

Nailed! Marque Lawyers semi-regular wrap up of who's been sprung by the ACCC and how much it cost

MARQUE

Activewear - great for wearing to brunch, not for fighting COVID

Lorna Jane has been hit with a \$5M penalty over false claims that its LJ Shield activewear 'eliminated' and 'protected wearers' from COVID-19. The TGA went first, issuing infringement notices totaling just under \$40k. Next the ACCC took a \$5M penalty, declarations, injunctions, corrective advertising and a compliance program - all by consent. It's a big hit, consistent with other advertising cases. But when you remember that the maximum penalties have increased nearly tenfold recently, LJ did not too badly. The court described the conduct as exploitative, predatory and potentially dangerous, and agreed that a substantial penalty was needed to take into account the exploitation of public fear and concern about COVID-19. But it also recognized that LJ didn't profit from the conduct, nobody was actually harmed, and LJ admitted the contraventions.

Mosaic Brands pays \$630k in spot fines for dodgy COVID products

In another example of the ACCC treating COVID-19 dodginess seriously - Mosaic Brands was pinged for claims about a range of 'Health Essential Products', including hand sanitizer and face masks. The campaign specifically targeted COVID-19 concerns (i.e. directly saying 'be prepared' and 'stock up now before it's gone'). They falsely claimed their hand sanitizer was 70% alcohol when one sample only had 17%), falsely advertised products as being 'WHO-approved' or 'CE/FDA certified' (they weren't), and said their products were 'non-refundable' (a big ACL no no).

Mosaic Brands paid \$630k in infringement notices. An 'infringement notice' is like a spot fine - you can just pay up and be done with it, avoiding prosecution and not formally admitting fault. But \$630k is mega for spot fines. They copped the maximum penalty for a listed company five times over, producing that epic six figure result. Still a better choice than prosecution.

Smile Direct Club (SDC) not smiling now

D2C dental aligners have disrupted the orthodontic industry, making a straight smile more affordable and accessible for a lot of people. Smile Direct Club took the pricing play one step too far though, telling Australian customers (by email, text message, flyers and its website) that they may be eligible for reimbursement from their health fund. In some cases, they actually told them that they *were* entitled (and had checked with their fund) or gave them incorrect item numbers to check with their funds.

The big issue for SDC is that most Australian private health funds won't cover D2C aligner treatment. The moral? Even just telling people to check if they are eligible (knowing that they won't be) could be misleading. Customers are an empowered bunch these days, and will report businesses pretty fast for those kinds of tactics.

Telstra's \$50M penalty for unconscionable sales to Indigenous customers

The ACCC prosecuted Telstra after staff were signing up Indigenous customers to contracts they didn't understand and couldn't afford (which staff knew, as they were manipulating credit assessments). Telstra copped a \$50M penalty for unconscionable conduct in relation to 108 customers (that's about \$463k per person), on top of waiving debts, refunding money and putting in place measures to stop this happening again. They were also misrepresenting that some products were free (when they were not). Given the exploitation of social, language, literacy and cultural vulnerabilities, and the board / senior execs not acting fast enough when they became aware, they got the second highest penalty ever imposed under the ACL. This is an enduring priority of the ACCC, with the huge penalty reflecting how seriously it takes this kind of behaviour.

SPECIAL: Not Nailed - CFMEU escapes criminal cartel action

The Commonwealth DPP has withdrawn criminal cartel charges against the CFMEU over attempts to fix prices in the steelfixing and scaffolding industries. The ACCC reports that the withdrawal was a result of the challenge for witnesses remembering events from 2012 to 2013. The prosecution was launched in 2018, already at least 5 years post the conduct. It's the third cartel case that the DPP has dropped against the CFMEU. Ouch.

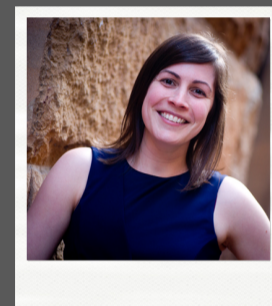
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