ADDISONS

Direct Selling Legal Update

December 2020

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 achieve business outcomes with solutions underpinned by commercially-sound legal advice.

Building and nurturing relationships is in our DNA. Our immersion approach facilitates a detailed 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 promotional materials
- Packaging and labelling
- Sponsorship, trade promotions and events
- Consumer protection issues
- Structuring and business establishment in Australia
- Data protection and GDPR
- Regulatory and compliance issues

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Introduction

Welcome to the December 2020 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.

TGA classifies sports supplements as therapeutic goods effective 30 November 2020

A declaration under the *Therapeutic Goods Act 1989* (Cth) has been published which mandates that, from 30 November 2020, certain sports supplements must be regulated as therapeutic goods.

The declaration requires certain sports supplements to be entered on the ARTG (if intended to be marketed as medicines) or to alter their product claims, ingredients and/or dosage forms. Sports supplements, which become classified as therapeutic goods as a result of the declaration, will no longer be able to rely on the Trans-Tasman Mutual Recognition Act to enter the Australian market via New Zealand. Those sports supplements which are supplied in the dosage form of a tablet, capsule or pill (other those supplements which contain glucose only) and which do not contain any specified substances, must be entered on the ARTG by 30 November 2023. Now is the time to start planning for 2023! Read more here.

Big Business Beware! Small businesses will soon be able to join forces and bargain against you with fewer hurdles

Under a class exemption recently made by the ACCC which is likely to take effect in early 2021, small businesses (including independent contractors) will be provided with a "safe harbour" to co-ordinate their negotiations with customers or suppliers over common issues without breaching competition laws and without first needing to seek specific ACCC approval. This has the potential to significantly impact businesses that contract with small businesses. Read more here.

Enhancing Protection for Small Businesses – proposed reforms to unfair contract term provisions under the Australian Consumer Law

Federal and State and Territory consumer affairs ministers have agreed to reform the existing unfair contract term protections under the Australian Consumer Law. If passed, these reforms will expand the application of the unfair contract term protections to a greater number of small businesses and will offer clearer guidance on when the protections apply. Read more here.

Direct Selling Australia – Legal & Regulatory Webinar

Direct Selling Australia hosted a Legal and Regulatory Webinar on 22 October 2020. Partner Jamie Nettleton and Special Counsel Cate Sendall were pleased to present on:

- Unfair contract term provisions in the ***Australian Consumer Law***, including:
  - How to identify unfair contract terms
  - Steps to make unfair contract terms fair and enforceable

- New disclosure obligations in the NSW ***Fair Trading Act*** relating to consumer contracts, concerning:
    - Substantially prejudicial terms
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  relating to consumer contracts.

While the webinar was not recorded, the Addisons slides are available to download here.

COVID 19 – Prevention and cure claims – advertisers beware!

The COVID-19 pandemic has led Australian regulators to issue warnings about advertisers making claims regarding their products' effectiveness in combatting the virus.

This paper provides a handy overview of the obligations which apply to direct selling companies and independent sales persons when making claims about product performance characteristics and suggests the steps which businesses should take to ensure compliance obligations are met. Read more here.

Changes to the Australian Consumer Law – expanding the consumer guarantees

It is time to dust off those terms and conditions of sale or supply. The scope of goods and services subject to consumer guarantees is being expanded. You need to consider whether the goods and services sold by your business automatically come with consumer guarantees under the Australian Consumer Law. If they do, you may need to make changes to your terms and conditions of sale to comply. Read more here.

Product Recall – My product has a safety issue, what do I do?

Think you might need to recall a product? In this paper, we outline exactly when product recalls are required under the Australian Consumer Law and provide a useful outline on how to conduct one. If you need further help, don't hesitate to reach out to a member of the Addisons team. Read more here.

Australian Government moves one step closer to allowing greater access to CBD

After a review of a substantial number of public submissions, the Delegate of the Secretary of the Department of Health has issued an interim decision concerning the regulation of cannabidiol (CBD) in Australia. This represents an important step in Australia's regulatory treatment of CBD towards a more permissive approach. This will be of interest to those direct selling companies which have CBD products as part of their product range in overseas markets. 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.

