

## TESTIMONIALS – TRUTH IS BETTER THAN FICTION

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Testimonials are a well-used strategy for many advertisers. They can add credibility to claims and give consumers confidence on the basis that a celebrity, professional, or another customer is happy with a product or service and willing to recommend it. But there are some things to be wary of with testimonials and reviews, and especially in the online and social media environment there have been some interesting developments. Below is a discussion of some key issues and some pointers for advertisers in this area.

### Golden Rule: Testimonials must always be genuine

Advertisers must ensure that any representations or claims they make are accurate and truthful. Making a false testimonial is expressly prohibited by Schedule 2 of the *Competition and Consumer Act*, following the Australian Consumer Law amendments of 1 January 2011. Previously, a false testimonial would have fallen under the general provisions prohibiting misleading and deceptive conduct and false or misleading representations, however the legislation was expanded to specifically prohibit making a false or misleading representation that is, purports to be, or concerns a testimonial relating to goods or services. This applies to fictitious testimonials but can also include those that are misrepresented or misquoted, if the result is that the testimonial is rendered false or misleading.

Making false or misleading representations, including false testimonials, is an offence that carries significant criminal penalties for individuals up to \$220,000 and for body corporates, up to \$1.1 million. Other legal remedies include injunctions, damages, compensatory orders and non-punitive orders like adverse publicity orders but advertisers should also factor in the damage to the reputation of a business that could result from exposure of a false testimonial. It is worthwhile noting that in some cases, the remedies will not be limited to the advertiser publishing the testimonial. An advertising agency can also be penalised for being 'knowingly concerned' in the misleading and deceptive conduct.

The Australian Competition and Consumer Commission (**ACCC**) has pursued companies (and their advertising agencies) in relation to false testimonials in the past. One reported example occurred where the Advanced Medical Institute Pty Limited (**AMI**), famed for its 'nasal delivery system' treatments for men, signed up former game show host Ian Turpie to front a series of newspaper ads. The ads included a dramatic confession from Turpie that his impotence 'nearly ruined his life' until he received successful treatment from AMI. Problem was, Turpie did not suffer from impotence, had not been treated by AMI, and the stated confession never actually took place. Turpie was paid to appear in the ads and the story itself was fabricated.

The Federal Court held that AMI's conduct in publishing Turpie's false testimonial was misleading and deceptive and that AMI's advertising agency was 'knowingly concerned' in this. It was no defence that Turpie had authorised publication of the ad. Both AMI and their advertising agency were ordered to pay the ACCC's costs. AMI also had to make a public declaration that it had engaged in misleading and deceptive conduct.

The message in this case is clear – always ensure testimonials are genuine!

### What about customer endorsements?

Many advertisers now have Facebook pages or Twitter accounts and often these are used to encourage consumers to post or tweet their opinion of a brand or product, including to provide testimonials and endorsements.

The Federal Court has decided that, in some circumstances, a company can be considered the “publisher” of customer testimonials on its Facebook page and liable for any misleading and deceptive content in those testimonials.

In 2009, the ACCC accepted court enforceable undertakings from health company Allergy Pathway Pty Ltd (**Allergy Pathway**), following allegations that it had engaged in misleading and deceptive conduct. The conduct concerned making false claims including that it could test for, cure and eliminate allergies. Allergy Pathway undertook not to continue to make or publish such statements.

The matter went before the Federal Court in 2011 after the ACCC argued that Allergy Pathway had engaged in misleading and deceptive conduct by publishing customer testimonials on its Facebook page which contained content in breach of the 2009 undertakings. The interesting part of this case was that the testimonial content was written and posted by the customers themselves and was not solicited by Allergy Pathway.

The Federal Court found that even though Allergy Pathway did not publish (i.e. post) the misleading testimonials, it assumed responsibility and liability for these posts when it became aware of them, knew they were misleading and failed to remove them from its Facebook page.

Allergy Pathway and its sole director were fined \$7,500 each, injunctions were ordered for three years to prevent similar conduct and the company was ordered to publish corrective advertising at its clinics, on its website, Twitter and Facebook pages and to send letters to all its customers. The company was also ordered to pay the ACCC’s legal costs.

The case suggests that it is no longer enough for a company itself to avoid publishing misleading or deceptive information on its social media platforms – it must also act to remove anything misleading or deceptive that is posted by third parties once it becomes aware of its existence.

Following this decision, a lobby group more recently submitted a complaint regarding VB and Smirnoff Facebook pages to the Advertising Standards Board (**ASB**) and referenced the Allergy Pathway case in their complaint. The ASB ruled that user generated content on a brand’s Facebook page is considered to be an advertising or marketing communication, and therefore governed by the Australian Association of National Advertisers (AANA) Code of Ethics. The flow on effects of this decision have caused a stir in the industry and raised questions over advertisers’ responsibility for social media content. While much of the furor that has followed the ASB decision in particular has been an overreaction, it does reinforce what has always been the case - that is, advertiser’s social media platforms are not exempt from the law.

