restaurant and café, late night (on-premises), on-premises, late night (general) and general licences being automatically extended to 1am every day on the basis that planning permission for these hours has been obtained. It has been clarified since the amendment came into operation that this does not apply to specific areas of a licensed premises that have different trading hours such as a beer garden although further clarification is intended to be provided by the regulator.

On 25 August 2022, a further suite of amendments to the Liquor Act came into operation.

Summary of key amendments.

The key amendments are as follows.

1. New Requirements for High-Risk Packaged Liquor Licence Applications.

   A new application and objection process for packaged liquor applications considered to be high-risk has been introduced.

   Large packaged liquor outlets with a floor space of over 750 square metres will be considered to be high-risk applications for the purposes of the Liquor Act. This will apply to new liquor licence applications and to variations of existing packaged liquor licences if the variation results in the licence applying to a large packaged liquor outlet.

   High-risk applications will be required to undertake a far more rigorous application process so as to ensure that any risk of harm has been properly considered. This will involve the requirement to submit a community impact statement (**CIS**).

   A CIS must contain the following information:

   a. consultation that the person making the application has undertaken with the local community regarding the proposed application;

   b. the positive and negative social and economic impacts of the proposed application on the local community; and

   c. any other matters specified by the Commission.

   A CIS requires consultation with the community, which is defined as the community in the municipal district in which the licensed premises are to be located and any surrounding municipal district if the licensed premises is located within 5km of the boundary of that district.

   The requirement for a CIS goes far beyond the advertising requirements previously in place.

   Additionally, the regulator has been provided with broad powers to refuse an uncontested application if it considers that the net economic and social impact of granting the application would be detrimental to the wellbeing of the local community.

2. Change to Definition of 'Harm'.

   The primary purpose of the Act is to minimise harm, however this term was not previously defined in the Liquor Act.

   The new definition of 'harm' includes harm to minors and vulnerable persons, family violence and anti-social behavior to provide the regulator with greater clarity when making decisions moving forward.

3. Offences relating to Delivery of Liquor.

   Given the popularity of online liquor deliveries, the Liquor Act imposes additional obligations on licensees and delivery drivers.

   Licensees must instruct the delivery person, in writing, on the same day the day the order is placed, not to leave the order unattended.

There are other key amendments to the Liquor Act which have not yet come into operation and which include:

- the introduction of a new category of licence for online vendors (the online-only vendor packaged liquor licence); and
- the introduction of a new mechanism for the Tribunal to review licensing decisions. Previously, liquor licensing decisions were reviewed by the regulator itself.

The dates for commencement of operation of the remaining provisions are not yet clear, however, the Amendment Act states that any provision that has not yet come into operation by 31 December 2022 will come into effect on that day.

No Planning Permit required to extend hotel trading hours or increase patron numbers if hotel has 'existing use rights'

In Victoria, hotel operators typically require two sets of approvals to extend their hotel trading hours or increase their patron numbers, namely:

- regulatory approval from LCV is required for a new licence or a variation to an existing licence; and
- planning approval under clause 52.27 of the Victorian Planning Provisions (**VPP**) to use land to sell or consume liquor from the relevant local Council.

This results in licensees essentially having to go through the approvals process twice – even if they dealing with a long-term, established licensed venue.

Both the LCV and planning permit applications require advertising (albeit for different durations) and can attract objections, which can in turn delay the process particularly if a review of the decision of the LCV and/or Council is made.

The recent decision of the Victorian Civil and Administrative Tribunal (**Tribunal**) in Kevak Hotels Pty Ltd v Darebin CC [2022] VCAT 318 (**Kevak**) comes as a welcome to the hospitality sector for those operating under existing use rights.

The Kevak decision stands as authority for the proposition that where existing use rights can be established, a planning permit is not required under clause 52.27 to increase trading hours, provided that the underlying purpose of the use does not change.

What are existing use rights?

Existing use rights are essentially long user rights – typically where a use has been in continual operation for a period of at least 15 years.

In practical terms, a planning scheme cannot prevent the continuance of a use for the purposes for which it was being lawfully used before the coming into operation of a planning scheme or amendment to that scheme.

How do you establish existing use rights?

