Piper Alderman

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.

March 2015

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ACCC getting to the root of the problem - hair smoothing therapy not all that it claimed it was

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Reckitt Benckiser (RB) markets and sells the following Nurofen branded products:

- Nurofen Migraine Pain ibuprofen lysine 342 mg tablet blister pack
- Nurofen Tension Headache ibuprofen lysine 342 mg tablet blister pack
- Nurofen Period Pain ibuprofen lysine 342 mg tablet blister pack
- Nurofen Back Pain ibuprofen lysine 342 mg tablet blister pack.

Specific pain range: The packaging of each product in the Specific Pain Range is coloured differently, refers to a different pain condition, bears the statement "FAST TARGETED RELIEF FROM PAIN" and bears the statement that the product "…IS FAST AND EFFECTIVE IN THE TEMPORARY RELIEF ASSOCIATED WITH…" the relevant pain condition.

It is alleged that between at least December 2012 and May 2014, RB marketed the Specific Pain Range on the website www.nurofen.com.au with statements such as:

- "Relieve Pain with the right types of pain mediation".
- "(l)et us provide a guiding hand in deciding what product is right for you, your pain and your body".
- "Nurofen has developed a range of products to target and relieve pain. If you're looking for back pain relief or relief from period pain, tension headaches and migraines, you can find the right product for you from the list below".

The website also contained a table which listed types of pain and suffering and "ticked" products in the Specific Pain Range referrable to the types of pain and suffering.

The ACCC alleges that by marketing and selling the Specific Pain Range in this manner, RB engaged in misleading and deceptive conduct, made false or misleading representations with respect to the performance, characteristics, uses and/or benefits of the Specific Pain Range and engaged in conduct that is liable to mislead the public as to the nature, characteristics and/or suitability for their purpose of the Specific Pain Range products.

It is alleged that RB represented that each product in the Specific Pain Range:

- was specifically designed and/or formulated to treat the particular type of pain specified on the packaging
- had specific efficacy in treating the particular type of pain specified on the packaging
- solely and/or specifically treated the particular type of pain specified on the packaging

when each product contains exactly the same active ingredient, the Australian Register of Therapeutic Goods approved indications for each product in the Specific Pain Range are identical, each product in the Specific Pain Range can be used interchangeably to treat any and all of the pain types specified with the same level of efficacy and no product is more or less effective than the others in treating any of the symptoms shown on the packaging.

Injunctions, pecuniary penalties and the publication of a corrective notice have been sought, as well as orders for the establishment and maintenance of a Consumer Protection Law Compliance Program.

Chairman of the ACCC, Rod Sims, has stated that the retail price of the Specific Pain Range is significantly above other comparable analgesic products, and around double the price of Nurofen's standard ibuprofen products. There is concern that consumers are purchasing more than one product in the Specific Pain Range depending on the pain relief sought.

The matter is scheduled for a case management conference in the Federal Court in Sydney on 31 March 2015.

The proceedings reflect the ACCC's priorities recently released, particularly the focus on truth in advertising and on the medical and healthcare industry.

For further information contact:

Anne Freeman, Partner
t +61 2 9253 9934
afreeman@piperalderman.com.au

ACCC getting to the root of the problem - hair smoothing therapy not all that it claimed it was

The Australian Competition and Consumer Commission (ACCC) recently released its priorities for 2015, which included continued scrutiny on truth in advertising and credence claims regarding the advertisement of products that claim to have particular benefits to the health and wellbeing of consumers. Senior Associate, Mitchell Coidan reviews a recent action by the ACCC in this area.

An example of the ACCC's ongoing scrutiny in respect of representations about the ingredients in cosmetic products came in the matter of *ACCC v Dateline Imports Pty Ltd & Taylor* and *ACCC v Dateline Imports Pty Ltd (No 2)*, where the Federal Court of Australia fined Dateline Imports Pty Ltd (Dateline) $85,000 for breaches of s. 52(1), 53(a) and 53(c) of the Trade Practices Act (Cth) 1974 (TPA) in relation to its sale of a hair straightening product called 'Keratin Complex Smoothing Therapy', used to straighten frizzy or curly hair (Keratin Product).

