

Communications Law

RECENT DEVELOPMENTS IN A COMPLEX LEGAL LANDSCAPE

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Advertising & Marketing | Rogues Gallery in the 1890's

[illegible]

CARBOLIC SMOKE BALL

The Approved Cure for **HAY FEVER** and **INFLUENZA**.

5/6
POST FREE.

Also

COUGHS

COLDS

CATARRH

ASTHMA

BRONCHITIS

HOARSENESS

THE ONLY USE OF OUR CARBOLIC SMOKE BALL



FOR INHALATION ONLY

5/6
POST FREE.

SORE THROAT

LARYNGITIS

CROUP

WHOPPING COUGH

NEURALGIA

HEADACHE

Get the carbolic mentioned above under name **ONE CAUSE**, and they can, therefore, be cured by **ONE REMEDY**



London News in 1892 - famous legal case *Louisa Carlill v Carbolic Smoke Ball Company*

English Court of Appeal 1893
£100 = £12,955




Advertising & Marketing | Rogues Gallery in the 2020's




Advertising & Marketing | Rogues Gallery in the 2020's

HERE TO PROTECT YOU

LJSHIELD is a groundbreaking technology that makes transferal of all pathogens to your Activewear (and let's face it, the one we're all thinking about is Covid-19) impossible by eliminating the virus on contact with the fabric.

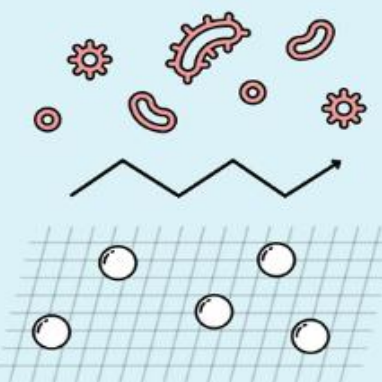


OTHER ACTIVEWEAR **ACTIVEWEAR WITH LJ SHIELD**



LJSHIELD IS SAFE, SUSTAINABLE & PERMANENT

- Applied as a water-based, non-toxic mist
 - Protects against bacteria, viruses, mould and fungus
 - No harmful effects on your body or the planet
- Never washes out & is never absorbed into your skin



LJ SHIELD

Protecting you with **ANTI-VIRUS ACTIVEWEAR**

Infectious diseases like COVID-19 and bacteria can remain on hard surfaces for up to 96 hours, but with our new fabric treatment, LJ SHIELD, they cannot be transferred to your Activewear.

Safe, Sustainable, Permanent

LJ SHIELD is applied with a non-toxic, water-based mist. The LJ SHIELD particles permanently adhere to the fabric and viruses and bacteria that come into contact with these particles have their outer shells pierced and are eradicated.

LJ SHIELD is non-toxic. It never washes out and it has no harmful effects on your body or the environment.



SAFE **SUSTAINABLE** **PERMANENT**



TODAY'S PRIVATE BRIEFING OUTLINE

01

HIGHLIGHTS TOUR OF THE
LEGAL LANDSCAPE

02

COPYRIGHT

03

PRIVACY & DATA

04

AUSTRALIAN CONSUMER
LAW

05

SPAM

06

TRADE MARKS

07

DEFAMATION

08

LAW & INFLUENCERS



There is a coalition of laws, regulations, codes and industry self-regulation that will influence and restrict how products can be promoted to consumers

Each product and supporting campaign will need to be assessed to determine what laws, codes and regulation may apply

The laws, regulations and codes apply in most cases to the agency and the brand and others in the supply chain:

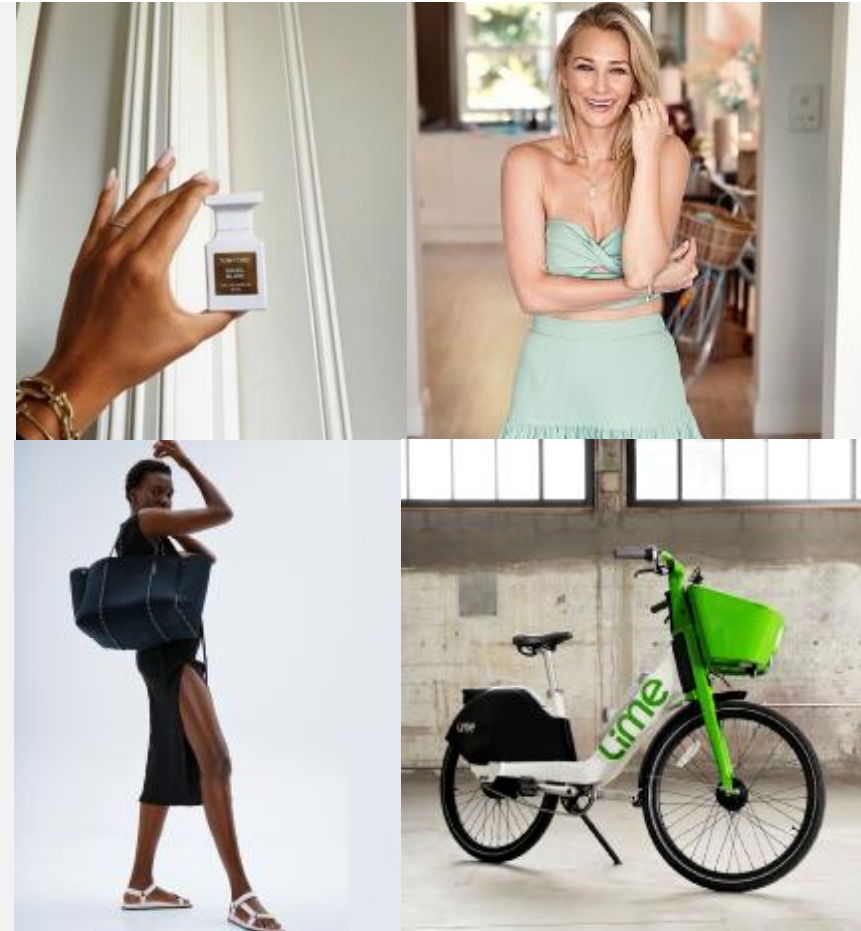
They must be considered & actioned in order to manage risk and demonstrate legal compliance