There are various ways in which existing use rights can be established as set out in clause 63.01 of the VPP.

One of the most common avenues to establish existing use rights is if proof of continuous use for 15 years can be established.

The onus of proof lies on the person asserting the existing use rights (i.e. the hotel operator).

Existing use rights can be established by providing copies of leases, utility/insurance records, receipts from suppliers/invoices and copies of liquor licences issued over the preceding 15 year period, statutory declarations from employees and aerial photographs of the subject site and surrounds.

Kevak decision – Olympic Hotel Preston

Kevak Hotels Pty Ltd (**Applicant**), the operator of the Olympic Hotel (**Hotel**) had sought an extension to its trading hours and applied to Darebin City Council (**Council**) for a planning permit pursuant to clause 52.27 of the Darebin Planning Scheme (**Scheme**).

At first instance the Council refused the application. While the Applicant initially sought a review of the Council's decision at the Tribunal, it then sought to rely on existing use rights and applied for a declaration under the *Planning and Environment Act 1987* (Vic) that it was entitled to extend its trading hours without the need for further planning permission.

The Tribunal ordered a declaration that the Hotel:

1. has existing use rights for the purpose of a hotel; and
2. by reason of the existing use rights, a planning permit is not required under clause 52.27 of the Scheme to modify or extend the hours within which liquor may be sold or consumed at the Hotel.

In Kevak, the establishment of existing use rights was non-contentious and undisputed by Council.

It was clear that the Hotel had been operating as such for a continuing period of 15 years or more. This was supported by evidence from directors and employees of the Applicant, records from the VCGLR of historical liquor licences and copies of planning permits granted by Council (relating to development works and signage) from 1995.

The Tribunal concluded at paragraph [21] that:

The establishment of existing use rights not only protects the use of the subject land for the purpose of a hotel but also allows the uses and activities that compromise the use to intensify over time.

The Tribunal referred to previous decisions establishing the principle that existing use rights may be intensified provided the underlying purpose of the use does not change. In this case, Member Shpigel concluded that the extension of the Hotel's trading hours did not change the use of the subject land for the purpose of a hotel.

The Tribunal was not persuaded by Council's submissions that clause 52.27 does not prevent the continuation of an existing land use but rather regulates the sale and consumption of liquor when a new licence or variation to an existing licence is sought.

In fact, the Tribunal concluded that clause 52.27 is a use control, as it imposes a permit requirement on the use of land to sell and consume liquor in circumstances where those activities are components of a protected existing use.

In leading to this conclusion, it is important to note that the use of the subject land as a hotel was not subject to any conditions imposed by a planning control, such as a planning permit. If this were not the case, the Tribunal's conclusions may well have been different.

What does the Kevak decision mean for the hospitality industry?

It is now open for hospitality operators (not just hotels) to rely on the Kevak decision to argue that where existing use rights exist, a planning permit is not required under clause 52.27 to intensify that use to increase trading hours. Taking this one step further, this could also logically apply to an increase in patron numbers and the licensed area which are regulated via clause 52.27.

This means that those operating under existing use rights would only require regulatory approval from LCV to intensify its operations. This would cut down the approval process significantly and save time and costs, particularly if a planning application is contentious and is likely to attract a large number of objectors with appeal rights to VCAT.

The only caveat is that even if you are operating under existing use rights, if a planning permit has been issued since the establishment of the VPP which limits the use then there is an argument that you may not be able to rely on this decision.

If you cannot rely on existing use rights, you must continue to seek planning permission under clause 52.27 of the Scheme (unless an exemption applies) in addition to seeking regulatory approval through LCV.

If you have any questions about whether your business is operating under existing use rights or in relation to the amendments to the Liquor Act, please do not hesitate to contact Maria Anenoglou.

The Therapeutic Goods Advertising Code

Advertising under the influencers, and changes to the TGA Code

By Kelly Griffiths, Partner and Joseph Abi-Hanna, Associate

On and from 1 July 2022, all Therapeutic Goods Advertisements (TG Advertisements) must comply with the *Therapeutic Goods (Therapeutic Goods Advertising Code) Instrument 2021* (Cth) (New Code). The transition period, during which TG Advertisements could comply with either the New Code or the *Therapeutic Goods Advertising Code (No.2) 2018* (Cth) (Former Code), ended on 30 June 2022. A caveat that, when referring to TG Advertisements, we are referring only to those advertisements to which the New Code applies (including advertisements of medical devices, complementary medicines and over-the-counter medicines directed to consumers). The prohibition on advertising prescription medicines to consumers remains.