TGA classifies sports supplements as therapeutic goods effective 30 November 2020

Authors: Jamie Nettleton, Tim Clarke, Cate Sendall and Brodie Campbell

Following a public consultation process in December 2019, a declaration under the *Therapeutic Goods Act 1989* (Cth)[1] has been published specifying that certain sports supplements will be regulated as therapeutic goods.[2] These changes are scheduled to take effect on **30 November 2020**. Broadly, the declaration provides that sports supplements which contain ingredients that are not acceptable for food (eg. medicinal ingredients) or which are presented in a medicinal form (eg. tablets, capsules or pills) will be regulated in Australia as medicines and will be required to be registered on the Australian Register of Therapeutic Goods (**ARTG**) in order to be promoted and made available for sale in Australia.

Under the declaration, the following goods will be classified as therapeutic goods provided that they are used, advertised or presented for supply for a therapeutic use or in a way that is likely to be taken to be for a therapeutic use:

- goods for oral administration that are represented as being for the improvement or maintenance of physical or mental performance in sport, exercise or recreational activity where the relevant good contains, or is represented as containing:
    - a substance included in a schedule to the Poisons Standard;
    - a substance identified on the Prohibited List by the World Anti-Doping Authority that is added as an ingredient to the goods;
    - a relevant substance that is identified as an ingredient to the goods (i.e. dendrobium (***Dendrobium nobile***) or methylliberine); or
    - a substance with equivalent pharmacological action to a substance mentioned above (including those that may be characterised as an active principle, precursor, derivative, salt, ester, ether or stereoisomer); and
- from 30 November 2023, goods that are supplied in the dosage form of a tablet, capsule, or pill (other than those goods which contain glucose only).
- Therapeutic claims to which the declaration will apply include, but are not limited to, claims regarding:
- gaining muscle;
- increasing mental focus;

[1] *Therapeutic Goods (Declared Goods) Amendment (Sports Supplements) Order 2020* (Cth).
[2] For background on the declaration, see our previous publication 'TGA proposal to declare various sports supplements are therapeutic goods: submissions close on 3 December 2019'.

- increasing metabolism;
- increasing stamina;
- increasing testosterone levels, reducing oestrogen levels or otherwise modifying hormone levels;
- losing weight or fat;
- preparing for workout; and
- recovering from workout.

Sports supplements that contain ingredients which are appropriate for food and are presented as foods will continue to be regulated as foods (such as protein powders, nutrition bars and energy drinks). The declaration will also not apply to any products that do not make therapeutic claims, such as artificial sweeteners and meal replacement shakes. Sports supplements that are compliant with the relevant food standards may continue to make health claims as permitted by the Food Standards Code. As noted in our previous "Insight on this topic, Food Standard 2.9.4 ("Formulated supplementary sports foods") currently remains under review by Food Standards Australia New Zealand.[3]

After the declaration comes into effect, sports supplements covered by the declaration will be required to be entered in the ARTG (if intended to be marketed as medicines) or will be required to alter their product claims, ingredients and/or dosage forms (if intended to be marketed as foods). Sports supplements which are marketed as medicines will be required to comply with legislative requirements regarding manufacturing, formulation, labelling, evidence and advertising. It will be illegal for retailers to sell sports supplements covered by the declaration without them being included in the ARTG.

The declaration will also have a significant impact on the importation of sports supplements from New Zealand. Generally, the *Trans-Tasman Mutual Recognition Act 1997* (Cth) (**TTMRA**) permitted goods which are lawfully able to be sold in New Zealand to be sold in Australia (save to the extent that they are therapeutic goods). As such, sports supplements which become classified as therapeutic goods as a result of the declaration will no longer be able to rely on the TTMRA and will not be able to enter the Australian market in this way.

We will monitor closely the regulation of sports supplements in Australia once the declaration comes into effect on 30 November 2020.

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[3] See https://www.foodstandards.gov.au/consumer/nutrition/sportfood/Pages/default.aspx.

Big Business Beware! Small businesses will soon be able to join forces and bargain against you with fewer hurdles

Authors: Laura Hartley and Sarah Best

Under a class exemption recently made by the ACCC[1], small businesses will be entitled to collectively bargain with customers and suppliers without breaching competition laws. This is the first class exemption to be introduced by the ACCC, following the regulator being given the power to grant certain class exemptions back in 2017.

This class exemption could significantly impact businesses that contract with small businesses and it is likely to encourage small businesses across all industries to set up collective bargaining groups to address power imbalances and to negotiate with large customers or suppliers.

Who can use this class exemption?

