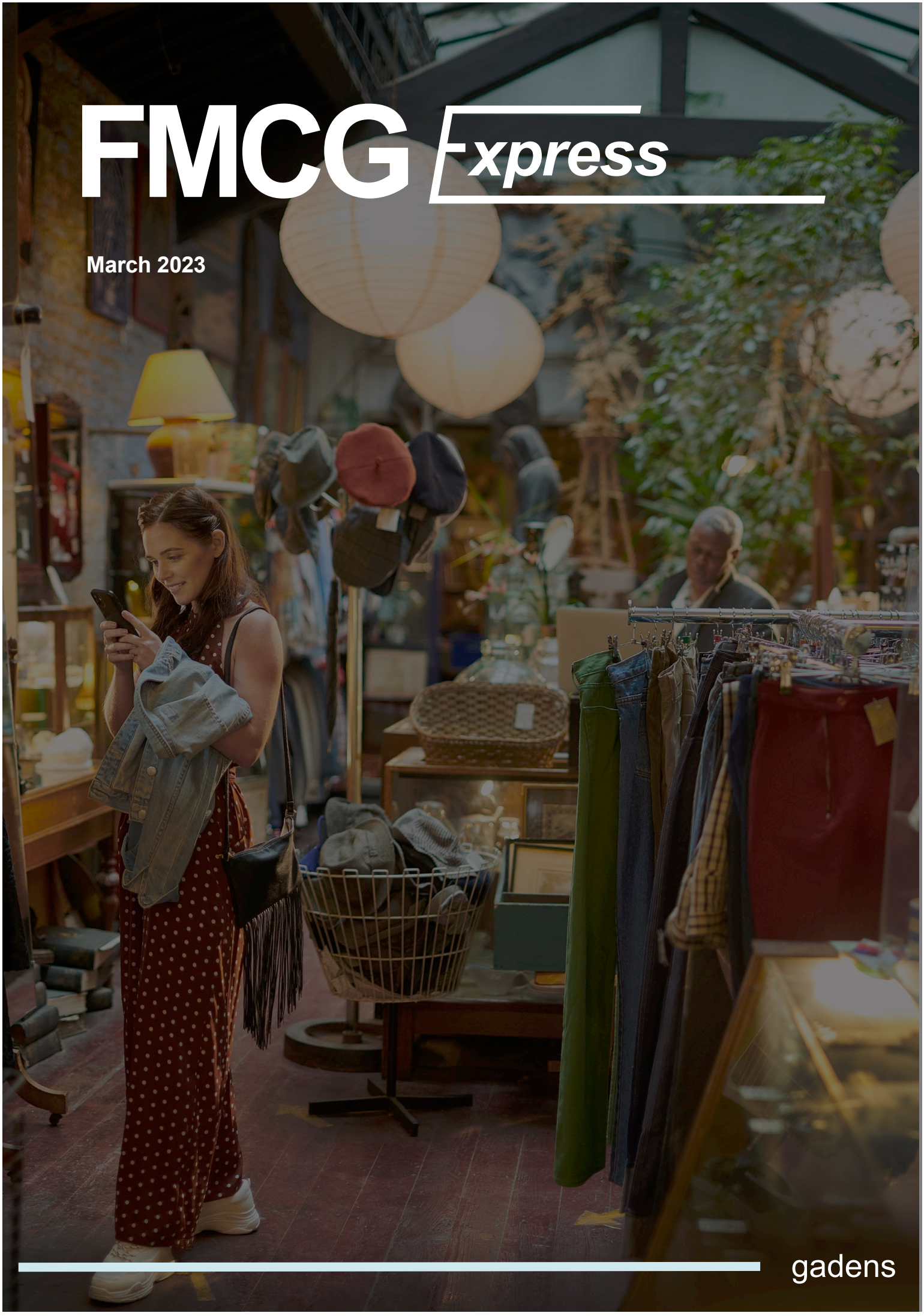
FMCG Express

March 2023



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Welcome to the seventh edition of FMCG *Express*.

This edition is going straight to the heart of key legal issues affecting corporate Australia in 2023: reforms to unfair contracts legislation; changes to the Fair Work Act; privacy law amendments; and cyber and data security.

Gadens is at the forefront of the analysis of these changes, and we are supporting our clients to ensure that they understand and comply with the myriad of obligations. Gadens provides practical, sensible and commercial advice. As an example of this, David Smith has joined with other industry leaders to push to harmonise trade promotions laws which we believe will be for the benefit of all and remove complicated compliance obligations.

Inflationary pressures are changing the buying and consuming patterns of Australians, but technology advancements are also varying purchasing behaviours. Sinead Lynch and her team look at how AI technologies have changed the landscape for e-commerce.

Once again, we thank the Gadens team of experts for contributing to this edition. We will soon be reaching out to our contacts regarding specific initiatives to assist our clients with reviews of their contracts to ensure compliance with UCT reforms, and also reviews of governing documents to ensure privacy obligations are met. If you would like to be on our mailing lists, please let us know.

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Unfair contract terms – The clock is ticking on significant reforms

By Edward Martin, Partner, Kier Svendsen, Senior Associate, and Trish Kastanias, Senior Associate

From 9 November 2023 significant reforms regulating unfair contract terms will come into effect.

The scope of unfair contract terms and the penalties for their use will expand through the enactment of reforms by the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth).

The reforms reflect the Government's position that existing laws are not deterring sufficiently the use of these types of terms in existing consumer and small business contracts.

The changes in more detail

Under the reforms, a contracting party must not include an unfair term in a 'standard form contract' which is either a 'consumer contract' or a 'small business contract'.

An unfair contract term will no longer be simply void and unenforceable by a Court order. They will be deemed unlawful from the start and Courts will have the power to hand down significant penalties if they are used.

To which contracts do the reforms apply?

The laws apply to 'standard form contracts', which are not formally defined, but are typically standard contractual terms and conditions prepared by one party with stronger bargaining power and presented to the other party who does not have a meaningful opportunity to negotiate – what might be called a 'take it or leave it' contract.

Unfair contract terms are covered by Part 2-3 of the Australian Consumer Law (**ACL**) and Part 2 Division 2 Subdivision BA of the ASIC Act (regarding insurance and financial products and services).

A standard form contract then needs to be either a '**consumer contract**' or a '**small business contract**'.

A consumer contact is for the supply of goods or services (or an interest in land) to an individual for primarily personal or domestic use or consumption. These contracts might be, for example, a large telecommunications company providing a 'standard form' contract to someone who wants to buy a mobile phone service. The reforms don't change the definition of what is a consumer contract.

However, the reforms do expand the definition of a **small business contract**. In broad terms, it will apply if one of the contracting parties has:

- fewer than 100 employees (previously, it was fewer than 20);
- turnover of less than $10 million (previously, the threshold was an upfront contract price of less than $300,000, or, a contract longer than 12 months with an upfront price of less than $1 million).

The expansion of the definition of a small business contract will capture far more standard contracts with potentially unfair contract terms.

The reforms generally apply to contracts which are entered into, renewed or varied on or after 9 November 2023.

What is an unfair contract term?

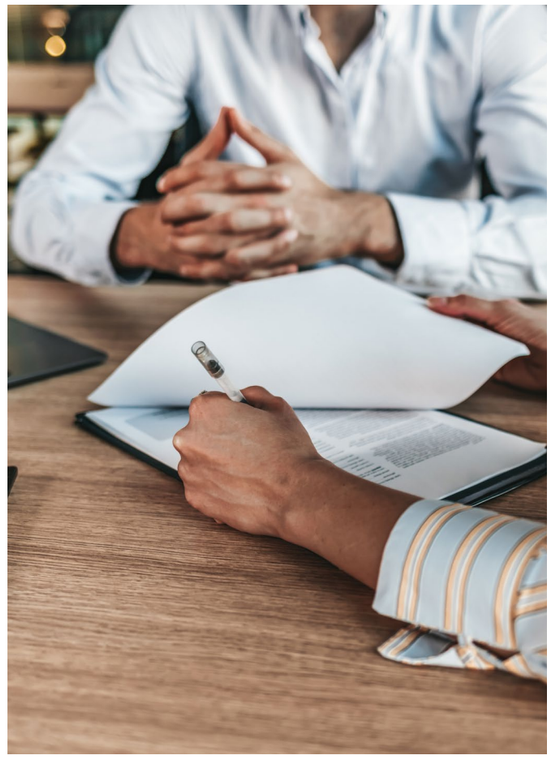
Under s 24 of the ACL, a term is unfair if it:

1. would cause a **significant imbalance** in the rights and obligations of the parties; and
2. isn't r**easonably necessary to protect the legitimate interests** of the advantaged party; and
3. would cause **detriment** to the (disadvantaged) party if relied on.[1]

Second, the Court must take into account how 'transparent' the particular term is, and the contract as a whole. By transparent, a term needs to be in reasonably plain language, presently clearly, legible and readily available to the party affected by that term.

