"Status Update"

Liability for third party comments beyond Advertising Codes

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The Australian Advertising Standards Board (the ***Board***) has recently determined in two separate instances that companies were responsible for third party comments posted to the companies' Facebook pages and that those comments were subject to the Australian Association of National Advertisers Code of Ethics (the ***Code***) as 'advertising'.

Although the Board's determinations are not case law, they raise interesting questions of whether companies will be liable for third party comments under Australian law, such as misleading and deceptive conduct (under s 18 of the Australian Consumer Law (the ***ACL***)), the *Racial Discrimination Act 1975* (Cth) (the ***RD Act***) and defamation. The ramifications for a company breaching these laws are far greater than those available to the Board for breaches of the Code and may include significant damages and in the case of misleading and deceptive conduct, the publication of corrective notices.

This article will consider the elements required to establish liability in these areas of law, discuss the Australian Competition & Consumer Commission's (the ***ACCC***) latest response to companies' use of social media, and provide some strategies for companies to manage the potential risks associated with third party comments on a company-owned social media page.

These issues have not been tested by Australian courts.

Summary of decisions

Earlier this year, the Australian Advertising Standards Bureau (the ***ASB***) received complaints about two official company Facebook pages and in particular the user comments posted on them.[1] One complaint concerned third party responses to a question posed by Carlton United Brewery (***CUB***) on its Facebook page: "Besides VB, what's the next essential needed for a great Australia Day BBQ?" The replies posted on the pages referenced nudity, strippers and drugs, and conveyed racism and homophobia.[2]

The other complaint related to an official Smirnoff Facebook page, which showed photographs of young people holding alcoholic drinks posted by Smirnoff and comments made by users on those images.

The complainant alleged that the comments (and pictures) breached the Code because:

- the images on the Smirnoff Facebook page depicted material contrary to prevailing community standards on health and safety; and
- the comments on both Facebook pages failed to use appropriate language and to treat sexuality with sensitivity, and depicted gender and racial vilification or discrimination.

In relation to the third party comments, the Board had to consider first whether the comments were within the jurisdiction of the Code, which applies to:

- any material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer, and over which the advertiser or marketer has a reasonable degree of control, and that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct.

CUB said the third party comments were not advertising or marketing communications because:[3]

- CUB had no practical (and therefore reasonable) control over the comments, as it was not "commercially feasible" to pre-moderate the Facebook page;

- a requirement to moderate comments prior to them being posted to the page would be "contrary to the spirit of social media"; and
- the comments were not calculated to promote the company's products because many of the comments did not reference any of CUB's products or services.

The Board decided that user-generated comments on a company's Facebook page fall within the definition of 'advertising or marketing communication' because:

- each company had a "reasonable degree of control" over the user-generated material;
- the Facebook page of a company is a marketing tool and is used to engage with customers; and
- the material promoted (whether directly or indirectly) the company's brand.

While the Board noted "the user comments identified in the complaint were posted in reply to questions posed by the advertiser",[4] the Board's determinations did not expressly state a view about whether *all* third party comments would be regarded as advertising, regardless of the circumstances and context in which the comments appeared. In other words, the Board did not give its view on whether advertising and non-advertising material could co-exist on a company's Facebook site. Ultimately, the Board upheld the complaint against CUB because the comments were seen to constitute advertising and some of the comments were found to include discriminatory, inappropriate, strong and obscene language in breach of the Code.

Smirnoff argued that the relevant material on its Facebook page should not constitute advertising because:

- the relevant material was not related to any "paid-for" advertising; and
- the Smirnoff Facebook page contained lots of material that was clearly not advertising (such as a game that allows users to mix music).

The Board found that the third party comments constituted advertising for the same reasons noted in the CUB case but dismissed the complaint against Smirnoff on the basis that neither the comments nor pictures were in breach of the Code.

Ramifications

Non-compliance with the Code will lead to a case report published by the ASB which may result in negative publicity for a company. The complainant or the advertiser may request to have the determination reviewed by an independent reviewer who will first decide whether or not to accept the request. If the request for review is accepted, the independent reviewer will recommend that the Board's decision either be confirmed or reviewed. The Board's determination on reviewed cases is final.