The media channel used can have different legal implications

Risks for the agency & brand include legal, commercial, reputational and regulatory / criminal

Legal landscape includes:

- Copyright
- Privacy & data laws
- SPAM / Telemarketing laws
- Consumer protection laws - ACCC & ASIC
- Trade Marks
- Defamation
- Corporate regulation / Regulator Guidance
- Gambling, Gaming & lottery laws
- Industry codes of practice (voluntary & mandatory*)



HIGHLIGHTS TOUR OF THE LEGAL LANDSCAPE

COPYRIGHT

02

COPYRIGHT | Copyright Act 1968 (Cth)

Copyright exists automatically upon creation of original content by a person

Copyright protects from unauthorised use of literary works, artistic works, computer programs, scripts, lyrics, paintings, sculptures, drawings, photographs, musical scores, films, videos, broadcasts, performances by artists, sound recordings, dramatic works, screenplays and content containing combinations of these:

- Film has up to 7 different copyrights
- Music has 3 different copyrights

Copyright generally lasts for the **life of the author plus 70 years**, depending on the type of copyright

The copyright owner has exclusive rights e.g. to communicate the work to the public (broadcast or place on the Internet) and to reproduce the work

Content creators and performers also enjoy separate Moral Rights – attribution, no false attribution and no derogatory treatment of works

Copyright law reform is on the way – limiting remedies for use of orphan works (where the copyright owner cannot be found) & fair dealing defence exception for non-commercial quotation

Key Takeaways:

Everything you find online including social will likely be protected by Copyright and Moral Rights

You cannot use without permission unless you have a fair dealing defence – **reporting the news, parody & satire and criticism & review**

Agencies must assume copyright exists and obtain ownership or a licence to use the content from a person that has legal authority





AGL Energy Limited v Greenpeace
Australia Pacific Limited [2021]

**COPYRIGHT | Copyright
Act 1968 (Cth)**





Universal Music Publishing Pty Ltd v
Palmer (No 2) [2021]

**COPYRIGHT | Copyright
Act 1968 (Cth)**





State of Escape Accessories Pty
Limited v Schwartz [2020]

**COPYRIGHT | Copyright
Act 1968 (Cth)**



PRIVACY & DATA

03

CURRENT INQUIRIES INVESTIGATIONS & REPORTS - IMPACTING PRIVACY AND DATA



Digital Platforms inquiry Final Report – ACCC

- Ø Released **26 July 2019**, the DPI Report spans 600+ pages & confirms law and regulation has not kept pace with technology & commercial practice
- Ø The DPI has a particular focus on protection of consumers' privacy & data, standards of consent and transparency of data handling
- Ø ***Ramifications for businesses that are involved in PI and data processing, handling and dealing – core to their business model***
- Ø Federal Government responded on **12 December 2019** with a detailed roadmap for policy and law reform

Digital Advertising Services Inquiry

- Ø March 2020 the ACCC released issues paper for inquiry into the markets for the supply of ad tech services and ad agency services
- Ø **Final report issued 28 September 2021 (Ad Tech Report)**
- Ø This report provides in-depth analysis of competition and efficiency in the supply of these services, and details recommendations to improve competition and efficiency in the supply of ad tech services
- Ø ACCC is also conducting a five-year inquiry into markets for the supply of digital platform services

Digital Platforms Services Inquiry 2020-2025

- Ø This is a further inquiry into markets for the supply of digital platform services
- Ø Digital platform services covered include internet search engine services, social media services, online private messaging services, digital content aggregation platform services, media referral services and electronic marketplace services
- Ø The inquiry also covers digital advertising services supplied by digital platform service providers and the data practices of both digital platform service providers and data brokers
- Ø 28 October 2021 third interim report into choice screens in facilitating competition and improving consumer choice
- Ø 31 March 2022 fourth interim report examining potential competition and consumer issues in the provision of general online retail marketplaces to consumers in Australia
- Ø Further reports in September 2022 and 2024 & final report due in March 2025

Privacy Act Review - OAIC

- Ø Privacy Act is being reviewed to ensure that Australia's privacy law framework empowers consumers, protects their data and supports the Australian economy (no date yet for a report)
- Ø Concurrent review underway of a proposed Online Privacy Bill (exposure draft has been released)

