ADDISONS

Direct Selling Legal Update

December 2019

Addisons delivers commercially-minded legal solutions that help drive the ongoing business success of our Australian and international clients.

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The Addisons Difference

Delivering bespoke legal solutions drives us every single day – and has done for over 140 years. Passionate and committed to ensuring your success, we excel in helping clients to drive positive business outcomes with solutions underpinned by commercially-sound legal advice.

Building and nurturing relationships is in our DNA. Our immersion approach facilitates intimate understanding of your business, culture and operations so we can support your commercial opportunities and help you navigate market challenges.

We're proud to be a diverse group of experts who work together to ensure all your needs are seamlessly managed. Our partners actively lead every engagement proudly supported by our lawyers to ensure you experience the ultimate levels of accountability and service.

Our commitment to sustainable and organic growth ensures we attract and retain like-minded individuals committed to the long-term needs of our clients.

Direct Selling Expertise

The Addisons team has been extensively involved in assisting the direct selling sector for many years. We have an intimate understanding of the business issues faced by the sector.

The Addisons team advises on the structure of global and Australian multi-level marketing and direct selling organisations in relation to their Australian operations, taking into account all applicable laws, and the relationship with distributors and customers. We also assist on all aspects of marketing and advertising law in relation to product development, branding, packaging and promotion.

Our key areas of focus:

- Independent consultant agreements
- Compensation Plans and Policies and Procedures
- Pyramid selling issues
- Branding and trade mark strategies
- Pre-vetting creative concepts
- Website development and e-commerce issues
- Marketing and pomotional materials
- Packaging and labelling
- Sponsorship, trade promotions and events
- Consumer protection issues
- Structuring and business establishment in Australia

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Welcome to the December 2019 edition of the Addisons Direct Selling Legal Update.

As the year draws to a close, we look at some of the legal issues which are relevant to those operating in the direct selling sector in Australia.

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With Christmas just around the corner, there's one list you definitely don't want to end up on – the ACCC's black list. The ACCC, which is the regulator for the Australian Consumer Law (**ACL**), has had a mammoth year of enforcement activity both in and out of the Federal Court.

Our Focus Paper provides guidance to retailers in avoiding common pitfalls when advertising sales, running promotions and dealing with customers in relation to faulty products this festive season. Read more here.

Federal Court orders Unique to pay $4.165 million in penalties – A reminder of why complying with the Australian Consumer Law is vital for direct sellers

On 31 October 2019, the Federal Court ordered Unique International College Pty Ltd to pay penalties of $4.165 million for breaches of the ACL; namely engaging in unconscionable conduct, making false and misleading representations and for breaching the unsolicited consumer agreement (**UCA**) provisions of the ACL.

The case is a timely reminder to direct selling companies to ensure that their sales force is aware of their obligations if a sale is unsolicited and that their sales agreement complies with the very prescriptive requirements for UCAs contained in the ACL. Read more here.

Outsourcing your IT arrangements? What are your privacy obligations?

Are you taking reasonable steps to ensure that the personal information your direct selling business holds is protected from misuse, interference and loss and from unauthorised access, modification or disclosure? Are your service providers also taking reasonable steps to secure the personal information of your distributors and customers that you entrust to them? The recent Federal Trade Commission investigation of Infotrax Systems LC, a service provider to many in the direct selling industry, is a timely reminder for direct selling businesses not to be complacent in respect of data security. Our Focus Paper considers what you can do to reduce your data security risk. Read more here.

What should be included in board minutes?

The Australian Institute of Company Directors and the Governance Institute of Australia have recently collaborated to explore contemporary issues in board minute taking practices, and have outlined their perspective in a Joint Statement. Our Focus Paper summarises some key takeaways and useful reminders from the Joint Statement. Read more here.

Is the ACCC losing its touch? “Flushable Wipes” and “Biodegradable Plates” cases break down in Federal Court

Environmental claims are becoming increasingly popular with marketers as companies seek to win over environmentally conscious consumers. Within one week earlier in the year, the ACCC had two high-profile consumer law cases thrown out of the Federal Court – against Kimberly-Clark and Woolworths, separately. Both cases involved the use of environmental claims by the respondents which highlighted the sustainable nature of the products.

The ACCC has had notable wins in similar actions commenced in the past so our Focus Paper considers what went wrong for the ACCC in these cases. Read more here.

TGA releases Guidance on “natural” claims in therapeutic goods advertising

On 11 June 2019, the Therapeutic Goods Administration (**TGA**) published guidance in relation to the use of “natural” claims when advertising medicines and medical devices to the public. Our Focus Paper considers how the TGA will interpret “natural” claims in light of the new guidance material. Read more here.

If you have any questions or would like to provide feedback or discuss, please get in touch with any of Addisons’ Direct Selling team.

Ho-ho-how to have an ACCC Compliant Christmas

Authors: Laura Hartley and Rachel White

With Christmas just around the corner, there's one list you definitely don't want to end up on – the ACCC's black list.

The ACCC, which is the regulator for the Australian Consumer Law (**ACL**), has had a mammoth year of enforcement activity both in and out of the Federal Court.

