COMPETITION AND CONSUMER NEWS

PiperAlderman

Welcome to Piper Alderman's bulletin looking at competition and consumer law. In this bulletin we seek to inform on developments in these areas of law and trade practices generally.

December 2014

Think before you type (take six): Seafolly liable for retaliation

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Back to the future: FOFA financial advice proposals defeated

With the blocking in the Senate of the Government's proposed amendments to the Future of Financial Advice legislation by the Opposition together with minor parties, the legislation will revert substantially to that put in place by the previous Government. Senior Associate, Bill Fragos discusses some recent developments relating to FOFA and what key provisions will apply.

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In addition to the images, Ms Madden posted various comments including:

- *"Why allowing 'buyers' to photograph your collection at RAFW can be a bad idea."*
- *"Ripping off is always going to happen, but sending in a dummy 'buyer' to get photos is super sneaky!"*
- *"Seriously, almost an entire line-line rip-off of my Shipwreck collection."*

In response to Ms Madden's Facebook posts, Seafolly issued two press releases which denied such copying and alleged that Ms Madden's claims had been made maliciously.

The Federal Court held that Ms Madden's conduct was misleading and deceptive and constituted false representations in contravention of the *Trade Practices Act 1974* (Cth) (TPA). Madden was ordered to pay Seafolly $25,000 in damages. Madden appealed the decision.

On appeal, the Full Federal Court, affirmed that Ms Madden's conduct was misleading and deceptive and constituted false representations in contravention of the TPA (as applicable at the time), but revised the damages award of $25,000 to $20,000 on the grounds that media articles that proceeded the Facebook posts got much wider readership than her Facebook pages and did not have the "underhanded" allegation. The Full Federal Court reversed the Federal Court's initial decision in relation to Seafolly's conduct and held that, as Ms Madden had believed in the truth of what she had published and did not knowingly make a false claim, Ms Madden's conduct was not malicious and that Seafolly's press releases alleging that Ms Madden's claims had been made maliciously were misleading and deceptive under the TPA.

On 12 September 2014, the Federal Court awarded $40,000 in damages (double the amount of damages payable by Ms Madden to Seafolly) on the grounds that the allegations were:

- serious misrepresentations and went beyond that which was necessary to defend Seafolly against Ms Madden's claims
- disseminated to the publishing and fashion industry
- published and remained published on Seafolly's website until trial and were read by potentially thousands of viewers.

Although the Full Federal Court gave an indication of the potential costs distribution, a seventh judgment is expected to determine final costs of the appeal, unless of course the parties can otherwise agree.

Lesson: the saga serves as costly reminder that businesses need to be careful to ensure that statements made on social media are correct and can be substantiated and that any response to third party statements are also correct. Businesses should be particularly aware of risks relating to social media: the ease by which comments can be hastily typed without proper reflection and the consequent speed by which these statements can spread.

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Back to the Future: FOFA financial advice proposals defeated

With the blocking in the Senate of the Government's proposed amendments to the Future of Financial Advice legislation by the Opposition together with minor parties, the legislation will revert substantially to that put in place by the previous Government. Senior Associate, Bill Fragos discusses some recent developments relating to FOFA and what key provisions will apply.

On 1 July last year, the former Government implemented FOFA reforms, seeking to address some perceived problems with respect to advice and standards in the financial planning and wealth management sector. The current Government sought to wind back some aspects of the legislation. With the amendments not passing the Senate, the FOFA Regulations that came into effect on 1 July 2014 will not apply.

Some key practical aspects should be noted.

Best Interest, catch-all provision

The Government sought to repeal the pre-existing FOFA provision referred to as the "best interest, catch-all provision" (Section 961B(2)(g) obligation). The intent of the provision was to ensure, in all circumstances, an advisor was acting in the best interests of their client.

That provision will now remain.

Fee Disclosure Statements and Ongoing fee arrangements

FOFA requires that a Fee Disclosure Statement be provided to a client by a financial advisor. This requirement will apply for all clients (both new and existing) where an ongoing fee arrangement exists. As such, these obligations will apply to a greater number of clients than that which was proposed by the Government pursuant to its rejected amendments. Further, the opt-in requirement is required every two years for all new clients who have entered into an ongoing fee arrangement post 1 July 2013.

Restrictions on payments

The Government sought to specifically exempt certain types of fees and payment structures. The failure of the changes means that there will be restrictions or questions over the types of fees and payment structures that financial advisors can apply (and in particular banks). It is noted that:

- commissions to financial advisors continue to be banned
- volume rebates (wholesale bonuses to financial advisor groups based on their sales) may be under scrutiny
- balanced scorecards (where banks award bonuses to, say, branch staff who have met revenue or referral targets along with other targets such as customer satisfaction) may be under scrutiny.

Scaling of Advice

One of the effects of the Government's amendments was to permit financial advisors to limit their advice to only one or a limited aspect of a client's financial position (say, superannuation, or insurance) when providing advice to a client. This raised a concern that financial advisors would limit their advice to particular "one size fits all" or "cookie cutter" products, or particular products with greater margins, and avoid advising clients on other more complicated, technical yet less profitable aspects of their needs. Indeed, this "inappropriate scaling of advice" has been identified by ASIC commissioner Peter Kell as a possible concern and may warrant investigation in future.

Whilst one may argue that financial advisors and their clients ought be able to agree the scope of any retainer, the concern is heightened in situations where it is apparent to the financial advisor that there are a range of issues that their client ought to be made aware of or encouraged to attend to promptly. This is consistent with the requirement to act in a client's best interests.

Some resolution between the Government and Opposition

The Government has reached agreement with the Opposition to pass some other aspects of its FOFA proposals, including grandfathering clauses. This agreement will go some way to addressing the complications generated from the Senate's rejection of the Government's previous proposal. This includes agreement on amendments to the:

- grandfathering provisions that will address unintended consequences, and facilitate competition in the financial advice industry, by enabling advisers to move licensees with their clients whilst continuing to receive grandfathered remuneration
- training and education provisions that specify that benefits in relation to education and training that relate to conducting a financial services business are not conflicted remuneration
- stamping fee provisions that clarify its application to capital raising activities and broaden its application to include investment entities
- accountants' certificate renewal period to provide that the extended two year renewal period also applies in relation to FOFA
- brokerage-related provisions of FOFA to extend the provisions to products traded on the ASX24.

ASIC Investigations

The Australian Securities and Investment Commission (ASIC) has indicated that it will take a 'facilitative approach' to enforcement of relevant provisions until 1 July 2015. There is also acknowledgment by ASIC that financial advisors will need to implement changes to comply with the "new" FOFA provisions.

Context

With the big banks controlling approximately 80 per cent of the financial advice market, the rejection of the Government's legislation will be felt most by those organisations. FOFA will now assist in preventing financial advisors working in the banks to receive any reward whatsoever for suggesting their own financial products.

There may also be a minimal increase in competition given disclosure obligations may lead some consumers to shop around. That said, it is not necessarily the case that FOFA will lead to any obvious immediate decrease in wealth management fees.

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