### **Endorsements in the social media sphere**

Most consumers are savvy enough to know that celebrities often get paid for personal endorsements in advertising. However, this is less clear in the social media setting. A spontaneous and organic paid tweet, blog or post about your brand may bear no hallmarks of sponsorship given the more natural way of communicating online.

It is clear from consumer backlash that consumers do not appreciate being on the receiving end of “cash for tweets”. In April 2012, Media Watch exposed the South Australian Tourist Commission (**SATC**) for paying celebrities like Matt Moran and Shannon Noll to spruik Kangaroo Island as a tourist destination on Twitter. None of the tweets revealed that the celebrities were paid to post the tweet or that this was part of a campaign by the SATC.

Although no legal action was taken in relation to this example and the position remains untested in Australian courts, there may be instances where paid tweets or blogs could be challenged and found unlawful. From a legal perspective, concerns would certainly be raised if the endorsement contained misleading statements or untrue claims about use of a product. Apart from legal consequences, there could also be negative publicity if paid for tweets are

exposed.

The ACCC has provided some guidance that celebrities do not necessarily need to disclose the fact that they are paid to tweet but it is important that in all instances, their comments are genuine and truthful. If not, it could constitute a false testimonial.

In the United States, the Federal Trade Commission has also issued a guide recommending that bloggers and tweeters disclose any material relationships with advertisers, unless it is reasonably known that the person is a paid endorser. For example, this could be done by including a “#paid” or “#spon” to indicate the message is paid for or sponsored. Although this approach has not been adopted or recommended by any Australian regulator, it could be an indication of best practice benchmarks that may shape things to come.

### **Astroturfing and review websites**

The anonymity of social media also presents unique temptations for advertisers to generate fake positive reviews or to unfairly denigrate their competitors online. This is commonly known as “astroturfing” which is the practice of spruiking a brand by what appears to be a genuine grassroots movement, but which is actually an orchestrated PR campaign. For example, by publishing a favourable testimonial in relation to your own brand. It can also arise where organisations are approached to “like” Facebook pages using fictitious profiles created by software programs for a fee.

Advertisers should be particularly careful of activities that amount to astroturfing as they are likely to amount to a breach of the law if they are false (i.e. fabricated or untrue) or misleading. Publishing a bad review to attack a competitor may also leave you exposed to potential defamation action in certain circumstances.

Although there has been no reported decision in Australia concerning astroturfing, in 2011 the ACCC issued a \$6,600 infringement notice on Citymove Pty Ltd (**Citymove**), a removalist company, for publishing false customer testimonials on a website hosted by it. The testimonials were misleading as they purported to be testimonials prepared by genuine consumers when this was not the case. They were instead copied from an unrelated review website, and details such as the consumer name, removalist company and star rating were then altered and the review published on the host website. The host website included a statement that the reviews were “authentic removal companies reviews”. The ACCC alleged Citymove failed to ensure the accuracy of the website and allowed the website to go live with knowledge that errors existed. Citymove provided a court enforceable undertaking to the ACCC that it would, among other things, not make false or misleading representations that purport to be testimonials, and establish and implement a Trade Practices Compliance Program.

It may also be misleading to claim that all reviews are genuine, where the advertiser cannot assure itself of this. An example arose in the UK in February 2012 where TripAdvisor, the online travel review website, was censured by the UK advertising watchdog for claiming that its user-generated travel reviews were “honest” and from “real travellers”. Although TripAdvisor had procedures in place for reviewers to sign and declare that their review was genuine and honest, the UK Advertising Standards Authority concluded that this did not prevent non-genuine or malicious reviews from being posted. Due to the scale of TripAdvisor, they were unable to ascertain that all reviews were in fact genuine. As many review sites are anonymous or operate by pseudonym, it is relatively easy for a fabricated review to be posted. Thus, it can be dangerous (and misleading) to assert that all reviews are “genuine” without proper checks or the ability to substantiate this.

The outcomes of the above cases serve as a reminder to businesses to take care when using testimonials and to ensure their websites are accurate, including any claims made about the truthfulness of testimonials.

**Take home lessons:**

- 1) Endorsements must always be genuine and accurately reflect the beliefs and opinions of the endorser.
- 2) It is prudent for advertisers to obtain written confirmation from endorsers that they have used and endorse the products and that all claims made in their testimonial are true and correct. This will be required in the event that the endorsement is challenged. Advertisers and brands should review this for long-running campaigns to ensure the endorser still uses the product or service.
- 3) Advertisers should have compliance processes in place when engaging in social media, including for the review of their social media platforms and the removal of unlawful material. At this stage there are no **clearly established, legally enforceable** rules or timeframes regarding removal of unlawful material, so this will vary on a case-by-case basis. Legal advice should be obtained if necessary.
- 4) Advertisers should exercise caution when considering paid for tweets or posts and avoid astroturfing with false testimonials.

**Contact us**

If you would like further information about testimonials and endorsements, and how this may affect you or your clients, please contact any of our experts below. We can provide tailored legal and practical advice to assist you.

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