There has been significant media coverage on the application of the New Code to influencers, but the impact of the New Code extends beyond your favourite social media personality. The key changes implemented by the New Code relate to testimonials and endorsements, mandatory statements and samples.

Endorsements and Testimonials

The requirements relating to endorsements and testimonials in the Former Code were considered a 'pain point' by industry stakeholders due to a lack of clarity concerning their application. For example, under the Former Code, a TG Advertisement could not contain a testimonial made by a corporation or certain individuals, including individuals engaged in the production, 'marketing' or supply of a therapeutic good (known as **relevant persons**). However, an individual who was not otherwise involved in the 'marketing' of a therapeutic good could provide a testimonial in return for valuable consideration and, arguably, would then become involved in the marketing of that good. The Therapeutic Goods Administration (**TGA**) noted this inconsistency in a Consultation Paper.

These requirements have been clarified and restated in section 24 of the New Code. A note in the New Code specifies that relevant persons include influencers, direct sellers and other persons receiving valuable consideration for making a testimonial. While influencers were not referred to expressly in the Former Code, it is difficult to see how an influencer could have promoted a therapeutic good without becoming involved in the marketing of that good. The New Code does not change the substance of this prohibition. It merely confirms that certain persons, including influencers, are expressly prohibited from making testimonials under the New Code.

On 26 May 2022, the TGA published guidance on testimonials and endorsements in advertising under the New Code (**Guidance**). The term 'testimonial' is not defined in the New Code. However, the TGA has clarified that an endorsement is a form of support, approval or sanction and a testimonial is a type of endorsement which involves a person who claims to have used a therapeutic good making a statement about that good. This means that a person cannot refer to a personal experience with a relevant good in exchange for money or something else of value. However, the New Code does not prevent a person from endorsing, or approving of, the good without referring to a personal experience with the good in return for valuable consideration.

Key takeaways from this Guidance include:

- before including a testimonial in a TG Advertisement, the advertiser must:
  - verify the identity of the person making the testimonial to ensure the person is permitted to make the testimonial under the New Code; and
  - ensure that the content of the testimonial does not breach applicable provisions of the New Code;
- any links in a TG Advertisement (e.g. to third party websites) are deemed to form part of the advertisement and any testimonials displayed at those links must comply with the New Code;
- if a TG Advertisement is published in a medium which enables third parties to leave comments, the advertiser is responsible for monitoring comments and removing any comments which are non-compliant with the New Code as soon as practicable (including if these comments are non-compliant testimonials);
- under the New Code, it would be misleading if a person endorsing a therapeutic good did not disclose receipt of valuable consideration in exchange for the endorsement; and
- a person who represents themselves as being a health professional, for example a health influencer who claims to treat people with certain health conditions, cannot provide an endorsement or a testimonial of a therapeutic good under the New Code.

Mandatory statements

Part 4 of the New Code deals with mandatory statements and other information which must be included in TG Advertisements. The requirements relating to mandatory statements have been streamlined and updated. For example, the requirements relating to short form advertisements have been simplified. Short from advertisements include text only advertisements of 300 characters or less which lack the reasonable capacity to include pictures, logos or other imagery. Advertisements that are published on social media are not considered short form advertisements. This means that social media advertisements must comply with other applicable requirements under Part 4 of the New Code.

However, a TG Advertisement can now include a link to applicable health warnings where more than one health warning applies to the relevant good. The link must provide consumers with direct access to the relevant warnings, such as on a webpage or in a document which sets out the relevant warnings. The changes to these requirements reflect the reality that therapeutic goods are increasingly promoted and sold online. There can be limited space to include mandatory statements in certain online environments, including on social media platforms with character limits. It makes sense to provide advertisers with the option to provide a link to lengthy mandatory statements in circumstances where these statements may not fit in the TG Advertisement itself.

