Overview

Welcome to the latest edition of the Addisons Direct Selling Legal Update.

2014 has got off to a busy start with many local changes of relevance to the direct selling sector. In this update, we consider the following matters and developments.

**ACCC releases Compliance and Enforcement Policy for 2014 - What does this mean for the direct selling sector?**

Each year, the Australian Competition and Consumer Commission (the ACCC) releases a Compliance and Enforcement Policy, which sets out the priority areas for the year and the key factors that the ACCC will consider when determining whether to take enforcement action.

On 21 February 2014, the ACCC published its Compliance and Enforcement Policy for 2014. The 2014 Policy provides insight into the ACCC’s focus areas for 2014, particularly those areas that the ACCC will be considering when exercising their investigative and enforcement powers.

**Australia’s New Privacy Laws Take Effect – when will the OAIC take enforcement action and what does this mean for your business?**

On 12 March 2014, significant changes to the Privacy Act 1988 took effect. The changes included the introduction of a set of Australian Privacy Principles (APPs), which set out the standards, rights and obligations in relation to the collecting, handling, holding, access and correction of personal information.

Given the Privacy Commissioner’s new powers, it is unsurprising that the Office of the Australian Information Commissioner (OAIC) has been busy, recently announcing its enforcement approach to the new privacy laws.

We take a look at what the OAIC will consider when deciding whether to take enforcement action against a business.

**Transfer Pricing Reforms - International Transaction Documentation - Time for a refresh?**

In July 2013, new Australian transfer pricing rules came into effect. One of the features of the rules was that cross-border transactions are to be undertaken on an arms-length basis. The Australian Taxation Office (ATO) may disregard actual transactions and “reconstruct” them on a hypothetical arm’s length basis. The rules not only apply to entities within the same group, but can apply to transactions between unrelated parties if they have not dealt with each other on an arm’s length basis.

**Parallel Imported Products and Counterfeit Goods - Direct Selling Companies Protect Your Brands - Lodge a Notice of Objection with Customs**

Direct selling companies may either have trade marks registered in Australia or be an authorised user of an Australian trade mark. Often, the business may have international operations which involve the production and sale of goods in various countries throughout the world. Issues relating to the importation of products from one country to another (which may not be authorised) or counterfeit products often arise. These issues can cause significant problems for the business. One step which direct selling companies can take is to lodge a Customs Notice. We outline details about this process.

**ACCC Succeeds in False Testimonials Case: ACCC v P & N Pty Ltd (2014) - Guidance for Using Testimonials**

Businesses that publish testimonials to promote their products or services should ensure that their testimonials are not false or misleading. This is demonstrated by the recent case of ACCC v P & N Pty Ltd (2014), which provides some guidance on publishing testimonials.

**Reforms to the Therapeutic Goods Act 1989 (Cth)**

Recent reforms to the Therapeutic Goods Act 1989 (Cth) (the Act) change the classification of therapeutic goods, the way regulatory decisions are published and the advertising requirements in respect of therapeutic goods to reduce potential risks to the public. New criminal offences and civil penalties are also introduced.
ACCC v Lux: the Federal Court provides clarity on unconscionable conduct provisions under the ACL

The Full Federal Court judgment in ACCC v Lux (2013) marks a significant decision on the application of the prohibition against unconscionable conduct contained in the Australian Consumer Law (ACL). Notably, the case provides greater clarity on the statutory concept of unconscionable conduct. Relevantly for direct selling businesses, this decision examines, in detail, unconscionable conduct that was engaged in by direct salespersons.

We explore the factors that make up "unconscionable conduct" and provide take home points designed to help businesses avoid engaging in unconscionable conduct.

For any queries, please contact any of Addisons’ Direct Selling team.

Cate Sendall
Editor

Jamie Nettleton
Partner
Telephone  +61 2 8915 1030
Facsimile  +61 2 8916 2030
E-mail Jamie.Nettleton@addisonslawyers.com.au

Laura Hartley
Partner
Telephone  +61 2 8915 1066
Facsimile  +61 2 8916 2066
E-mail laura.hartley@addisonslawyers.com.au

Arthur Davis
Partner
Telephone  +61 2 8915 1045
Facsimile  +61 2 8916 2045
E-mail Arthur.Davis@addisonslawyers.com.au

Martin O’Connor
Partner
Telephone  +61 2 8915 1027
Facsimile  +61 2 8916 2027
E-mail martin.o’connor@addisonslawyers.com.au

Cate Sendall
Senior Associate
Telephone  +61 2 8915 1028
Facsimile  +61 2 8916 2028
E-mail Cate.Sendall@addisonslawyers.com.au

