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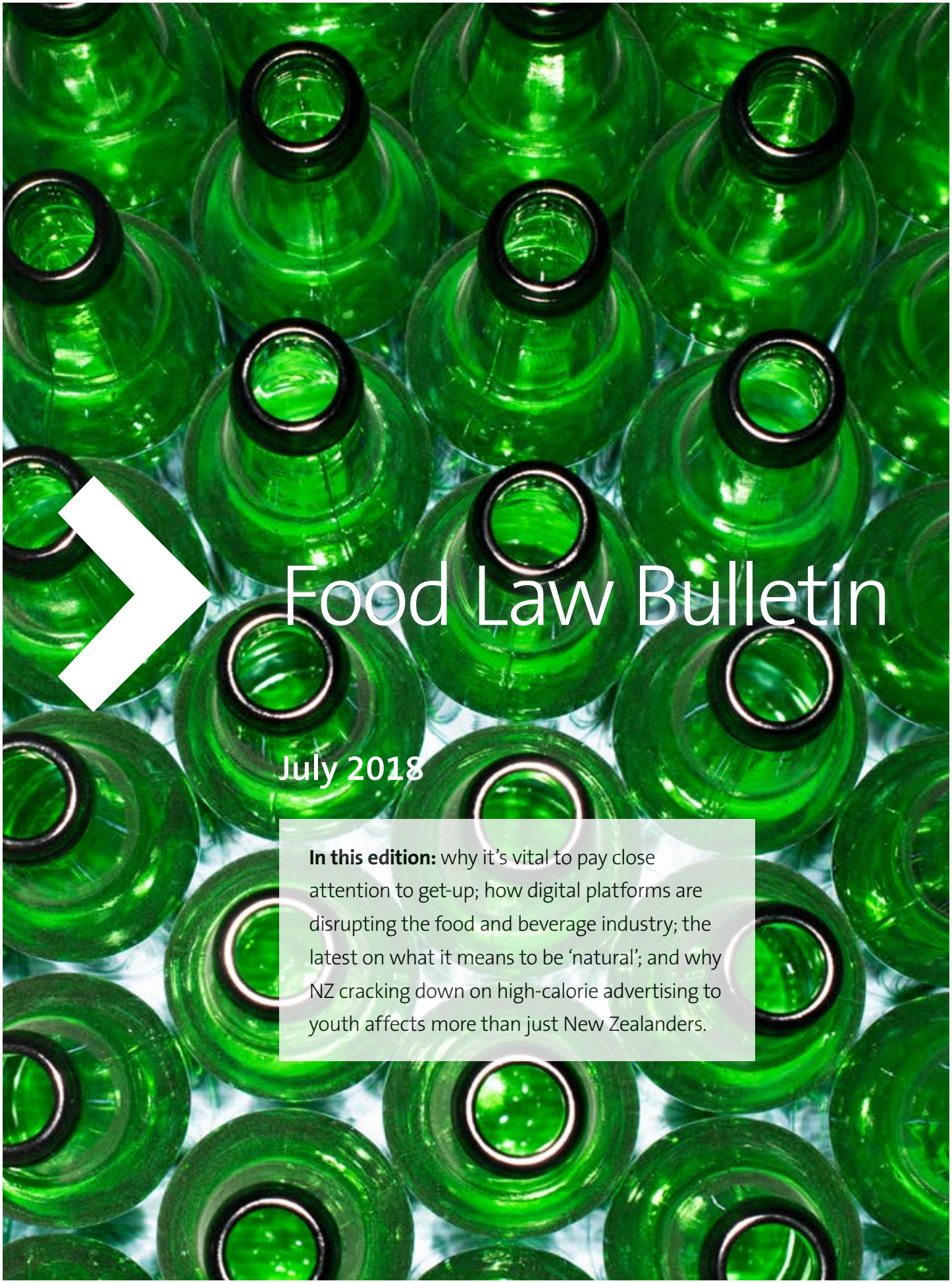