Background and the Alleged Breaches by Dateline

Dateline represented in magazine advertisements, published between 30 August 2010 and 20 September 2010, that the Keratin Product "infuses over 35% Natural Keratin" into the hair. Between 27 September 2010 and 5 November 2010, the claims in the advertisements were that the Keratin Product contained 40% natural Keratin. Between 4 October 2010 and 9 November 2010, magazine advertisements were published by Dateline stating that the Keratin Product "reduces frizz, curl and styling time for up to 6 weeks by infusing 40% natural Keratin in to your hair" (collectively Keratin Representations).

In his decision dated 30 July 2014, Justice Rangiah found that the Keratin Product contained less than 3% Keratin and was incapable of delivering the stated levels of Keratin directly into hair. The Keratin Representations were therefore false.

The ACCC had also alleged that prior to ceasing sales on 27 October 2010, between 2009 and 2010 Dateline had sold the Keratin Product in contravention of the TPA, having made representations on its website, in magazines and in a letter to prospective purchasers that the Keratin Product "…does not contain toxic or dangerous chemicals such as formaldehydes" and that the product was safe and complied with relevant health regulations (Formaldehyde Representations).

The ACCC was unsuccessful in proving that the Formaldehyde Representations were false, with the Court finding that the testing conducted by the experts called by the ACCC was invalid, and could not establish that formaldehyde was present.

Finally, Dateline represented to about 20 customers, or potential customers, in a letter dated 20 September 2010, that Dateline considered that a ban on the Keratin Product in Ireland "would" be retracted by the Irish health authorities (Ireland Ban Representations). The Ireland Ban Representations were held by the Court to have been made by Dateline when it had no reasonable grounds to make the representations, in breach of s 52(1) of the TPA, and were therefore misleading or deceptive.

Imposition of Penalty by the Court

A separate hearing was later held for the consideration and imposition of a penalty against Dateline and the managing director of Dateline, Mr Taylor.

The ACCC sought declarations of contravention of the TPA, a pecuniary penalty and orders that Dateline pay an amount of the ACCC's costs. Dateline resisted orders for that relief, submitting that since the findings of the Court in the principal proceeding were already a matter of public knowledge, the effect of declarations rendered them ineffective as a deterrent. Dateline further argued that procedurally, as the ACCC had not sought declarations by way of relief in the principal proceedings, it was prohibited from seeking them now.

The Court held that the declarations sought by the ACCC were appropriate and Dateline had suffered no prejudice in the circumstances.

Although the parties had agreed the form of the declarations they wished the Court to make, Justice Rangiah rejected that approach. His Honour considered that those agreed declarations did not go far enough and formulated his own declarations, which included particularisation of the offending conduct, how the conduct was said to have breached the TPA, and outlining the general findings of the Court.

The Court found that the advertisements were misleading, however it could not be established that consumers sustained any loss as the product was promptly recalled on 27 October 2010. Furthermore, given the Keratin Representations were not a significant part of the advertisements, judged as a whole, the Court found that the Keratin Representations were not the dominant message being conveyed to consumers.

Important factors in considering the appropriate penalty included the fact that there was an intention that the advertisements would increase the sales of the Keratin Product, with over three million copies of the magazines sold and $97,575 (plus GST) spent on the media campaign. It could not, however, be readily determined whether consumers had suffered any loss as a result of the representations, or whether Dateline had made any profit from the sale of the Keratin Product, both considered by the Court to be mitigating factors in the severity of the penalty to be imposed. There was no evidence that the Keratin Product did not work, and in any event, the voluntary recall of the Keratin Product included the collection of unused stock and refunds to hairdressing salons and customers.

As to the conduct of the managing director of Dateline, Mr Taylor, the Court found that he had believed that the Keratin Product contained 40% natural Keratin, which was the concentration that had been represented to him by the supplier, Copomon Enterprises LLC. Regardless, the failure by Mr Taylor to make enquiries as to the accuracy of those representations, when he was aware of circumstances which suggested the representations may have been false, was unreasonable.

Whilst the Court acknowledged that Dateline had no prior history of contraventions of the TPA, the fact that the senior management of Dateline were complicit in the conduct was considered to be an aggravating factor. Dateline was not considered to be at risk of further contravening behaviour, having retained a specialist consultant in October 2010 to ensure that it continued to comply with its obligations under the TPA.

The ACCC had asserted that a further aggravating factor in the offending was that Dateline contested the allegations and failed to cooperate with the ACCC. The Court, however, considered that there was no obligation on Dateline to cooperate and that its voluntary recall of the Keratin Product and other corrective measures showed a level of cooperation.