The exemption is available to:

- **businesses** (including farmers, growers, independent contractors) which each have an aggregated **turnover of less than $10 million** in the preceding financial year to collectively bargain with customers or suppliers; and
- **franchisees** including motor vehicle dealers (covered by the Franchising Code) to collectively bargain with their franchisor, regardless of their size.

This will cover more than 98.5% of businesses according to the ACCC[2].

What protections are provided to small businesses by the class exemption?

Currently, all businesses that engage in collective bargaining conduct risk breaching Australia's competition laws as this would otherwise generally involve competitors coming together to co-ordinate their negotiations with customers or suppliers over common issues (e.g. terms and conditions of supply or acquisition and/or prices). The class exemption however provides small businesses with a "safe harbour" to engage in collective bargaining conduct without fear of breaching competition laws and without needing to seek specific ACCC approval by way of the authorisation or notification process.

Are there any limitations to the protections provided by the class exemption?

The class exemption is subject to certain important limitations. These include the following:

[1] ***Competition and Consumer (Class Exemption – Collective Bargaining) Determination 2020***, 19 October 2020.
[2] Paragraph 23 of the ***Explanatory Statement to Competition and Consumer (Class Exemption – Collective Bargaining) Determination 2020***, prepared by the Australian Competition and Consumer Commission.

- It only covers contracts, arrangements or understandings between ***eligible*** businesses which are for the substantial ***purpose*** of "collectively negotiating" with a target business. It does not apply to collective boycotts (i.e. refusing to contract with a target business).
- It does not protect collective bargaining for the supply of goods or services to a target business for their non-commercial use.
- It is only available to businesses who have a reasonable expectation of contracting with the target business, regardless of whether such a contract is ultimately made. This is to ensure that collective bargaining groups are confined to members who have a "legitimate, shared interest in collectively bargaining with the same target(s)"[3].
- It is not available to businesses which have previously made an unsuccessful attempt to obtain an authorisation or notification in relation to the conduct.
- It only permits businesses to share and use information when this is reasonably necessary to engage in the collective bargaining conduct. Small businesses that are competitors therefore need to take care not to share more competitively sensitive information than is necessary for the collective bargaining process, both before and after joining a collective bargaining group.
- A "Collective Bargaining Class Exemption Notice" must be lodged with the ACCC within 14 days of the conduct and a copy of the Notice must be provided to the target business. The collective bargaining must also be consistent with the scope of the Notice.

What does a small business need to do to get the benefit of the class exemption?

Businesses will self-assess their eligibility to rely on the exemption, and if they seek to rely on it, they will need to lodge a simple, one page notice with the ACCC when the group is formed and also notify each target business that the group proposes to collectively bargain with, when they first approach the target business. No fee is payable for lodging the form. These forms will be on the ACCC's public register. Importantly, legal protection from competition laws commence automatically on lodgement.

The exemption does not require anyone to join a collective bargaining group, or require a customer, supplier or franchisor to deal with the bargaining group if they don't want to do so. It simply means that the group can collectively bargain with the target business on a voluntary basis without needing to worry about a possible breach of competition laws. The target business is still free to choose to continue to negotiate with each member of the group individually or to deal with the group collectively.

What if a business or the conduct falls outside the scope of the class exemption?

Larger businesses or those with more complex arrangements will still be able to use the ACCC's authorisation and notification processes to seek legal protection to collectively bargain on a case-by-case basis.

[3] Attachment 1 to the Explanatory Statement, Paragraph 11.

When will the class exemption be available?

It is likely that the class exemption will be available for businesses to use in early 2021 once a number of administrative and other parliamentary procedural steps have been attended to.

Enhancing Protection for Small Businesses – proposed reforms to unfair contract term provisions under the Australian Consumer Law

Author: Jamie Nettleton, Cate Sendall and Brodie Campbell

On 9 November 2020, the Commonwealth Treasury announced that Federal and State and Territory consumer affairs ministers had agreed to reform the existing unfair contract term protections under the Australian Consumer Law (**ACL**).[1] If passed, these reforms will expand the application of the unfair contract term protections to a greater number of small businesses and will offer clearer guidance on when the protections apply. Most notably, these reforms will have the effect of making unfair contract terms unlawful, meaning that courts will be able to impose civil penalties for contraventions of these provisions.

Proposed Reforms

The unfair contract term protections, which apply to standard form consumer and small business contracts, seek to address contract terms that create a significant imbalance in parties' rights or obligations.[2] Having regard to stakeholder feedback received during the recent consultation, the Commonwealth and State and Territory governments have indicated the following key reforms to the protections.