New Zealand Advertising Codes

In October 2012, the New Zealand Advertising Standards Authority published a guidance note on the Codes of Practice and Social Media. The guidance note described situations when companies will be liable for third party comments under the Codes of Practice. The note distinguished between social media over which the company has a reasonable degree of control and other social media over which it did not. For example, the note indicated that a company would not be liable for a re-tweet of a company advertisement which added offensive comments.[5]

The guidance note acknowledged that not all third party comments posted to a company's Facebook page would be characterised as advertising and suggested the relevant factors would be:[6]

- whether the company originally solicited the submission of the third party comment and then adopted it and incorporated it within its own advertising;
- whether the third party made the comment on an unsolicited basis, with the company subsequently adopting and incorporating it within its own advertising; and
- whether the company solicited the third party comment (for example via an invitation to enter a competition) that resulted in content being posted on the page.

The New Zealand approach is different to the Board's determinations which, at this stage, suggest that all third party content submitted to any of the company's "brand" Facebook pages (regardless of the context of it) might constitute advertising material for which the company is responsible under the Code.

Social Media and the Law

Apart from liability under the Code, use of social media and third party comments may also expose a company to liability for:

- misleading and deceptive conduct;
- racism; and
- defamation.

Third party posts to a company's Facebook page that infringe third party intellectual property rights are another key area of potential liability. However, this article focuses only on liability for third party "textual comments" where those comments have not been copied.

In the United States, a federal law protects companies from liability from actions against them in connection with content provided by third parties, provided that the company is regarded as a "service provider" (a mere intermediary for the posting of the comments) and not a "content provider" (a person responsible for the creation or development of information provided through the

internet).[7] There is no equivalent general statutory "defence" in Australia. However, the Australian courts have developed similar distinctions in some areas of law.

Misleading and Deceptive conduct

The specific elements of s 18 of the ACL provide:

> A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Australian courts have not yet considered whether all third party comments on a company's official Facebook page constitute conduct "in trade or commerce". However, some analogies can be drawn with existing case law.

The authority for whether conduct is in "trade or commerce" is *Concrete Constructions (NSW) Pty Ltd v Nelson* (***Concrete Constructions***).[8] In that case, the court held that conduct in relation to employment conditions did not bear a trading or commercial character. Their Honours held that "in trade or commerce" referred to a "central conception of trade or commerce" consisting of "conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character".[9] Conduct undertaken with actual or potential consumers, such as "promotional activities in relation to, or for the purposes of, the supply of goods or services", was conduct inherently of a trading or commercial character.[10]

The effect of *Concrete Constructions* on statements made in the context of public debate is unclear. In *Sun Earth and Homes Pty Ltd v Australian Broadcasting Corporation*, Burchett J did not strike out a claim which alleged that the ABC had engaged in misleading and deceptive conduct by unfairly editing a story about a company that appeared on one of its television programs.[11] Based on a proposition put forward by Toohey J in *Concrete Constructions,* J Burchett noted that it was not necessary for the conduct to be in the line of trade or commerce of the defendant in order for it to contravene what is now s 18 of the ACL.[12]

As previously noted, the two ASB decisions discussed above did not give a view on whether advertising and non-advertising material could co-exist on a Facebook site.[13] What is clear from *Concrete Constructions*, however, is that the Australian courts do not consider that all conduct engaged in by a company will constitute conduct in trade or commerce. Nevertheless the cases suggest that the concept is likely to be broad enough to cover statements on Facebook that occur in connection with any promotional activities of the company's products or services and also statements that are not necessarily about the line of trade and commerce of the company operating the Facebook page.

Do third party comments constitute the company "engaging in conduct?"

Australian courts have not yet considered whether a company will be held accountable for "engaging in conduct" on the basis of comments posted to a social media page by third parties who are not employees or agents of the company. The most recent case to consider some relevant principles is *ACCC v Google Inc.*[14] In that case, the Federal Court was required to consider whether Google engaged in misleading and deceptive conduct as a result of displaying an advertiser's web address in a link, which was sponsored by the advertiser. The link appeared in response to a search for the name of the advertiser's competitor in Google's search engine. The alleged misleading and deceptive conduct was the representation (by Google) to the person conducting the search that the advertiser and the advertiser's competitor were affiliated in some way when they were not.