In imposing penalty, the Court referred to previous decisions and the penalties imposed in ACCC v Avitalb, ACCC v Mandurvit and ACCC v Gordon Superstore for similar conduct. The Court considered that Dateline's offending was not deliberate, and that is should receive a low range penalty.

As to the costs of the proceedings, the Court held that the ACCC was unsuccessful in a number of its claims against Dateline and that those unsuccessful claims added to the costs and length of the trial. It ordered the ACCC to pay one third of Dateline's costs of the proceedings and that Dateline pay one third of the ACCC's costs.

As well as ordering declarations and the costs, Dateline was ordered to pay a pecuniary penalty of $85,000.

Response by the ACCC and Appeal of the decision of Justice Rangiah

In response to this case, on 19 November 2014 ACCC Commissioner Sarah Court said that "Consumers must be able to trust claims that are made about ingredients and benefits of beauty products … Credence claims are a current enforcement priority for the ACCC". On 10 December 2014, the ACCC filed a Notice of Appeal of Justice Rangiah's decision, and is awaiting hearing.

Takeaway points from the Case

The case serves as a reminder to retailers to ensure the accuracy of claims made by suppliers in packaging and advertising of the products about the composition of the products and their benefits.

Failure by the ACCC to obtain findings that the Formaldehyde Representations were false also highlights the difficulties in credence cases of identifying and properly characterising the chemical components which make up the product. It further highlights the difficulties which can arise in obtaining reliable evidence which proves or disproves claims as to the product's capabilities.

For further information contact:

Mitchell Coidan, Senior Associate
t +61 2 9253 9968
mcoidan@piperalderman.com.au

ACCC v Pfizer: fuel for the fire regarding an "effects test"

The ACCC's loss of another case concerning section 46, the abuse of dominance provision, may well add to the pressure for the Competition Policy Review to deliver a final recommendation in March 2015 consistent with its earlier draft recommendation that section 46 should be amended to introduce an "effects" test, subject to a new defence if the conduct has a rational business purpose and is in the interests of consumers. Consultant, George Raitt discusses the possible impact of the proposed test.

The Federal Court in its recent decision essentially concluded that Pfizer had substantial market power, until its patents expired, and took advantage of that market power in implementing direct to pharmacy distribution arrangements that bundled its patented product Lipitor with its generic atorvastatin, which was launched into the market prior to patent expiry. However, the Court concluded that Pfizer did so for the purpose of meeting competition, and not a proscribed purpose of preventing or deterring competition in a relevant market. Nothing, of course, could prevent Pfizer's patent expiring, and the Court concluded that suppliers of generics would not likely be deterred from entering the market post-patent expiry.

The intuition underlying the Court's decision is that once Pfizer's patent expired there was nothing Pfizer could do that would create an insurmountable "barrier to entry" and accordingly the process of competition should be left to take its course. Generic suppliers have their own distribution arrangements, which encourage pharmacists to promote generics, with which Pfizer must compete. Pfizer's estimates of the impact of patent expiry on sales of its products in Australia in the 5 years after patent expiry indicated that sales would reduce from about $1M pa to $200K pa (worst case) or with the direct to pharmacy distribution arrangements would reduce to $500K pa (best case).

The Court accepted the ACCC's contention that, for the purposes of assessing "market power", the market is "atorvastatin". The Court's reasons seem slightly confused but it may be inferred from the repeated statement "a pharmacist presented with a prescription for atorvastatin was required to supply atorvastatin" is intended to suggest that generics did not form part of the market for the purpose of assessing market power. Given the Court's finding on "purpose", it became unnecessary to solve the conundrum that market power pre-patent expiry existed in relation to Lipitor and post-patent expiry the relevant market would be generic atorvastatin. This conundrum suggests that, by definition, the required nexus between the exercise of market power and harm to competitors in a relevant market could not be demonstrated.

The decided cases indicate the "purpose" is subjective and is to be distinguished from "effects" (though of course a person is taken to intend the natural and probable consequences of their actions, so purpose and effect are in some ways linked).

While section 46 does not currently contain an "effects" test, the ACCC also argued the case under section 47, which does have an "effects" test. Curiously, however, the ACCC did not contend that the conduct had an anti-competitive effect. We might reasonably conclude, therefore, that the introduction of an "effects" test into section 46 would not have altered the outcome of the case on the present facts. Perhaps, however, the ACCC might say it would have argued "effects" if section 46 had contained an "effects" test. Perhaps the ACCC felt that it has a better chance forensically of proving "purpose" and may have sought to avoid gathering evidence on market effects. The possible application of the proposal by the Competition Policy Review is, nevertheless, considered below.