Food Law Bulletin

July 2018

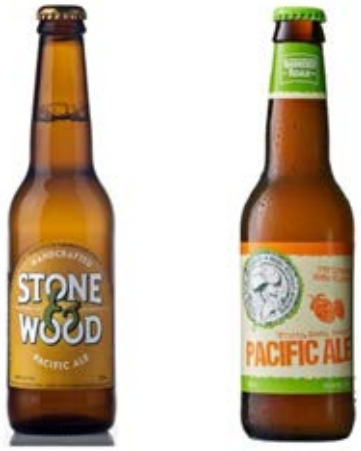
In this edition: why it's vital to pay close attention to get-up; how digital platforms are disrupting the food and beverage industry; the latest on what it means to be 'natural'; and why NZ cracking down on high-calorie advertising to youth affects more than just New Zealanders.

Beverage get-up round-up

In brief: Recent Federal Court beverage cases illustrate the challenges involved in protecting and enforcing secondary marks on food and beverage product packaging. Managing Associate Alison Beaumer reviews two cases serving as cautionary tales for food and beverage companies that they must pay close attention to their products' get-up.

Stone & Wood v IP Development Corp

In *Stone & Wood v IP Development Corp* [2018] FCAFC 29, Stone & Wood, brewers of a craft beer called 'Pacific Ale', unsuccessfully alleged passing off and misleading or deceptive conduct regarding a competitor product called 'Thunder Road Pacific Ale'. The Full Court of the Federal Court has now upheld the first instance judgment, dismissing Stone & Wood's claims.



In essence, Stone & Wood's case was that it had developed a substantial reputation in the words 'Pacific Ale', such that relevant consumers would be misled into thinking that Thunder Road Pacific Ale was associated with it. Stone & Wood's case was not that the get-up of the respondent's bottle was misleading, but, rather, that the mere use of the words 'Pacific Ale' constituted misleading or deceptive conduct.

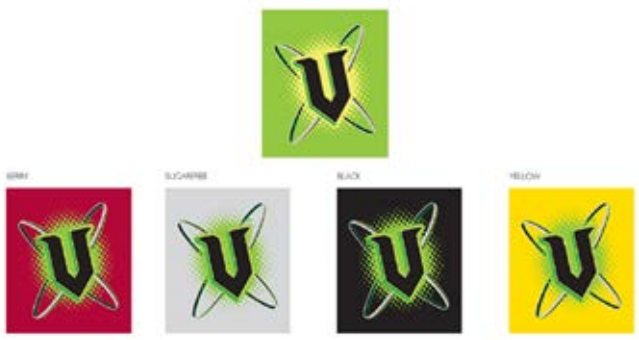
At first instance, Justice Moshinsky dismissed Stone & Wood's claims. His Honour found that the dominant feature of the Stone & Wood bottle and associated marketing was the Stone & Wood logo, rather than the name 'Pacific Ale', which occupied a subsidiary position. His Honour found the labels, packaging and overall 'look and feel' of the two bottles to be very different. There was no evidence of actual confusion in the marketplace and Justice Moshinsky did not think there was likely to be any.

The Full Court dismissed the appeal and found no error in His Honour's reasoning. Like the trial judge, the Full Court found the get-up and packaging of the two products to be very different.

Frucor Beverages Ltd v The Coca-Cola Company

Frucor Beverages Ltd v The Coca-Cola Company [2018] FCA 993 was an appeal to the Federal Court from a decision of the Trade Marks Office in which Frucor's trade mark application for the colour Pantone 376C (described by Frucor as 'V' green) regarding energy drinks in class 32 was held to be deficient. The fatal flaw in Frucor's application, both in the Office and on appeal, was that the colour of the swatch accompanying it was, mistakenly, a different shade of green from Pantone 376C. This article focuses on the aspect of the Federal Court's decision where Justice Yates considered what the position would have been if the trade mark application had correctly attached Pantone 376C.