Samples

A sample is a therapeutic good given for free, excluding goods offered under a 'buy one, get one free' arrangement. Under the Former Code, it was prohibited for a TG Advertisement to include an offer of a sample unless the relevant good was listed in Schedule 3. Under the New Code, it is prohibited for a TG Advertisement to include a sample, or an offer of a sample, unless the therapeutic good is listed in Annexure 2 and certain other conditions are met. The rationale for exempting certain goods from this prohibition is that these goods have an obvious individual or public health benefit and are safe to use without guidance from a health professional.

The list of samples has been expanded under the New Code. Under the New Code, the expanded list of samples includes:

- condoms and personal lubricants;
- continence catheter devices for self-management;
- COVID-19 rapid antigen tests for self-testing;
- disinfectants;
- face masks and gloves for preventing the transmission of disease in persons;
- hand sanitisers;
- sunscreens and other therapeutic goods containing sunscreen;
- tampons and menstrual cups; and
- wound care dressings for superficial wounds, including first aid items and antiseptics.

Conclusion

In the therapeutic goods sector, there is likely to be increased regulatory focus on TG Advertisements from 1 July 2022, regardless of the date of publication of an advertisement. Given the overt references to influencers and direct sellers in the New Code, TG Advertisements incorporating content from these individuals should be examined carefully. More broadly, individuals and businesses involved in therapeutic goods marketing would be wise to evaluate their current practices to ensure that existing compliance policies reflect the requirements of the New Code.

The changes to the New Code in relation to testimonials and mandatory statements may be viewed as part of a broader trend whereby regulators continue to provide certainty for stakeholders on the application of laws and regulations to online advertising. For example, the Australian Securities and Investment Commission recently published an Information Sheet which covers applicable requirements when advertising financial products and services online. We anticipate that further measures of this nature will be forthcoming across various highly-regulated sectors.

A responsible approach to responsible sourcing in the supply chain

By Kevin McVeigh, Senior Associate

It is hard to think of another topic that has preoccupied corporate discourse in recent times more than ESG responsibilities and commitments. 'ESG' stands for Environmental, Social and Governance – but what is specifically included in those metrics is not defined. In addition, global supply chains are operating under a climate of heightened pressure and this is also affecting many of our clients. This article will discuss some of the issues we have witnessed when ESG considerations and supply chain issues intersect.

Responsible sourcing is a voluntary commitment by companies to take into account social and environmental considerations when managing their relationships with suppliers. With the exception of modern slavery laws, responsible sourcing is generally not legally mandated in Australia. As ESG has well and truly entered the mainstream and now become a critical issue for business, it is standard convention for a business to impose on their suppliers a contractual responsible sourcing obligation.

Typically, this in the form of an obligation to comply with the procuring entity's responsible sourcing policy (as it may be varied), but could take other forms. The aim is to require suppliers and sub-contractors to meet any stringent responsible sourcing obligations a business sets for itself (or that a business has been required to set by any counterparties it contracts with).

As there is no standard or legislated approach to responsible sourcing, suppliers may have legitimate concerns about agreeing to diverging layers of compliance obligations imposed by each of their customers. To address the compliance burden, an approach that businesses have frequently adopted is to rely on accepted standards developed by standard setting bodies (with appropriate amendments tailored for a particular business's needs). Accepted standards have some level of credibility and objectivity and in our experience can lead to less work at the negotiation table.

Responsible sourcing compliance burdens also come with a cost. An approach that we have seen implemented successfully is for business to share some of these costs with their suppliers, where it is commercially appropriate to do so. The procuring entity could offer to cover some of the costs of complying with an audit obligation undertaken to ensure the supplier has complied with that business's responsible sourcing policy. After all, compliance is crucial and a business that treats responsible sourcing as a box ticking exercise (e.g. merely requiring a shopping list of warranties) rather than taking an active preventative focused approach may have limited protection when an ESG scandal goes viral. This collaborative approach demonstrates a good faith commitment to responsible sourcing and may encourage a supplier to treat the issue with appropriate importance, which may assist manage compliance risk and strengthen the relationship between the parties.

With the importance of compliance in mind, we have also noticed an uptick in the level of due diligence that businesses undertake when engaging a supplier. Businesses cannot afford to take a reactive approach to responsible sourcing compliance.