Make Unfair Contract Terms Unlawful

Currently, the law technically does not prohibit the use of unfair contract terms, but instead allows courts to declare unfair terms as unlawful and void. As potentially the most significant reform, it has been proposed that unfair contract terms be made unlawful and that courts be given the power to impose civil penalties in relation to these terms. It is recommended that consumers also retain the right to challenge unfair contract terms in court and have them rendered void.[3]

Courts would be able to determine the appropriate penalty up to a maximum amount as prescribed by law. Before a civil penalty could be imposed, the court would need to be satisfied that imposing the penalty was appropriate in the circumstances of each individual case. It is expected that such a change will be more likely to deter contract-issuing parties from including unfair contract terms in their standard form contracts.

Flexible Remedies

As noted by stakeholders, there is the potential currently that, if an unfair contract term is challenged and declared void, small businesses may be put into a worse situation than if the term were to remain. As such, the proposal that courts be given the flexibility to order appropriate remedies received strong support from

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[1] Australian Government Treasury, 'Enhancements to Unfair Contract Term Protections' (9 November 2020) https://treasury.gov.au/publication/p2020-125938

[2] In October 2020, we gave a presentation about what constitutes an "unfair contract term" under the ACL at a Direct Selling Australia webinar. A copy of our presentation is available here.

[3] Australian Government Treasury, 'Enhancements to Unfair Contract Term Protections: Regulation Impact Statement for Decision' (**RIS**) (September 2020) https://treasury.gov.au/sites/default/files/2020-11/p2020-125938-ris.pdf.

both stakeholders and regulators. In particular, the Australian Securities and Investment Commission (**ASIC**) noted in its submission that removing the automatic voiding of unfair contract terms may promote the fairness objective of the unfair contract term provisions and may allow courts to tailor remedies for the needs and circumstances of each business on a case by case basis.[4]

An alternative option which received general stakeholder support was amending the law to create a rebuttable presumption that a contract term is unfair if in a separate case the same or a substantially similar term has been used by the same entity or in the same industry and has been declared by a court to be unfair. In other words, if a term has been declared by a court to be unfair, a business who seeks to use the same term in similar circumstances bears the onus of proving that the term is not unfair.[5]

Definition of "Small Business Contract"

Submissions were generally unsupportive of retaining the existing 20 employee threshold for defining a "small business". This is because small businesses, such as those in the hospitability industry during busy seasons, may often employ more than 20 persons, and the 20 person headcount may be inconsistent with other commonly-used definitions of "small business".[6]

The most favoured option by stakeholders was replacing the 20 employee threshold with a 100 employee threshold or a $10 million annual turnover threshold. If accepted, as long as at least one party to the contract meets either of these requirements, a standard form small business contract would be covered by the unfair contract term protections.[7]

In relation to the contract value threshold, the most supported option was to remove the threshold entirely. This is on the basis that, as submitted by ASIC, where a small business has no opportunity to negotiate standard form contracts, the unfair contract term protections are necessary and appropriate regardless of contract value.[8]

Clarity on "Standard Form Contract"

The reforms also seek to address the question of what constitutes a "standard form contract". To assist in clarifying this term, the reforms propose to require courts to consider factors such as "repeat usage" – in other words, evidence that a substantially similar contract has been used by a contract issuer in a number of transactions would support a finding that the contract is a standard form contract.[9] A further proposed option to assist in clarifying what constitutes a standard form contract is to amend the law to clarify the types of situations where a party has not had an "effective opportunity to negotiate".[10]

[4] RIS Pages 54-55.
[5] RIS Page 56.
[6] RIS Pages 58-59.
[7] 7 RIS Page 60.
[8] RIS Page 66.
[9] RIS Page 68.
[10] RIS Pages 7, 68.

Minimum Standard Exemption

Under the current protections, terms which are required or expressly permitted to be included in contracts under Commonwealth, State or Territory law are exempt from the application of the unfair contract term protections.[11] However, some laws require that, if certain "headline" clauses are included in a contract, additional terms which set industry-specific requirements must also be included. The reforms propose to extend unfair contract term exemptions to these types of "headline" terms.