© ADDISONS. No part of this document may in any form or by any means be reproduced, stored in a retrieval system or transmitted without prior written consent. This document is for general information only and cannot be relied upon as legal advice.
## Contents

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACCC RELEASES COMPLIANCE AND ENFORCEMENT POLICY FOR 2014 - WHAT DOES THIS MEAN FOR THE DIRECT SELLING SECTOR?</td>
<td>5</td>
</tr>
<tr>
<td>AUSTRALIA’S NEW PRIVACY LAWS TAKE EFFECT: THE OAIC RELEASES DRAFT PRIVACY REGULATORY ACTION POLICY - WHEN WILL THE OAIC TAKE ENFORCEMENT ACTION?</td>
<td>7</td>
</tr>
<tr>
<td>AUSTRALIA – TRANSFER PRICING REFORMS - INTERNATIONAL TRANSACTION DOCUMENTATION - TIME FOR A REFRESH?</td>
<td>10</td>
</tr>
<tr>
<td>PARALLEL IMPORTED PRODUCTS AND COUNTERFEIT GOODS - DIRECT SELLING COMPANIES PROTECT YOUR BRANDS - LODGE A NOTICE OF OBJECTION WITH CUSTOMS</td>
<td>11</td>
</tr>
<tr>
<td>ACCC SUCCEEDS IN FALSE TESTIMONIALS CASE - ACCC V P &amp; N PTY LTD (2014) – GUIDANCE FOR USING TESTIMONIALS</td>
<td>14</td>
</tr>
<tr>
<td>REFORMS TO THE THERAPEUTIC GOODS ACT 1989 (CTH)</td>
<td>16</td>
</tr>
<tr>
<td>ACCC V LUX (2013): THE FEDERAL COURT PROVIDES CLARITY ON UNCONSCIONABLE CONDUCT PROVISIONS UNDER THE ACL</td>
<td>18</td>
</tr>
</tbody>
</table>
ACCC releases Compliance and Enforcement Policy for 2014
What does this mean for the direct selling sector?

Author(s): Cate Sendall, Karina Chong

Introduction

Each year the Australian Competition and Consumer Commission (the ACCC) releases a Compliance and Enforcement Policy, which sets out the priority areas for the year and the key factors that the ACCC will consider when determining whether to take enforcement action.

On 21 February 2014, the ACCC published its Compliance and Enforcement Policy for 2014 (the 2014 Policy). The 2014 Policy provides insight into the ACCC’s focus areas for 2014, particularly those areas that the ACCC will be considering when exercising their investigative and enforcement powers.

The 2014 Priorities

A number of the priorities announced in the 2014 Policy are new, while others extend the priorities set out in the ACCC’s 2013 Compliance and Enforcement Policy.

In the area of consumer protection, the ACCC has identified nine priorities for 2014.¹

The key priority areas for direct selling organisations are:

1. **Emerging consumer issues in the online marketplace**
   - The ACCC is concerned at the lack of transparency on drip-pricing and comparator websites.
   - Drip pricing occurs where consumers who purchase products or services online are quoted one price at the beginning of the booking or ordering process, but are given details of further fees and charges as they progress through to the payment phase.
   - Comparator websites allow consumers to compare online prices between a number of retailers, for example when booking hotels or other travel activities. The ACCC has expressed its concern that the presentation of the information on these websites can be misleading.

2. **Complexity and unfairness in consumer or small business contracts**
   - The ACCC will be looking to enforce the provisions of the Australian Consumer Law (the ACL) which deal with unfair consumer contract terms.

3. **Credence claims**
   - Credence claims exist through the use of a statement that makes a qualitative claim about the goods or services to which they refer. This is an issue of ongoing interest to the ACCC.
   - For example, in 2013, the ACCC focused on credence claims in the food industry, for example “free range” egg claims and “free to roam” chicken claims. For more information about the ACCC’s enforcement action in respect of the food industry, please see our Focus Paper, “Foodies Beware! – ACCC Cracks Down on Misleading and Deceptive Credence Claims”.²
   - In 2014, the ACCC will be looking to continue its enforcement action in respect of unsubstantiated credence claims.

¹ The full 2014 Policy can be viewed at the ACCC website:

4. **Consumer guarantees regime**

The ACCC continues to be concerned about misrepresentations being made in respect of the supply of goods with extended warranties, and particularly the possibility that consumers are misled into paying for consumer guarantees to which they already have a right under the ACL.

5. **Sales activities in the telecommunications and energy sectors**

The ACCC is concerned about the extent of door to door selling and telemarketing activities in these sectors, as well as misleading representations made by energy retailers about savings representations.

6. **Competition and consumer issues in highly concentrated sectors**

The ACCC will monitor closely the supermarket and fuel sectors. Action has already been taken in these areas.