Google argued that it should not be responsible for the misleading effect of the search result because it had merely communicated the misrepresentation without adopting or endorsing it. The primary judge agreed with Google, but on appeal to the Full Federal Court,[15] the Full Federal Court stated, "several features of the overall process indicate that Google engages in misleading conduct".[16] The main feature was that the user asks a question of Google and Google obtains a search result. A defence in s 85(3) of the *Competition and Consumer Act 2010* (Cth), often referred to as "the publisher's defence" because it protects defendants whose business it is to publish advertisements, was unavailable to Google due the particular circumstances of the matter.

The Full Federal Court considered the principles set out in *Butcher v Lachlan Elder Realty Pty Ltd,*[17] and other cases. In *Butcher v Lachlan Elder Realty Pty Ltd*, a majority of the High Court held that a real estate agent who gave to a purchaser a brochure prepared by a third party with incorrect information on it, had done no more than communicate what the vendor was representing without either adopting or endorsing it. The Full Federal Court also referred to *Yorke v Lucas.*[18]. In that case, the court held that a company would not be liable when it "is not the source of the information" and it "expressly or impliedly disclaims any belief in its truth or falsity" and "merely passing it on for what it is worth" but noted that the absence of a disclaimer would not necessarily mean the statement was attributable to the company.[19]

Defamation

Two cases have established that companies operating a Facebook page will be held responsible for defamatory comments by third parties posted to their page: *ACCC v Allergy Pathway* and *Trkulja v Google.*[20] Although *Allergy Pathways* considered liability for third party comments on social media in the context of misleading and deceptive conduct,[21] the case concerned a breach of an undertaking not to "publish" misleading and deceptive information.[22] As such, the case considered well-established law on the meaning of "publish" in the context of defamation and did not apply the law of misleading and deceptive conduct.

In 2009, Allergy Pathways gave an undertaking that it would not *publish* (on any internet website or other media) statements that represented that it could cure or

eliminate allergies or allergic reactions. A number of statements to this effect were published by the company, including testimonials written and posted by clients on Allergy Pathway's Facebook "wall" and testimonials by customers that were re-tweeted by the company.

The case considered "bulletin board" cases in the UK[23] and Internet Service Provider cases.[24] The court held that Allergy Pathways knew of the testimonials but had not taken steps to have them removed and thus was in breach of the undertaking.

In *Trkulja v Google,* the Victorian Supreme Court recently held that Google was a publisher of defamatory material located in a search result using the Google search engine.[25] Google submitted that because a search result using its search engine was "fully automated", it was a mere intermediary for the information. Justice Beach rejected this argument, noting that Google was a publisher even before it had any notice from anybody acting on behalf of the plaintiff.[26]

Given that Google has been held liable for defamatory material that appeared in response to searches in the Google search engine, it seems that it would be extremely difficult in the case of companies operating Facebook pages, who have arguably greater control over the content on their page, to successfully deny responsibility for third party comments under defamation law.

Racial Discrimination Act

In March 2012, in *Clarke v Nationwide News Pty Ltd,*[27] Justice Barker considered the operation of s 18C of the RD Act in connection to comments that were posted by members of the public onto The Sunday Times' website (and later published in the hardcopy newspaper). The comments were in response to a news report on a car accident in which five young Indigenous Australians died.

The RD Act provides that it is unlawful for a person to do an act, otherwise than in private, if:

- the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people; and
- the act is done because of the race ... of the other person...

An act is taken not to be done in private if [the act] "causes words, sounds, images or writing to be communicated to the public".[28] Section 3(3) of the RD Act deems failure or refusal to do an act to constitute an act and s 18D lists some exemptions to the offence in s 18C.[29]

Justice Barker considered whether media outlets, in publishing third party comments, could be said to have published the comments of another "because" of race. Justice Barker reviewed the case of *Wanjurri v Southern Cross Broadcasting,*[30] in which the inquiry commissioner, in applying s 18C, found a talkback host had caused the racist views of callers to be communicated to the public because he controlled whether comments from callers would be broadcast by using the "dump" button. His employer was considered vicariously liable under s 18E.