For instance, State and Territory retail lease legislation currently provides that, if a demolition clause is included in a lease agreement, certain requirements relating to the demolition must also be included. The current protections would exempt the latter clauses, but not the headline demolition clause. The new reforms propose to exempt these "headline" clauses from the application of the unfair contract term protections, but only to the extent that they also include minimum standards or industry-specific requirements as required under legislation.[12]

What next?

The Commonwealth Treasury will now develop and release for comment draft legislation incorporating these proposed reforms. This will provide stakeholders with a further opportunity to comment on the amendments. For more information on the unfair contract term protections, including whether they would be likely to apply to your contract or may impact on you or your business, please contact the Addisons team.

[11] ACL section 26(1)(c)
[12] RIS Pages 69-70.

Direct Selling Australia – Legal & Regulatory Webinar

Authors: Jamie Nettleton and Cate Sendall

Direct Selling Australia hosted a Legal and Regulatory Webinar on 22 October 2020. Partner Jamie Nettleton and Special Counsel Cate Sendall were pleased to present on:

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COVID 19 – Prevention and cure claims – advertisers beware!

Authors: Jamie Nettleton and Cate Sendall

The COVID-19 pandemic has led Australian regulators to issue warnings about advertisers making claims regarding their products' effectiveness in combatting the virus. The Australian Competition and Consumer Commission (**ACCC**), for example, issued a warning to consumers about COVID-19 scams on 20 March 2020, which included claims by online stores that their products are a cure for coronavirus.[1] The Therapeutic Goods Administration (**TGA**) has also issued numerous warnings about therapeutic goods, for example, complementary medicines and disinfectants being advertised inappropriately as preventing or treating COVID-19 infections.[2]

The TGA's warning to consumers refers to various claims including: "unregistered products that 'kill COVID-19', air purifiers that help fight the coronavirus, complementary medicines that prevent the virus, and a medical device that treats a number of serious diseases including COVID-19, HIV AIDs and cancer".[3] Yet, there is currently no treatment or cure for COVID-19.

This is a timely reminder for direct selling companies (**DSOs**) to ensure that their independent sales persons (**ISPs**) are aware of their obligations which arise under, for example, the *Therapeutic Goods Advertising Code (No. 2) 2018* (**TGAC**) and the *Australian Consumer Law* (**ACL**). If a DSO is a member of Direct Selling Australia (**DSA**), there are also obligations under DSA's Code of Practice.

We provide an overview of the obligations which apply to both DSOs and ISPs when making product claims including claims about product performance characteristics and steps DSOs and ISPs should take to ensure compliance obligations are met.

What are your obligations?

Obligations arise under the ACL, the *Therapeutic Goods Act 1989* (**TG Act**) and the TGAC. In short, claims must be truthful, able to be substantiated and not likely to mislead or deceive.

The Australian Consumer Law

The ACL prohibitions apply to all advertising and promotional activities of DSOs and ISPs in Australia. When promoting their products, DSOs and ISPs **must not** make:

- statements that are misleading and deceptive or which or are likely to be misleading and deceptive; or

[1] See ACCC media release Warning on COVID-19 scams 20 March 2020

[2] See TGA media releases: Warning about products claiming to treat or prevent the novel coronavirus 7 February 2020 and TGA issues warning about illegal advertising relating to COVID-19 24 March 2020

[3] See TGA media release, TGA issues warning about illegal advertising relating COVID-19 24 March 2020

- false representations that, for example, a product is of a particular standard, quality, grade, composition or style. Similarly, false representations concerning product testimonials are also prohibited.

The maximum penalties are substantial! For companies, the maximum penalties are the greater of:

- $10 million;
- three times the value of the benefit the company received from the false representation; or
- if the benefit cannot be determined, 10 per cent of annual turnover in the preceding 12 months.

For individuals, the maximum penalty is $500,000.

The Therapeutic Goods Act and Therapeutic Goods Advertising Code

Therapeutic claims are not permitted to be made in respect of a product unless the product (with few exceptions) has first been entered on the Australian Register of Therapeutic Goods (**ARTG**). Once the product has been entered on the ARTG, the only claims which may be made are the "indications" for which the product has been entered. Indications are the product's intended therapeutic uses. Appropriate evidence must be held to support a product's therapeutic indications.