Highlights include penalties ordered by the Federal Court against training college Empower Institute ($26.5 million), Optus ($10 million) and Jetstar ($1.95 million) for contravening the ACL. What's more, the regulator has shown no sign of slowing down. In recent months, the ACCC has commenced proceedings against each of Google, Kogan, Sony, Samsung and Mazda, alleging further breaches of the ACL against each of them. As a reminder, for breaches occurring after 1 September 2018, the maximum penalty which can be sought by the ACCC against a company for each breach of a key provision of the ACL[1] is the greater of up to: (a) $10 million; (b) 3 x the value of the benefit; and (c) 10% of the contravening entity's annual Australian turnover.

The ACCC has also been swift to hand out fines and seek undertakings from businesses on its own initiative for alleged breaches of the ACL. Various homeware and furniture retailers (including Big W, Target and Plush), an online game publisher (ZeniMax), and travel agency (Flight Centre) have been the latest to feel the sting for treading too close to the edge of unlawful conduct.

What does this mean for you?

Here's our wrap-up to help online and traditional bricks and mortar retailers avoid common pitfalls when advertising sales, running promotions+ and dealing with customers in relation to faulty products this festive season.

1. **Advertising sales ("was/now" discounts)**

   With the Australian economy experiencing challenging times, businesses know that it's going to take a lot more effort than usual to convince consumers to spend big this festive season. However, it's important not to underestimate the ACL risks around discount pricing.

   Earlier this year, the ACCC commenced proceedings in the Federal Court against major online retailer Kogan for allegedly making false and misleading claims around a "10% discount" promotion which it ran in June 2018. And just a few weeks ago, the ACCC fined four major furniture chains (Plush, Koala Living, Early Settler and Oz Design) a total of $50,400 for using was/now advertising in a manner which the ACCC considered false and misleading.

[1] See our previous focus paper "Penalties looming for unfair small business contracts".

Here are our top tips for running an ACL compliant sales promotion:

- Remember, was/now advertising (e.g. “Was $799, Now $599”) should only be used where the advertised products have been offered at the “was” price for a reasonable period before the sales promotion. What constitutes a reasonable period will vary between cases, but 6 months is the typical benchmark adopted by the ACCC. This is to demonstrate that the sale is a genuine sale – otherwise, customers are likely to be misled about the level of discount available when buying the product at the “now” price.

- Have a discount pricing policy in place to monitor how discounts are calculated on sales items and product categories. For instance, in what circumstances would you use an “Up to 70% off armchairs” claim? Is it enough if only two of the 200 items within that product category are 70% off? This would likely be a high risk strategy, particularly if the remaining items in that category have much lower levels of discount (e.g. around 5%). With discount advertising, the devil is often in the detail and it is critical to have a robust and defensible calculation methodology behind your advertised discounts.

- Keep an updated schedule of all the listed and current sale prices for your SKUs so you can monitor how long a particular product has been on sale at a particular price in order to justify a discount pricing claim. Discounts should only run for a limited period (typically not more than a few weeks). As soon as that period expires, you must remember to return the product to its original listed price and remove any sales advertising around it – otherwise you may be running a high risk of false or misleading conduct under the ACL.

2. Running promotions and competitions

In October, Flight Centre was fined $252,000 by the ACCC for publishing allegedly misleading advertisements promoting holiday vouchers during the 2018 Christmas and 2019 Easter periods. Customers who spent $1500 were offered a $250 voucher to spend on their next holiday with Flight Centre. However, key conditions applied to the use of these $250 vouchers. These conditions were: (1) vouchers were only redeemable on a holiday worth more than $5000; and (2) customers could only redeem their voucher within a limited timeframe. The ACCC considered that Flight Centre had not properly disclosed these conditions to consumers and had therefore been false and misleading in its advertising in breach of the ACL.

If you are planning to use promotions or competitions to raise your business profile and/or boost sales over the holiday period, you should:

- Double-check your promotional T&Cs and ensure that any key conditions are identified in the headline advertisement for your promotion. If you have conditions unique to your offer which might not typically be expected by a reasonable consumer, you should call out those individual conditions upfront (e.g. “Min. spend $5000”), rather than simply relying on a generic “T&Cs apply” disclaimer.

- Ensure that your full promotional T&Cs are readily accessible to the public. You should set them out in full on your website and including a link to those T&Cs on any social media posts advertising the promotion.

3. Dealings with customers around faulty products

Consumer guarantees have continued to be a major enforcement priority for the ACCC throughout 2019. It is important to remember that where products are faulty, a retailer or manufacturer's own warranty policy is not the end of the story.

In October, the ACCC accepted court-enforceable undertakings from each of Big W, Target, and ZeniMax (which owns Bethesda Softworks, publisher of the popular Fallout 76 online game) for allegedly making false or misleading representations in relation to consumers' statutory rights under the ACL. In particular, Target and Big W were criticised for telling consumers that they needed to contact the manufacturer directly to obtain a remedy if their claim was made outside the retailer's warranty period.