If you have any questions regarding any of your responsible sourcing obligations or commitments please reach out.

Button Battery Safety Standards

Combating a Danger Lurking in the Household

By Antoine Pace, Partner

The new button/coin battery safety standards became mandatory on 22 June 2022. They affect manufacturers, importers, wholesalers and retailer of products that contain button batteries.

So, what do you need to know?

Purpose

It is hard to imagine, but potentially lethal button and coin batteries are lurking in a broad range of seemingly innocent products around our homes. These products include watches, clocks, remote control units, key finders, calculators, torches, flameless candles, digital kitchen scales, musical greeting cards, and home medical devices.

Of even greater concern, they can also be found in many children's toys.

If swallowed, a button battery can result in catastrophic injuries and even death. Insertion of button batteries into body orifices such as ears and noses can also lead to significant injuries. Indeed a number of children have been injured – some fatally – from swallowing button batteries that had easily been accessible in innocent-looking devices around the home.

As a result of this, four distinct mandatory standards regulating button batteries were introduced by the Australian authorities, and these came into effect on 22 June 2022. Those standards regulate safety of and information relating to button batteries, as well as products that contain button and coin batteries. The standards are primarily designed to reduce the risk of serious injury and/or death in small children resulting from ingestion of the products.

Compliance obligations rest with not only the manufacturer, but with participants across the entire supply chain including importers, wholesalers and retailers.

The standards:

The batteries themselves and their packaging

- **Packaging** – Packaging of button batteries must now be child-resistant, and, if using blister packaging, must be designed to release only one battery at a time.
- **Compliance testing** – Market participants must engage in compliance testing for their packaging that is consistent with existing industry standards, and must be able to substantiate compliance through demonstrating upon request by the Regulator, the tests that were used to demonstrate compliance.
- **Warnings** – Battery packaging must now clearly and prominently be marked with warnings, and batteries that are greater than 2cm in diameter must have the warnings marked on the battery themselves.

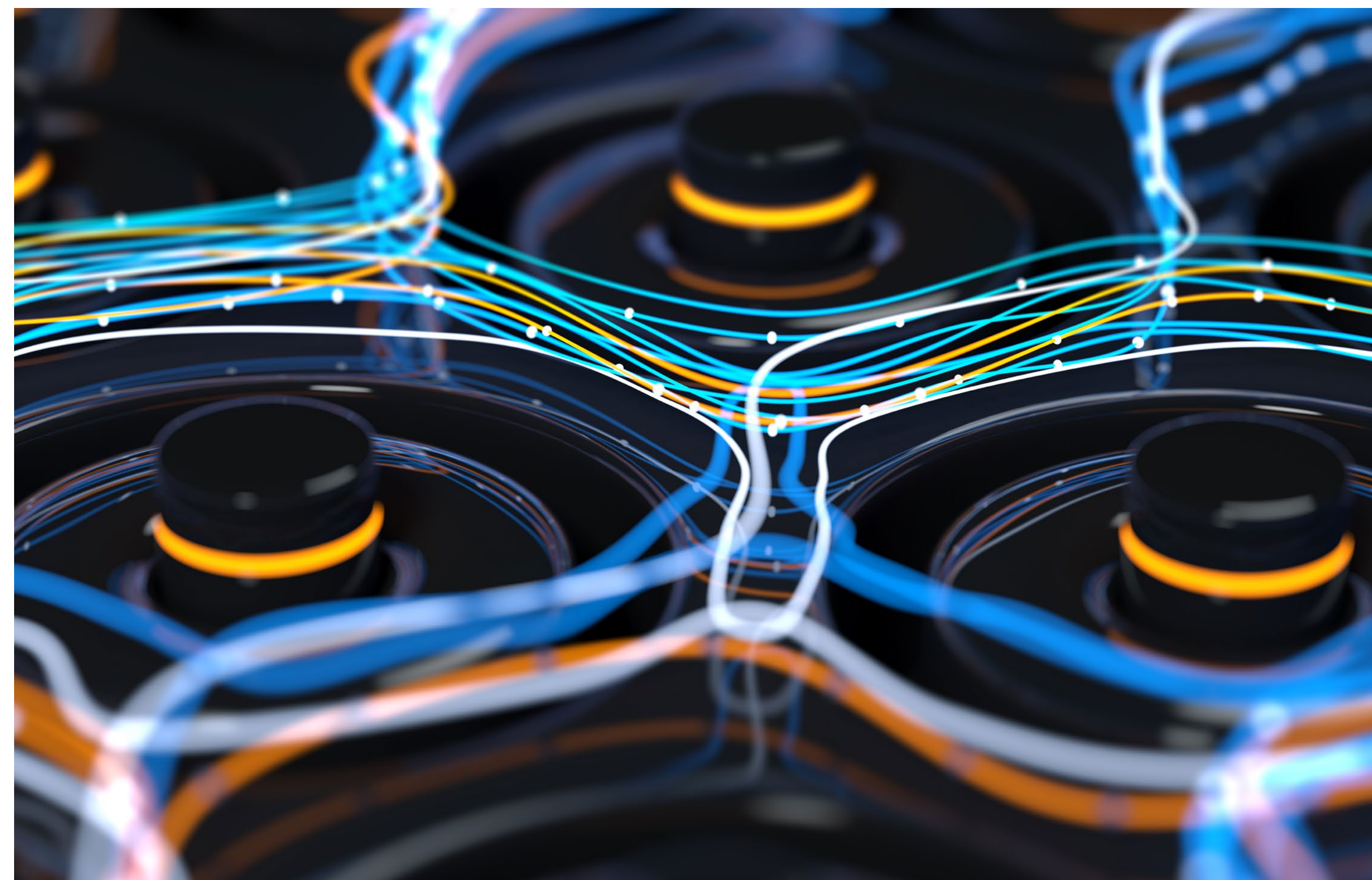
  The warnings must be internationally recognised symbols such as the 'Keep out of reach of children' and 'Safety Alert' symbols (see below).