Justice Barker said that this case and others showed that where there is evidence that a company actively solicits and moderates contributions from third parties before publishing them, and reserves the right not to publish or to modify them, "the potential for a finding of a contravention of s18C is real".[31] Justice Barker found that because Nationwide News moderated the comments before publishing them, it would be responsible for those comments that objectively gave offence to s 18C and to which none of the exemptions applied.[32]

Regulatory response

Following the Board's determinations, the ACCC published an information page on its website to include some examples of when a business operating a social media site will be at risk of liability for third party comments that are false or likely to mislead or deceive consumers.[33] For example, the ACCC indicated:

> [If] A fan of XYZ Pty Ltd posts negative and untrue comments about a competitor's product on XYZ's Facebook page [and] XYZ knows that the comments are incorrect, but decides to leave the comments up on its page [then] XYZ may be held accountable for these comments even though they were made by someone else.

The ACCC has indicated that it would expect larger companies, or companies which may be small but have a significant number of followers to their social media page, to remove misleading or deceptive comments. For example, the ACCC would expect a company with 300 staff members, or company with only ten staff members but more than 50,000 Facebook fans, to be devoting adequate resources to moderating the pages and to be removing misleading or deceptive comments "soon after they are posted".[34] Shortly after the ASB published the Board's determinations, the ACCC specified that it would expect "big brands" to take down offensive comments within one day.[35]

What can companies do?

According to a study in the US, the majority of directors of public companies in the US (approximately 60%) believe that their board does not fully understand the risks surrounding social media. Only 39% of directors said that their company had a social media policy.[36]

Some ways to deal with the risks of social media include the development of a monitoring policy for the business to review third party comments on social media. The key decision a company needs to make is whether to adopt a pre-moderation (screening comments before they are published) or post-moderation policy.

At the time of writing, Facebook settings permit pre-moderation or the option to receive email notifications when comments are posted, and permit companies to filter explicit language. The Australian Association of

National Advertisers (AANA), the peak national body for advertisers, recently released a Best Practice Guideline for companies using social media. The guideline recommends that companies make use of Facebook functionalities (in particular selecting options to receive email notifications when comments are posted and selecting appropriate profanity block lists), provide third parties with an email address to report inappropriate comments and use automated software (if possible) to remove inappropriate comments which offend community standards.[37] In CUB's written response to the ASB investigation it noted that it had introduced twice daily monitoring of user comments, including removal.[38]

Companies would be wise to introduce 'house rules' for third parties. The house rules should explain to users that their comments will be reviewed and removed if inappropriate, and should prohibit defamation, harassment, racism and misleading comments. Companies may also minimise their risk of liability by having general disclaimers about the accuracy of 'posts'.

Companies should ensure that people with an appropriate level of experience are moderating their social media sites and that there is a clear process for them to raise concerns with senior staff members. Companies should consider employing social media moderators, or training existing staff members in being able to identify defamatory, racist and misleading and deceptive comments made by third parties. In *Clarke v Nationwide News*, the managing editor of the PerthNow website gave evidence to the court that he only ever permitted journalists with more than five years experience to moderate the newspaper's website.[39] Telstra's Chief Executive has said that Telstra employs about 60 people to monitor social media sites.[40] The National Australia Bank recently launched a 'Social Media Command Centre' that operates seven days a week monitoring public sentiment across all its social media platforms.[41] This shows that NAB has recognised the potential impact of social media and has the capacity to monitor it extensively.

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[1] Interestingly the complaints were made by an academic.

[2] Advertising Standards Bureau, 'Case Report – Fosters Australia, Asia & Pacific – 0271/12' (Case Report, Advertising Standards Bureau, 11 July 2012).

[3] Ibid.

[4] Ibid.