In a manner similar to the ACL, the objective of the TGAC is to ensure that advertising is ethical and does not create unrealistic expectations about a product's performance or mislead or deceive consumers. The TGAC prohibits numerous types of advertising claims, including the following:

- claims referring to a serious form of a disease unless the TGA has provided prior approval (claims of this nature are known as "restricted representations" and the TGA considers that representations referring to coronavirus are restricted representations);
- claims which exaggerate product efficacy or performance;
- claims which are likely to lead to people delaying necessary medical attention;
- claims which encourage inappropriate or excessive use of therapeutic goods;
- claims that therapeutic goods are infallible, magical or miraculous;
- claims which suggest that the therapeutic good's use will result in a cure;
- claims which suggest harmful consequences may arise from the therapeutic goods not being used;
- endorsements (or implied endorsements) from a health professional; and
- testimonials from a person involved in the sale, supply or marketing of the goods.

The TG Act contains a number of criminal offences, with some being punishable by imprisonment and maximum fines of $4.2 million (for a company) and $840,000 (for individuals). Civil penalties include

maximum fines of $10.5 million for companies and $1.05 million for individuals. In recent proceedings commenced by the TGA, the Federal Court awarded $10 million in civil penalties in respect of breaches of the advertising provisions of the TG Act.[4]

Direct Selling Australia's Code of Practice

Further, DSOs which are members of DSA and their ISPs are required to comply with DSA's Code of Practice (**Code**) which includes prohibitions against making false or misleading claims concerning a product's standard, quality, value or grade; its performance; a need for the product; and false or misleading claims concerning any supporting testimonial.

What should you be doing?

DSOs and their ISPs should ensure that all claims which are made in respect of the products they promote and sell are truthful and able to be substantiated. The overall impression created by marketing material must not be likely to mislead or deceive. No claims should be made that a product treats or cures COVID-19. Therapeutic claims must not be made in respect of products unless entered on the ARTG (with very few exceptions to this rule). Advertising claims in respect of therapeutic goods which have been entered on the ARTG must be limited to the indications for which the product has been listed or registered.

DSOs should be regularly monitoring their own websites and official social media pages to ensure that all posts comply with legal requirements and where non-compliant posts are identified, those posts are removed immediately. DSOs will be considered the "publisher" of the posts on their official social media pages if they are aware that a third party post is misleading but do not remove the post.

DSOs should ensure that they are regularly reminding their ISPs of their advertising compliance obligations. Indeed, it is usually a requirement of an ISP's independent contractor agreement that the ISP complies with all laws and regulatory requirements relating to advertising and promotional activities. ISPs should be encouraged to review their social media content and to remove any non-compliant material, particularly any express or implied claims that a product prevents, treats or cures COVID-19.

DSOs should also regularly monitor their ISPs' advertising, including on social media, to ensure that no inappropriate claims are made, including claims that a product may have a particular effect in respect of COVID-19. Where inappropriate claims are identified, ISPs should be notified, reminded of their contractual obligations and required to remove immediately the claims. Depending on the circumstances, taking steps to terminate the DSO's independent contractor relationship with the ISP may be warranted.

Don't delay – now is the time to ensure that all marketing claims comply fully with legal requirements!

[4] See TGA media release, $10 million penalty ordered against Peptide Clinics Pty Ltd for advertising breaches, 23 July 2019

Changes to the Australian Consumer Law – expanding the consumer guarantees

Authors: Renee Shipp

It is time to dust off those terms and conditions of sale or supply. The scope of goods and services subject to consumer guarantees is being expanded. You need to consider whether the goods and services sold by your business automatically come with consumer guarantees under the Australian Consumer Law. If they do, you may need to make changes to your terms and conditions of sale to comply.

What are consumer guarantees?

Under the Australian Consumer Law, goods and services supplied to a "consumer" automatically come with certain guarantees prescribed by the law. These guarantees include:

- for goods, that they are of acceptable quality and are reasonably fit for any purpose represented by the supplier or disclosed by the consumer; and
- for services, that they will be rendered with due care and skill and will be provided in a reasonable timeframe.

Businesses are prohibited from excluding, limiting or modifying the consumer guarantees in any way in their terms and conditions. Failure to meet the consumer guarantees will mean that the consumer can claim various remedies provided for under the Australian Consumer Law, which include a repair, replacement or refund and, in some cases, compensation for damages and loss.

When do goods and services come with the consumer guarantees?

The critical test is whether the goods and services are being supplied to a "consumer". At present, a good or service is taken to be supplied to a "consumer" if the amount payable for them is $40,000 or less. Goods and services can also be taken to be supplied to a "consumer" if they are over $40,000, but are of a kind ordinarily acquired for personal, domestic or household use.