Key Takeaway:

There will be new laws and codes – **transparency, consumer protection, privacy & data a focus**

All about **C**HOICE, **C**ONSENT & **C**ONTROL to be afforded to consumers



PRIVACY | Privacy Act 1988 (Cth) – Current Law



Privacy Act 1988

When collecting personal data it is important to be aware of the requirements of the *Privacy Act 1988* (Cth) and the

13 Australian Privacy Principles.

The legislation and APPs apply to organisations with an annual turnover of more than \$3 million **or if you trade in or use PI for business.**

The APP's require a business to have a **Privacy Policy** (APP 1), the collection must be **necessary for a business purpose** (APP 3) and **a business must have a separate Collection Statement** (APP 5) **that provides up-front information to an individual about the collection, use and disclosure of the PI.**

Direct Marketing

The collection, use and/or disclosure of personal information for direct marketing purposes is prohibited, except in special circumstances.

Marketing teams can use personal information collected directly from an individual where:

APP 7.2 – the individual **would reasonably expect** to receive marketing communications

(Collection Statement disclosures achieve this) **OR**

Key Takeaway:

You can use personal information collected internally or from other sources where:

APP 7.3 – the individual would not reasonably expect to receive direct marketing:

- a. but it would be impractical to obtain consent; and
- b. the marketer provides a simple means to opt-out from receiving marketing communications; and
- c. The marketer provides an opt-out statement in each separate marketing communication; and
- d. The individual has not already requested to opt-out



PRIVACY | Privacy Act 1988 (Cth)



DATA: is any information in digital form that can be transmitted or processed

PERSONAL INFORMATION UNDER THE AUSTRALIAN PRIVACY ACT : is *information or an opinion about an identified individual*, or an *individual who is reasonably identifiable* (a) whether the information or opinion is true or not, and (b) whether the information or opinion is recorded in a material form or not

PERSONAL INFORMATION is simply a 'type' of DATA. The Australian definition is broad, but the GDPR and Californian definitions for example are even broader:

Key Takeaway:

There is a trend towards any data that relates to an individual being PI, even if anonymous or deidentified when taken in isolation due to AI and data analytics technologies and this may become law as part of Privacy Act review



Privacy Act 1988 (Cth) Section 6

Personal Information means information or an opinion about an identified individual, **or an individual who is reasonably identifiable**

- a. Whether the information or opinion is true or not; and
- b. Whether the information or opinion is recorded in a material form or not

GDPR Article 4(1)

Personal Data means any information relating to an identified or identifiable natural person –

an identifiable natural person is one who can be identified, directly or ***indirectly***, in particular by reference to an identifier such as a name, ***an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person***

California Consumer Privacy Act 2018 Section 1798.140 (o)

Personal information is information that identifies, relates to, or could reasonably be linked with a person or a household

Includes a name, social security number, email address, records of products purchased, ***internet browsing history, geolocation data, fingerprints, and inferences from other personal information that could create a profile about a persons preferences and characteristics***



PRIVACY | Privacy Act 1988 (Cth) – current prosecution by the OAIC



[OAIC v Facebook \[March 2020\]](#)

Australian Information Commissioner alleged that, during March 2014 – May 2014, Facebook seriously and/or repeatedly interfered with privacy of approx. 311,127 Australian Facebook users by disclosing their personal information to the 'This is Your Digital Life' App (Digital Life App)



Users did not install the Digital Life App, their friends did - yet their information was disclosed by Facebook by default

Facebook did not adequately inform these individuals of the manner in which their personal information would be disclosed



Personal information of these individuals was exposed to the risk of disclosure, monetisation and use for political profiling purposes – Cambridge Analytica scandal & a trigger for the DPI

OAIC is seeking a penalty for each act of disclosure of PI – the penalty could theoretically be as high as **\$500 billion**

Key Takeaway

No judgment yet. However, Agencies and Advertisers can take the following tips from this case:

- **Consent** has to be obtained directly from the person involved
- Issue is the inability of users to exercise reasonable **choice** and **control** about how their PI was disclosed
- Agencies and Advertisers should have strong contracts with third parties to ensure customer data is not being disclosed without authorisation - know what third parties will do with the data and ensure that contracts have provisions making third parties comply with the Australian Privacy Principles and future new laws



AUSTRALIAN CONSUMER LAW

04

CONSUMER LAW | Australian Competition and Consumer Act 2010 (Cth)



Sections 18 and 29 of the Australian Consumer Law (ACL) found in Schedule 2 of the *Australian Competition and Consumer Act 2010* (Cth) prohibit conduct by a *person in trade or commerce*:

- that is misleading or deceptive (**Section 18**); and
- prohibits a number of specific misrepresentations including false testimonials and false associations (**Section 29**)

The Australian Competition and Consumer Commission (ACCC) is the Federal Government regulator looking after the interests of consumers and the ACCC enforces the ACL

Whether an advertisement is misleading or not is based on the overall impression it conveys to the target audience, being: ‘*a reasonable, casual and attentive, but not overly analytical viewer of the advertising material*’, who is a member of the target audience