In essence, Justice Yates found that even if the correct colour had been attached, Frucor's 'substantial, consistent and conspicuous' use of 'V' green since 1997 did not constitute use as a trade mark, and could not satisfy the conditions for registration under section 41 of the *Trade Marks Act 1995* (Cth). Accepting that there could be more than one mark on a product, Justice Yates nevertheless found that the V logo was the consistent and dominant badge of origin across the V product range. The difficulty for Frucor was that its use of other block colours for varietals other than traditional 'V' suggested that it was using colour in a descriptive sense to indicate varietal, rather than as a badge of origin. Justice Yates was not satisfied that, before the filing date, 'V' Green functioned as a separate trade mark alongside and independently of the 'V' logo.



Secondary marks

Both Stone & Wood and Frucor were attempting the challenging task of claiming an exclusive reputation in a secondary mark on their beverage get-up.

The dominant mark on the Stone & Wood bottle was the Stone & Wood logo. To be able to assert an exclusive reputation in 'Pacific Ale' or 'Pacific' alone, Stone & Wood needed to establish a reputation in that expression 'shorn of direct or clear contextual relation' with Stone & Wood. The evidence fell short in this respect. The words 'Pacific Ale' appeared in conjunction with Stone & Wood (rather than on their own) in almost all cases. The issue was compounded by the fact that the secondary mark 'Pacific Ale' had a descriptive aspect (albeit 'imprecise and evocative' in the words of the Full Court). There was evidence from Stone & Wood's own website describing Pacific Ale as being 'inspired by our home on the edge of the Pacific Ocean' and suggesting that Pacific Ale was a 'style of beer'.

Similar issues arise where the secondary mark is the colour or shape of the food or beverage packaging, which may have a descriptive or functional aspect. In Frucor's case, Justice Yates considered that the use of colour across the 'V' product range was predominantly descriptive, to indicate varietal. The evidence did not establish that 'V' green was functioning as a separate and independent trade mark from the 'V' logo. In the shape context, Coca-Cola unsuccessfully asserted in *The Coca-Cola Company v PepsiCo* [2014] FCA 1287 that it had such a reputation in the waisted silhouette of its contour bottle that consumers would be misled or deceived by a Pepsi bottle having a waisted silhouette. The court was not satisfied that consumers were so familiar with the mere outline or silhouette of the shape (absent its other features) as to associate it automatically with Coca-Cola.

Expert evidence and consumer testing

Without persuasive evidence, the court is likely to find that consumers are responding to the dominant mark on the product, which will ordinarily be the word mark or logo. This raises the question of what evidence is necessary to prove that the secondary mark is functioning independently as a trade mark.

Stone & Wood at first instance presented evidence from a wine marketing expert, Professor Lockshin, to the effect that consumers do not normally use their cognitive processes when buying consumer packaged goods. Rather, they make purchasing decisions based on their subconscious memory of 'dominant cues' such as a sub-brand like 'Pacific', colour or logo. Professor Lockshin was not asked to carry out any tests in relation to the products in issue, although he accepted that it would be possible to test the propositions contained in his report.

In the absence of any testing, Justice Moshinsky did not accept it was established that consumers would subconsciously respond to the sub-brand 'Pacific Ale' or 'Pacific' as a dominant cue. Rather, the evidence was equally consistent with 'Stone & Wood' being the dominant cue on the bottle.

This raises the question of whether consumer surveys or testing are necessary or desirable in cases of this kind. The position that emerges from Stone & Wood, and other cases such as *The Coca-Cola Company v PepsiCo*, is that where the reputation of a secondary mark (particularly one having descriptive or functional aspects) is in question, and there is no evidence of actual confusion, it may be difficult to persuade the court that deception is likely based on marketing expert opinion alone. This, of course, depends on the quality of the competing expert evidence presented by both sides, but it is worth bearing in mind the potential need for testing in such circumstances.

Where consumer survey evidence is presented, however, it should be anticipated that it is likely to be the subject of extensive criticism. Frucor relied upon two consumer surveys in support of its reputation in 'V' green, both of which were heavily criticised by Coca-Cola (the reasons included that the surveys did not examine the proper universe of the relevant market; the results were skewed towards people already familiar with 'V'; the sample was drawn from self-selected members of a rewards program; and, perhaps most importantly, the surveys did not demonstrate trade mark use because they did not separate out the role of colour from that played by the 'V' logo). What is clear is that in the case of secondary marks on product packaging, any consumer survey must be designed with great care, to best ensure that relevant trade mark use and reputation of the secondary mark are established.