7. **Scams**

There have been reports of scams which cause severe and widespread consumer or small business detriment.

The other ACCC priority areas for 2014 are:

1. Misleading carbon pricing representations.
2. Consumer protection issues impacting on indigenous consumers.

**What does this mean for the Direct Selling Sector?**

The first four enforcement priority areas (above) are of particular relevance to direct selling businesses, especially those that operate online businesses.

It is therefore important for direct selling businesses to evaluate their compliance procedures and processes. This review should be undertaken as soon as possible to minimise the risk that your business will targeted by any ACCC enforcement action. In particular, direct selling businesses should carefully review:

- the pricing of products and/or services online and the necessity to ensure that clear information is given to consumers upfront about additional fees and charges;
- the terms and conditions of consumer contracts to ensure that they are not unduly harsh;
- if made, credence claims or representations made in respect of products and/or services must be accurate and there must be sufficient evidence to substantiate any claims or representations made about the products and/or services; and
- warranties provided and the information provided to consumers about these warranties, to ensure that consumers are fully aware of their statutory right to certain guarantees under the ACL.
Australia’s New Privacy Laws Take Effect

The OAIC releases draft privacy regulatory action policy

When will the OAIC take enforcement action?

Author (s): Cate Sendall

On 12 March 2014, significant changes to the Privacy Act 1988 took effect. The changes included the introduction of a set of Australian Privacy Principles (APPs), which set out the standards, rights and obligations in relation to the collecting, handling, holding, access and correction of personal information. The APPs apply to all Australian businesses with an annual turnover of more than $3 million and all Australian Government agencies.

Along with the introduction of the APPs, the Privacy Commissioner now has strong enforcement powers and is able to seek penalties of up to $340,000 for individuals or $1.7 million for companies.

Given the Privacy Commissioner’s new powers, it is unsurprising that the Office of the Australian Information Commissioner (OAIC) has been busy, recently announcing its enforcement approach to the new privacy laws and releasing its draft March 2014 “Office of the Australian Information Commissioner’s privacy regulatory action policy” (Regulatory Policy).

What will be the OAIC’s compliance focus?

In the coming months, the OAIC’s compliance focus will involve working with agencies and companies to ensure that they have put in place systems and procedures to comply with the APPs and that they are aware of and understand the new requirements. Should any complaint be made to the OAIC, in resolving the matter the OAIC will consider what steps the agency or business has taken to comply genuinely with the new requirements.

In enforcing the new laws, the OAIC will utilise an escalation model as follows:

- Individuals should first attempt to resolve privacy issues directly with the business;
- If the business is a member of a recognised dispute resolution scheme, such as the Credit Ombudsman Service Ltd, the individual should access the scheme before contacting the OAIC; and
- If the matter remains unresolved, the individual complains to the OAIC and the OAIC considers the dispute falls within its area of regulation, the OAIC will attempt to resolve the matter by conciliation.

However, if conciliation is not effective, the OAIC may use other methods at its disposal including determinations and enforceable undertakings. Where privacy breaches are serious or repeated, the OAIC may commence legal proceedings to seek penalties.

What action will be taken?

When deciding whether to exercise a regulatory power, the draft Regulatory Policy states that the OAIC is required to prioritise matters taking into account the following matters (among others):

- Is the relevant conduct consistent with the Privacy Act’s objects? (These include the protection of the privacy of individuals; to promote transparent and responsible personal information handling

---


processes; achieving a balance between the protection of an individual’s privacy and a business’
interest in carrying out its activities; and providing a mechanism for individuals to complain.)

- How serious is the matter, for example, how many people are affected, what adverse
consequences occur, was the conduct reckless or intentional and, as a result, should the OAIC
take urgent action, taking into account the level of seniority of the person(s) responsible?
- Will action by the OAIC have a deterrent effect or be of educative value?
- Has the organisation previously been the subject of prior OAIC compliance or enforcement
action?
- Is it likely that the organisation will breach the Act in the future?
- Has the organisation recently changed its information handling practices?
- Is the conduct unconscionable?
- Is the matter of substantial public concern or interest?
- Has the organisation co-operated with the OAIC?
- What is the cost of enforcement action and how long will enforcement action take?
- Will the legal proceedings provide greater clarity of the law?
- Is there enough admissible evidence?
- Is the conduct becoming more widespread?
- Is intervention required for the conduct to cease?

The closing date for comments on the draft Regulatory Policy is Friday 28 March 2014. Comments
may be submitted by email: consultation@oaic.gov.au or by post: GPO Box 5218 Sydney NSW 2001.
If you would like further information, please contact us.