The ACL applies to any marcoms channel, any product, any claim / message and in infinite ways



Key Takeaway:

Terms, elucidation or disclaimers CANNOT cure a misleading ad if the **impression of the ad as a whole** is misleading

Consider the **media channel used** and the **dominant impression conveyed by all elements** – talent, voice, images, music, text, film

Always put yourself in the shoes of the consumer & ask **(1) what is the ‘claim’ being made;** and **(2) what is the ‘take out’?**



CONSUMER LAW | Recent Cases



JUNE 2021

NBN providers Dodo and iPrimus have been ordered to pay **\$2.5 million in penalties** following an ACCC investigation discovered their 'typical evening speed' claims were misleading

The providers '*cherry-picked only the fastest speeds its network could deliver*,' rather than providing an accurate estimate of typical speeds



MAY 2021

The ACCC issued five infringement notices to Mosaic Brands after the brand admitted to breaching Australian Consumer Law by making false and misleading representations of hand sanitiser and face masks for sale on their various websites

Claims included that face masks sold were 'CE/FDA' certified' when they were not, and that a hand sanitiser contained **70% alcohol when a tested sample contained 17%** Mosaic Brands admitted in the undertaking that its conduct contravened the Australian Consumer Law. **\$630,000 in penalties**



APRIL 2022

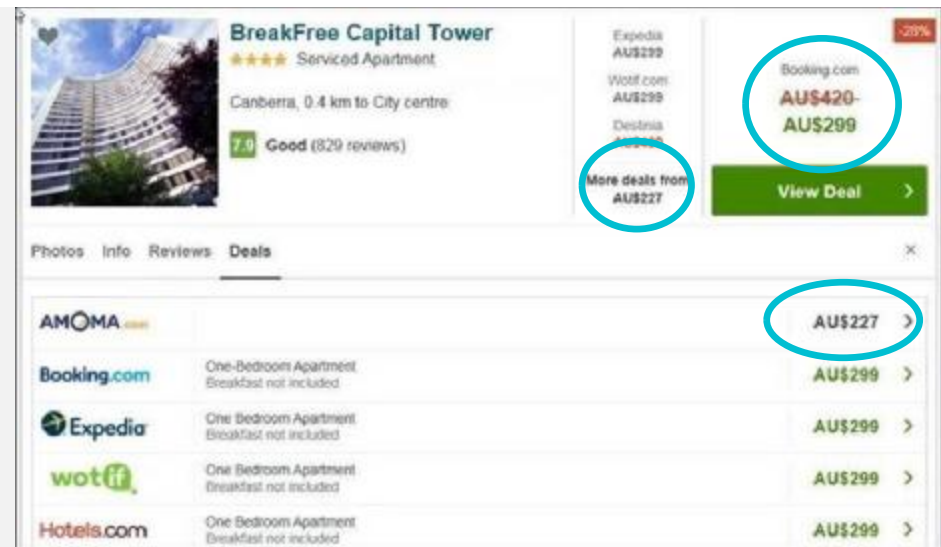
Uber admitted that it breached the ACL by making false or misleading statements in cancellation warning messages and Uber fare estimates and agreed to **penalties totalling \$26 million** to be imposed

Between at least December 2017 and September 2021, the Uber rideshare app displayed a cancellation warning to consumers who sought to cancel a ride saying words to the effect of '*You may be charged a small fee since your driver is already on their way*,' even when consumers were seeking to cancel a ride within Uber's free cancellation period



CONSUMER LAW | Australian Competition and Consumer Act 2010 (Cth)

ACCC v Trivago [November 2020 & April 2022]



Trivago's website aggregated deals offered by online hotel booking sites and hotel proprietors' own websites

Penalty = \$44.7 million

Showed available rooms at a hotel and **highlighted one offer out of all online hotel booking sites** (referred to as the 'Top Position Offer')

But higher-priced room rates were selected as the Top Position Offer over alternative lower-priced offers in 66.8 per cent of listings

Trivago's revenue was primarily obtained from cost-per-click (CPC) payments from online hotel booking sites, which significantly affected that booking site's appearance and prominence in search results

Full Federal Court upheld an earlier decision which found Trivago had breached the ACL by making:

- § misleading representations about hotel room rates on its website and television advertising
- § misleading consumers by representing its website would quickly and easily help users identify the cheapest rates available for a given hotel
- § misleading as website did not sufficiently disclose to users that its website **used an algorithm that gave prominence to accommodation providers paying Trivago a higher payment fee (cost per click)** - the most prominent offers were often not the cheapest offers for consumers
- § misleading use of strike through prices and text in different colours because Trivago often compared the rate for a standard room with the rate for a luxury room at the same hotel

CONSUMER LAW | Prosecution for misleading SEM

[ACCC v EmploySURE \[2021\]](#)

From August 2016 to August 2018, EmploySURE had published advertisements that promoted its free employment-related advice service **in response to google searches** such as “fair work commission”, “fair work Australia”, “fair work”, “fwc” and “fair work ombudsman”

EmploySURE also employed “dynamic key word insertion”, a feature that dynamically updates the displayed advertisement text to include one or more of the keywords from the user’s search terms.