Top tips for food and beverage get-up

These food and beverage get-up tips might not always make you popular with your marketing department but they could keep your company out of trouble:

- Ensure that the overall 'look and feel' of the product is sufficiently different from that of competitor products.
- Ensure that all trade marks sought to be protected are distinctive, rather than predominantly descriptive or functional.
- If secondary aspects of the get-up (eg sub-brands, colours, shapes) are intended to function as independent trade marks, ensure they are sufficiently prominent on the product packaging, across the relevant product range and on marketing materials. Critically, ensure that secondary marks are always used in a trade mark sense, rather than in a descriptive or functional sense, including in marketing and promotional materials.
- Bear in mind the target market and distribution channels for the product when assessing any likelihood of confusion. Is it a fast-moving consumer good, to be pulled off the shelf by consumers in a hurry at the supermarket or petrol station? Or is it a premium product, to be sold to more discerning consumers at upmarket venues?
- If you are concerned that your product, or a competitor's product, might be sailing too close to the wind, get advice. Cases of this kind often need careful judgment based on all the facts and circumstances.

How will the food & groceries market adjust to the rise of digital platforms?

Digital platforms, such as Amazon, have the potential to transform the food and grocery industry. The amended misuse of market power provision aims to protect smaller competitors without stifling innovation. Does the new law have any role to play in the ascent of digital platforms? Senior Associate Sophie Matthiesson, Associate Christopher O'Yang and Lawyer Annie Cao report.

Background

Digital platforms facilitate interactions between user groups, including suppliers, retailers and consumers. In the food and grocery industry, digital platforms may provide new ways for consumers to source their weekly shop, including by bypassing the traditional supply chain and directly dealing with suppliers.

Amazon officially arrived in Australia in December 2017, and local retailers braced for tough competition from the tech giant. The ACCC has stated publicly that it considers Amazon's entry into Australia will be good for consumers, and has made clear that the amended misuse of market power provision is not designed to protect competitors from competition. However, while Amazon now is currently a new entrant into Australia, it could gain market power over time, and it may well come under ACCC scrutiny.

More generally, digital platforms are facing intense regulatory scrutiny. There are growing concerns that certain digital platforms may possess market power and that they have the potential to foreclose smaller rivals. Competition authorities around the world are investigating the practices of digital platforms, including the mass collection and use of data, the tying and bundling of other services, and the preferential treatment given to their own services.

The ACCC is currently conducting an inquiry into the effect of digital platforms on the production of news and journalism in Australia, while the European Commission recently published a range of proposals to regulate online platforms and search engines. The US Federal Trade Commission will shortly conduct public hearings to consider whether adjustments to competition and consumer protection laws are required to address changes in the economy brought about by new technologies, including algorithmic decisions and big data.

Recent reforms to competition law arising from the Harper Review have also broadened the range of conduct that may be prohibited. The question is how the ACCC will seek to target anti-competitive conduct without stifling innovation or digital disruption.

New misuse of market provision

One of the boldest reforms arising from the Harper Review was the amendment to the prohibition on misuse of market power. The *Competition and Consumer Act 2010* (Cth) now prohibits any conduct engaged in by a firm of substantial market power that has the purpose, effect or likely effect of substantially lessening competition in a market in which the firm directly or indirectly supplies or acquires goods or services.

The new prohibition has the potential to capture a far broader range of conduct than the previous prohibition. Previously, the law prohibited firms from taking advantage of their market power for one of three proscribed purposes. The amendments have lowered the threshold for establishing a misuse of market power by removing the 'taking advantage of' element, which required a causal connection between the conduct and the firm's market power, and introducing an 'effects' based test to assess the firm's conduct.

Do platforms have 'super-Market' power?

'Market power' is the ability to behave unconstrained in a market for a sustained period. In determining whether digital platforms have market power, regulators will consider the level of concentration in the market, barriers to entry and expansion, and the degree of vertical integration.