**So what does this mean for your company?**

This OAIC announcement and the release of the draft Regulatory Policy serve as a warning to those
companies that have not already taken genuine and reasonable steps, in the circumstances, to
comply with the new obligations set out in the APPs.

We have previously written about the various steps companies are required to take to comply with the
new requirements.\(^4\)

When reflecting on whether you have taken genuine and reasonable steps, you should consider the
following questions:

- Have you conducted a thorough privacy audit so that you understand what processes and
  procedures must change and be updated?
- Have you ensured all staff members handling personal information received adequate privacy
  training and are they aware of your privacy practices and internal policies?
- Has an employee (or team) been designated as the “Privacy Officer” to deal with privacy-related
  queries, complaints and compliance issues?
- Have you considered setting up an email address for privacy queries, for example,
  privacy@yourcompany.com.au to ensure that privacy related correspondence is not lost and will
  be dealt with promptly and appropriately?
- Have agreements with third parties, suppliers, contractors and agents been reviewed to ensure
  that you meet your privacy obligations, for example, by the inclusion of warranties, indemnities
  and appropriate resolution procedures and remedies?
- Have your privacy policy and privacy collection notices been amended? In particular:

---

\(^3\) Privacy Act 1988 (Cth), s.2A.

Are individuals provided with collection notices, at or about the time that they provide your business with personal information, which adequately address the matters required in the APPs?

If your business discloses personal information to overseas recipients, are the overseas recipients aware of specific APP obligations relevant to their handling of the information? Have you obtained legal advice about the potential liability for your business? The overseas disclosure will also likely need to be disclosed in your privacy policy.

- If your business collects sensitive information (such as health information) is your business aware of the specific obligations which apply in respect of such information?
- If your business provides credit for goods and/or services on deferred payment terms, does your business satisfy requirements in the Privacy Act and Credit Report Privacy Code concerning policies about credit information, statements of notifiable matters and collection notices?
- Have you implemented a privacy complaints handling system to ensure that privacy queries and complaints are addressed in a timely fashion and escalated, if required?
- Have you put in place processes and procedures to handle and manage personal information to ensure ongoing compliance with privacy obligations?

**Message:** Taking each of these steps sends a strong message that you take your privacy obligations seriously and reduces the risk of non-compliance.

If you would like further information about the changes to the privacy laws and/or a checklist with further information on the above matters, please contact us.
Australia – Transfer Pricing Reforms

International Transaction Documentation - Time for a refresh?

Author(s): Arthur Davis

In July 2013, new Australian transfer pricing rules came into effect. One of the features of the rules was that cross-border transactions are to be undertaken on an arm’s-length basis. The Australian Taxation Office (ATO) may disregard actual transactions and “reconstruct” them on a hypothetical arm’s length basis. The rules not only apply to entities within the same group, but can apply to transactions between unrelated parties if they have not dealt with each other on an arm’s length basis.

Under the rules which took effect in July 2013, tax payers must “self assess”. Businesses which do not have documentation in place substantiating the “arms-length” nature of their international transactions, run the risk of substantial penalties if the ATO subsequently adjusts those transactions. Australian subsidiaries may not be able to rely on documentation prepared for the whole group. Consequently, Australian entities should review all of their documentation relating to international transactions to ensure that it reflects market practice.

The Australian transfer pricing rules specifically adopt OECD guidance. On 1 December 2013 Australia assumed the presidency of the G20. The Prime Minister, Tony Abbott, announced that Australia would “lead stronger cooperation in the G20 to combat tax base erosion and profit shifting” (BEPS). On 30 January 2014, the OECD issued a draft report on transfer pricing documentation to assist cooperation between countries to combat BEPS.

If Australia adopts the OECD draft report, it’s likely that disclosure requirements and compliance costs will increase. Consequently it’s prudent to ensure all documentation complies with the current rules.
Parallel Imported Products and Counterfeit Goods - Direct Selling Companies Protect Your Brands - Lodge a Notice of Objection with Customs

Author(s): Karen Hayne, Mary Huang

Direct selling companies may either have trade marks registered in Australia or be an authorised user of an Australian trade mark. Often the business may have international operations which involve the production and sale of goods in various territories throughout the world. Issues relating to the importation of products from one country to another (which may not be authorised) or counterfeit products, often arise. These issues can cause significant problems for the business. One step which direct selling companies can take to protect the business from these issues and try and identify infringing parties involved, is to lodge a Customs Notice. We outline details about this process below.

