2-13-2015

The Australian Consumer Law in the digital sphere

Francina Cantatore
Bond University, francina_cantatore@bond.edu.au

Follow this and additional works at: http://epublications.bond.edu.au/law_pubs
Part of the Consumer Protection Law Commons

Recommended Citation

This Miscellaneous Material is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.
The Australian Consumer Law in the digital sphere

Dr Francina Cantatore
Assistant Professor, Bond University
Special Counsel, Cronin Litigation Lawyers
The digital environment

- Online retail spending (2014) - $16.2 billion
- Facebook Australia – January 2015 - 13,800,000 users
- International marketplace
- Increased opportunity for breaches of consumer laws
Introduction

- Application of the Australian Consumer Law (ACL)
- Emerging issues – the Internet and Social Media
- Misleading or Deceptive Conduct (s 18)
- False or Misleading Representations about Goods or Services (s 29)
- Enforcement challenges and solutions
The Australian Consumer Law

- **Application**: *Competition and Consumer Act (CCA) – s 5*
  - ACL includes all dealings with Australian consumers
- Applies to all industries and products except financial services
- **General prohibitions**: Misleading and deceptive conduct, unconscionable conduct and unfair contract terms
- **Misleading or deceptive conduct** provision – section 18 – strict liability
- Section 29 prohibits the making of **false or misleading representations** in relation to goods or services
Emerging issues

- Liability of owners of a website or Facebook page for postings on their site/page
- Innocent carriers of information – who makes the representation?
- The blurring line between information and opinion
Discount coupon websites

ACCC action against 3 group online sites

- **ASIC v LivingSocial Pty Ltd** 2014 – breach of ss18, 29, 23
  [http://registers.accc.gov.au/content/index.phtml/itemId/1183806](http://registers.accc.gov.au/content/index.phtml/itemId/1183806)

- **ACCC v Scoopon Pty Ltd** (QUD 402 of 2013) - $1 million fine

- **ACCC v Spreets**
Third party comments

ACCC v Allergy Pathway (No.2) (2011) 192FCR34

- Posting of social media comments or clips amounts to “conduct” under the ACL
- What is a reasonable timeframe?
  - ACCC – 2 key factors – size of company, number of followers
    - Social media – 24 hours a day, 7 days a week
    - Informally – remove in 24 hours
Intermediaries

- Landmark decision – **Google Inc v ACCC** (2013) 294 ALR 404
- Sponsored ads on Google not representations
- Cited **Yorke v Lucas** (1985) 158 CLR 661
  – “passing it on for what it’s worth”
ACL Defences

- ACL s 19 exemption – protects “information providers” - *Bond v Barry* [2007] FCA 1484

- Includes:
  - publication of advertisements where the publisher did not know and had no reason to suspect the advertisements were in breach of the consumer laws

- But see *ACCC v Channel Seven Brisbane Pty Ltd* [2009] HCA 19
Information or Opinion?

- *Seafolly Pty Ltd v Madden* (2012) 297 ALR 337
  - Facebook post - “The sincerest form of flattery?”
  - Misleading and deceptive or merely an expression of the writer’s opinion?
  - Opinions expressed recklessly as to their truth may be caught
Enforcement challenges

- Identity of the defendant:
  - *Keith-Smith v Williams* [2006] EWHC 860 (QB)
  - South Australian District court order - Google to disclose names of bloggers – Shane Radbone (2013)

- Obtaining redress against a foreign entity:
  - Cross-border legal proceedings
  - Cost of litigation to consumer
Solutions?

- Consumers’ word of mouth
- Social media site management
- Need for businesses to consider:
  - education, training and monitoring
  - Billson - “flexible and responsive to new issues as they emerge”