Digital platforms have certain characteristics that make a traditional misuse of market power analysis more difficult.

First, digital platforms often offer services to consumers for 'free' in return for the right to collect user data. They use this data to refine their services, develop new services, and offer other services for remuneration, such as targeted advertising opportunities. This makes digital platforms enormously popular; however, popularity does not necessarily mean market power. The digital marketplace is riddled with stories of rapid expansion and freefall – remember MySpace, Napster and Netscape?

Second, a distinctive characteristic of data is that it is non-rivalrous. This means that the collection of data by digital platforms does not prevent others from collecting or using the same data. Nevertheless, there is growing recognition that the scale of data collection by some digital platforms, coupled with consumers' tendency to remain loyal to certain platforms means that the possession of a huge dataset may represent a barrier to entry.

Third, the digital marketplace features 'network effects' that tend towards a winner-takes-all scenario. 'Network effects' means that the value of a service to its users increases as the number of other users increases. More traffic to a digital platform also helps it to improve quality, as there is more data to collate and analyse. The high level of quality in turn drives more traffic to the platform. This gives the leading platforms a competitive advantage over emerging platforms, which compounds as the platform becomes more entrenched.

What are the regulators doing?

Despite the challenges of applying a traditional market power analysis, competition regulators around the world are considering the impact of digital platforms on the competitive process and have launched investigations into potential misuse of market power concerns:

- In 2015, the European Commission investigated Amazon's business practices – in particular, its use of most favoured nation clauses (***MFN clauses***) as part of its e-book business. The MFN clauses required publishers to ensure that no competitor of Amazon could receive better terms relating to price, commission and e-book catalogues. In some circumstances, the clauses also required a publisher to inform Amazon about more favourable terms that were offered to Amazon's competitors. The European Commission expressed concerns that MFN clauses may breach European anti-trust rules and that such clauses made it more difficult for other e-book retailers to compete with Amazon. In 2017, the European Commission accepted commitments from Amazon to address these concerns; in particular, these commitments required Amazon to not enforce, include or change certain MFN clauses, and to allow publishers to terminate e-book contracts that contained certain MFN clauses.
- The German Federal Cartel Office launched an investigation into Facebook's privacy policy. A preliminary view released in December 2017 found that Facebook had abused its dominant position by making the use of its social network conditional on it being allowed to amass data gathered from third party apps and websites, and merged this with users' profile data. The preliminary assessment concludes that Facebook has implemented terms of service that are deceptive or otherwise in violation of European data-protection laws, and that this practice enabled it to build and maintain a dominant position in the market for social media services.
- The US Federal Trade Commission, which serves as the consumer watchdog over privacy issues, announced in March 2018 that it is conducting a non-public investigation into Facebook regarding privacy and data-security requirements.

In addition to enforcement action, regulators are conducting various inquiries, research projects and public hearings to determine the right regulatory response to digital disruption.

Is there cause for concern?

Even if digital platforms come to hold a substantial degree of market power in the food and grocery market, there is still a question as to whether their conduct would have the purpose, effect or likely effect of substantially lessening competition.

The ACCC has, to date, signalled a cautious approach to the practices of digital platforms. The Chairman of the ACCC, Rod Sims, has shown a positive attitude towards the arrival of Amazon, noting that the suppliers would have a new route to market, which will bring about lower prices to consumers, and likely trigger a competitive response from the big retailers.

In fact, the ACCC has indicated that in responding to the disruption of the market caused by digital platforms, powerful retailers and suppliers should be careful not to engage in a misuse of market power themselves. For instance, selective discounting to match a digital platform's offering could raise concerns where it is below cost or intended to prevent a digital platform from establishing itself in the market.

That is not to say that the ACCC will not consider the potential harm of digital platforms as they gain market share. As noted above, the ACCC is currently reviewing the impact of digital platforms on the production of news and journalism, and it is expected that the outcome of this inquiry will have a broader impact on the practices of digital platforms in other markets. Developing the right regulatory response to the ascent of digital platforms is likely to be a hot topic for the ACCC for the foreseeable future.