What is changing?

Effective from 1 July 2021, the monetary threshold for the supply of goods is set to increase from $40,000 to $100,000[1]. This amendment followed the recommendations of the Australian Consumer Law Review which found that the level of protection afforded to consumers by the consumer guarantees has been eroded over time due to inflation and the increase is warranted in order to restore the level of coverage to consumers in real terms.

Due to a drafting anomaly in the new regulations, the increased threshold doesn't currently apply to services, even though it was clearly the intention that the increased threshold would apply to both goods and services. We expect this to be rectified by parliament before these changes become effective.

[1] *Treasury Laws Amendment (Acquisition as Consumer – Financial Thresholds) Regulations 2020* (Cth)

What does this mean for business?

This change means that suppliers who have previously been able to escape the consumer guarantee regime because their goods and services are valued over $40,000 may find that their goods and services are now caught. It will be important for any businesses selling goods and services over $40,000 to reassess whether the consumer guarantees apply to them. If they do, the terms and conditions of sale or supply, as well as sales and refunds policies, should be reviewed as they will likely need an update.

Businesses newly caught by the consumer guarantee regime will need to make sure that the remedies they offer for faulty goods and services are consistent with those mandated by the Australia Consumer Law, which, of course, may be more extensive than those currently being offered by the business on a voluntary basis.

It is not all bad news for business. On the flipside, businesses in Australia purchasing goods and services will be able to rest assured that any goods and services up to the increased value of $100,000 will come with the consumer guarantees and they can avail themselves of the remedies under the Australian Consumer Law in the event they don't meet the minimum standards required by the consumer guarantees.

What else has changed?

These developments to the consumer guarantee regime follow changes that became effective on 9 June 2019 to the mandatory wording required to be contained in voluntary warranties against defects given by businesses in addition to the consumer guarantees[2]2. The mandatory wording required to be included in warranty documents is intended to ensure that consumers are aware that any warranty against defects operates in addition to the consumers' rights under the Australian Consumer Law.

Up until 9 June 2019, the mandatory wording was only required in connection with a supply of goods alone, but this has now been extended to the supply of services or a supply of goods combined with services. If you haven't done so already, we recommend that any businesses supplying services or goods combined with services should consider whether the wording of their warranty documents is compliant.

[2] *Competition and Consumer Regulations 2010* (Cth), regulation 90

Product Recall – My product has a safety issue, what do I do?

Authors: Laura Hartley and Julie Allen

A phone call comes in on your company's consumer care line "Excuse me, but your product has caused me an injury".

You ask for photos of the offending product and the alleged injury and when they come through, you open them with trepidation. Sadly, there is no doubt. The photos clearly tell the story. And there is your product, featured in the photo, trademark and all.

So where to from here?

Step 1: Do you need to conduct a recall?

When use of your product has resulted in a consumer injury, it doesn't mean that your entire suite of products of the same type are necessarily at fault. What caused the injury to the consumer? Was it a manufacturing defect with the product? Was there something about the design of the product that made it inherently dangerous?

Conduct any tests that you require on the product. Technical tests can be useful to determine the root cause of the fault. Any discussions with the injured consumer need to be carefully framed at this point and while you are waiting for those results so that your company does not automatically admit any liability, without actually knowing whether the product itself was at fault or whether there was something specific or irregular about that consumer's use, handling or maintenance of the product.

Check customer call logs and determine whether there are any other reports of injuries, issues or complaints with this or any product you sell that is similar to it.

When you have the information in front of you, it is time to make a determination. Under the *Australian Consumer Law* (**ACL**), where a "***consumer good***" has been identified as posing a safety risk to consumers in Australia, the supplier of that product **must** initiate a recall of that product.

Circumstances in which a product will be considered to pose a safety risk to consumers include instances where:

- the product will or may cause injury to a person; and/or
- a reasonably foreseeable use (including a misuse) of the product will or may cause injury to a person.

Sometimes, where customers are using the product in an unusual manner, it may not be "***reasonably foreseeable***" that they were ever intending to use it that way. Tilting backwards on a chair and having the leg snap may be a reasonably foreseeable misuse of the product – however, performing acrobatics on the same chair, perhaps not quite so reasonably foreseeable. Your product only has to be safe for any use or reasonably foreseeable misuse.

Concerningly, at this stage, you have now determined that your product has a safety defect. Time for action.