Unauthorised Importation

Unauthorised importation of products into Australia may occur in the form of parallel imported products or counterfeit goods. Parallel importation occurs when a trade mark is applied to genuine products overseas and the products are then imported into Australia by a person other than the trade mark owner or authorised user in Australia, and outside of standard authorised trading channels. In some circumstances steps may be able to be taken to prevent this occurring. Counterfeit products, in comparison, are not genuine goods and any application of the trade mark on or in respect of those products is not authorised. Steps can be taken to prevent use of trade marks in respect of counterfeit products.

In order to assist in the detection of counterfeit and parallel imported products entering into the Australian market, direct selling companies should consider lodging a Notice of Objection with the Australian Customs and Border Protection Services (Customs). As a result of the reforms made to the Notice of Objection scheme in April 2013, the Notice of Objection procedure has become more brand owner friendly and is an efficient and cost-effective way for reinforcing brand protection.

Notice of Objection

A Notice of Objection is a legal document that allows Customs to seize goods which:

- it suspects of infringing trade marks; or
- have been notified by a brand owner as infringing trade marks.

The Notice of Objection can be lodged by either the registered owner of the trade mark or an authorised user of the trade mark (Objector). Provided that a Notice of Objection is in place, Customs can seize goods when they appear to be infringing and are intended for some commercial purpose.

In order to complete the Notice of Objection form, the following details must be provided:

a) Full name and address of the Objector accompanied by either the company ABN (if the Objector is Australian-owned) or the Customs Client ID (if the Objector is an international company);

b) Confirmation whether the Objector is the registered owner or authorised user of the trade marks being covered by the same Notice;

c) Details of the legal representative of the Objector; and

d) Details of the contact person that should be advised by Customs of any seizures made.

---

1 Intellectual Property Laws Amendment (Raising the Bar) Act 2012 (Cth)

The Objector must also include the following documents when submitting the completed Notice of Objection form to Customs:

a) A trade mark schedule which includes information regarding trade mark details, registration number, expiry date, class and description of goods for each trade mark to be covered by the Notice of Objection;

b) An ATMOSS\textsuperscript{3} report evidencing registration of the trade marks to be covered;

c) If the Objector is the authorised user of the trade mark (such as an exclusive Australian distributor), then the authorised user must enclose an Authorisation Letter from the trade mark owner which authorises them to file the Notice of Objection on the trade mark owner’s behalf;

d) A Deed of Undertaking which is a formal undertaking to be executed by the Objector agreeing that it will pay any costs incurred by Customs while enforcing the Notice of Objection;

e) A list of companies or individuals who are authorised to import goods bearing the trade marks covered by the Notice of Objection (optional); and

f) Any information pertaining to companies or individuals importing alleged infringing goods into Australia (optional).

There is no fee payable to Customs to lodge a Notice of Objection. However, the Objector is required to pay costs incurred by Customs when suspected goods are seized. These costs generally relate to the storage, transportation and destruction of suspected goods.

Effect of Notice of Objection

The Notice of Objection scheme is a quick and cost-effective step which direct selling companies can take to assist in the protection of their brands. If Customs identifies suspect goods and they are seized (and the brand owner notified this has occurred), the onus is then on the importer (or owner of the goods) to take steps proactively to reclaim the seized goods.

The importer (or designated owner) of the goods can only reclaim the seized goods by making a claim for their release within 10 working days of receiving the Notice of Seizure from Customs. Any claim for the seized goods must contain information which is necessary to identify and contact the importer or owner of the goods. This procedure means that, if the importer or owner does not follow due process or provide accurate information, then it will not be entitled to the release of the seized goods. The stringent procedures are likely to lead to more suspected infringing goods being forfeited and reduce the number of counterfeit and parallel imported products being placed on the Australian market.

If the importer or owner of the goods does not make a claim, the seized goods will be forfeited to the Commonwealth. On the other hand, if the importer or owner makes a claim for the release of the goods, then Customs must notify the Objector and the Objector will have 10 working days to commence proceedings against the importer or designated owner.

In any event, if Customs seize goods pursuant to the Notice of Objection, the Objector will be provided with:

- Any information that Customs may have on record about the importer or owner of the goods;
- The details of the sender (i.e., the foreign exporter) and any other personal information that may assist in the identification of the sender of the goods; and
- The opportunity to inspect the seized goods or remove multiple samples of the seized goods.

This means that the Objector can obtain information that would assist it to identify if further action (such as litigation) is necessary. More importantly, it allows the Objector to identify the origin of the goods and address infringement at its source and identify any repeat offenders.

Take Home Message

- Direct selling companies wanting to protect their brand (especially those whose products are not locally made) should seriously consider using the Notice of Objection scheme.

\textsuperscript{3} ATMOSS is the Australian Trade Marks Online Search System.
The Notice of Objection scheme is a quick, easy, efficient and cost-effective way to assist companies to protect their trade mark rights and to identify and prevent products which have been imported without authorisation (where possible) and counterfeit products from being available in the Australian market.