Some example of types of unfair contract terms found by the Federal Court are:

1. automatic renewal terms (without notice to the customer);
2. termination rights which are far more available and extensive in the supplier's favour but not its customer;
3. unilateral rights to vary terms in the contract; and
4. requiring customers to keep paying suspension fees during a period where one party has suspended services for breach of contract.[1]



[1] See *ACCC v Fujifilm Business Innovation Australia Pty Ltd [2022]* for more information.

Are there contracts that are excluded?

Yes, some contracts will be excluded. Examples are certain shipping contracts, constitutions of companies, contracts dealing with the operation of a payment or settlement system, and certain life insurance contracts.

Penalties

The penalties for corporations using unfair contract terms will be up to the greater of:

1. $50 million;
2. three times the benefit obtained as a result of the breach; or
3. 30% of turnover during the breach period (if the value of the benefit can't be obtained).

The penalties apply to a single contravention. That is, if there are multiple unfair terms in one contract, the penalties can technically apply to each contravention.

The Court will also have powers to, for example, void, vary or refuse to enforce unfair terms.

The penalties for non-corporates (say a partnership or sole trader) are up to $2.5 million.

More to come

Gadens will be preparing further analysis in the weeks ahead to assist clients make the swift transition to compliance with the reforms.

The commencement date for the amendments to the unfair contract terms regime has been amended to 9 November following a change in the date previously communicated by the Australian Competition and Consumer Commission.

Sweeping up misconduct – Digital marketing and influencers in the crosshairs of Australian regulators

By Antoine Pace, Partner and Joseph Abi-Hanna, Associate

On 27 January 2023, the Australian Competition and Consumer Commission (ACCC) announced a social media sweep targeting influencers.[1]

Digital marketing is also on the agenda for other Australian regulators, including the Australian Securities and Investments Commission (ASIC) and the Therapeutic Goods Administration (TGA).

All three regulators have released guidance for digital marketing and expect industry participants.

With a heightened regulatory focus on digital marketing, influencers and the businesses they promote should ensure that their current and future promotional activities comply with applicable laws. Significant penalties may be imposed for non-compliance, especially for breaches of the Australian Consumer Law (ACL).

The ACCC Sweep

As at 27 January 2023, the ACCC had received over 150 tip-offs from people who responded to an earlier Facebook post in which the ACCC had asked the public to report influencers who were not disclosing that their posts were advertisements, or who were otherwise 'doing the wrong thing'.[2]

Under the ACL, a failure to disclose that a social media post is a paid advertisement may constitute a breach of several prohibitions, including the prohibition against engaging in misleading or deceptive conduct or conduct that is likely to mislead or deceive.[3] We understand that the ACCC's primary concern is social media posts where an influencer depicts themselves as impartial, when in fact they have been paid (whether in cash or in kind) to make such posts and this conduct has the potential to cause significant detriment to consumers.

According to the ACCC Chair Gina Cass-Gottlieb:

> *"With more Australians choosing to shop online, consumers often rely on reviews and testimonials when making purchases, but misleading endorsements can be very harmful.*
>
> *It is important social media influencers are clear if there are any commercial motivations behind their posts. This includes those posts that are incentivised and presented as impartial but are not.*
>
> ***The ACCC will not hesitate to take action where we see consumers are at risk of being misled or deceived by a testimonial, and there is potential for significant harm."***

The ACCC noted that many of the tip-offs related to influencers in the beauty and lifestyle, parenting and fashion industries. In addition to these industries, the ACCC's sweep is focused on the cosmetics, food and beverage, travel, health and well-being, gaming and technology industries. The sweep is not restricted to influencers. The ACCC is also contemplating whether advertisers, marketers, brands and social media platforms facilitate wrongdoing.

The ACCC has updated its guidance materials on social media promotions and other digital marketing activity.[4] This sweep is a timely reminder to all participants – including advertisers, marketers, brands and social influencers – to revisit and familiarise themselves with these materials.

ASIC

Other Australian regulators are actively scrutinising digital marketing. For example, ASIC recently publicised that the Federal Court had made findings against a 'finfluencer' for carrying on the business of providing financial services by providing financial product advice by way of courses and seminars, and promoting them online, and promoting those courses and seminars via Twitter and Instagram, without a licence.[5]

In March 2022, ASIC had issued Information Sheet 269 (**INFO 269**) which covers applicable requirements when advertising financial product and services online.[6] INFO 269 sets out specific guidance for influencers and case studies on specific conduct that is likely to be unlawful.

The TGA

There was significant media coverage regarding the new *Therapeutic Goods (Therapeutic Goods Advertising Code) Instrument 2021 (*Cth) last year, and its application to influencers.[7]

Please see our previous article, which sought to clear up some of the misconceptions regarding online advertising and what influencers are permitted to do when promoting certain therapeutic goods. The TGA has helpfully released guidance to provide further clarity regarding the obligations of influencers in this highly regulated space.[8]

Industry associations

Separately from the regulators, industry associations such as the Australian Association of National Advertisers (**AANA**) and the Australian Influencer Marketing Council (**AIMCO**) have sought to provide practical guidance to influencers and other digital marketers.

The AANA updated its Code of Ethics in March 2017 to include a section on distinguishable advertising.[9] The thrust of this section is that advertising content should be clearly identified as advertising and/or marketing, and should clearly be distinguished from other forms of content.

As the ACCC has pointed out more recently, this is particularly important in a digital environment where it may be difficult to tell the difference between 'impartial' user-generated content including product reviews on the one hand, and advertising, including social media posts which an influencer is paid to publish, on the other.

Through Ad Standards, the AANA has also published guidance on social media advertising more broadly.[10] AIMCO has also released a Code of Practice targeted at influencers, which contains a section on best practice relating to advertising disclosure.[11]

Your digital marketing practices

For FMCG businesses, the digital marketing industry and influencers, there is no time like the present to make sure you comply with applicable laws relating to your digital marketing practices. Australian regulators are becoming more sophisticated and adept at identifying non-compliance online, and action against parties who cross the line can be swift.

What's more, participants in a regulated industry, including the financial products and services or therapeutic goods industries, should make sure they know what laws apply to their advertising and promotional activities, and also remember that the ACL applies to any marketing activities as an additional overlay.

Guidance materials released by regulators and industry associations are a useful way of ensuring that you comply with applicable legal requirements. However, we recommend that a business should create its own internal marketing guide which reflects the particular context in which the business operates and its unique approach to digital marketing, with clear rules for compliance.

Don't get swept up in regulatory or enforcement action – as the guidance materials say, when in doubt, seek legal advice.

1. See: https://www.accc.gov.au/media-release/accc-social-media-sweep-targets-influencers.
2. See ACCC Chair's speech; see also: https://www.abc.net.au/news/2023-01-20/social-media-influencers-on-notice-as-accc-targets-hidden-ads/101872506 and the ACCC's Facebook post.
3. Australian Consumer Law, Section 18.
4. See, for example: https://www.accc.gov.au/business/advertising-and-promotions/social-media-promotions.
5. See: https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-371mr-federal-court-makes-findings-against-social-media-finfluencer-tyson-scholz/.
6. See: https://asic.gov.au/regulatory-resources/financial-services/giving-financial-product-advice/discussing-financial-products-and-services-online/.
7. See: https://www.legislation.gov.au/Series/F2021L01661.
8. See: https://www.tga.gov.au/how-we-regulate/advertising/how-advertise/advertising-guidance/resources/resource/guidance/guidance-applying-advertising-code-rules.
9. See: https://aana.com.au/self-regulation/codes-guidelines/code-of-ethics/.
10. See: https://adstandards.com.au/issues/social-media-advertising.
11. See: https://www.aimco.org.au/best-practice.

Digital platforms offering consumer goods bracing for change – What you need to know

By Sinead Lynch, Partner and Freya vom Bauer, Associate

What are digital platforms?

Digital platforms are online spaces for the exchange of information, goods and services between the producers, their customers and the larger community (Digital Platforms). Digital Platforms range from app stores like Google Play Store or Apple's App Store, social media platforms like Instagram, e-commerce marketplaces like Alibaba, Kogan and Airbnb and discussion threads like Reddit. While the Digital Platforms market is dominated by major global players like Google, Meta and Apple, the move to expand from e-commerce sites to a more immersive digital marketplace is also recognisable amongst larger businesses, who have tended to capitalise on smaller businesses reselling on their platforms.

ACCC's Digital Platform Services Inquiry

In November 2022, the Australian Competition and Consumer Commission (**ACCC**) released its fifth report of the Digital Platform Services Inquiry (**Report**). The much anticipated report deals with the competition and consumer issues raised in the Digital Platform Services Inquiry, the Digital Advertising Services Inquiry (2020-2021) and the Digital Platform Inquiry (2017-2019).