- Retailers owe obligations to consumers directly under the ACL. Where there has been a failure in respect of a consumer guarantee (e.g. "acceptable quality"), retailers must replace, repair or refund the faulty item – irrespective of whether or not the retailer's own warranty period has expired.
- Check customer service documents and sales and service team scripts to ensure that they do not contain any inaccurate or misleading representations around consumer guarantee rights under the ACL. In particular, watch out for statements around arbitrary time limits on obligations under the consumer guarantees. These are serious red flags to both the regulator and increasingly, ACL savvy consumers.

In this high risk environment, it's more important than ever to recognise the red light issues under the ACL – before the ACCC brings your business to a complete halt.

Have yourself a very compliant Christmas.

Federal Court orders Unique to pay $4.165 million in penalties

Authors: Cate Sendall and Aleksandra Pasternacki

Why compliance with the Australian Consumer Law is vital for direct sellers

On 31 October 2019, the Federal Court ordered Unique International College Pty Ltd (**Unique**) to pay penalties of $4.165 million for various breaches of the *Australian Consumer Law* (**ACL**), namely:

- engaging in unconscionable conduct;
- making false and misleading representations; and
- breaching the unsolicited consumer agreement (U**CA**) provisions.

In awarding such a high penalty, the Federal Court considered the deliberate nature of Unique's conduct and the involvement of Unique's senior management in the contravening conduct, including its exploitation of vulnerable people in selling its courses and the losses suffered by the Commonwealth.

The case is a timely reminder to direct selling companies to ensure that their salesforce is aware of their obligations if a sale is unsolicited and that the sales agreement complies with the very prescriptive requirements for UCAs contained in the ACL.

Background

Unique was a private education college which offered Diploma courses costing from $10,000 to $25,000 per course. The courses were approved courses under the VET FEE-HELP scheme. Under this scheme, the Commonwealth pays the tuition for approved courses in full to the course provider, and treats this payment as a loan to the student. In obtaining the loan, the student incurs a debt to the Commonwealth which accrues interest. The loan becomes repayable once the student earns a yearly income of at least $53,345.

In the 2014-15 financial year, Unique enrolled 3,600 students to its courses and was paid approximately $57 million by the Commonwealth in tuition fees.

Unique sold these courses using face-to-face marketing, including door-to-door sales where they attended consumers' homes. Unique marketed its courses to consumers in remote and low-socio economic areas, including indigenous communities, across Victoria, New South Wales and Queensland. Both senior management and staff performed the door-to-door sales. Unique gave students who enrolled in their courses a free iPad or laptop as incentives to sign up.

Contravening Conduct

The proceedings concerned Unique's enrolment of six consumers from remote or rural communities, five of whom were indigenous Australians. By enrolling in a course, each consumer incurred a debt of $26,400 to the Commonwealth.

In making the door-to-door sales, the Federal Court found:

- Unique made false and misleading representations to consumers.
    - Unique's staff told consumers that its courses were free or free until they began earning a certain level of income; and
    - Unique's staff failed to inform consumers that they were enrolling in a course.
- Unique failed to inform consumers of both the cost of the course and that the consumers would incur a significant debt to the Commonwealth. This debt comprised the course fee, along with a 20% loan fee, with the debt increasing yearly in accordance with the Consumer Price Index.
- Unique did not provide the information prescribed under the UCA provisions of the ACL to consumers at the time of signing them up to the courses, in particular, no information was provided to consumers during the home visit about:
    - the consumers' rights to terminate the agreement during the 10 business day cooling-off period; and
    - the way the agreement can be terminated,
- both of which are required under section 76 of the ACL.
- Unique did not provide the consumers with a written copy of the agreement as required by section 78 of the ACL. Accordingly, Unique also did not comply with section 79, which sets out in considerable detail all the information which must be included in a UCA. (UCAs must, for example, conspicuously and prominently inform consumers of their right to terminate the UCA and include a prescribed form which can be used to terminate the UCA.)

The Court found that in one instance a Unique staff member signed up a consumer to a course which was clearly not suitable for them. The Court noted that it would have been obvious to the Unique staff member that the consumer, who had a learning disability, was "totally unable" to understand what she was doing. The Court noted this was the "exploitation of an obviously vulnerable person for financial gain. It is difficult to imagine unconscionable conduct which could be worse".

Accordingly, the Court held that Unique had engaged in unconscionable conduct, made false and misleading representations and breached the UCA provisions of the ACL.

Size of the Penalty

Under s 224(3) of the ACL, the maximum penalty per contravention for unconscionable conduct or for making false and misleading representations has recently increased to be the greater of:

- $10 million;
- three times the value of the benefit obtained which is attributable to the contravening conduct; and
- if the value of the benefit is unable to be determined, 10% of the company's annual turnover in the preceding 12 months.

However, at the time of Unique's contravening conduct, the maximum penalty was $1.1 million for these contraventions. The maximum penalty for a contravention of the prescribed information requirements for UCAs remains unchanged and is $50,000.