The Notice of Objection scheme also allows companies to identify more readily the origin of the counterfeit or unauthorised parallel imported products, so that problems can be addressed at their source.

Addisons has extensive experience dealing with the Notice of Objection scheme and can assist companies wishing to use the scheme. Please contact us if you would like further information.
ACCC Succeeds in False Testimonials Case - ACCC v P & N Pty Ltd (2014) – Guidance for Using Testimonials

Author(s): Cate Sendall, Mary Huang

Businesses that publish testimonials to promote their products or services, should ensure that their testimonials are not false or misleading. This is demonstrated by the recent case of ACCC v P & N Pty Ltd (ACCC v P&N Pty Ltd),¹ which provides some guidance on publishing testimonials.

ACCC v P&N Pty Ltd

In ACCC v P&N Pty Ltd, the three respondents were related companies who carried on a business as a supplier of solar panels. Mr Patel was the sole director and shareholder of P&N Pty Ltd as well as the sole director of another respondent in the proceedings.

Between May 2012 and February 2013, the respondents published videos and written statements that purported to be testimonials by their customers relating to solar panels. The Court, based on a statement of agreed facts and joint submissions by the parties, found that the testimonial representations made by the respondents were false, misleading or deceptive because the purported testimonials were not given by genuine customers of the respondents. Accordingly, the Court held that the respondents contravened section 29(1)(e) of the Australian Consumer Law (ACL) as well as section 18 of the ACL, which relates to misleading or deceptive conduct.

The respondents were also found to have contravened sections 18 and 29(1)(k) of the ACL by virtue of representing to consumers that the solar panels were made in Australia when, in fact, they were made in China. Section 29(1)(k) prohibits a person, in connection with the supply of goods or services, from making a false or misleading representation concerning the place of origin of goods.

Given the above, the Court ordered the respondents to pay combined penalties of $125,000 and Mr Patel to pay a penalty of $20,000.

ACCC Guidelines

As a response to its concerns regarding the increase in paid for and fake reviews and testimonials, the Australian Competition and Consumer Commission (ACCC) has published guidelines for businesses that use online review platforms (i.e., sites which specialise in presenting product reviews about a range of businesses). Addisons has previously written about these guidelines and the steps that businesses can take in order ensure that their online review platform does not contravene the ACL.²

Take Home Points

Many businesses, including direct selling companies, publish testimonials to promote their products or services. When publishing testimonials, businesses should give consideration to the following guidelines:

- Ensure that the testimonial is reasonably accurate and genuinely reflects the customer's opinion on or experience of the product;
- Ensure that the testimonial is not false or likely to mislead or deceive consumers;
- Ensure that the testimonials are from genuine consumers and that any claims made in respect of goods or services are able to be substantiated;
- If using "before" and "after" photos, ensure that the photos are of the same person and that photos are taken at the same time of day, using the same backdrop and lighting; and
- Do not use a testimonial which is fictitious.

It is timely for businesses to be proactive in reviewing the ways in which their products and/or services are promoted. For further information on compliance with the ACL, contact Addisons.
Reforms to the Therapeutic Goods Act 1989 (Cth)

Author(s): Jamie Nettleton, Cate Sendall, Karina Chong

Introduction

Recent reforms to the Therapeutic Goods Act 1989 (Cth) (the Act) change the classification of therapeutic goods, the way regulatory decisions are published and the advertising requirements in respect of therapeutic goods to reduce potential risks to the public. New criminal offences and civil penalties are also introduced.

These reforms came into effect as law in February with the enactment of the Therapeutic Goods Amendment (2013 Measures No. 1) Act 2013 (the Amending Act).

When are products therapeutic goods?

“Therapeutic goods” is defined broadly in the Act as “goods that are represented in any way to be, or that are, whether because of the way in which the goods are presented or for any other reason, likely to be taken to be for therapeutic use”.

Under the Act, before the recent amendments, certain goods are declared expressly not to be therapeutic goods. For example, food-type products will be excluded from regulation under the Act if they are already covered by a standard published under the Food Standards Australia New Zealand Act 1991 (Cth).

Further, most cosmetic products are not regulated by the Act, as they tend to have a cosmetic rather than therapeutic use. However, this depends on the ingredients of the cosmetic product and whether therapeutic claims are made on the product labelling or in advertising.

These express exclusions remain. However, the Amending Act introduces a new section 7AA, which gives the Minister for Health (the Minister) further powers to declare specific goods to be excluded entirely, or excluded when used, advertised or presented in a specific way.