While the Report clearly acknowledges the value that Digital Platforms bring to consumers and businesses, the focus of this Report is on the significant consumer and competition harm associated with the use of digital platforms and the protections needed to prevent them. The approach suggested by the ACCC is multifaceted – it builds on the existing consumer protections and competition laws, but further pushes for industry specific codes and safeguards to address the complexity of the Digital Platforms market.

Expected changes for digital platforms

The ACCC makes five key proposals - as headlined in brief below:

1. **Fake reviews –** Consumers should be able to easily report fake reviews and Digital Platforms must respond to these reports. Digital Platforms should further be required to disclose what measures they take to verify reviews.
2. **Minimum standard for dispute resolution –** At a minimum, users should have the option to speak to a human representative and be given the ability to escalate disputes to an independent ombudsman.
3. **Unfair contract terms and penalties –** Unfair trading practices that are not currently covered by Australian Consumer Law (**ACL**) should be banned (e.g. subscription traps). The proposal also recommends the strengthening of unfair contract term laws, including financial penalties for breaches. Recent legislative changes discussed here confirm the new road ahead for businesses who seek to include unfair contract terms in standard form contracts.

4. **Scam protections –** Users should be able to report a scam or harmful app and Digital Platforms should be required to action reports. Further, Digital Platforms should verify users like advertisers and merchants to prevent scams. The management and regulation of scams and the mitigation of losses arising, have been a material focus for the ACCC and other regulators (e.g. APRA) this year alone. We will provide more detail on this issue in future publications of FMCG Express.
5. **Mandatory codes of conduct –** The Report proposes to introduce legally binding codes of conduct for designated Digital Platforms (applied service-by-service, e.g. to app store providers) to combat industry intrinsic anti-competitive behaviour, such as self-preferencing and exclusive pre-installation agreements.

From a regulatory perspective, the ACCC is clearly seeking to align the Digital Platform services industry with other Australian industries and is renewing its push for an economy wide ban on unfair trade practices.

What does this mean for Digital Platform businesses operating in Australia?

While the proposed laws should not come as a surprise for the global players, Australian businesses operating in the industry may also be impacted (either directly or by way of a trickledown effect), and should take note of the changes.

Digital Platform businesses, or those considering expanding into the Digital Platform space, should take note of the following:

- Rules relating to Digital Platforms are in flux and tougher, industry specific rules are expected – businesses should monitor this space closely.
- Combatting fake reviews, offering appropriate dispute resolution processes and scam protections might become mandatory for some designated Digital Platforms, but should be adopted as best practice by all e-commerce providers (a trickledown effect is expected).
- The Digital Platforms Services Inquiry, together with recent changes in the Unfair Contracts Regime under the ACL, confirms that the regulatory tide is turning on what are considered unfair business practices (such as self-preferencing and unfair dealings with business customers) and a review of all aspects of user interactions, business conduct and service contracts in Australia should be on the top of every organisations' 'To-Do Right Now' list.

Stop press! Attorney General proposes sweeping amendments to the Privacy Act

By Antoine Pace, Partner and Sinead Lynch, Partner

On 16 February 2023, the Commonwealth Attorney General's Department issued its Report on its review of the *Privacy Act 1988* (Cth) (**Act**), proposing a number of significant reforms to the Act (**Reforms**). This Final Report completes the Attorney General's review and was the outcome of extensive consultation and research by the Department. The Review had been instigated following the Australian Competition and Consumer Commission's 2019 Digital Platforms Inquiry - final report, which made several recommendations regarding privacy.

As part of the Review, the Attorney General considered whether or not the Act and its enforcement mechanisms and powers are effective in a modern digital world. Gadens was one of the contributors to the Review and our prior submissions, including client survey results, have been quoted throughout the Final Report.

The proposed Reforms are very likely to affect all businesses that interact in any way with consumers or other individuals and handles personal information. Among the most significant changes being proposed are:

- expanded definition of personal information, including new rules on de-identifiable information;
- removal or significant scaling back of the exemption for small businesses, and a reduced application for employee records;
- substantive requirements concerning the quality and form of privacy collection notices and consents;
- new GDPR-aligned terminology, differentiating between the different roles that businesses play when handling personal information e.g. controller and processor concepts;
- new transparency obligations for online advertising and marketing;
- the introduction of a requirement for privacy impact assessments to be undertaken for certain uses of personal information, including as it affects vulnerable individuals, including children;
- introduction of extensive new rights for individuals, including a right of direct action to claim compensation for a privacy breach (being considered alongside a new statutory tort of privacy), a right to require erasure of certain personal information, and new transparency rights on automated decision making processes; and
- material changes to the privacy breach penalty regime (in addition to the maximum penalties introduced in December 2022), and an enhanced enforcement regime.

The next stage in the process will involve the Attorney General's Department undertaking further industry and wider market consultation – with final submissions made to the Department by 31 March 2023.

Once completed, amendments to the Act will be then drafted and put to Parliament for approval. The legislative drafting process would determine the precise wording of any amendments to the Act, and it is anticipated that we will have sight of the Government's proposed legislation as early as the last quarter of this year.

Gadens will be making further submissions as part of this final stage. We will also be undertaking a program of e-updates, blogs and articles to assist our clients prepare for the coming changes. However, if you wish to receive more detailed and tailored advice, or would like to learn more about our submission, please don't hesitate to contact our Technology and Data team: Antoine Pace, Dudley Kneller and Sinead Lynch.

Gadens and industry leaders push to harmonise trade promotions laws

By David Smith, Partner

When companies run trade promotion 'games of chance' to drive sales of their products, they have to deal with a complicated patchwork of state and territory laws. Gadens, together with other leading players in the trade promotions industry, Pilgrim Communications and VCG PromoRisk, is pushing for harmonisation of these laws. We invite you to join us!

The 'patchwork' of laws governing trade promotions imposes unnecessary complexity

'Buy a pack of our washing powder, find the code printed inside the pack, go online and enter your contact details and the code – and you could win a share in $1 million!'

This is a typical 'game of chance' trade promotion lottery structure.

This type of promotion is governed by different, complex laws in each of the eight states and mainland territories of Australia. The complexity poses a significant disincentive for organisations wishing to run promotions.

There is a strong public interest in the regulation of trade promotions, so that promotions are run fairly and the promised prizes are actually provided to winners. However we can't see any good reason why the requirements in each state and territory should differ as much as they do.

That's why we are planning to write to each state and territory urging them to harmonise and simplify their trade promotions laws and regulatory processes to help reduce red tape for businesses.

This initiative is being led by Gadens and industry leaders Pilgrim Communications and VCG PromoRisk. Pilgrim Communications is a marketing consultancy that builds trade promotion facilitation software and manages data capture compliance processes. VCG PromoRisk is Australia's leading provider of innovative promotional risk management, helping to amplify promotions and protect marketing budgets.

Examples of inconsistency

It's easy to identify examples of current inconsistencies in the legal requirements in different Australian jurisdictions. To name just a few:

1. Some states/territories require a company to obtain a permit or authority before it can run a 'game of chance' trade promotion. Others do not.
2. In the states/territories that issue permits or authorities, the triggers for the requirement to obtain a permit or authority differ. For example, the prize pool threshold for requiring an authority in NSW is $10,000 but in the neighbouring ACT, the prize pool threshold for requiring a permit is only $3,000.
3. There are different requirements in each state/territory for mandatory information to be included in the advertising materials for trade promotions.
4. The requirements for keeping records in relation to trade promotions differ between the states/territories.
5. Different states/territories impose different restrictions on certain types of prizes, for example alcohol prizes.
6. Some states/territories require publication of winners' details, for example on a website – but the requirements differ.
7. In some states, certain prize draws require scrutiny by an independent scrutineer. And among the states that require this, the detailed requirements are different.
8. Electronic systems for drawing winners only require approval in Queensland.

We could easily list many more examples.

While there may be some justification for limited differences based on different social circumstances and government policy positions in different parts of Australia (for example in relation to alcohol prizes), most of the above in our view simply reflects many years of failure to seek opportunities to harmonise the requirements.

The complicated patchwork of trade promotion laws sits within a broader compliance context where a company conducting a trade promotion must also comply with various other laws. These include the Australian Consumer Law, the *Privacy Act 1988* (Cth) and the *Spam Act 2003* (Cth).

And more strands will be woven into the regulatory web as privacy law reforms are rolled out. The Commonwealth government has recently issued a report setting out its proposals to implement a raft of privacy law changes. Some of these may have significant implications for promoters and their service providers, for example it is proposed that individuals will have:

- a right to find out how their personal information has been used by an organisation;
- a right to object to the collection, use or disclosure of their personal information; and
- a right of erasure of their personal information. In many cases the organisation that holds the information will also be required to notify a third party (from which the organisation collected the information, or to which the organisation has disclosed the information) of an erasure request.