Directly below the headlines was the URL www.fairworkhelp.com.au/Fair-Work/Australia, and the advertisements referred to ‘free advice’

The advertisements had no indication that they were provided by or related to EmploySURE

In December 2018 the ACCC instituted proceedings against EmploySURE following over 100 complaints. **EmploySURE argued, alongside other evidence, that the ‘.com’ domain, as opposed to ‘.gov’, and the indication that it was an ‘Ad’ would have indicated to a person that it was not a government agency**

Fair Work Ombudsman Help - Free 24/7 Employer Advice

(Ad) www.fairworkhelp.com.au/Fair-Work/Australia ▼ 1300 856 110

The Free Advice Service For Employers On All **Fair Work** Topics. Call Us Now!
Business Owner HR Advice · 24/7 Immediate Solution · Free Specialist Advice · Confidential
“Best thing ever for small business start ups” – Trustpilot.com

Business Awards Advice
Workplace Discrimination

Unfair Dismissal Claims
Pay Rates for Your Staff

Decision: The Federal Court dismissed the ACCC’s case, however the ACCC’s appeal was successful and the Full Federal Court unanimously ruled in favour of the ACCC in August 2021

EmploySURE ordered to pay a pecuniary **penalty of \$1 million** but this penalty is now being appealed by the ACCC as inadequate – **ACCC looking for at least \$5 million**

Key Takeaway:

The Full Court found that EmploySURE’s Google Ads were misleading in large part because of the use of the government agency names in the largest and most prominent typeface, and because the ads omitted any reference whatsoever to EmploySURE





ACCC'S OFFENSIVE ACTIONS

The ACCC and OAIC have formed a “pincer movement” and are not waiting for new law to fall out of the DPI and privacy law reform process

The ACCC is using misleading and deceptive conduct provisions under the ACL and OAIC the existing Privacy Laws to bring businesses with PI and data as their centre of gravity to heel

20 August 2020

Health Engine liable for collecting and disclosing users' PI and patient information to insurance brokers without consent and for publishing misleading patient reviews and ratings **Health Engine found liable for ACL breach and issued a \$2.9 million fine**

19 October 2019

Proceedings against Google alleging misleading conduct and false representations to consumers via phone screen about the sensitive and valuable personal location data it collects, keeps and uses (for numerous purposes)

Google found liable for breach of ACL - In addition to penalties, ACCC seeking Orders for Google to publish a notice to Australian consumers to better explain Google's location data settings in the future

27 July 2020

Proceedings against Google alleging misleading conduct in obtaining consumer consent to expand the scope of PI that Google could collect and combine about internet activity for commercial purposes including targeted advertising

December 2020

ACCC proceedings in the Federal Court against **Facebook** for false, misleading or deceptive conduct when promoting Facebook's **Onavo Protect mobile app** to Australian consumers. Onavo Protect was a free downloadable software application providing a **virtual private network (VPN)** service

The ACCC alleges that, between 1 February 2016 to October 2017, Facebook misled Australian consumers by representing that the Onavo Protect app *would keep users' personal activity data private, protected and secret, and that the data would not be used for any purpose other than providing Onavo Protect's products*

In reality Onavo Protect collected, aggregated and used significant amounts of users' personal activity data for Facebook's commercial benefit. This included details about Onavo Protect users' internet and app activity, such as records of every app they accessed and the number of seconds each day they spent using those apps

This data was used to support Facebook's market research activities, including identifying potential future acquisition targets

March 2022

ACCC instituted Federal Court proceedings against Facebook alleging that they *engaged in false, misleading or deceptive conduct by allowing the publishing of scam advertisements featuring prominent Australian public figures (Dick Smith, David Koch and former NSW Premier Mike Baird) that mislead consumers and caused them losses*

"The essence of our case is that [Facebook] is responsible for these ads that it publishes on its platform,"
ACCC Chair Rod Sims said.

In November 2019, Andrew Forrest published an open letter to Mark Zuckerberg criticising Facebook for allowing cryptocurrency scam ads using his identity onto the platform. He then commenced private criminal proceedings against Facebook in February 2022. While these proceedings concern similar advertisements to those in the ACCC's case, the ACCC's case is separate and concerns different questions of law.



CONSUMER LAW | Privacy Breaches prosecuted under the ACL and Privacy Law



Key Takeaways drawn from the ACCC & OAIC Cases

The ACCC and OAIC are increasingly focussed on the disclosures provided by businesses for how personal data is collected, used and disclosed

Businesses should consider how terms and conditions, particularly around consumer data, are presented and likely to be understood

Consumers must have an informed choice about how their data is handled - rather than a default setting being present whereby certain data can be collected, used and disclosed in any manner desired by the business

It is clear that misleading representations made to consumers can lead to liability under the ACL

Failure to obtain explicit informed consent will

CHOICE, CONSENT & CONTROL

Disclosure not sufficient if buried in "layers and layers of privacy policy or disclaimer" terms

Courts have now decided that consumers are time poor and unlikely to effectively engage with information presented in a layered manner that requires attention to links and 'click-throughs' in a digital environment

Advertisers should consider whether all relevant information required to be disclosed is presented in a way that is easily accessible to consumers and understood by them – eg "Choice Screens" supported by comprehensive Collection Statement (APP 5) – allows for consumer control