Previously, the Minister could only exempt goods from certain parts of the Act. This new section 7AA is an attempt to address the broad definition of “therapeutic goods” which had previously captured clothing, jewellery and bedding which make therapeutic claims but for which public health is not an issue, for example ‘power band’ bracelets and mattresses which contain bacteria designed to reduce the effects of dust mites.

This amendment also reflects the Australian Government's preference that therapeutic-type claims for certain products be dealt with under the misleading and deceptive or false representation provisions of the Australian Consumer Law.

The Advertising of Therapeutic Goods

Under the Act, the Secretary of the Department of Health (the Secretary) has the power, by written notice, to cancel the registration or listing of goods on the Australian Register of Therapeutic Goods (the Register) if it appears to the Secretary that the quality, safety or efficacy of the goods is unacceptable (among other things).¹

Whilst the Secretary's power remains, the Amending Act gives the Secretary further powers to cancel the registration or listing of the goods on the Register, if the sponsor (for example, the manufacturer, supplier or distributor) of the good does not comply with the advertising requirements of the Therapeutic Goods Advertising Code (the Code) and any other advertising requirement under the Act or the regulations.

In particular, the Amending Act gives the Secretary the power to cancel the registration or listing of goods on the Register if it appears that the “presentation” of the goods is not acceptable. The “presentation” of therapeutic goods refers to “the way in which the goods are presented for supply and

¹ Therapeutic Goods Act 1989 (Cth), s 30.
includes matters relating to the name, labelling and packaging and any advertising or other informational material associated with the goods.\textsuperscript{2}

This amendment gives the Secretary greater powers to ensure that therapeutic goods continue to satisfy the advertising requirements for as long as they remain on the Register.

**Introduction of New Criminal Offences and Civil Penalties**

The Amending Act also introduces new criminal offences and corresponding civil penalties.

Under the Act, a person may request that the Secretary vary the information\textsuperscript{3} on the Register, for example, information relating to product warnings or precautions to be included in the product information sheet or scientific data or evidence relevant to the Secretary's assessment of the “safety, efficacy or quality of the good.”

This provision still remains in the Act. However, the Amending Act introduces criminal offences and civil penalties for supplying false or misleading information in a request for variation.\textsuperscript{4} The criminal penalties include, for example, a maximum penalty of 5 years imprisonment or a fine of $680,000 (or both) where the information provided is false or misleading and has or will result in harm or injury to a person and a maximum penalty of 12 months imprisonment or $170,000 (or both) where the information provided is false or misleading but does not cause damage.

Further, the Amending Act introduces a civil penalty for false statements with the maximum penalty for an individual being $850,000, and a maximum $8.5 million penalty for a company.

**Changes to Publication Requirements**

Previously, where the Secretary cancelled the registration or listing of a therapeutic good, the goods were formally taken off the Australian Register of Therapeutic Goods, in most cases, on the day the notice of cancellation is given. This would often result in manufacturers, suppliers and sellers being in breach of the Act at that time as the goods in question would still be on the market at the date of cancellation.

Whilst this provision remains, the Amending Act also allows a particular date to be specified in the notice of cancellation as the date that the product will be removed from the Register, which must be a date at least 20 working days after the notice is given to the person. This gives suppliers, manufacturers and sellers more time to remove their products from the market after cancellation.

**Importance for Direct Sellers**

The Amending Act is relevant to direct selling companies who manufacture, distribute and sell products that fall within the definition of therapeutic goods. One category of goods that may be a therapeutic good are weight-loss products.

For example, given the Secretary's new powers to remove and cancel the registration of a product on the Register, direct selling suppliers and sellers of weight-loss products will need to carefully consider the weight-loss and health claims that are presented on the product’s packaging and labelling, as well as any claims made in the advertising of the product. It will be important to ensure that any therapeutic claims made can be supported by evidence.

We will keep you informed about the impact that these new amendments have in practice, and any action taken by the TGA to exercise their new powers, including the enforcement of the new criminal penalties.

\textsuperscript{2} Explanatory Memorandum, Therapeutic Goods Amendment (2013 Measures No.1) Bill 2013 (Cth), 36.

\textsuperscript{3} Therapeutic Goods Act 1989 (Cth), s 9D.

\textsuperscript{4} Therapeutic Goods Act 1989 (Cth), s 9G.
ACCC v Lux (2013): the Federal Court provides clarity on unconscionable conduct provisions under the ACL

Author (s): Cate Sendall, Mary Huang

Introduction
The Full Federal Court judgment in ACCC v Lux (2013),¹ marks a significant decision on the application of the prohibition against unconscionable conduct contained in the Australian Consumer Law (ACL).² Notably, the case provides greater clarity on the statutory concept of unconscionable conduct. Relevantly for direct selling businesses, this decision examines, in detail, unconscionable conduct that was engaged in by direct salespersons.