Impact of the current complexity

The complexity of the current regulatory landscape means that organisations have to spend undue amounts of time (or pay fees to lawyers!) to understand the requirements that apply to their promotions. This generates economic inefficiencies and unnecessary red tape and requires marketing teams to be across complex legal issues.

Harmonised laws would be easier for consumers to understand, and would also be easier for companies to comply with, so legal compliance would likely increase which is in everyone's interest.

Consumer confidence in promotions would increase, and we have no doubt that companies would conduct more promotions if the requirements were harmonised and simplified across Australia. We think this would promote competition amongst companies and benefit consumers. It could also benefit the state and territory governments, as harmonised laws should be easier to administer and the states/territories that charge permit/authority fees could generate additional revenue.

There is also scope to improve and update the regulatory regime across Australia. For example, it would assist consumers if harmonised trade promotion laws required promotion terms and conditions to use a consistent form of wording to state the odds of winning prizes.

We call for an industry forum to discuss solutions!

We will be writing an open letter to each state and territory urging them to take all practical steps to promote the harmonisation of trade promotions laws and regulatory processes, across Australia.

We plan to write to the regulators in each state and territory giving examples of the inconsistencies and encouraging them to work together to harmonise and simplify the requirements. We will make the case that harmonised laws will benefit all stakeholders.

We will call for a forum to be held, at which interested industry stakeholders (such as promoters) can meet with regulators to discuss the steps forward.

Will you join us?

We are planning to write our letter on behalf of Gadens, Pilgrim Communications, VCG PromoRisk and numerous other participants in the trade promotions sector, for example promoters, marketing and creative agencies, and 'insurers' of promotions. We expect that our letter will carry the names of a large number of organisations.

If your organisation would like to lend its weight to this initiative, or you have any questions about it, please contact the writer at david.smith@gadens.com before 21 April 2023. We also plan to reach out directly to our clients and contacts to invite them to participate. Pilgrim Communications and VCG PromoRisk will do likewise.

We hope that our grass-roots campaign for reform will lead to changes that make life easier for everyone involved in conducting trade promotions!

Secure Jobs, Better Pay Act – How its changes to the *Fair Work Act 2009* (Cth) will impact your business

By Siobhan Mulcahy, Partner, Diana Diaz, Special Counsel, and Sarah Saliba, Associate

On 6 December 2022, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Act) received royal assent after passing both houses of parliament.

The Act provides for the most widespread industrial relations reform since the introduction of the *Fair Work Act 2009* (Cth) (FW Act) and will significantly impact how businesses structure and manage their workforce. These reforms will be rolled out in stages over a 12 month period.

In this update, we highlight the key changes and what they mean for organisations in the FMCG sector.

Key changes relevant to the FMCG Sector

Pay secrecy

From 7 December 2022, the FW Act includes a prohibition on pay secrecy. The amendments give both current and future employees the workplace right to share or not share information about their pay, as well as employment terms and conditions that would be needed to work out their pay, such as their hours of work. The amendments also allow employees to ask other employees about their pay or about their employment terms and conditions that would be needed to work out their pay.

Employers who take adverse action against an employee because of reasons that include the employee's exercise of their new workplace rights will contravene the FW Act's general protections provisions.

From 7 June 2023, pay secrecy terms will be in breach of the general protocols in employment contracts or other written agreements and will attract penalties under the FW Act.

Prohibition on sexual harassment in the workplace

On 6 March 2023, amendments to the FW Act came into effect prohibiting sexual harassment in connection with work, including in the workplace. The amendments increase protections against sexual harassment and provide a new way for workers to deal with sexual harassment complaints. Workers will now have the choice to pursue their dispute through the Fair Work Commission (**FWC**), the Australian Human Rights Commission or applicable State and Territory anti-discrimination processes.

The FWC will also have greater powers to deal with disputes about sexual harassment, including through conciliation and to arbitrate disputes by consent. A person who experiences sexual harassment in connection with work will be able to pursue civil proceedings if the FWC cannot resolve their dispute.

Enterprise agreements

From 7 December 2022 there are a number of key changes to enterprise bargaining that employers need to be aware of including:

1. An amendment to provide that, on application by an employer, employee or employee organisation covered by the enterprise agreement, the FWC must terminate an enterprise agreement that has passed its nominated expiry date, if it is satisfied that it is appropriate in all the circumstances and the relevant criteria have been met.
2. The FWC has the power to correct errors in enterprise agreements on its own initiative or on application by an employer, employee or union covered by the enterprise agreement.
3. The FWC has the power to validate a decision to approve an agreement or a variation to an enterprise agreement if the wrong version was mistakenly submitted for approval (by the FWC's own initiative or on application).
4. There is no longer a requirement for employee bargaining representatives, such as a union, to obtain a majority support determination from the FWC to initiate bargaining in certain circumstances.

There will be additional changes from 6 June 2023 including that some of the more prescriptive pre-approval requirements for enterprise agreements will be removed.

Better off overall test (BOOT)

From 6 June 2023, the better off overall test will be simplified and will apply to any enterprise agreement made on or after the commencement date. Some of the amendments will include:

1. Clarifying that the BOOT is a global assessment to ensure each employee is better off overall, and is not a line-by-line comparison between the proposed agreement and relevant modern award.
2. Requiring the FWC to only consider patterns or kinds of work, or types of employment that are reasonably foreseeable, having regard to the nature of the enterprise/s to which the enterprise agreement relates.
3. Enabling the FWC to amend an enterprise agreement where this is necessary to address a concern that it does not otherwise meet the BOOT.
4. Enabling an in-term enterprise agreement to be reassessed against the BOOT if relevant circumstances were not properly considered during the approval process, and for the enterprise agreement to be amended (including with retrospective effect) if necessary to address a concern that it does not pass the BOOT.

Multi-employer enterprise bargaining

From 6 June 2023, there will be three streams allowing multi-employer enterprise agreements.

Cooperative workplaces bargaining stream

The existing multi-employer bargaining stream will be renamed the 'Cooperative Workplaces Bargaining Stream' to provide for a voluntary form of bargaining. Under this stream, conciliation and arbitration of bargaining disputes by the FWC can only occur with the consent of all parties.

Supported bargaining stream

The FW Act will be amended to reform the existing low-paid bargaining stream which has been renamed the 'supported bargaining stream'.

Under the amendments, the FWC is required to make a Supported Bargaining Authorisation if it is satisfied that it is appropriate for the relevant employers and employees to bargain together when considering a number of factors which include:

1. the prevailing pay and conditions in the relevant industry/ sector, including whether low rates of pay prevail in the industry or sector; and
2. whether the employers have 'clearly identifiable common interests' (which may include geographic location, the nature of the enterprises to which the agreement will relate, the terms and conditions of employment in those enterprises, and whether they are substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory).

Single interest authorisation stream

The FW Act will be amended to remove barriers to the existing Single Interest Bargaining Stream.

The amendments provide that small businesses (with fewer than 20 employees) cannot be required to bargain in this stream and can only access this stream by consent.

Under this stream (which may include involuntary participation), a single interest employer authorisation can be made when certain criteria are met, including but not limited to:

1. the employers are related franchisees or have 'clearly identifiable common interests' (including reasonably comparable business activities, their geographical location, whether they are subject to a common regulatory regime and the nature of the enterprises to which the agreement relates and the terms and conditions of employment in those enterprises); and
2. must not be contrary to the public interest for common interest employers to bargain together.

Other key points regarding multi-employer bargaining

Employers and employees undertaking defined types of general building and construction work are excluded from multi-employer enterprise bargaining streams subject to certain carve-outs.

Protected industrial action will be available in the Supported Bargaining and Single Interest Authorisation Streams with additional measures, including mandatory conciliation and a requirement for 120 hours' notice of taking the protected industrial action. Participants in these streams also have access to the new intractable bargaining process, which allows parties to seek conciliation and arbitration in certain circumstances.

Can an employer avoid multi-employer enterprise bargaining?

The best ways to prevent involuntarily being brought into the multi-enterprise agreement stream are:

- having an in-term enterprise agreement covering the organisation and its employees; or
- having a written agreement with a union to negotiate a single-enterprise enterprise agreement of substantially the same scope; or
- if an employer is less than nine months post the nominal expiry date of the previous enterprise agreement and the organisation is bargaining in good faith with a history of effective bargaining.

One of the key risks arising from these charges is that employers may be 'roped in' after an enterprise agreement is made. That is, if an employer does not have an enterprise agreement that covers its workforce or it has an expired enterprise agreement and is not protected (as set out above), the employer can be roped-in to an existing multi-employer enterprise agreement.