The Federal Court was in no doubt as to the seriousness of Unique's misconduct. Unique's conduct was exploitative and targeted consumers from low socio-economic backgrounds by incentivising them to sign up to the courses in exchange for free laptops and iPads.

Relevant matters to consider when determining the penalty amount include:

- The nature and extent of the conduct. The Court found Unique's conduct was serious and deliberate.
- The loss or damage suffered as a result of the contravening conduct. The consumers suffered significant debts when they incurred a loan to the Commonwealth.
- The circumstances in which the contravening conduct took place.
- The size of the company and its financial position. While the Court was unable to determine positively this matter, it was satisfied that "a great deal of money" had passed to Unique and had been paid to its shareholders in dividends.
- Whether there is a culture of corporate compliance. The Court found Unique did not have a corporate culture which promoted compliance with the ACL. It did not train staff as to ACL provisions and its code of conduct did not refer to the ACL.

The Court considered other matters in determining the amount of the penalty including the deliberate nature of the conduct and the involvement of senior management in the door-to-door sales. The Federal Court noted that the penalty of $4.165 million "adequately reflects the wrongdoing and is proportionate overall", given the maximum penalties which could be imposed totalled $13.95 million.

Take Home Points

This judgment is a reminder for direct selling companies to ensure they have an ACL compliance program in place which involves training staff and their independent salesforce about ACL compliance, including the requirements for negotiating and entering into UCAs. Sales staff engaged by direct selling companies must be aware of the disclosure requirements in respect of UCAs and, where required, must only use sales agreements which adhere to the UCA requirements contained in the ACL. Sales strategies which involve targeting vulnerable or disadvantaged people must always be avoided.

Companies are strongly recommended to consider whether ACL compliance training is overdue and, if so, to arrange for appropriate training to be provided.

Outsourcing your IT arrangements: What are your privacy obligations?

Author: Cate Sendall

Are you taking reasonable steps to ensure that the personal information your direct selling business holds is protected from misuse, interference and loss and from unauthorised access, modification or disclosure? Are your service providers also taking reasonable steps to secure the personal information of your distributors and customers that you entrust to them? The recent Federal Trade Commission (**FTC**) investigation of Infotrax Systems LC (**Infotrax**), a service provider to many in the direct selling industry, is a timely reminder for direct selling businesses not to be complacent in respect of data security.

Who is Infotrax?

Infotrax provides backend operations systems and online distributor tools for multi-level marketers. Infotrax's services include operating aspects of its direct selling clients' website portals. In registering and placing orders on the website portals, distributors and customers provide Infotrax with their personal information – including bank account and credit card details, usernames and passwords.

As of September 2016, Infotrax stored the personal information of approx. 11.8 million consumers.

What went wrong?

Earlier this year, the FTC issued a complaint against Infotrax, and its CEO, Mark Rawlins, alleging that they had breached s 5(a) of the *Federal Trade Commission Act* which prohibits unfair acts or practices.[2] The FTC alleged that, from 2014 to March 2016, Infotrax engaged in a number of unreasonable data security practices including:

- failing to:
    - have a system which deletes consumers' information when it is no longer required;
    - conduct a code review and penetration testing of Infotrax's software and network to assess cybersecurity risks to consumer data;
    - detect malicious file uploads;
    - segment Infotrax's network;
    - implement safeguards to detect anomalous activity; and
    - limit locations to which third parties could upload unknown files into Infotrax's network; and

[2] The FTC is able to issue a complaint of this nature where it reasonably believes a law is/has been violated and the proceeding is in the public interest.

- storing consumer's personal information in a readable format on Infotrax's network.

As a result of the failures, between May 2014 and March 2016, hackers accessed Infotrax's server (and websites it maintained on behalf of its clients) multiple times and pulled personal information, including consumers' passwords, names, addresses and credit card details from the server/websites.

The FTC alleged that Infotrax's failure to:

- protect consumer data through implementing readily available and low-cost security measures; and
- provide reasonable security for the personal information it held,

caused, or was likely to cause, substantial injury to consumers in the form of fraud, identity theft and monetary loss.

What are your obligations?

Companies which are required to comply with the Australian Privacy Principles (**APPs**) must ensure that they take such steps *as are reasonable* to:

- implement practices, procedures and systems relating to their functions and activities which enable them to comply with the APPs and deal with inquiries and complaints from individuals about their privacy compliance (APP 1); and
- protect personal information from:
  - misuse, interference and loss; and
  - unauthorised access, modification or disclosure (APP 11).

Your company also has data breach notification obligations under the *Privacy Act 1988*. In Australia, a data breach is notifiable if it is likely to cause serious harm to affected individuals. If serious harm is more probable than not, both the affected individuals **and** the Office of the Australian Information Commissioner (**OAIC**) must be notified promptly.

If your company has outsourced its IT arrangements, it continues to have mandatory data breach obligations under the *Privacy Act 1988*. If the personal information has been disclosed to a contractor overseas, then an Australian company may also remain liable for mishandling by the overseas recipient.

If you are a director or officerholder of the company, you also have a duty under the *Corporations Act 2001* (Cth) to act with reasonable care and diligence in your position.