We explore below the factors that make up unconscionable conduct and provide take home points designed to help businesses avoid engaging in unconscionable conduct.

Unconscionable Conduct
Broadly speaking, "unconscionable conduct" is a statement or action so unreasonable or harsh that it defies good conscience.

The statutory provisions governing unconscionable conduct in the ACL are set out in sections 20 to 22. Namely, section 21 prohibits a person (including a business) from engaging in unconscionable conduct in connection with the supply of or the acquisition of goods and services to or from a person. Section 22 provides a list of factors to be taken into account when the court considers whether there has been a breach of section 21.

The maximum civil penalties are $220,000 for an individual and $1.1 million for a body corporate.³

Background
Lux conducted business through selling vacuum cleaners. The conduct in question involved Lux sales representatives calling three elderly women, on separate occasions, for the purpose of making meetings to arrange a "free maintenance check" on their existing vacuum cleaner. Upon agreeing to the "free maintenance check", the Lux sales representatives attended the premises of the three elderly women as part of an attempt to sell them a new vacuum cleaner. The Lux sales representatives tested the existing vacuum cleaners and conducted a test which compared their vacuum cleaners to a demonstration model. The results were used to convince the elderly women to replace their existing vacuum cleaners with the Lux model at a price of $1,999 or more.

On 10 May 2012, the ACCC commenced proceedings against Lux in the Federal Court of Australia, asserting contraventions of section 51AB of the Trade Practices Act 1974 (Cth) and section 21 of the ACL. However, Jessup J dismissed the ACCC's case at first instance.

Decision on Appeal
The Full Federal Court (the Court) unanimously overturned the trial judge's decision and allowed the ACCC's appeal.

The issue before the Court was whether Lux engaged in unconscionable conduct in connection with the supply of vacuum cleaners to each of the purchasers. In assessing unconscionability, the Court considered:

1. The societal values and expectations that consumers will be dealt with honestly, fairly and without deception or unfair pressure by direct salespersons; and

2. The relevant State laws which contained provisions preventing unfairness in direct sales transactions.

¹ Australian Competition and Consumer Commission v Lux Distributors Pty Ltd (2013) FCAFC 90 (ACCC v Lux).
² Schedule 2 to the Competition and Consumer Act 2010 (Cth).
³ Australian Consumer Law, Section 224(3).
In determining the scope of societal values and expectations in respect of direct selling, the Court referred to the ACL’s Explanatory Memorandum and indicated that the purpose of the ACL is to address the inherent inequalities in the bargaining power involved in the conduct of door-to-door selling. The Court acknowledged that the vulnerability of the consumer in having a salesperson in his or her home arises from the difficulty in terminating the sales process when the salesperson is in the home. Critical to the success of the sales conduct is gaining entry into private homes and winning the consumer’s confidence. In this respect, truthfulness of the salesperson’s information is of utmost significance.

In the present case, the Court found that Lux had engaged in unconscionable conduct by virtue of the following:

- The "free maintenance check" was a deceptive ruse to gain entry to the consumers’ homes, which is inconsistent with today’s norms and standards requiring businesses to exhibit honesty and openness when gaining entry to the homes of people for selling opportunities;
- The long length of time spent by Lux sales representatives at the elderly women’s homes placed pressure on them;
- The deception by Lux sales representatives at the outset tainted all conduct which occurred subsequently on the basis that it deprived each of the consumers of the opportunity to decline having the Lux sales representatives in their homes;
- The opportunity to enter and remain in the consumers’ homes created a position of power for the Lux sales representatives; and
- The "cooling-off period", as required by law, did not lessen the deceptive conduct which had occurred beforehand.

The Court did not decide on the penalty to be imposed on Lux and ordered the parties to submit further submissions on the issue of penalty.

**Take Home Message**

The Lux case makes it clear that unconscionable conduct should be given a broad interpretation. Further, it clarifies that businesses cannot rely on a cooling-off period to overcome conduct that may be deemed unconscionable.

For direct selling businesses, we would recommend the following to ensure that unconscionable conduct does not occur:

- Be honest about the purpose of the visit when securing entrance to a potential customer’s home;
- Comply with Commonwealth legislation regulating direct selling;
- Be aware that the longer the time a sales representative stays on the premises, the more vulnerable the customer may be perceived;
- Do not reward workers for unfair, pressure-based selling;
- Ensure that the contracts are thorough, easy to understand and not too lengthy; and
- Make sure that the sales representatives disclose clearly important or unusual terms or conditions of an agreement.

---

4 Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth).