

OUTSOURCEDLAW NEWSLETTER

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ISSUES COVERED:

- **Social Media & Misleading or Deceptive Statements [p1]**
- **Compliance with Do Not Call Register [p2]**
- **“Sham” Contractor Issues [p3]**
- **Use of Trade Marks on a Global Website [p4]**

Social Media & Misleading or Deceptive Statements

Is this relevant to you?

Yes if you use social media to promote your business' products or services

Background

Many businesses now use social media sites to promote their business, such as through Twitter or Facebook. It is also not uncommon for businesses to encourage users of their products or services to post comments, such as whether they found the product useful, whether it was good value, whether there were any issues with the product etc.

Businesses would be alive to the risks of this in terms of customers posting unfavorable comments and needing to decide how best to deal with this issue. What is also of concern is that a business needs to take care that favorable comments are not misleading or deceptive with regards to their products or services.

Misleading or deceptive comments on a social media site

Businesses should be aware that they need to take care when promoting a product or service that the promotion is not misleading or deceptive. It is clear that this applies equally to where a business is promoting its products or services through the use of social media.

Is a business liable when a customer posts a misleading comment on the business' social media site?

It seems that yes this can be the case. In a recent case, a business was held liable for misleading 'testimonials' posted on its social media sites by customers because the business was found to be aware of the posts and had decided not to remove them (even though they knew the testimonials were misleading). The business in question was fined \$7500 as was the sole director and was ordered to publish corrective advertising including on YouTube and pay all of the ACCC's legal costs.

Issues to be aware of when allowing customer posts on a social media site

A business needs to monitor posts placed on its site by persons other than the business itself and consider whether such posts need to be removed because:

- The posts could be harmful to the business and could damage its reputation if critical of the product
- The posts could be in breach of fair trading laws for which the business itself could be held liable, where the posts are providing misleading information on your product/services. While it is a new area of law, it is possibly not going to be a sufficient answer to say that you were not aware of the post. This suggests that to reduce the risk of a prosecution, businesses should be establishing procedures to monitor third party content on their social media sites. Another option is to consider disabling the ability of users to post content on business' social media sites if a business does not have the resources to monitor such posts.

Compliance with Do Not Call Register

Is this relevant to you?

Yes if you engage in telemarketing calls to consumers or send marketing material via fax to consumers or businesses

What is the purpose and scope of the Do Not Call Register

The Register prohibits unsolicited telemarketing calls and the sending of unsolicited marketing material via faxes to numbers registered on the Do Not Call Register. This does not prevent telemarketing calls to other businesses as a phone number can only be included on the Register if it is used or maintained primarily for private or domestic purposes. For faxes however, both personal and business fax numbers can be included on the Register.

It is worth remembering that it is only unsolicited marketing calls/faxes that are relevant for the purposes of the Register. If a person has consented to receiving a call/fax either expressly or because of a pre-existing relationship with the business, then the Register is not relevant.

Registration lasts for five years and some organisations are exempt from compliance with this law, such as if your business is a charity or religious organisation.

What is the penalty for breaching the Do Not Call Register requirements?

Substantial fines can be issued by the Australian Communication Media Authority (ACMA) who is responsible for managing the Register. ACMA can issue infringement notices ranging from \$220 to \$110,000 and commence court proceedings where fines of up to \$1.1M for multiple breaches of this law can be awarded. To date, ACMA has issued nine infringement notices totaling \$438,300 and 18 undertakings have been required. More recently the Federal Court fined a business \$120,000 as it was proven that it had caused more than 12,000 marketing calls to be made to numbers listed on the Register. The business was also restrained from making telemarketing calls without first notifying ACMA, for a period of five years.

How does a business ensure it does not inadvertently call a number or send a fax that is listed on the Register?

A business must regularly 'wash' its contact lists against the Do Not Call Register to ensure this law is not breached, if there are some concerns that this Register could be relevant. 'Washing' a contact list is undertaken by an ACMA service provider and once a list is 'washed' this can be relied on for a period of 30 days. ACMA can be contacted for further details on how to 'wash' a contact list.

“Sham” Contractor Issues

Is this relevant to you?

Yes if you have staff

The Fair Work Act and Hiring Contractors

The Fair Work Act prohibits “sham” contracting arrangements. A company must not misrepresent an arrangement as that of the hiring of a contractor when it is really an employer/employee arrangement and neither must a company dismiss an employee to re-hire them as a contractor.

What is the potential Impact on your business of wrongly classifying a staff member?

A penalty of up to \$33,000 can be awarded against your business if found in breach of this provision. In a recent case, the Fair Work Ombudsman fined a business \$13,200 for dismissing employees and then rehiring them as contractors where they were basically undertaking the same work but no longer had employee entitlements such as annual leave or personal/carer's leave. Not only was the business fined but the HR Manager was also fined personally, \$3,750.

Aside from breaching this particular provision, a failure to comply with obligations under the National Employment Standards and/or relevant Award would result in a breach of these obligations as well. This could involve a company being fined and having to pay back pay. Avoiding payments such as payroll tax and group tax can also lead a company to fall foul of the ATO.

Who is a contractor?

Unfortunately there is no single legal definition. Different laws use different definitions but there are some pointers which suggest that a person is a contractor, rather than an employee.

In summary a contractor includes those who:

- Sell their time, expertise and equipment as a service
- Have a high level of discretion and flexibility as to how the work is performed
- Can often employ others to work for them without asking anyone else
- Can work on more than one contract at a time
- Pays their own insurance, superannuation etc
- Often supplies their own tools and workspace
- Submits invoices and deals with their own tax
- Usually agrees to the tasks to be undertaken beforehand and their contract governs the tasks that must be performed
- Advertises their services to the public at large
- Is responsible for their own expenses
- Does not receive any leave entitlements.

Use of a Trade Mark on a Global Website

Is this relevant to you?

Yes if your website contains trade marks

Use of your trade mark by an overseas based company without your permission

Trade Marks are registered in the country in which you wish to use the trade mark. Theoretically then, use of your trade mark in another country by another business would not infringe your Australian trade mark registration. The internet complicates this issue somewhat. What if a UK based company uses your trade mark by placing your trade mark on its website? Could you prevent this occurring?

It appears yes if the UK company had a website that was suggesting it had a connection in Australia with you. This was held to be the case in a recent Australian decision, so it provides some comfort to Australian businesses who are concerned about use of their brands on global websites by overseas based businesses.

Guidelines if using others Trade Marks on your Website

- If your website is targeting another country; to the extent possible, ensure any brands you are using on your website do not infringe a trade mark owner's rights in that country or obtain that trade mark owner's authorisation to use their trade mark.
- Do not use trade marks on your website to suggest you are providing services in an overseas market, by suggesting a non-existent connection with an existing brand in that country.

Should you have any queries regarding any of the above, please contact kerry-ann.aitken@outsourcedlaw.com.au