If an Agency assisted or aided a business with any of the above conduct via the provision of its services, the agency and individual employees in the agency could also be liable under the ACL and Privacy Laws



SPAM

05

Spam Act 2003 (Cth)

Do Not Call Register Act 2006 (Cth)

APP 7 in the privacy context does not apply to the extent that the Spam Act 2003 and the Do Not Call Register Act 2006 apply

Under the Spam Act every commercial electronic message **must** have:

1. **The consent** of the recipient (at the time of collection);
2. Clear and accurate sender identification; and
3. A functional 'unsubscribe' facility to 'opt out' of receiving such messages

The unsubscribe facility **must**:

1. Remain functional for at least 30 days after the message was sent;
2. Be clear and conspicuous; and
3. Be at no cost to the consumer

DNCR: You cannot contact persons on the DNCR regardless of how lawfully the personal information has been collected

SPAM | Spam Act 2003
(Cth)



SPAM | Spam Act 2003 (Cth)



July 2020	January 2020
Woolworths was fined \$1,003,800 by ACMA for infringing the Spam Act when marketing emails were sent to consumers who had opted out	Optus was fined \$504,000 following a finding by ACMA that the telecom provider was in breach of the Spam Act. The investigation uncovered that consumers who had unsubscribed from Optus marketing continued to receive messages well after they opted out
May 2018	March 2018
Window and door glazing company Eco Star was fined \$25,200 for calling numbers on the Do Not Call Register. Eco Star had initially obtained consent for its telemarketing activities, but the consent had lapsed for a majority of the numbers called (generally lapses after 3 months)	The ACMA cited Allied Construction as part of its crackdown on telemarketing in the solar industry. The company has paid a \$21,600 infringement notice for calling numbers on the Do Not Call Register (DNCR)



SPAM | Spam Act 2003 (Cth)



Reform on the horizon?

Mass political text messaging from United Australia Party Member, Craig Kelly in September 2021 sparked debate about whether the unsolicited messages were legal under current legislation

ACMA received over 4000 complaints with respect to the messaging

The bottom line is that the messages were legal because they were not offering, advertising or promoting goods, therefore they do not need to comply with Spam Act 2003 (Cth)

The fact that they were sent by a UAP also means that if it did fall under the Act, it would be exempt on the basis an exception for charity groups and political parties in the Act



TRADE MARKS

TRADE MARKS | Trade Marks Act 1995 (Cth)

Trade Marks Act 1995 (Commonwealth)

A trade mark is any sign used to distinguish goods or services of one trader from those of another

- Applies to brand names, product names and even taglines/slogans

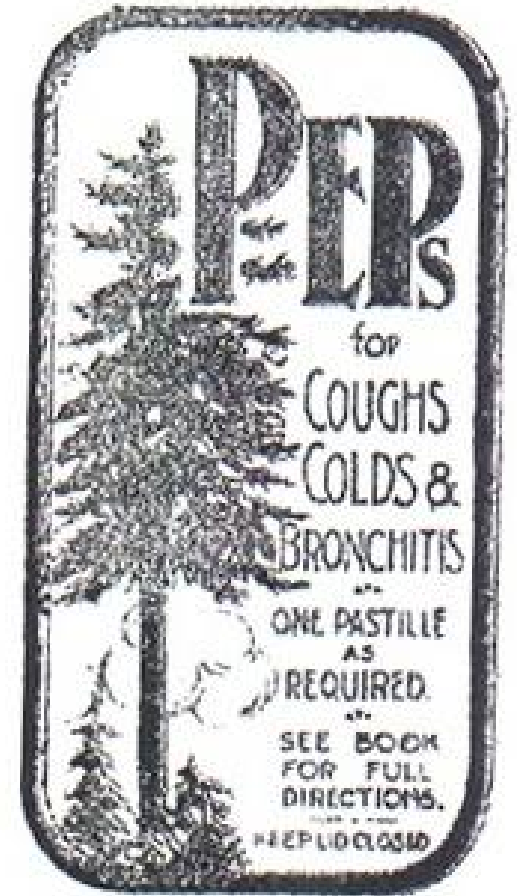
Not automatic like copyright, a business needs to register and can take months or years to obtain

There are 45 classes of goods and services

Trade mark infringement can occur if an advertiser uses a '**substantially identical**' or '**deceptively similar**' sign '**as a trade mark**' in its communications in respect of same or similar classes of a registered mark

Key Takeaway:

Always ensure that you undertake a 'road block' type search to ensure no registered trade marks or reputational common law marks exist that may give rise to legal liability in the agency or advertiser



Australian Trade Mark # 1 – July 1906
Class 5 “Chemical Substances”

TRADE MARKS | Classic Fail

Organic Marketing Australia P/L v Woolworths [2011]

Organic Marketing is the owner of the registered trade mark which includes the words '**Honest to Goodness**' and the image of a tulip.

Organic Marketing obtained an injunction to restrain Woolworths from using 'Honest to Goodness' in its advertising





Easton Corp Pty Ltd v
Pacific Brands [2015]

TRADE MARKS | Fails



TRADE MARKS | Fails

Easton owns the registered trademark for the word and brand "**Hottie**" in Australia and New Zealand and has done so for many years.