Further, if your company is publicly listed, there are also continuous disclosure obligations.

How do you comply with these privacy obligations?

In order to avoid an Infotrax situation, ensure that you adopt a privacy-by-design approach when rolling out new projects. Regularly conduct risks assessments to ensure that you are aware of risks and take reasonable steps to avoid or reduce the risks.

When entering into agreements with service providers ensure that you conduct due diligence in respect of their data handling practices and security policies. As stated above, where the third party is overseas, it is especially important to take reasonable steps before disclosing personal information as your company may be liable under the *Privacy Act 1988* for any mishandling by the overseas recipient. Reasonable due diligence steps may include the following:

1. Ensure your contract with the service provider is adequate. Your contract should:
    - address compliance with particular privacy requirements and require the service provider to provide warranties in respect of, for example, its level and standard of data protection compliance and indemnities for any breach of the warranties and for any loss caused by a data breach;.
    - address data breach notification requirements, including:
        - the procedures which must be followed should a data breach occur, (including details of when, how and what is required to be notified to you); and
        - requiring the contractor to cooperate with you and to investigate fully and promptly contain the breach.
    - require the service provider to be liable for any costs you incur if there is a breach of the data they hold on your behalf. If the OAIC and affected individuals are required to be notified, ordinarily your company would be responsible for notifying affected individuals because your company has the direct relationship with those individuals;
    - include mechanisms to ensure that data protection obligations are being met, such as reporting requirements; and
    - address what must happen to your company's data when the contract ends.
2. You should also consider whether the service provider should be permitted to subcontract its obligations or use your company's data for its own purposes.
3. Ask the service provider for evidence of its IT security practices and policies. Has the service provider been certified as compliant with ISO 27001, an internationally recognised standard that sets requirements for information security management systems?
4. The service provider's IT systems should be required to be audited too, for example, on at least a yearly basis.

Regardless of whether you outsource your IT arrangements:

- Your IT team should be vigilant and ensure that updates and patching are completed routinely and promptly when released. Obsolete software should be removed from systems.
- You should also have a **data breach response plan** that you can activate and a **data breach response team** to manage the crisis caused by a data breach. Should you have an actual or suspected data breach, you may wish to also engage external IT experts to urgently assess your systems to identify any security issues and fix those issues.
- Do you have a data retention policy? When you no longer require personal information, it should be destroyed or deleted. Do not hold onto personal information indefinitely or for some future use of which you are currently not aware.

There is no shortage of resources to assist you with privacy compliance. The OAIC publishes an extremely useful and easy-to-read Guide to securing personal information, which outlines many examples of "reasonable steps" which should be taken by businesses to comply with their obligations under the APPs.[3]

The above list is not exhaustive and hopefully your company is already undertaking the above routinely. If not, **now** is the time to start.

If you have any concerns or questions, please contact us.

[3] https://www.oaic.gov.au/privacy/guidance-and-advice/guide-to-securing-personal-information/.

What should be included in board minutes? Useful guidance from the joint statement by AICD and the Governance Institute

Authors: Li-Jean Chew and Chuanchan Ma

The Australian Institute of Company Directors (**AICD**) and the Governance Institute of Australia (**Governance Institute**) have recently collaborated to explore contemporary issues in board minute taking practices, and have outlined their perspective in a joint statement on board minutes (**Joint Statement**).

The Joint Statement summarises key principles, provides opinions on what matters should be included in board minutes, and considers the approach to board papers and document retention policies. It also explores issues such as the status of drafts and notes, how to record dissenting views in minutes, and how to maintain legal professional privilege in board papers.

The Joint Statement provides useful guidance on minute taking practices for boards, individual directors and company secretaries. AICD and the Governance Institute have also obtained counsels' opinion on particular issues, to add legal context to their conclusions and recommendations. The legal opinion from Dominique Hogan-Doran SC and Douglas Gration is attached to the Joint Statement.

We have summarised below some key takeaways and useful reminders from the Joint Statement and the legal opinion:

What should board minutes include?

- Board minutes are not a report or transcript of the discussion or debate during the meeting, or a record of an individual director's contribution. Too much information can be as unhelpful as too little, and can cause a lack of clarity and stifle healthy boardroom debate.
- Minutes should include the key points of discussion and the broad reasons for board decisions. This may help to establish that directors have exercised their duties to act with care and diligence and in good faith, for a proper purpose and in the best interests of the company. Boards should consider also if business judgment rule applies to a decision – if judgment is required and directors are balancing competing risks and considerations in making a decision, these should be captured in the minutes.
- It is appropriate for minutes to record significant issues raised with management by directors and the reactions received (e.g. responses received or action promised by management). However, it is neither necessary nor desirable to record every question put and every response received; it would be sufficient to record the thrust of significant issues raised.

What level of detail should be included in board minutes?