It is further recommended that clear warnings of the risks of ingestion and what to do if the battery is ingested by a child are present on the packaging.

Products containing button batteries

- **Product design** – The product containing the batteries must be designed and manufactured so that the batteries themselves are secure and cannot foreseeably be released during the actual use or misuse of the product.

  Misuse in these circumstances may extend to a child playing with a particular product (including if the product is not a child's toy – for instance a key finder on a parent's keyring). Further, if the product requires the batteries to be replaced over time, the battery compartment must be child-resistant.



  Putting this into practice would commonly involve designing the product so that the battery compartment can only be accessed by using an external tool like a screwdriver, a Torx™ wrench or a custom-designed tool that can only open the device with considerable force.
- **Compliance testing** – Market participants must test their products against the appropriate product standard and be able to substantiate compliance upon request by the Regulator.
- **Warnings** – Products containing button batteries must be marked with warnings that are clearly visible, prominent, and legible and that include an upper-case alert word ('DANGER', 'WARNING', 'CAUTION'), a safety alert symbol, a statement detailing the battery's hazards, and advice on what to do if the battery is ingested by a child.

Exemptions

Broadly, batteries supplied before the requirements became mandatory, and those used in professional equipment away from children are exempt from the standards.

Given the risks of non-compliance, you should always seek professional advice on whether your products are exempt.

Expectations

The ACCC expects that by now, businesses (having had ample time since the transition period commenced 18 months before, in December 2020) have already made the relevant manufacturing and design changes, undertaken compliance testing, and removed non-compliant stock. Accordingly it is unlikely that the regulator will give further time for market participants to put their respective houses in order.

Penalties for non-compliance

The consequences of failing to meet the standards and supplying non-compliant items to customers are severe for companies, with maximum penalties of the greater of (a) $10 million, and (b) three times the value of the financial benefit from selling the product, and (c) ten percent of annual turnover during the 12-month period preceding the offending conduct.

Conclusion

Perhaps companies who have already recognised the issue and voluntarily recalled their products have got off lightly. Ultimately the safety of our youngest and those least able to protect themselves is paramount.

If you are concerned that products you supply do not yet meet the standards, you should act promptly and seek professional advice.