Rethinking 'natural' history

Is there more than one reason to call a product 'natural'? The Full Court of the Federal Court thinks so, overturning Justice Katzmann's finding that it is misleading to describe a product as 'natural' if it is not made wholly or substantially from natural ingredients. Associate Anna Conigrave reports.

How does it affect you?

The consequences of the Full Court decision in *Aldi Foods Pty Ltd* v Moroccanoil Israel Ltd [2018] FCAFC 93 are that:

- describing a product as 'natural' will not necessarily convey that the product is made wholly or substantially from natural ingredients;
- traders might have genuine reasons for describing a product as 'natural' that are unrelated to the percentage of natural ingredient(s) in the product; and
- the definition of 'natural' is unchanged, and ingredients that are naturally derived but chemically altered are not 'natural'. But this point is distinct from whether it is misleading to describe a product as 'natural'.

The background

We previously reported on Justice Katzmann's decision in *Moroccanoil Israel Ltd v Aldi Foods Pty Ltd* [2017] FCA 823. That case concerned the marketing by Aldi Foods Pty Ltd (Aldi) of a range of argan oil hair care products under its house brand PROTANE and sub-brand NATURALS. Moroccanoil Israel Ltd (***MIL***), which produces and distributes argan oil hair and skin care products, claimed that Aldi's marketing infringed MIL's trade marks and breached sections 18 and 29 of the Australian Consumer Law (***ACL***).

Among MIL's ACL claims was that by using the word NATURALS on the packaging of Aldi's PROTANE NATURALS argan oil hair care products, Aldi had misleadingly conveyed that the products were made wholly or substantially from natural ingredients. Justice Katzmann found in MIL's favour in relation to this claim. Her Honour accepted that the representation was conveyed for the following reasons:

- the dictionary definition of 'natural' is 'not manufactured or processed' or 'not artificial';
- ordinary reasonable consumers would not consider a product made mostly from processed or manufactured ingredients to be 'natural'; and
- there is no logical reason why a trader would call a product line 'NATURALS' unless it intended to convey that the products were 'natural' or comprising substantially natural ingredients.

Her Honour found that the representation was misleading on the basis that, water aside, the products contained a very small percentage of natural ingredients. In coming to this finding, Justice Katzmann considered expert evidence on the classification of ingredients as either 'naturally occurring' or 'chemically synthetic'. One of the experts suggested that the term 'naturally occurring' was misleading, as it 'does not adequately reflect the complexity involved in manufacturing'. He preferred the term 'naturally derived with synthetic modification'. Her Honour's response to that evidence was that:

> I do not believe that the ordinary or reasonable consumer would consider a product that has been chemically altered to be a natural product. 'Naturally derived with synthetic modification' is not a synonym for 'natural'.

1. *Moroccanoil Israel Ltd v Aldi Foods Pty Ltd* [2017] FCA 823.

The appeal

Aldi appealed Justice Katzmann's finding that use of the word NATURALS on its product packaging conveyed that the products were made wholly or substantially from natural ingredients. Aldi submitted, among other things, that:

- Her Honour placed too much emphasis on the definition of the word 'naturals'; and
- it was wrong to say that there was no logical reason a trader would call a product line 'NATURALS' unless it intended to convey that the products were 'natural' or comprising substantially natural ingredients.

The Full Court accepted both of these submissions and allowed Aldi's appeal.

In relation to Aldi's first submission, Justice Perram (with whose reasons Chief Justice Allsop and Justice Markovic agreed) said:

> Armed with the dictionary definition her Honour was understandably seduced into asking whether the ingredients in the products could be described as 'natural' when the correct question was what did the use of the word 'NATURALS' convey to ordinary reasonable consumers.

In response to Aldi's second submission, Justice Perram expressed the view that:

> A trader might well have legitimate reasons for calling a product line NATURALS which have little to do with the quantity of natural product in the product. For example, it may merely connote that the product has a nominated natural product added to it.