- The level of detail in minutes is a question of judgment and may vary from company to company and between the matters being considered by the board. While there is no "one size fits all"

approach, relevant factors to consider when incorporating key points of discussion and reasons for decision into minutes include:

- the nature and importance of, and risks attaching to, the decision and discussions concerned;
- the level of detail contained in any supporting board papers;
- the regulatory environment that either the company or the particular decision is subject to; and
- any perceived self-interest or conflict of interest on the part of management or the board in the decisions concerned.

- Minutes should be drafted in a clear and succinct manner, using plain English, and written in a way that someone who was not present at the meeting can follow the decisions that were made.
- The board acts as a collective, not as a group of individuals. Accordingly, the details of any robust discussion that takes place along the way should not be attributed in minutes. It is important to note the difference between a robust discussion that leads to a collective decision by the board, and the dissent of a director in discharging their individual duty to act with care and diligence.

The role of board papers and scope of document retention policies

- Well-written, concise board papers help to ensure that meetings are run smoothly and facilitate the drafting of minutes. They are also important in establishing that directors have discharged their duties. Therefore, directors should satisfy themselves that board papers are adequate, and that they have sufficient information on which to base decisions. If the board makes a decision that is not canvassed in the supporting board papers or is contrary to management's recommendation, it is good practice to provide sufficient detail about the reasons for the decision.
- Companies should adopt and consistently apply a document management and retention policy, which addresses what documents must be retained (and in what format) and when they may be destroyed, and should cover material in any board portal. This policy should also deal with the status of draft minutes and handwritten notes. Retention policies should also be consistent with any obligations to preserve evidence for actual or likely legal proceedings.
- Care should be exercised when taking personal notes at board meetings. It is important to bear in mind that like board minutes, directors' notes can be discoverable and admissible as evidence in court, and can create risk if the notes are considered to be ambiguous, inconsistent or incomplete by the court.

Maintaining legal professional privilege in board papers

- Caution and judgment should always be exercised when determining the degree of detail of any privileged legal advice that is necessary to include in the minutes. In particular, if board papers

containing the gist or conclusion of legal advice received by the company are disclosed in discovery to the opposing party during legal proceedings, there is a risk that privilege over the entire legal advice is lost.

- Any privileged information in the minutes should be clearly identified, and ideally included in an appendix or attachment. This will assist in any later discovery process and mitigate the risk of inadvertently disclosing privileged information. It is also good practice not to provide minutes containing privileged information to third parties without first taking legal advice, as disclosure of the substance of the privileged information might result in the loss of privilege.

Reach out to the authors for more advice on what should be in your board minutes.

“Flushable Wipes” and “Biodegradable Plates” cases break down in Federal Court

Authors: Laura Hartley and Rachel White

Within one week, the ACCC has had two high-profile consumer law cases thrown out of the Federal Court – against Kimberly-Clark[4] and Woolworths[5], separately.

Both cases involved the use of environmental claims by the respondents which highlighted the sustainable nature of the products. In particular, Kimberly-Clark described certain wipes as “flushable”. Woolworths, on the other hand, claimed that its ‘Select eco’ range of disposable plates, bowls, and cutlery was “biodegradable and compostable”. The ACCC argued that both Kimberly-Clark and Woolworths lacked substantiation for their claims and so had made false and misleading claims in breach of the Australian Consumer Law (**ACL**).

Environmental claims are becoming increasingly popular with marketers as companies seek to win over environmentally conscious consumers. The ACCC has had notable wins in this space in the past, including against Pental which was ordered by the Federal Court in April 2018 to pay a $700,000 penalty for claims about its White King “flushable” toilet and bathroom cleaning wipes.[6]

So, what went wrong for the ACCC here?

Quite simply, the evidence just wasn’t on the ACCC’s side.

In the Kimberly-Clark decision, the Federal Court ruled that there was insufficient evidence to show that the company’s “flushable” wipes – as opposed to other wipes such as baby wipes and household cleaning wipes – had contributed to problems in household and municipal sewerage systems. This was so notwithstanding that the wipes were found to pose a greater risk of harm than toilet paper, due to their inferior properties of breakdown and dispersion. The Federal Court took the view that this risk of harm posed by the “flushable” wipes did not eventuate as “*the instances of blockages identified by the complaints are so few in the context of the total sales of the wipes that they are properly characterised as insignificant*”.

As for Woolworths, a considerable amount of expert evidence was adduced to show that the relevant products were capable of biodegrading and being turned into compost. This was sufficient to satisfy the legal test as construed by the Federal Court. In particular, the Federal Court disagreed with the ACCC’s view that the relevant products needed to break down or compost “within a reasonable time” in order to justify the claims.

[4] *ACCC v Kimberly-Clark Australia Pty Ltd* [2019] FCA 992.
[5] *ACCC v Woolworths Limited* [2019] FCA 1039.
[6] *ACCC v Pental Limited* [2018] FCA 491.

Neither Kimberly-Clark nor Woolworths is off the hook yet, however, as the ACCC has recently announced its decision to appeal both decisions.[7]

What does this mean for you and your environmental marketing claims?

1. **You must be able to substantiate all claims**

   All marketing claims, including broadly worded and vague claims which are capable of multiple meanings, must be capable of substantiation. Therefore, you should limit claims to what can be verified having regard to the evidence which you currently have available.