The trademark covers the classes of clothing, accessories, clothing and fashion design, web and digital design

Pacific Brands did not seem to follow trade marks 101....

Bonds ran a widespread marketing and public relations campaign to celebrate its 100th anniversary and promote its Bonds 'New Era' range, including the '**Boyfriend Hottie**' and several '**Hipster Hottie**' styles which were sold in Bonds stores as well as department stores including David Jones, Myer, Target and Big W

Dispute settled before final decision

Significant brand dilution and damage – settlement for \$\$\$ assumed

Easton Corp Pty Ltd v
Pacific Brands [2015]



DEFAMATION

07

DEFAMATION| Defamation Act 2005 (NSW) and National Reform



Defamation occurs when a party publishes (either orally or in writing) something about another party that is untrue and that is harmful to their reputation

Historically defamation was governed by the common law. There were two different types of defamation – **slander** and **libel**

Slander was when a party defamed another party orally, and libel was when a party defamed another in writing. However, there is no longer a distinction between these two forms of defamation and the law in New South Wales governing defamation is covered by the *Defamation Act 2005*

On 1 July 2021, new defamation laws came into effect in NSW, VIC and SA. The most notable changes are:

Public Interest Defence: where a defendant can prove the following, they can rely on the defence of publication in the public interest:

- The matter concerns an issue of public interest
- The defendant reasonably believed that the publication was in the public interest

Single Publication Rule: means time runs from the date of first electronic publication. As such, there is only one publication date that will be relevant. Pre-2021, the limitation period started over again each time an electronic publication was accessed

Serious Harm: introduces the requirement for serious harm in a defamation action. The goal is to set the threshold for harm at a level above the trivial

Key Takeaway: Whilst highly unusual in practice, an individual can be defamed in advertising as there is a “publication”



DEFAMATION | Recent Cases

[Voller v Nationwide News Pty Ltd \[2020\]](#)

Facts: Dylan Voller was detained in the Northern Territory youth detention centre, which was documented on a July 2016 episode of Four Corners. There was widespread outrage over the program which led to a royal commission for treatment of youth in the child protection and youth detention systems in the NT

Footage was posted on the defendants' Facebook pages which then allowed for derogatory comments to be made by third-parties. Alleged Mr Voller was subjected to “hatred, ridicule and contempt” and had “suffered and continues to suffer distress and damage to his reputation”

NSW Supreme Court & Court of Appeal: The Facebook page owner / administrator is in control of what posts are made and can clearly delay and monitor comments being made in relation to these posts

Justice Rothman noted ***publishers knew at the time that the posts were uploaded that defamatory material would likely be published on their pages as a consequence of allowing comments***

Therefore they are responsible for the comments. The publishers were found to be liable for the defamation of Voller

Appeal to the High Court of Australia ...



DEFAMATION | Recent Cases

[Voller v Nationwide News Pty Ltd \[2021\] HCA](#)

High Court: dismissed The Sydney Morning Herald's appeal of the Federal Court's decision that media outlets are considered publishers of third-party comments on the respective outlet's Facebook.

The Court's decision means that Dylan Voller was free to pursue a defamation action against the Herald, along with Sky News and The Australian, on whose Facebook pages potentially defamatory comments also appeared

Case settled in March 22

Just decided 6 June – John Barilaro v Google

Key Takeaway:

This case places **significant legal obligations on the page administrators** of Facebook and other social media sites to **moderate** and ensure that community comments are not defamatory of a person that is able to be identified – even in the advertising context – **as brands will be considered to be the 'publishers' of such third party comments**



LAW & INFLUENCERS

08

INFLUENCERS | LAWS?

The Australian Consumer Law (ACL) is mandatory and has always been there to influence and restrict the ways in which brands & influencers can use social media to “influence” consumers

The ACL:

Section 18 prohibits misleading or deceptive conduct

Section 29 prohibits specific misrepresentations including false testimonials and false associations

In the influencer marketing context, the relevant question ACL to ask then is twofold:

Do social influencers need to be accurate and truthful about testimonials and expressions of personal support for a product?

Do social influencers need to disclose rewards (monetary payment, gifts and value in kind) and commercial connections with brands and products?

The other laws discussed may also apply to influencer marketing:

Copyright

Privacy & Data

Trade Marks

Defamation

CI 2.7 of the Advertiser Code of Ethics - lives in the realm of self-regulation

AdStandards Determinations

Mandatory & Voluntary Codes of Practice:

Financial Services

Therapeutic Goods Ad Code

Alcohol (ABAC)

AiMCO



Do social influencers need to disclose rewards (monetary payment, gifts and value in kind) and /or commercial connections with brands and products?