The Pfizer case may be contrasted with the recent Cement Australia case, where the ACCC failed in its section 46 case but succeeded under section 45 on the basis that Cement Australia's purposes included a substantial purpose of excluding competitors.

It is noteworthy that section 45 has an "effects" test, but the Court considered that any anti-competitive effect of Cement Australia's exclusive supply contract was dissipated by market factors. Unlike many areas of law where "causation" is a well-established requirement, the "effects" test that appears in section 45 refers to "effects or likely effects". It has been held that a "likely effect" is one which has "real chance or possibility" of occurring. That is, the test is prospective, and must be decided without the benefit of waiting to see what happens. Although the trial in Pfizer occurred during 2014, it would not have been necessary for the purposes of an "effects" test to enquire what actual effects may have occurred in the market after expiry of Pfizer's patent in May 2012. Nevertheless, there was some evidence before the Court of customers switching between generics post-patent expiry.

In the Pfizer case, the Court recognised the problem of "dual purposes", in that any action to secure sales of Pfizer's products at one and the same time harms competitors, who are thereby foreclosed from making the same sales. Section 4F provides that one anti-competitive purpose among others will suffice, provided it is a substantial purpose. However, the Court concluded on the facts, having regard to the evidence and credibility of Pfizer's witness, that Pfizer did not have a substantial purpose of preventing or deterring competition. The Court was satisfied that Pfizer's overwhelming purpose was to ensure the survival of its generic product post-patent expiry. Thus the Court in Pfizer neatly side-stepped the "dual purposes" issue that the Court in Cement Australia resolved in the ACCC's favour.

The Competition Policy Review draft report adopts much of the ACCC's 2014 submission that section 46 should be changed to prohibit conduct that has "the purpose or likely effect of substantially lessening competition" with, however, the addition of the following: the accused corporation would have a defence if it proves that the conduct in question would be rational for a corporation that did not have substantial market power and the conduct would be likely to have the effect of advancing the long-term interests of consumers.

The first element of the defence, "rational decision", re-opens the question of the hypothetical standard by which conduct is assessed under the current "taking advantage" requirement, i.e. is the conduct possible in a hypothetical competitive market in which market power is absent?

The second element of the proposed defence has been widely criticised: economists might interpret the long term interests of consumers as "economic efficiency" but this is unclear, given the ACCC wears a "consumer protection" hat, and it is possible that the defendant might have to prove that long-term prices to consumers will be minimised as a result of the conduct in question.

It remains to be seen what final changes the Review may recommend to section 46. Hypothetically applying the draft recommendations to the facts and findings of the Pfizer case, we are faced first with the fact that the ACCC did not allege any anti-competitive effect, despite the case being put additionally under section 47. Can we infer that the ACCC did not consider there to be any such effect (i.e. that Pfizer may have merely "attempted" to lessen competition)?

Or can we infer that, as apparently anticipated by Pfizer and reflected in the Court record, generics would be likely to reduce Pfizer's sales in the short-term to anywhere between 20%-50% of pre-patent expiry levels, and that there would be active reprice competition and consumer switching between generics?

There does not appear to be clarity around forensic methods of establishing competition effects. Nevertheless, there is strong intuitive appeal for a conclusion that, post-patent expiry, the market for atorvastatin was at least workably competitive despite the distribution arrangements of Pfizer (and its competitors).

If the ACCC were able to demonstrate an actual or likely anti-competitive effect, Pfizer would bear the burden of establishing the proposed defence. It could be concluded that Pfizer would likely satisfy the "rational decision" defence but that the "long-term interests of consumers" element is imponderable, absent facts concerning the relative efficiency of Pfizer and other generic manufacturers post-patent expiry. The reverse onus of proof is offensive to general notions of justice and fairness given that the matters which must be proved by the defendant are hypothetical and virtually incapable of definitive proof. It is clear, however, that the forensic application of section 46 and the proposed defence, if the proposed changes are adopted, will make section 46 cases vastly more complex navel-gazing exercises than they are at present.