   For instance, don't use a claim such as "*Packaging made from recycled parts*" if only part of the packaging is made from recycled parts (e.g. the bottle itself but not the plastic label or lid). Any key qualifications must be called out upfront. For claims subject to conditions or variables, e.g. claims regarding energy savings which are based on specific usage criteria, you should use a disclaimer to clarify and limit the scope of your claim.

   Further, the ACCC notes that environmental claims should take into account the entire product life cycle. It therefore recommends avoiding broad claims like "environmentally friendly" or "green". This is because almost every product will have some negative impact on the environment at some point in its lifespan – whether at the input sourcing stage or the manufacturing, packaging, use, or disposal stage.

2. **Compliance with industry standards may provide evidentiary support for a claim**

   The test for truth in advertising under the ACL is whether a not insignificant number of reasonable consumers in the relevant target market would reach an erroneous view of the facts, based on an overall impression of the claim. Accordingly, each case must be determined on its facts having regard to this "reasonable consumer" test, and not according to some third party technical standard.

   Nevertheless, compliance with a reputable industry standard may help to provide evidentiary support for a claim. Here, Kimberly-Clark relied upon its compliance with international industry standards regarding flushability. Despite being heavily criticised by the ACCC, these standards were accepted by the Federal Court at first instance as a "*conscientious and scientific effort to establish an appropriate framework for assessing flushability*" which provided strong support for Kimberly-Clark's flushability claim.

3. **You must maintain strict internal processes for approving marketing claims**

   Businesses should have robust systems in place for signing off all marketing claims at senior management level. Approvers must be provided with, and must review, all relevant substantiation before signing off on those claims. This is particularly critical for claims regarding future matters, e.g. "*We will be carbon neutral by 2025*". This is because a future representation

[7] See ACCC media releases at: https://www.accc.gov.au/media-release/accc-appeals-flushable-wipes-decision (29 July 2019) and https://www.accc.gov.au/media-release/accc-appeals-decision-on-woolworths-disposable-picnic-products (5 August 2019).

is deemed misleading under the ACL unless its maker can provide sufficient evidence of reasonable grounds for making that representation.

This is why it is so important to keep clear records of all marketing sign-offs and supporting documentation, bearing in mind that the limitation period for bringing an action for misleading or deceptive conduct under the ACL is 6 years.

The ACCC tried to argue that Woolworths' "biodegradable" and "compostable" claims were future representations. This argument was rejected by the Federal Court at first instance. However, the Federal Court noted that if the claims were characterised as future representations, then it would be necessary to consider whether Woolworths had reasonable grounds to make the claims. The Federal Court found that, whilst substantiation for the claims was in fact available, Woolworths could not point to any actual reliance on that information by a relevant decision-maker within its business. Nor could Woolworths identify who had in fact approved the use of the relevant claims.

It will be interesting to see whether the Full Federal Court upholds the decisions in relation to Kimberly-Clark and Woolworths on appeal. Notably, the ACCC has already signalled that its appeal against the Woolworths decision will centre on whether the claims were future representations – which will bring the focus back to whether Woolworths had reasonable grounds to make those representations.

It's a timely reminder of the importance of maintaining robust internal compliance processes for signing off marketing materials. Such processes are there to protect your business in the event that someone, e.g. a competitor or the ACCC, challenges the truth of your marketing claims.

Would your marketing approval processes stand up to scrutiny?

Naturally, industry needs guidance – TGA Guidance on "natural" claims in therapeutic goods advertising

Authors: Cate Sendall, Tim Clarke and Joseph Abi-Hanna

Natural claims in respect of therapeutic goods are regulated by the *Therapeutic Goods Advertising Code (No. 2) 2018* (**Code**). Claims (including natural claims) must not be misleading, or likely to mislead, consumers.[8] Under the Code, all claims (including natural claims) must also be truthful, valid, accurate, balanced and substantiated.

On 11 June 2019, the Therapeutic Goods Administration (**TGA**) published guidance in relation to the use of "natural" claims when advertising medicines and medical devices to the public (**TGA Guidance**).[9]

In short, the TGA Guidance clarifies how the TGA will interpret "natural". It provides that a consumer will understand a therapeutic good or ingredient to be natural if it:

- is in a form found in nature;
- has undergone minimal processing; and
- is identical chemically to the finished ingredient or product.

If a natural claim is made and the therapeutic good or ingredient does not satisfy the above criteria, the advertiser must explain the claim in a satisfactory manner to avoid misleading consumers.

What is a natural claim?

In the context of therapeutic goods advertising, a natural claim is a statement that a therapeutic good or ingredient is natural. Examples of natural claims are statements, such as "derived from nature", "naturally sourced" or "100% natural".

The TGA considers that an ingredient or product will be natural if **each** of the following three requirements (**Natural Claim Requirements**) is satisfied:

1. **Form in Nature** – The original substance, from which the ingredient or product is derived, is a form found physically in nature, such as plant, mineral or bacterial.
2. **Minimal Processing** – The manufacturing process involves minimal processing. Processing steps considered to be minimal include freezing, drying, fermentation, solvent extraction, fractionation and filtering.

[8] For further information on the recent changes to the *Therapeutic Goods Advertising Code*, please see our previous focus paper: Is your Direct Selling business compliant with the new Therapeutic Goods Advertising Code (No. 2) 2018?
[9] Further information on the TGA Guidance is available here.

3. **Identical Chemically** – The original substance is identical chemically to the finished ingredient or product. In other words, the original substance must not undergo any chemical conversion or alterations. For example, the chemical process must not cause the original substance to have been transformed into a derivative or salt form.

Is a qualification needed?

The TGA considers that a natural claim may be made without qualification if a therapeutic good consists solely of ingredients which satisfy the Natural Claim Requirements. In other words, a therapeutic good must comprise wholly ingredients for which natural claims could be made. However, the advertiser has discretion to provide further information on its basis for making the natural claim.

To the extent that a therapeutic good comprises natural and synthetic ingredients, a natural claim may still be made in respect of that good. However, qualification would be required to ensure that a consumer is not misled into believing, wrongly, that each ingredient is natural.

An advertiser may elect to specify those ingredients which are natural (i.e. they satisfy the Natural Claim Requirements) and those which are synthetic/artificial/non-natural (i.e. they do **not** satisfy the Natural Claim Requirements).

Any natural qualities which a therapeutic good may possess should not be linked, directly or indirectly, with other attributes such as safety or efficacy. Examples of problematic claims provided in the TGA Guidance include "*you can trust [product name], it's all natural*" and "*protect your child's health by choosing natural*".

"Natural" product names

The TGA acknowledges that the word "natural" is used frequently in the names of products, brands and companies, especially in the complementary medicines industry.

The use of "natural" in a company or trading name would not necessarily, in and of itself, cause consumers to believe that the company is claiming that all of its products are natural. However, a company must exercise a degree of caution to ensure that the natural descriptor is linked to the company and not to its goods.

If the name of a product includes "natural", the company must be extremely careful to ensure that a claim is not made, by implication, that the product is wholly natural or consists of natural ingredients.

"Natural" modes of action

If a therapeutic good is said to have a "natural mode of action", the TGA considers that a consumer will interpret this to mean that it has a process which is, or emulates, normal physiological processes in the human body.

The focus is on the function performed by the product, rather than the composition of the product. For example, in the case of a bulk forming laxative which invokes a normal bodily process, it would be reasonable to state that the laxative has a "natural mode of action". However, it would not be reasonable to claim that it is a "natural" product unless it satisfies each of the Natural Claim Requirements.

Alternatively, if a therapeutic good does not involve, or mimic, a normal physiological process, claims such as "works naturally" could mislead a consumer. Further, if a medicine only has an impact on the body's physiological processes, it may be misleading to state that the medicine has a "natural mode of action".

To the extent that a therapeutic good does have a "natural mode of action", "works naturally" or "acts naturally", sufficient evidence should be given to consumers in advertising to ensure that consumers are not misled as to the substance of these claims.

What about the Australian Consumer Law?

The requirements of the Code should always be considered in parallel with the requirements of the Australian Consumer Law (**ACL**).

The ACL prohibits a person from making, in trade or commerce, any claim which is misleading or deceptive or likely to mislead or deceive (section 18) or which amounts to a false representation about a variety of specified matters, such as falsely claiming that a product is of a particular standard, quality, value, grade or composition when this is not the case (section 29). The Australian Competition and Consumer Commission (**ACCC**) published a guideline in 2006 on when descriptors, such as "natural", may mislead a consumer in the context of food products (**ACCC Guideline**).[10]

The TGA Guidance refers to the ACCC Guideline and, in particular, a section which emphasises that a natural claim should be interpreted from the perspective of a consumer. Further, consideration should be given to the consumer's understanding of that claim, as opposed to the understanding of a manufacturer or a food technologist. Product developers and marketing teams should bear this in mind.

The ACCC Guideline provides that, when the term "natural" satisfies a code or standard, to the extent that the consumer is not aware of this fact, the consumer may reach conclusions which are not accurate and may be misled. This principle is also applicable to natural claims in the context of therapeutic goods.

Takeaways

The release of the TGA Guidance is a timely reminder that making "natural" claims is risky and caution must be exercised. As well as considering the requirements of the Code, marketing teams must also consider the requirements of the ACL too.

Care should be taken to ensure that the use of the word natural is appropriate and to distinguish between a natural ingredient, a natural product and/or a natural mode of action. If a business wishes to make claims about the "naturalness" of a product, ingredient or process, any claim which it makes must be justified and supported by evidence.

If a natural claim is made, the TGA considers that the claim should be interpreted from the viewpoint of the consumer and not the business. Accordingly, further information should be provided with the claim so consumers can make informed decisions and to ensure that they are not misled.

If you'd like guidance regarding the use of "natural" or other claims, please contact us.

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[10] The ACCC Guideline is available here.

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