ACCC has successfully prosecuted Section 18 ACL cases in respect of:

- User Generated Content - liability for Facebook posts of consumers when not **moderated** or **removed**
- Modified or moderated genuine customer reviews – publish the good but not the bad or ugly
- Fake Testimonials – by a celebrity, written by brand or their agency and not real consumers
- False Product Reviews – written by brand or their agent on review sites
- But no case involving a non-disclosure by an Influencer as yet

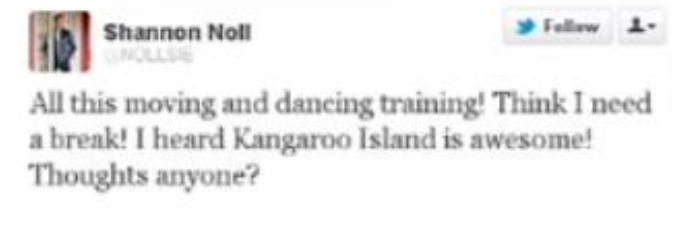
Key Takeaway: Be very careful when using influencers from this year ...

The ACCC Priorities for 2022/23 include the following issues related to consumer and fair trading:

Under the banner of manipulative buying tactics, the ACCC will be prioritising enforcement and compliance activity related to practices in the market that seek to distort or disregard consumer choice in the digital economy, such as ***fake reviews*** and ***social media influencers who do not disclose that they are paid to promote the products they pitch to consumers***



INFLUENCERS | Australian Consumer Law



... I have been contacted by South Australia Tourism and they are looking for high profile celebrities with a high twitter following to tweet about Kangaroo Island.

They will pay \$750 plus GST for one tweet.

They don't want the tweet to appear endorsed, rather an organic mention, injecting your own personality into the tweet.

— Email to Media Watch, name withheld, 4th April, 2012

Under ACL an influencer would only need to disclose rewards and commercial connections if misleading not to do so – threshold for breach is quite high and **consumers must be led into error**

To make a judgment around what side of the line a post falls, the **assessment must be on a post by post basis** having regard to **the nature of the communication as a whole, the context, the likely audience of the post and the dominant impression created by the post to a reasonable member of the audience**

- If impression = this is a commercial post due to its wording, who the influencer is, where the post features, the requirements of the social site, well known brand ambassador, what audience would expect then not misleading and no need for further elucidation
- If impression = this post is an organic, unscripted, unsolicited, uncurated, unrewarded post when in reality cleverly camouflaged and disguised commercial post then without elucidation by some means the post is likely to be misleading

INFLUENCERS| Advertiser Code of Ethics Provision 2.7

Effective from February 2021, the following new provision was incorporated into the Code

“2.7 Advertising shall be clearly distinguishable as such”

Impacts agencies and the brands they represent in circumstances where social “influencers’ are engaged by or on behalf of brands for advertising and marketing communications purposes

Key Takeaway: To determine if applies, you must consider:

- Is the post advertising or marketing communications?
- Degree of control
- Promote a product to the public
- Is the post clearly distinguishable?
- To the relevant audience?



AiMCO Code Best Practice

The Code of Practice provides guidance to any business engaging in influencer marketing.

Areas covered include:

Transparency regarding influencer vetting practices;

- Brand safety considerations;
- Advertising disclosure recommendations to meet Australian Consumer Law;
- Ensuring appropriate briefs and contracts;
- Importance of including content rights/IP within contracts; and
- Metrics and reporting transparency

The AiMCO logo is displayed in a bold, black, sans-serif font. The 'i' is lowercase and has a dot, while the other letters are uppercase. The logo is centered within a dark gray rectangular background.

INFLUENCERS | Ad Standards

Samsung Electronics Australia Pty Ltd
Determination 28 July 2021 | [Upheld](#)

Complaint: complainant believed advertisement posted by Nadia Fairfax on Instagram on 2 June 2021, was not properly declared as a commercial association

Determination: Panel considered material which would draw the attention of the public in a manner designed to promote the brand:

- Product placement
- Brand name tagged
- Product hashtag
- Additional 2 hashtags referring to the brand

Hashtag **#WorkingWithSamsung** could be interpreted as completing work using a Samsung device, and did not clearly identify a relationship between Fairfax and the brand.

Panel considered that the use of the hashtag #WorkingWithSamsung on its own is not enough for the post to be clearly distinguishable as advertising Panel determined the advertisement was not clearly distinguishable.

*This may also result in ACL breach for misleading or deceptive conduct ***



INFLUENCERS | Ad Standards

Volvo Car Australia

Determination 8 September 2021 | [Dismissed](#)

Complaint: the complainant believed the advertisement posted by @tashsefton on Instagram on 13 August 2021, did not indicate that there is a commercial relationship between Sefton and Volvo

Determination: Panel noted Sefton is a brand ambassador for Volvo. They also acknowledged that the advertiser did not have direct control over the post

However, sd there was an existing relationship between Ms Sefton and the advertiser and that this would constitute a reasonable degree of control

Considered the use of #Volvopartner in the second story meant that the relationship between the advertiser and influencer was disclosed and the advertisement was clearly distinguishable

May be sufficient for AdStandards, but compliance with Code of Ethics does not always equal ACL compliance, depends on the context, dominant impression, take outs and actual audience



TODAY'S 'LEGAL LOWDOWN' SUMMARY



01

HIGHLIGHTS TOUR OF THE
LEGAL LANDSCAPE

02

COPYRIGHT

03

PRIVACY & DATA

04

AUSTRALIAN CONSUMER
LAW

05

SPAM

06

TRADE MARKS

07

DEFAMATION

08

LAW & INFLUENCERS – A
MIX OF ALL THE LAWS &
CODES

Thank you

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