It may be useful to further test the facts of Cement Australia and Pfizer against a possible approach to section 46 using a possible prohibition of market manipulation. In Cement Australia, it seems reasonable to infer that the ACCC considered that the defendant was attempting to corner the market for fly ash in order to become the sole supplier in the region of concrete grade fly ash, so forcing up the costs of its competitors (in concrete markets) gaining access to that raw material. The evidence however is focussed on the defendant's ability to price without constraint, not the actual effect on prices and supplies to competitors, or prices and competition in the concrete markets. The evidence was clear that collection and processing of raw fly ash involves capital investment and risk. Adopting a "market manipulation" approach, we might therefore ask: 1. Did the defendant restrict supply to competitors? 2. Was price commensurate with costs of production and normal return on capital invested? 3. If price is thought to be above a competitive level, is this caused by restriction of supply? 4. If the defendant has obtained a monopoly profit, is this due to competitive activity (e.g. by competitive tendering to remove power stations' waste fly ash)?

In Pfizer, it seems reasonable to infer that the ACCC considered that the defendant was attempting to extend its patent monopoly by locking in distribution arrangements. This seems inherently unlikely to succeed. Adopting a "market manipulation" approach, it seems obvious that the defendant, the "incumbent monopolist", did not attempt to restrict supply, and prices were subject to competitive forces. It seems that incumbent and new entrants will compete on price, for volume, and the outcome will be determined by "survival of the fittest". The Court's judgment seems intuitively sound – the law should not intervene.

For further information contact:

George Raitt, Consultant
t +61 3 8665 5532
graiit@piperalderman.com.au

Time to play fair

Now, more than ever, franchisors need to take a look at their contracts and practices and make sure that they align with the new regime of fairness, as Partner Andrea Pane explains.

At the start of the year, the new Franchising Code of Conduct introduced an obligation on franchisors to act in good faith.

And now the Government intends to extend the unfair contract protections in the Australian Consumer Law to franchisees.

So what does this mean for franchisors?

Franchisors need to be willing to negotiate with franchisees in the contract process.

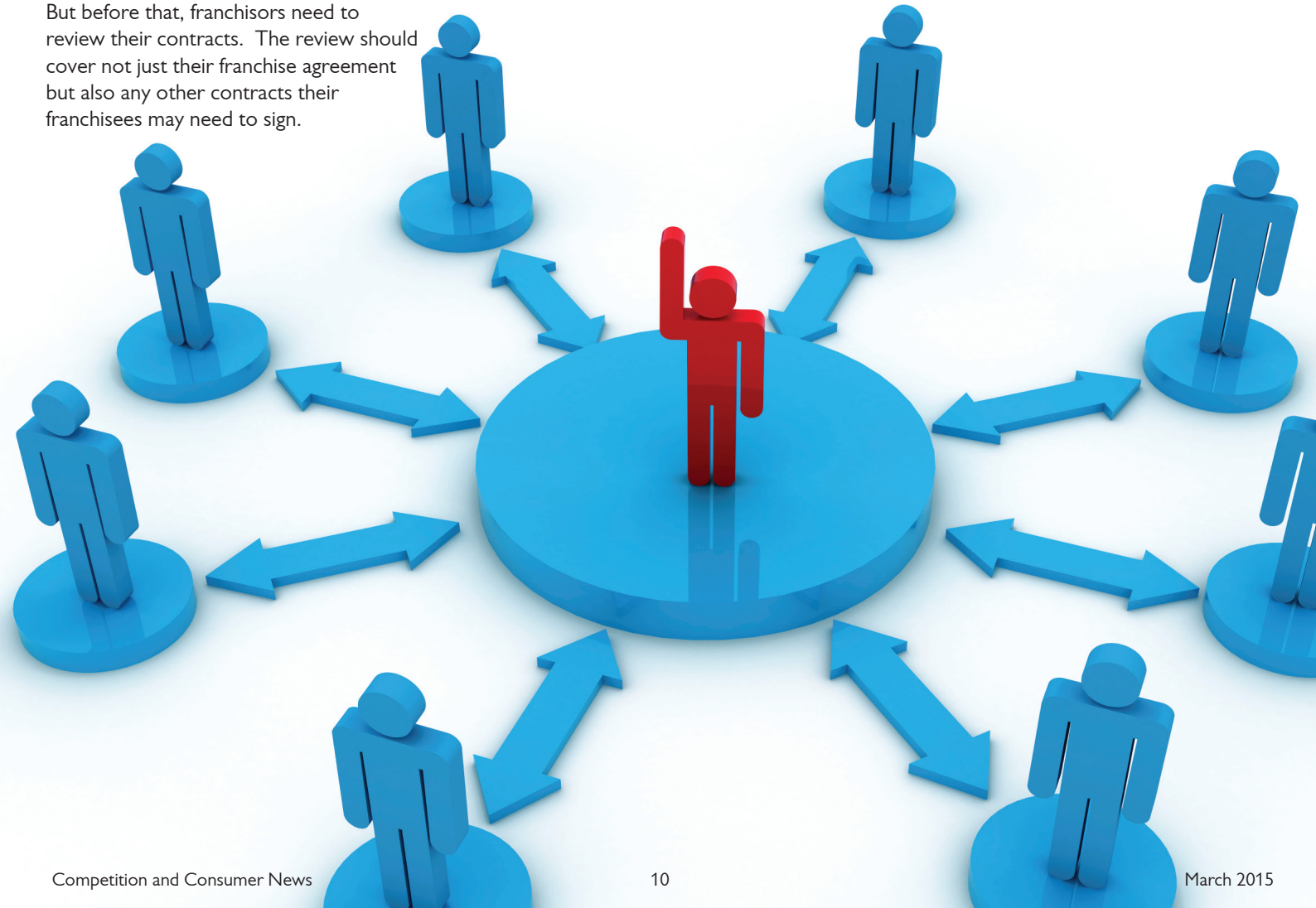
But before that, franchisors need to review their contracts. The review should cover not just their franchise agreement but also any other contracts their franchisees may need to sign.