Step 2: How to conduct a product recall

First thing to know is if your company becomes aware that a consumer good which it has supplied has, or has potentially, resulted in the death of, or serious injury/illness of a consumer, you must notify the ACCC within 2 days of becoming aware of that event.

You also need to initiate a recall as quickly as possible and get your products out of circulation as fast as possible.

You must notify the ACCC in writing of the details of a product recall within 48 hours of initiating that recall. This can be done by submitting an online form which is available here. The maximum penalty that may be imposed on a company for failing to notify the ACCC within 48 hours of initiating a recall is $16,650.

You then need to prepare your communications to consumers carefully:

- You need to include specific requirements in your communications including providing consumers with a full remedy, contact details and what to do to obtain the remedy you are offering. This means you will need to repair or replace the unsafe product or provide the consumer with a full refund.
- Do not use the word “voluntary” in any communications to consumers. The ACCC will make you delete it. Yes, technically it is a voluntary recall in that it is driven by you as a supplier, but it’s still required by legislation.

Now is also the time to remember your insurance – if you have a product recall insurance policy (or similar), you should notify your insurer.

Note that if your product is a specific type of good governed by another authority your regulator may change. For example, the Therapeutic Goods Administration governs medical devices and products, and if your product is edible, the regulator for all recalls is Food Standards Australia New Zealand. Check the appropriate regulator before starting any recall as their requirements and processes differ.

Step 3 – Keep good records and report

The ACCC likes to keep a close watch on recalls and how they are going.

Regular reports to the ACCC are part of a recall so keep records of exactly how many people have responded and what has happened to each of the products you have onsite, in storage, with any reseller etc.

Should your communications plan yield low results (in that consumers are not responding, the product is not being returned and there are a large number of products still out there), the ACCC may require you to ramp up communications or try a different forum to reach consumers with the affected products.

When the numbers of people returning or replacing stabilise and the ACCC considers those numbers reflect a good response/return rate, you will be told that you no longer need to file reports.

The good news is once the decision is made to recall products, the legal requirements associated with recalls are largely straightforward. The difficulty is always the judgement call associated with whether you need to recall a product, and the scope of that recall. Need help? Please contact Laura Hartley or Julie Allen for specific advice on your circumstances.

Australian Government moves one step closer to allowing greater access to CBD

Authors: Jamie Nettleton, Tim Clarke and Cate Sendall

Further to our Insight of 4 May 2020, after a review of a substantial number of public submissions, the Delegate of the Secretary of the Department of Health (**Delegate**) has issued an interim decision in respect of a private scheduling application and a Delegate-initiated amendment concerning the regulation of cannabidiol (**CBD**) in Australia. Given the significant overlap, both proposals were considered jointly and the Delegate has issued the following interim decisions:

- Private scheduling application – an interim decision not to:
    - amend the current Poisons Standard to exclude CBD from scheduling; and
    - allow its general sale; and
- Delegate initiated amendment – an interim decision to down schedule CBD to permit greater access via a new Schedule 3 (**S3**) entry in the Poisons Standard in accordance with:
    - specific requirements to be added to S3; and
    - supply requirements to be added to Appendix M to enable CBD to be provided by a pharmacist provided that the medicine has been entered on the Australian Register of Therapeutic Goods.

The Delegate initiated amendment would require various amendments and new entries in the Poisons Standard including the addition of CBD to S3 of the Poisons Standard as being a pharmacist-only medicine in respect of oral, oral mucosal and sublingual formulations preparations permitted for therapeutic use when:

- the CBD is either plant-derived or, when synthetic, only contains the (-) CBD enantiomer;
- the maximum recommended daily dose is 60mg or less of CBD;
- in packs containing not more than 30 days' supply;
- CBD comprises 98% or more of the total cannabinoid content of the preparation;
- any cannabinoids, other than CBD, must be only those naturally found in cannabis and comprise 2% or less of the total cannabinoid content of the preparation;
- packed in blister or strip packaging or in a container fitted with a child-resistant closure; and
- for adults aged 18 and over.

In addition, a new entry in the Poison Standard (Appendix F, Part 3) would be required for CBD when included in S3 that products contain the following warning statements:

- 67 "***do not use if pregnant or likely to become pregnant***"; and
- 111 "***do not use if breastfeeding or plan to breastfeed***".

Submissions regarding the interim decision close on 13 October 2020. More information can be found here. For further information relating to the interim decision or CBD in Australia, please contact us.

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