Intractable bargaining declarations

From 6 June 2023, the FWC will be able to make an intractable bargaining declaration on application by a single bargaining representative. The new intractable bargaining provisions will not apply to bargaining for greenfield agreements or bargaining in the Cooperative Workplaces Bargaining Stream.

If an intractable bargaining declaration is made, the FWC will consider whether to provide the parties with a further period to negotiate, that is, a post-declaration negotiation period. Following a post-declaration negotiation period, the FWC may make an intractable bargaining workplace determination to resolve any matters that have not been agreed by the parties.

'Zombie agreements'

From 7 December 2023, all agreements made before the commencement of the FW Act that are still in operation will automatically 'sunset' (terminate). These agreements, commonly known as 'zombie agreements', include:

1. agreement-based transitional instruments;
2. Division 2B state employment agreements; and
3. enterprise agreements made between 1 July 2009 and 31 December 2009.

Parties to a zombie agreement can apply to the FWC to extend the sunset date for the agreement by up to four years at a time. Applications need to meet certain conditions, for example, that bargaining is occurring for a proposed replacement agreement or employees would be better off under the zombie agreement.

Before 7 June 2023, employers who have employees covered by these agreements need to let those employees know, in writing, that the agreement will be terminating on 7 December 2023 unless an application for extension is made to the FWC.

Flexible work requests and unpaid parental leave

From 6 June 2023 the right to request flexible working arrangements will also extend to:

1. employees, or a member of their immediate family or household, experiencing family and domestic violence; and
2. employees who are pregnant.

The FWC will also be empowered to deal with a dispute about a request for an extension of unpaid parental leave.

There will also be more fulsome requirements that an employer must follow when responding to these requests. The threshold of 'reasonable business grounds' in which an employer can refuse a request has not changed But the FWC will also be able to hear and make orders about disputes about flexible working arrangement requests and requests for an extension to unpaid parental leave if the parties cannot resolve the dispute at the workplace level. The FWC will be able to resolve a dispute by conciliation, mediation or mandatory arbitration. Unless there are exceptional circumstances, the FWC must first attempt to resolve the dispute using non-binding methods, such as conciliation or mediation, before it can arbitrate a dispute.

Fixed and 'maximum' term contracts

From 6 December 2023, subject to a number of limited exceptions, employers can no longer employ an employee on a fixed or maximum term contract that:

1. is for two or more years (including extensions); or
2. may be extended more than once; or
3. is a new contract that is for the same or a substantially similar role as previous contracts, with substantial continuity of the employment relationship between the end of the previous contract and the new contract and, either:
   - the total period of the contracts is two or more years;
   - the new contract can be renewed or extended; or
   - a previous contract was extended.

Employers will be prohibited from taking certain actions to avoid the new restrictions from applying. For example, employers will not be able to delay re-engaging an employee for a period, engage someone else instead to do the same or substantially similar role.

From 6 December 2023, employers will also have to give employees that they are engaging on new fixed term contracts a Fixed Term Contract Information Statement.

What do the changes mean for your organisation?

Employers are strongly encouraged to review template employment contracts as soon as possible to:

1. remove any pay secrecy provisions prior to 7 June 2023; and
2. amend any fixed-term employment contracts to ensure compliance with the new provisions.

While changes to fixed and maximum term contracts do not come into effect until the end of the year, employers should start considering current and future hiring arrangements if they currently rely on these forms of temporary contracts.

Employers should also review existing policies and procedures and conduct workforce training to ensure compliance with the amendments to the FW Act for requests for flexible working arrangements, requests for extending unpaid parental leave and sexual harassment in the workplace.

With respect to enterprise bargaining, employers should consider:

1. Can you commence bargaining and finalise a new single-employer enterprise agreement prior to 6 June 2023 to be protected from being included in a multi-employer enterprise agreement?
2. Their potential exposure to multi-employer bargaining or roping in applications.
3. The business' bargaining strategy, preferably well in advance of the next bargaining round, including determining areas of differentiation between other companies in the same industry.
4. Preparing for bargaining and industrial action mitigation strategies.

Prior to 7 June 2023, employers should consider the extent to which any 'zombie agreements' exist and the impact that termination will have on the workforce (including whether written notice is required to be provided to employees). If a zombie agreement exists, employers must notify employees and decide whether to apply for an extension to the sunset period.

From a workplace culture perspective, the changes to the pay secrecy provisions may also be an opportunity to consider whether employee remuneration reviews are required with a particular view to ensuring pay equity between the genders.

Please contact us should you require any advice or assistance with any of the recommendations above or if you would like further information on the training packages we offer with respect to workplace policies and procedures.

The continuum of obligations: Best and reasonable endeavours clauses

By Breanna Davies, Partner, Alistair MacLennan, Lawyer and Joshua Ranalletta, Paralegal

There are often times in commercial relationships where, while a party intends on fulfilling its obligations under the relevant agreement, performance cannot be absolutely guaranteed. It is in these circumstances that we most commonly see absolute or unconditional obligations replaced with endeavours clauses that are expressed to require a party to use their 'best' or 'reasonable' efforts to fulfil their side of the bargain.

However, parties commonly do not realise that an obligation to use 'best' or 'reasonable' endeavours goes far beyond merely attempting compliance with a contract.

This article explores best and reasonable endeavours clauses and provides some key takeaways for businesses when drafting these type of provisions and also what is required to perform the obligations to such standard to risk being in breach of the relevant contractual provision.

What do they mean?

'Best' endeavours clauses have been taken to require an obligor to do what is reasonable in the circumstances, having regard to their nature, capacity, qualifications and responsibilities' to fulfil a contractual obligation.

Where 'reasonable' endeavours is instead specified, the Courts have said a party will be taken to have fulfilled their obligations where they have exercised a fair, proper and due degree of care and ability as might be expected from an ordinarily prudent person with the same knowledge and experience as the party under the particular circumstances.

Thankfully, the Courts in Australia have largely done away with the subjectivity inherent within the differently worded clauses, with the adopted view being that 'best' and 'reasonable' endeavours clauses impose substantially similar contractual obligations (see *Electricity Generation Corp v Woodside Energy* (2014) 306 ALR 25 at [40]).

Example - *Transfield v Arlo*

What the actual scope of those contractual obligations are, however, is fluid, and depends on what is considered reasonable in the particular circumstances having regard to the context of other provisions of the agreement within which they find themselves in. This is a challenging assessment to make.

This was explored in the High Court case of *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83 (***Transfield v Arlo***), where the Court considered the scope of a 'best endeavours' clause under an exclusive license agreement for the fabrication, installation, sale and promotion of steel electricity transmission line poles. The clause stated (emphasis added):

> **'7. The licensee covenants during the period of the PTL Licence at all times to use its best endeavours in and towards the design fabrication installation and *selling* of the arlo ptl pole throughout the licensed territory and to energetically *promote* and develop the greatest possible market for the arlo ptl pole …'**

In this case The High Court said that, as the license agreement was an exclusive arrangement, for the licensee to properly discharge their obligations to use best endeavours, they were impliedly prohibited from engaging in conduct that would prejudice the sale of the licensor's products. Examining the licensee's conduct in light of that interpretation, the High Court determined that by using and selling its own product, which was a direct competitor of the licensor's, the licensee had failed to exercise their best endeavours, and was therefore in breach of the license agreement.

Risks and Mitigation

In the event of a dispute arising, the Court will be required to, as it did in *Transfield v Arlo*, form a view on how strictly along the continuum of obligations a best endeavours clause should be interpreted. In circumstances where an endeavours clause is overly subjective and poorly defined, parties run the risk of the Court unfavourably interpreting the clause and the scope of the attaching obligation and may suffer the added detriment of being required to expend significant time and monies on Court proceedings that could be otherwise put to use.

Some risk mitigation strategies may include:

1. where possible, avoiding the use of best or reasonable endeavours clauses in drafting contracts and instead opt for the use of absolute terms such as 'will' and 'must'; however
2. if including best or reasonable endeavours clauses, qualify what it means to use best or reasonable endeavours to the extent possible by including reference to objective criteria and/or temporal limitations on performance so a party knows what it must do and by when in order to exhaust their obligations; and
3. prior to entry into contract, give significant thought and consideration to whether the business' existing operations will conflict with its ability to fulfil its new obligations under the endeavours clause, taking into account the broader context that the business is operating in.

ACCC remains on the look out for competitors acting improperly

By Adam Walker, Special Counsel

Businesses should remain vigilant to ensure that their dealings with their competitors – whether current or potential – are lawful. With a recent escalation in the statutory maximum for financial penalties, increased public activity by the Australian Competition and Consumer Commission (ACCC), and even those who attempt to engage in prohibited anti-competitive conduct being potentially exposed to enforcement action, businesses and their senior personnel have additional cause to reflect on their policies and processes for interacting with competitors to ensure compliance.

Cartel conduct

For over a decade, competitors, or potential competitors, that engage in cartel conduct, or attempt to do so, have been exposed to the potential of not only significant financial penalties but also the risk of criminal proceedings. Broadly speaking, where there is a contract, arrangement or understanding between parties where at least two of them are likely to be (or would be but for the contract, arrangement or understanding), in competition in relation to the supply, re-supply or acquisition of the relevant goods or services, the entity or person will be at risk of contravening the cartel conduct prohibitions of the *Competition and Consumer Act 2010* (Cth) (**the Act**) where that entity or person makes a contract, arrangement or understanding that includes a provision, or otherwise seeks to give effect to such provision, that, in general terms:

- has the purpose, effect or likely effect of, directly or indirectly, fixing controlling or maintaining prices, discounts, allowances, rebates or credit in relation to relevant goods or services; or
- has the purpose of, directly or indirectly:
  - preventing, restricting or limiting the production, capacity, supply or acquisition of relevant goods or services;
  - allocating between any two of them, the persons, classes of persons, or geographical areas in which goods or services are to be acquired or supplied; or
  - rigging responses to a request for bids (e.g. a request for tender).[1]

Concerted practices

A less prominent, but potentially explosive, provision of the Act is the prohibition against engaging with one or more persons in a 'concerted practice' that has the purpose, or would have the effect or likely effect, of substantially lessening competition.[2]

While 'concerted practice' is not defined, and the prohibition, on its face, applies to any person – not just as to matters between at least two competitors – examples provided by the ACCC, in its published guidance, tend to suggest its focus is on 'cooperative behaviour or communication' that substitutes, or would be likely to substitute that cooperation in place of the uncertainty of competition.

Sanctions

Since November 2022, the maximum financial penalty that can be ordered against a body corporate in a successful action by the ACCC is the greater of:

- $50 million;
- three times the value of the benefit obtained; and
- if the court cannot determine the value of the benefit obtained, 30% of the company's (and related bodies corporate's) 'adjusted turnover' during the 'breach turnover period'.

For individuals and those who may not otherwise be a body corporate, the maximum penalty is now $2.5 million.

More information about these penalties can be found in our Legal Insights published at the time.

Furthermore, in the case of cartel conduct, the matter can instead be pursued as a criminal action. While the penalty for the body corporate is the same as above, an individual found guilty of criminal cartel conduct (for example, for being knowingly involved in that conduct) could potentially face a maximum penalty of:

- 10 years imprisonment; and/or
- a fine of up to $550,000.

Recent events and areas for attention

While there are other aspects of the Act that could be relevant to interactions between competitors, there are two areas that have been generating recent attention. Firstly, the ACCC has been increasingly visible in its pursuit of cartel conduct, which is an enduring enforcement priority of the ACCC, recently instituting a number of matters in the Federal Court. In addition, the ACCC announced in November the acceptance of an enforceable undertaking in response to its concerns that a turf breeder had engaged in a concerted practice.[3]

For businesses, aside from what may seem to be the more obvious conduct to avoid, there are a number of examples of other dealings that, if approached improperly, could put a business and its personnel at risk of contravening these provisions or, at the very least, attracting the attention of the ACCC. Such conduct includes:

- A business acting as, or being used as, a 'hub' to suppress or hinder price competition amongst its 'spokes' of suppliers or resellers.
- A business becoming aware of competitively sensitive information of a competitor, even where learnt through 'casual' circumstances (such as personnel sharing information in 'out of hours' personal events).
- Industry and professional associations, and similar groups and forums (such as social media pages used by competitors), being used as a means to undermine the ordinary competitive uncertainty that would otherwise be experienced between two or more of its members or participants. Businesses should be particularly mindful of communications about pricing and potential pricing.
- Competitors entering into arrangements with each other, sometimes in the form of sub-contracting or distribution contracts that do not fit within the bounds of the statutory exceptions.
- Competitors pre-empting a lawful merger or acquisition between them by engaging in anti-competitive conduct, such as directing potential customers from one to the other, prior to settlement or, as applicable, awaiting 'clearance' from the ACCC to the transaction.

Cartel conduct remains an 'enduring priority' for the ACCC. In light of the significant increase in the maximum penalties, attempted acts of contravention also being prohibited, and persons involved in a contravention also being potentially exposed, businesses should be vigilant to ensure that dealings with its competitors are lawful.

If you have any concerns about whether dealings with your actual or potential competitors may be problematic, or require assistance about ensuring appropriate protocols and education are in place internally, please contact us to canvass your concerns and/or options.

1. *Competition and Consumer Act 2010*, sections 45AF, 45AG, 45AJ and 45AK.
2. *Competition and Consumer Act 2010*, section 45(1)(c).
3. https://www.accc.gov.au/media-release/turf-breeder-to-address-concerted-practices-concerns

Recent developments in the use of AI and virtual retail purchasing behaviours

By Sinead Lynch, Partner and Freya vom Bauer, Associate

Artificial intelligence in e-commerce

It's no surprise to many that the mainstream use of artificial intelligence technology is on the rise and is showing no signs of decline. The retail sector is no exception. Catalysed by the long-tail impacts of COVID-19 on shopping habits and consumers' expectations, machine learning, automation and deep learning tools continue to change the way and the manner in which we as consumers interact online.

> **Stanford University defines Artificial Intelligence broadly as 'the science of getting computers to act without being explicitly programmed' – in the retail space, this involves utilising complex algorithms to analyse large data sets of consumer activity, identifying trends, habits and behaviours without the need for any human intervention along the way. The system is also able to learn from its mistakes and improve over time.**

The ability to enhance customer experience and boost sales offered by these new technologies is necessary to meet what Accenture calls a 'crisis of relevance'[1] between retailers and consumers - as retailers clamber across each other to offer the next best shopping experience for trend-savvy customers whose purchasing habits change at a rate that traditional retailers are struggling to keep up with.

Cost reduction, while improving efficiency, accuracy, and customer experience, is also the hallmark of successful AI implementation for the retail industry. Some of the more popular examples include those virtual shopping assistants, often in the form of chat-bots or other virtual support that we've all come across who help us to locate a product, or suggest products or services to us as we trawl through a site; or those that remind us of an 'abandoned shopping cart' in a bid to incentivise us to complete the infallible product acquisition. With improved functionality and appearance, these virtual assistants are becoming more appealing to customers and taking over the most time-consuming and mundane tasks usually performed by an in-person assistant.

AI-driven analytics can also be used to identify customer trends and preferences, allowing retailers to tailor offerings to meet the personalised needs of customers. Other AI powered tools operate on the back-end of an e-commerce site (e.g. by ranking products relevant to individuals higher up their preference list). The benefits of AI-driven automation are also immeasurable. Retailers are seeking to get better organized and more productive with AI tools so that we can focus on more strategic tasks without sacrificing operational excellence; they are seeking to streamline supply chain operations (a necessary output from COVID -9 downturns) supporting the delivery of products and services on time and in the right quantities. IBM claims that its Watson Assistant is now 79% accurate at detecting a customer's intent.[2]

Augmented Reality and Virtual Reality commerce – the future of e-commerce?

Combined with an increase in AI-powered tools and automation, the 'new world' of Augmented Reality (**AR**) and Virtual Reality (**VR**) products promise to elevate the convenience of shopping from home to a whole new level. Although both AR and VR shopping tools are relatively in their infancy in the mainstream, the market demands for both technologies are huge - exacerbated by the impacts of COVID-19 lock-downs and the convenience of remote working and shopping in real time.

So what exactly are AR and VR shopping services? And is there really a difference? Yes there is!

Although both AR and VR shopping tools allow for real time product acquisition and customisation, in the AR shopping experience, customers virtually try-on and test individual or identified products via existing platforms, such as the retailer's website, device app or through social media platforms such as Instagram or Snapchat. Have you ever tried on a pair of glasses from an online retailer through a smartphone enabled live image of yourself (virtual try-on)? Or projected a new couch into your living room to see how it fits in your space (virtual showroom)? These are also good examples of current at-home AR offerings. AR can also be used in the bricks-and-mortar store by allowing customers to 'try on' via a camera enabled terminal (e.g. for make-up) in-store.

VR shopping is a more immersive shopping experience. Customers can enjoy the retail experience of an online store as if they were walking through the bricks-and-mortar store by using smart VR glasses which provides them with a 360 degree virtual shopping environment. The use of VR in mainstream retail is steadily increasing with a recent PwC Global Consumer Insights Survey (June 2022) confirming that one-third of their respondents surveyed had used VR within the past six months; this wave of popularity with VR is only set to increase.[3]

Both AR and VR expand customer confidence, bridge the gap between in-store and e-commerce, and thereby increasing the likeliness of consumer impulse buying and hopefully minimising the need for product returns. Advertisements and enhanced image recognition features also ramp up traditional product displays.

But what about consequences and risk issues for retailers and consumers alike who engage in this virtual world?

Legal Issues

At this point in time, there are no express or specific laws in Australia applicable to either the use of virtual technology or of artificial intelligence. Whilst internationally we are seeing a major shift in this area, with proposals to regulate AI in the UK,[4] combined with the AI Act[5] recently introduced in the EU, Australia is still viewing from the sidelines as it undertakes its own reviews and taskforces into automated decision-making and AI regulation.

However, there are a range of existing laws and regulations that do apply to shape the use and implementation of these new technologies, from privacy and data security to consumer laws, financial services regulatory, corporate laws, as well as IP, competition and anti-discrimination laws.

Here are just some of the most likely legal hurdles to look out for:

- **Supply Chain Risks – use of third party tools –** AI and AR/VR tools are often purchased 'off the shelf' from third party retailers, and then integrated into an e-commerce site or app. The terms and conditions applicable to these tools are generally not reviewed in depth (particularly where procured from an offshore provider), and in many cases do not account for jurisdiction specific laws (such as specific privacy or consumer laws) or may allow for the third party retailer to use customer data in a way that the business is not aware - or supportive - of. Businesses acquiring such products and tools should ensure that accurate technical due diligence (where feasible) as well as contractual due diligence are carried out on each proposed tool (and their associated terms) carefully to identify legal risk issues in implementing and use.
- **Privacy laws not equipped for AI and VR/AR –** Australian privacy laws, including the Privacy Act 1988 (Cth), do not specifically regulate the use of AI or VR/AR tools. Broad principles are therefore applied to AI specific issues that may challenge businesses. Further, if products are sold from an Australian website or to Australian customers (or a business is otherwise carrying on business in Australia), retailers must comply with Australian privacy laws and should consider carefully to what extent personal information is collected, stored and used and/or disclosed. Privacy policies should reflect the use of AI or AR/VR tools, customers need to be provided with appropriate collection notices, and even where a retailer only collects or handles de-identified customer data (which it may view as outside of Australian privacy laws) there is still an obligation on the retailer to ensure that the data cannot reasonably be re-identified, either via AI data analytics or otherwise. Such an assessment requires an in-depth knowledge of the AI or AR/VR tools used, including their underling algorithms and the capacity to manipulate information for a desired purpose. The use of AI and VR/AR tools increase the ability to use personal information in ways that can infringe an individual's privacy interests and identifying these privacy risk areas early in the process, including through targeted due diligence questions from AI and/or AR/VR tool providers, is critical. This obligation on retailers is only set to increase as a result of the new Privacy Act Reforms recently announced by the AG's Office which proposes a wholesale review and uplift of privacy obligations including where the use of emerging technologies is involved. And with maximum penalties of privacy breach now uplifted to meet ACL thresholds (see below), data breach is an agenda issue for the Boards of many organisations and shows no sign of reducing importance.

- **Consumer Laws –** While virtual e-commerce provides retailers with greater opportunities to showcase their products online, retailers must keep in mind that virtual displays are subject to existing advertising and consumer laws. An inaccurate advertisement or display in a virtual world is still subject to the same laws that apply if the advertisement or display was presented in the 'real bricks-and mortar' world, and has the capacity, if presented inaccurately, to run the risk of falling foul of misleading and deceptive conduct prohibitions under Section 18, and/or false or misleading representations under Section 29 of the ACL (Australian Consumer Law, *Competition and Consumer Act 2010* (Cth) – Schedule 2). Violations of the ACL – and these sections in particular, following recent penalty increases, can also incur significant fines up to (inter alia) the greater of $50 million or 30% of annual turnover.
- **Corporate responsibility for AI based decision making –** Retailers should also be aware that, although AI based tools and their underlying algorithms might at times be hard to understand or identify, courts and regulators take a dim view of any lack of understanding, awareness or risk management by organisations for use of these tools. Just last year, travel website Trivago was ordered to pay a $44.7 million fine for misleading representations in breach of Section 29 of the ACL in respect of its AI powered tool which self-preferenced its own offerings in the marketplace.[6] Part of Trivago's defence - that it was 'impossible' to understand the workings of the algorithm - was not looked upon kindly by the Federal Court who rejected all such arguments.

The bottom line

The use of AI and VR/AR tools in the e-commerce market is strong – and we believe it will continue to rise. These are critical business drivers and the opportunities for retailers grow almost as fast as the technologies themselves develop and emerge. It is critical however to recognise that these tools come with legal and practical risks and challenges. While express legislation in Australia may be a little way off (or might indefinitely stay technology-neutral), enforcement action is not. The onus remains on senior management to engage with their technical teams to identify, review, test and ultimately understand the tools they employ across their business – particularly as they engage with the consumer – and to ensure compliance with existing legal obligations. The compliance burden in this space is only increasing, so getting on the front foot now and carving out a competitive advantage over peers is a recommended action. Obtaining expert advice and introducing organisation-wide use policies for AI tools and the use of VR/AR which address the responsibilities, information management practices, ethics and legal compliance are recommended initial steps for all affected businesses.

1. Accenture's report *'The Human Paradox: From Customer Centricity to Life Centricity'* is based on a survey of more than 25,000 consumers across 22 countries, focusing on the gap between people's expectations of what businesses should be providing and what businesses think their customers want (https://www.accenture.com/us-en/insights/song/human-paradox).
2. https://www.ibm.com/products/watson-assistant/artificial-intelligence.
3. https://www.pwc.com/gx/en/consumer-markets/consumers-respond-to-waves-of-disruption/gcis-report-june-2022.pdf.
4. https://www.gov.uk/government/news/uk-sets-out-proposals-for-new-ai-rulebook-to-unleash-innovation-and-boost-public-trust-in-the-technology.
5. https://artificialintelligenceact.eu/.
6. *Australian Competition and Consumer Commission v Trivago N.V. (No 2) [2022]* FCA 417.

Advertisers beware: TGA's recent enforcement activity

By Kelly Griffiths, Partner and Ujjesha Singh, Lawyer

Stakeholders in the health industry are no strangers to the Therapeutic Goods Administration (TGA). The TGA, a branch of the Australian Government Department of Health, regulates the supply and manufacture of therapeutic goods in Australia, including prescription medicines, vaccines, medical devices, vitamins, sunscreens, blood and blood products.

In May 2021, (previous publication) we updated our readers on the TGA's enforcement activity targeting uncorroborated therapeutic claims made with respect to COVID-19. As we move out of the emergency phase of the pandemic, the TGA has renewed its enforcement focus on the broader industry.

The TGA's present enforcement priorities remain:

- deterring and enforcing the unlawful import, advertising and supply of unapproved therapeutic goods associated with COVID-19;
- disrupting and addressing the unlawful import, advertising and supply of nicotine vaping products;
- ensuring compliance with the requirements of the *Therapeutic Goods Act 1989* (**the Act**) across the medicinal cannabis industry;
- disrupting and addressing the unlawful import, manufacture, advertising and supply of unapproved performance and image enhancing therapeutic goods, including sports supplements, with a focus on products containing schedule 4 and 8 poisons;
- deterring and addressing the unlawful import, advertising and supply of unapproved therapeutic goods used in the beauty and cosmetic dental industry;
- addressing the unlawful use of restricted and prohibited representations in advertisements that have not been approved or permitted, particularly those that target especially vulnerable consumers; and
- deterring and addressing the unlawful advertising of unapproved therapeutic goods on digital platforms; including for pregnancy and prenatal goods, weight loss products and hangover cures.[1]

The recent enforcement activity by the TGA has been consistent with its stated priorities for the 2022- 2023 period, particularly targeting the beauty, nicotine vaping and medicinal cannabis industries.

Recent TGA Enforcement activity

Unlawful advertising of complementary medicines in the beauty category

JS Health is a well-known beauty, health and wellness supplement brand, with particularly effective marketing campaigns across social media platforms, such as Instagram. In September 2022, the TGA issued two infringement notices to JS Health, totalling $26,640, for unlawful use of restricted and prohibited representations in its advertising of complementary medicines.[2] The TGA alleged that JS Health's advertising contained references and implied claims relating to serious health conditions, such as cancer and Alzheimer's disease, in breach of both the Act and the Therapeutic Goods Advertising Code.

In an Instagram post, JS Health discussed the research behind the C3 turmeric extract, an ingredient in their Turmeric+ formula. In particular, some of its claims were that its products could prevent these serious health conditions. Under the Act, manufacturers and advertisers must not make marketing claims that refer, whether expressly or by implication, to a serious form of a disease, condition, ailment or defect. Such claims are 'restricted representations' and may only be made with the prior approval of the TGA. This approval must be obtained via a formal approval process, including the submission of scientific data to support the claims. This process must be followed even if the therapeutic good in question is indicated for use in connection with that health condition.

JS Health had not obtained approval to use these restricted representations in its marketing. JS Heath also failed to demonstrate to the TGA that its claims with respect to the products had a scientific or evidentiary basis.

Regulatory non - compliance

JS Health faced further scrutiny from the TGA in February 2023 for supplying a complementary medicine, its 'Detox + Debloat' vitamin, in non-conformance with Therapeutic Goods Order No. 92 (**Order 92**). Order 29 is the Standard for labels for non-prescription medicines.

The 'Detox and Debloat' tablet contained an ingredient extracted from fennel, *Foeniculum vulgare*, which is not recommended for children under the age of 12, or women who are pregnant, likely to be pregnant or breastfeeding. JS Health failed to include a warning statement to this effect on its label, and did not seek TGA's approval to supply the medicine without the warning statement.

The TGA issued an infringement notice in the amount of $13,320 to JS Health, and required a recall of the product.

TGA proceedings for unlawful advertisement of 'unapproved' nicotine products

In July 2022, the TGA commenced Federal Court proceedings against Vapor Kings Pty Ltd (**Vapor Kings**) and its sole director, Amir Kandakji, for alleged unlawful advertising of nicotine vaping products on Vapor Kings' UK and Australian websites. Nicotine vaping products are on TGA's 'unapproved medicines' list and must conform to the ministerial standard set by the *Therapeutic Goods (Standard for Nicotine Vaping Products) (TGO 110) Order 2021* (**TGO 110**).

Nicotine is a prescription-only substance under schedule 4 of the Poisons Standard, and therefore can only be prescribed by an authorised healthcare professional. Under TGO 110, nicotine vaping products are those that contain nicotine in base and/ or salt forms in solution to allow vapourisation and inhalation through a device. This, however, is different to nicotine replacement therapies, such as sprays, lozenges, patches and some prescription medicines, which are listed on the ARTG and can be sold over the counter.[3]

To provide context, prior to 1 October 2021, customers were able to purchase nicotine vaping products from international websites without requiring a prescription from a healthcare professional. Similar to medical cannabis, nicotine vaping products can be prescribed by healthcare professionals to their patients via the SAS and AP pathways. Consumers can also legally import nicotine vaping products through TGA's personal importation scheme provided they have a valid prescription.

The decision to schedule nicotine products under the Poisons Standard stirred controversy. The intention of the TGA was to prevent young adults from using nicotine vaping products as a gateway to smoking, and to utilise these products as a clinically appropriate aid for smoking cessation. Nicotine, as captured under schedule 4 of the Poisons Standard and TGO 110, does not extend to tobacco products. Tobacco products are governed by the *Tobacco Act 1987* (Vic) and its relevant counterparts in other states and territories.

Despite warnings from the TGA, Vapor Kings and its director continued to unlawfully advertise their products directly to Australian consumers. What was notable about Vapor Kings' conduct is that despite moving their advertising of the products to an overseas website, their advertising was still targeted to Australian consumers, thereby enlivening their responsibilities under Chapter 2A of the Act.

Furthermore, Mr Kandakji was found to be personally liable for aiding, abetting, counselling or procuring Vapor Kings to advertise products that refer to nicotine. References to nicotine are unlawful if they are not authorised or required by a government authority thereby contravening sections 42DLB(1) and (7) of the Act. Accordingly, the TGA has submitted that Mr Kandakji has contravened section 54B(3) of the Act for the reasons that[4]:

- he was an executive director of Vapor Kings;
- had knowledge that Vapor Kinds had caused advertising of products that referred to nicotine;
- he was a sole director and shareholder of Vapor Kings; and
- he was in a position to influence the conduct of Vapor Kings and failed to take reasonable steps to prevent the unlawful advertising.

While the proceeding is still on foot, it provides a timely reminder to officers of companies that the TGA has the power to pierce the corporate veil and bring an action against a director in their personal capacity, when considered necessary.

Key takeaways

The TGA plays a critical role in monitoring and regulating the advertising of therapeutic goods. Stakeholders need to understand that having TGA approval in one aspect of their product does not provide them blanket coverage for all activities in relation to it. To avoid being caught out by the TGA, consider:

1. checking if your product is a therapeutic good;
2. if your product is a therapeutic good, ensure it is listed or registered on the ARTG as appropriate;
3. the relevant classification or scheduling of your product;
4. the regulatory limitations on advertising your product to an Australian consumer whether locally or internationally; and
5. seeking advice on your legal obligations should you need it.

1. https://www.tga.gov.au/import-advertising-and-supply-compliance-priorities-2022-23.
2. https://www.tga.gov.au/news/media-releases/jshealth-vitamins-pty-ltd-fined-26640-alleged-unlawful-advertising.
3. https://www.tga.gov.au/products/medicines/prescription-medicines/nicotine-vaping-products-hub/nicotine-vaping-product-access.
4. https://www.tga.gov.au/sites/default/files/2022-07/concise-statement-filed-220725.pdf.

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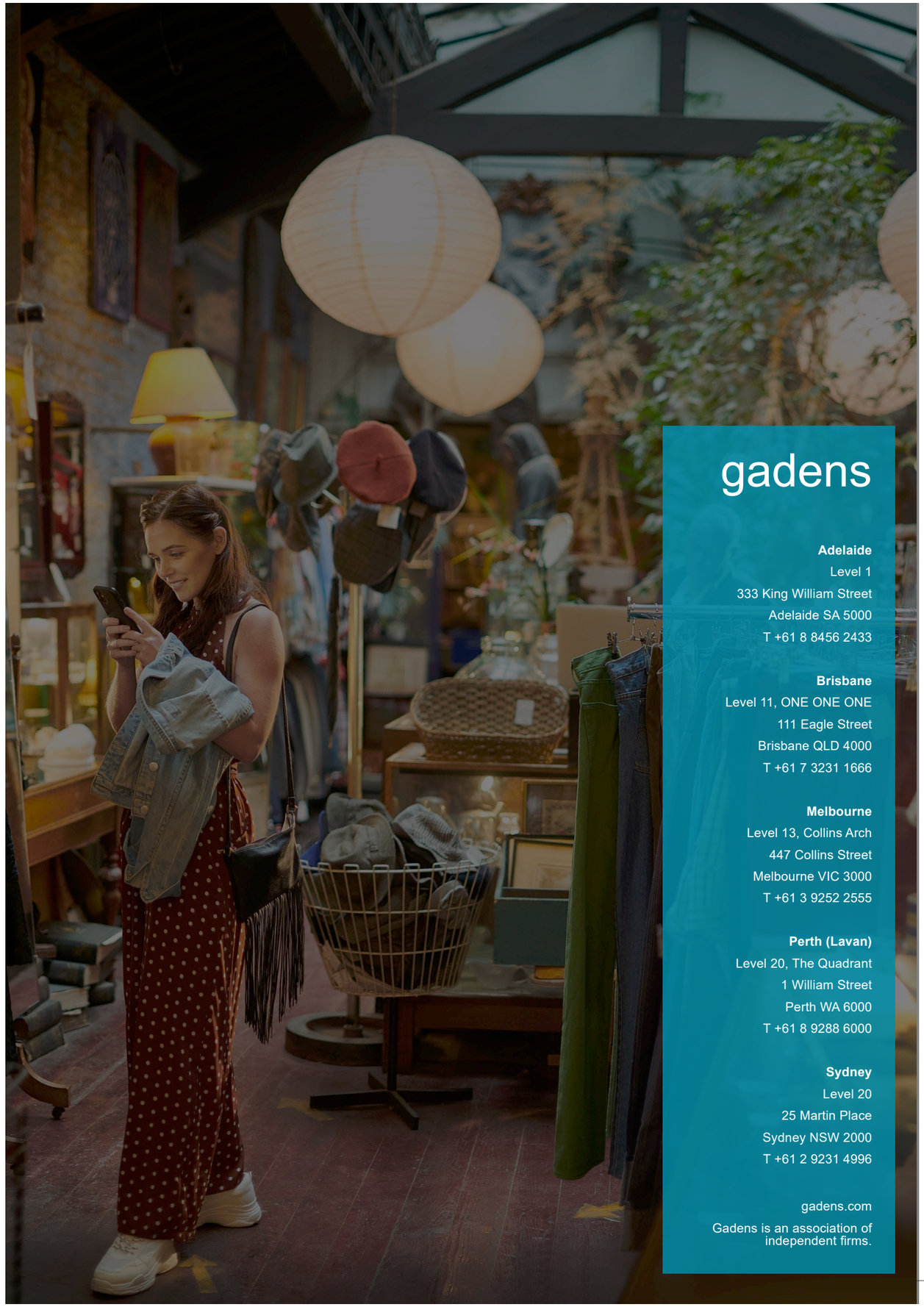

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