[5] Advertising Standards Authority, 'ASA Guidance Note on Social Media' (Advertising Standards Authority, October 2012).

[6] Ibid.

[7] *Communications Decency Act of 1996*, 47 USC § 230(c)(1); See also April Dembosky, 'Australian ruling a challenge for Facebook', *Australian Financial Review* 14 August 2012, 22. There is a school of thought that companies with a social media page that permit interactive third party comments must exercise minimum control over the page to be eligible for this protection.

[8] *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594.

[9] Ibid 603.

[10] Ibid 604.

[11] *Sun Earth Homes Pty Ltd v Australian Broadcasting Corporation* (1990) 98 ALR 101.

[12] *Sun Earth Homes Pty Ltd v Australian Broadcasting Corporation* (1990) 98 ALR 101, 112.

[13] Advertising Standards Bureau, 'Case Report – Fosters Australia, Asia & Pacific – 0271/12' (Case Report, Advertising Standards Bureau, 11 July 2012); Advertising Standards Bureau, 'Case Report – Diageo Australia Ltd – 0272/12' (Case Report, Advertising Standards Bureau, 11 July 2012).

[14] *Australian Competition and Consumer Commission v Google Inc* (2012) 201 FCR 503.

[15] Google has appealed the decision to the High Court. At the time of writing the article, the High Court's decision has not yet been published.

[16] *Australian Competition and Consumer Commission v Google Inc* (2012) 201 FCR 503, 521.

[17] *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592.

[18] *Yorke v Lucas* (1985) 158 CLR 661.

[19] *Australian Competition and Consumer Commission v Google Inc* (2012) 201 FCR 503, 521.

[20] *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)* (2011) 192 FCR 34; *Trkulja v Google (No 5)* [2012] VSC 533.

[21] *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)* (2011) 192 FCR 34.

[22] Ibid 37.

[23] Cf *Byrne v Deane*, where a golf club owner was held liable for third party comments because he was aware of, but did not take down, a defamatory piece of paper from the club's wall and *Bunt v Tilley*, where the judge struck out a claim alleging that three Internet Service Providers were publishers of defamatory comments.

[24] *Byrne v Deane* [1937] 1 K.B. 818; *Bunt v Tilley and others* [2007] 1 WLR 1243.

[25] *Trkulja v Google (No 5)* [2012] VSC 533.

[26] Ibid [30]-[1].

[27] *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389.

[28] Section 18C(2)(a).

[29] There are a number of exemptions to the offence in s 18D, such as anything done reasonably and in good faith in the performance of an artistic work or in the course of debate held for genuine academic purposes.

[30] *Wanjurri v Southern Cross Broadcasting (Aus) Ltd* (2001) EOC 93-147.

[31] *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 412.

[32] *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 422.

[33] Australian Competition and Consumer Commission, *Using social media to promote your business* (26 November 2012) <http://www.accc.gov.au/content/index.phtml/itemId/1091193/fromItemId/ACCC>.

[34] Ibid.

[35] Julian Lee, 'Warning to firms on Facebook comments', *The Age* (online), 13 August 2012 <http://www.theage.com.au/technology/technology-news/warning-to-firms-on-facebook-comments-20120812-242vr.html>.

[36] The Corporate Board Member/FTI Consulting, Inc., *Legal Risks on the Radar* (2012) FTI Consulting, 5 <http://www.fticonsulting.com/global2/media/collateral/united-states/legal-risks-on-the-radar.pdf>.

[37] Australian Association of National Advertisers, 'AANA Best Practice Guidelines – Responsible Marketing in the Digital Space' (November 2012) 3.

[38] Advertising Standards Bureau, 'Case Report – Fosters Australia, Asia & Pacific – 0271/12' (Case Report, Advertising Standards Bureau, 11 July 2012).

[39] *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 419.

[40] Linda Luu and Alison Willis, 'Facebook – Advertiser Liability for User Comments... A Post Too Far?' (2012) 31(4) *Communications Law Bulletin* 1, 4.

[41] Paul McIntyre, 'NAB ready for social media avalanche', *The Australian Financial Review* (Australia), 10 December 2012, 39.