Franchisors need to know what is in their contracts and why, and make sure that those contracts are easy to read and as balanced as possible. This means not just looking at what is in the contracts at the moment but also looking at what might need to be included in those contracts to make them more balanced.

Otherwise franchisors run the risk of being unable to enforce critical rights under those contracts.

For further information contact:

Andrea Pane, Partner
t +61 3 8665 5566
apane@piperalderman.com.au



Competition and Consumer Law team

Anne Freeman
Partner
t +61 2 9253 9934
afreeman@piperalderman.com.au

Tom Griffith
Partner
t +61 2 9253 9913
tgriffith@piperalderman.com.au

James Lawrence
Partner
t +61 2 9253 3880
jlawrence@piperalderman.com.au

Dr Teresa Nicoletti
Partner
t +61 2 9253 9946
tnicoletti@piperalderman.com.au

Robert Postema
Partner
t +61 2 9253 3835
rpostema@piperalderman.com.au

Celestine Frost
Special Counsel
t +61 7 3220 7714
cfrost@piperalderman.com.au

Dr George Raitt
Consultant
t +61 3 8665 5532
graittt@piperalderman.com.au

Tania Maystrenko
Associate
t +61 8 8205 3391
tmaystrenko@piperalderman.com.au

Tim Clark
Partner
t +61 3 8665 5511
tclark@piperalderman.com.au

Michele Kramer
Partner
t +61 3 8665 5522
mkramer@piperalderman.com.au

Ian Nathaniel
Partner
t +61 3 8665 5509
inathaniel@piperalderman.com.au

Andrea Pane
Partner
t +61 3 8665 5566
apane@piperalderman.com.au

Ewan Robertson
Partner
t +61 7 3220 7741
erobertson@piperalderman.com.au

Tony Abbott
Consultant
t +61 8 8205 3301
tabbott@piperalderman.com.au

Valerie Blacker
Senior Associate
t +61 7 3220 7720
vblacker@piperalderman.com.au

Contact us

Sydney
Level 23
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
DX 10216, Sydney Stock Exchange
t + 61 2 9253 9999
f + 61 2 9253 9900

Melbourne
Level 24
385 Bourke Street
Melbourne VIC 3000
GPO Box 2105
Melbourne VIC 3001
DX 30829, Collins Street
t + 61 3 8665 5555
f + 61 3 8665 5500

Brisbane
Riverside Centre
Level 36
123 Eagle Street
Brisbane QLD 4000
GPO Box 3134
Brisbane QLD 4001
DX 105, Brisbane
t + 61 7 3220 7777
f + 61 7 3220 7700

Adelaide
Level 16
70 Franklin Street
Adelaide SA 5000
GPO Box 65
Adelaide SA 5001
DX 102, Adelaide
t + 61 8 8205 3333
f + 61 8 8205 3300

www.piperalderman.com.au

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