Having found error in Justice Katzmann's reasons, Justice Perram considered what the use of the word NATURALS on Aldi's product packaging conveyed to ordinary reasonable consumers. The font, positioning and plurality of the word NATURALS indicated that it was a sub-brand (and not merely descriptive of the product). Further, the products were sold 'in the cheapest part of one of the cheapest stores'. Given this context, the court concluded that although ordinary reasonable consumers would have understood that the products contained the natural ingredient argan oil, they would not have thought that the products were made wholly or substantially from natural ingredients.

What was left unsaid?

The Full Court only considered whether use of the word NATURALS on Aldi's product packaging conveyed that the products were made wholly or substantially from natural ingredients. It did not consider whether, if conveyed, that representation would have been misleading. Accordingly, the Full Court did not disturb Justice Katzmann's findings regarding the meaning of 'natural'.

The implications of the findings in the trial decision for the food industry are set out in the previous *Food Law Bulletin*

New Zealand tightens its belt on high-calorie advertising to youth

The New Zealand Advertising Standards Authority has been enforcing a new code since October 2017 that governs all advertising targeted to children and young people. It outlines specific rules for food and beverage advertisements, including for high-calorie 'Occasional Food and Beverage Products'. Lawyer Eliza Lockhart reports.

How does it affect you?

- The Children and Young People's Advertising Code (the ***ASA Code***), enforced since 2 October 2017, applies to New Zealand advertisements, and to international advertisements that are intended primarily for non-New Zealand audiences but nevertheless reach New Zealand audiences.
- This means the ASA Code applies to a wide range of online marketing, including advertisements on social media platforms, such as product reviews by independent third parties.
- The advertisement of 'Occasional Food and Beverage Products' is highly restricted, including a prohibition on sponsorship advertisements showing the product, the product's packaging or the consumption of the product.

Overview of the ASA Code

The ASA Code applies to all advertisements that 'target' children (under 14 years of age) or young people (between 14 and 18 years of age), whether contained in children's or young people's media or otherwise. In determining whether the Code is applicable, the ASA Complaints Board will make an evaluation based on the context of the advertisement and the relationship between the following three criteria:

(a) whether the nature and intended purpose of the product being promoted is principally or generally appealing to children or young people;

(b) whether the presentation of the advertisement content (eg theme, images, colours, wording, music and language used) is appealing to children or young people; and

(c) whether the expected average audience at the time or place the advertisement appears includes a significant proportion of children or young people.

Overview of the ASA Code

'Occasional Food and Beverage Products'

The key provisions of the ASA Code govern the representation of 'Occasional Food and Beverage Products', which are defined as those that are high in fat, salt or sugar, and classified under the Food and Beverage Classification System (the ***FBCS***).

Under the FBCS, foods are categorised as either 'everyday', sometimes' or 'occasional' foods. There are foods that automatically and unsurprisingly fall into the occasional category, such as confectionery, deep-fried foods, and full-sugar and artificially sweetened energy drinks and carbonated beverages. However, it is important companies be aware that many foods listed in the FBCS can change category depending on portion size and nutritional content. For example, a 30-gram packet of dried fruit, nut and seed mixture is categorised as an 'everyday' food if there is less than three grams of saturated fat per serve. However, if the package size is more than 30 grams and it contains more than five grams of saturated fat per serve, the item is classified as an 'occasional' food.

The ASA Code requires that, in relation to occasional food or beverage products:

- an advertisement must not state or imply that the product is suitable for frequent or daily consumption and, where possible, healthier options should be promoted;
- the quantity of the product in the advertisement should not exceed recommended portion sizes for the person of the age depicted;
- an advertisement must not create a sense of urgency or encourage the purchase of an excessive quantity of the product; and
- advertisers need to demonstrate that care has been taken to evaluate whether children will be a 'significant proportion' of the expected audience before placement of the advertisement.

Sponsorship advertisements

- Although the ASA Code allows companies to sponsor teams, individuals, events and activities, it requires that they exercise a 'special duty of care' if an occasional food and beverage product is to be the subject of a sponsorship advertisement. The ASA Code prohibits any sponsorship advertisement from showing the product, the product's packaging, or depicting the consumption of the product.
- Instead, the ASA Code recommends that the advertisement focus on the sponsored team, individual, event or activity.

How does it compare?

There are two Australian Association of National Advertisers (AANA) codes that cover similar ground to the ASA Code. They are:

- the AANA Food & Beverages Advertising & Marketing Communications Code; and
- the AANA Code for Advertising & Marketing Communications to Children (together, the ***Australian Codes***).

The Australian Codes contain analogous requirements that food and beverage advertisements not undermine the importance of a healthy balanced diet; encourage or portray excess consumption; or employ a deceptive sense of urgency.

However, the Australian Codes do not require advertisers to evaluate whether children will be a 'significant proportion' of the expected audience of such advertisements, and do not contain specific restrictions around the advertisement of 'occasional food and beverage products'.

But this New Zealand Code doesn't concern me ... does it?

The ASA Code applies to all New Zealand advertisements but also applies to advertisements that originate outside of New Zealand, if those advertisements reach New Zealand audiences.

Where a complaint is made about a non-New Zealand advertisement that is intended primarily for audiences outside of New Zealand, the ASA Complaints Board will determine whether the ASA Code applies. In making its determination, it will take into account the size and composition of the New Zealand audience, whether the advertising is targeted at New Zealand consumers, and the accessibility of the product to New Zealand consumers.

This can be a complicated question in relation to online marketing. The ASA broadly defines an advertisement as any message the content of which is controlled directly or indirectly by the advertiser, expressed in any language, and communicated in any medium with the intent to influence the choice, opinion or behaviour of those to whom it is addressed. This captures a wide range of advertising material published online, including messages on social media, blogs and vlogs.

On 28 February 2018, the ASA released a new Guidance Note on Identification of Advertisements, with a section dedicated to outlining transparency for social media advertising. The key determining factor in social medial content being considered an advertisement is whether the brand has control over the brand messages and / or content of the material. For example, the ASA Code would not apply to a situation where a brand has provided an independent third party with a free sample of a product to review but does not have any control over the content of the messaging, including requiring that certain information about the product be included in the review. This would be the case with the relevant Australian Codes as well, under the AANA's Clearly Distinguishable Advertising Best Practice Guideline.

Conclusion

It is important for businesses to review existing and planned advertisements that may reach a New Zealand audience in order to avoid breaching the ASA Code, and the negative brand associations that follow. This is particularly the case for online advertisements such as messages conveyed through social media platforms.

Furthermore, companies that engage in sponsorship advertisements with occasional food and beverage products should be cognisant of the extensive nature of the sponsorship advertisement prohibition, which means that any depiction of the product, its packaging or consumption is likely to be in breach of the ASA Code.

For further information, please contact:

Jacqueline Downes
Partner,
Sydney
T +61 2 9230 4850
Jacqueline.Downes@allens.com.au

Richard Hamer
Partner,
Melbourne
T 61 3 9613 8705
Richard.Hamer@allens.com.au

Andrew Wiseman
Partner,
Sydney
T +61 2 9230 4701
Andrew.Wiseman@allens.com.au

Tim Golder
Partner,
Melbourne
T +61 3 9613 8925
Tim.Golder@allens.com.au

Carolyn Oddie
Partner,
Sydney
T +61 2 9230 4203
Carolyn.Oddie@allens.com.au

Belinda Thompson
Partner,
Melbourne
T +61 3 9613 8667
Belinda.Thompson@allens.com.au

Peter O'Donahoo
Partner,
Melbourne
T +61 3 9613 8742
Peter.O'Donahoo@allens.com.au

Rosannah Healy
Partner,
Melbourne
T +61 3 9613 8421
Rosannah.Healy@allens.com.au

Philip Kerr
Senior Patent/Trade Mark
Counsel, Sydney
T +61 2 9230 4937
Philip.Kerr@allens.com.au

Alison Beaumer
Managing Associate,
Sydney
T +61 2 9230 4936
Alison.Beaumer@allens.com.au