Deadline to apply for Priority Status for '.au' direct domain names is approaching

By Kerry Awerbuch, Partner and Madeleine McMaster, Senior Associate

On 4 October 2022, '.au' direct domain names will finally be available for use and registration, which means those who wish to use '.au' namespaces will no longer be restricted to third level domain names such as '.com.au', '.net.au', 'edu.au' and 'org.au'.

Unlike '.com.au' and '.net.au', it will also be possible for a person or entity with an Australian presence (for example, an Australian resident, a company registered under the *Corporations Act 2001* (Cth) or an applicant or registrant of an Australian word trade mark) to register any '.au' direct domain name. There is no requirement that there must be some connection (e.g. a company name registration) with the chosen domain name. This means that persons with an Australian presence can register any '.au' domain name.

Registrants of existing domain names

As part of the implementation process of '.au' direct domain names, a Priority Status process has been put in place for registrants of existing Australian domain names. This means that if you have an Australian presence and have held a domain name ending in '.au' (e.g. 'gadens.com.au') prior to 24 March 2022, you may be eligible to apply for Priority Status for the '.au' direct match of your existing domain name (e.g. 'gadens.au').

There is a deadline of **20 September 2022** to apply for Priority Status.

Priority Status registration will give a domain name holder the best chance of protecting their equivalent '.au' direct domain names once '.au' direct domain name registrations become publicly available at 8am (AEDT) on 4 October 2022.

It is strongly recommended that all Australian domain name holders apply for Priority Status for all key domain names held in other '.au' namespaces (such as '.net.au', '.com.au' and '.org.au') as soon as possible.

While a good opportunity for domain name holders to consolidate their online presence, it is also an opportunity for cyber squatters, particularly in circumstances where there are no requirements to have a connection to the domain name being registered.

Irrespective of whether a domain name holder intends to use the '.au' direct domain name, there is a risk that if businesses do not secure priority for all relevant '.au' direct domain names before the Priority Status cut-off date of 20 September 2022, another person or business could register the '.au' direct domain name themselves and attempt to engage in fraudulent conduct and impersonate their business.

Competing claims for domain names

It is likely that there will be competing claims for some '.au' direct domain names. This will occur when there are different registered domain names in the third level namespaces (for example, 'gadens.com.au', 'gadens.net.au' and 'gadens.vic.edu.au').

There are a set of rules that will be applied in order to determine which domain name has priority and therefore who will be granted the '.au' direct domain name licence. For competing domain names both created after 4 February 2018, this will be determined based on the earliest creation date of the two domain names. For competing domain names created prior to this date, it will be up to the parties to negotiate as to which party will be able to register the exact match in the '.au' namespace. If no agreement is reached, neither party will be entitled to use the direct registration for that domain name. However, it is a requirement that both parties continue to pay the annual application renewal fee for that domain name. In the event that one party fails to pay the annual application renewal fee or they no longer satisfy the eligibility or allocation criteria for holding the third level domain name, then the application will lapse and the other party will be able to claim the direct registration.

auDA (Australia's domain name administrator) has provided a Priority Status tool which allows you to see if there are any competing claims for a '.au' direct domain name and, if there are, the priority category for each of the domain names. The Priority Status tool can be found here.

New domain names

For those businesses who have not been able to obtain their desired '.au' domain name due to prior third party registrations, registration of a '.au' direct domain name may provide a great solution. For example, if you have always had to operate from 'exampleservices.com.au' because 'example.com.au' was unavailable, it may now be possible to obtain registration of the 'example.au' direct domain name, if the prior registrant of 'example.com.au' has failed to apply for Priority Status on or before 20 September 2022.

Applications for '.au' direct domain names are open to any person (provided they have an Australian presence) from 8am (AEDT) on 4 October 2022.

You can use the Priority Status tool provided above to determine who has made a priority application for a particular domain name.

Further information

If you would like to know more about what it means to have a '.au' direct domain name, auDA has recently released a '10 things you need to know' summary for '.au' direct domain names, which you can read here.

If you would like to reserve your '.au' direct domain name, you can do so by visiting an auDA accredited registrar.

You can find more information about '.au' direct domain names on auDA's website.

If you would like any assistance with securing your '.au' direct domain name prior to the cut-off date or if you have any questions, please let us know. Alternatively, we recommend that you instruct your relevant IT team members to ensure your domain name registrations are covered.

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