

ACCC CRACKDOWN ON INFLUENCERS – ARE YOU IN THEIR CROSSHAIRS?

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"Complaints and reports to the ACCC by Australian consumers reflect growing concern about influencer practices."

At the end of January 2023, the Australian Competition and Consumer Commission (the "ACCC") announced a crackdown on social media influencers and the online social media platforms they use. This is part of their 2022/23 compliance and enforcement strategy, which includes deceptive marketing conduct and practices in the online/e-commerce sector and on social media. The crackdown is also in tandem and aligned with the ACCC's ongoing investigation into digital platforms and the misuse of platforms for misleading and deceptive conduct and the role of advertisers and advertising in such misconduct.

WHAT IS THE FOCUS OF THE ACCC CRACKDOWN?

The ACCC is examining social media content by influencers which:

- does not clearly communicate that it is undisclosed or disguised advertising;
- fails to disclose the relationship between a brand or product and the influencer; or
- makes claims which are misleading or deceptive.

These all fall under its core objective of consumer protection.

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WHO IS THE FOCUS OF THEIR INVESTIGATIONS?

The ACCC is examining the social media posts and content of influencers with a particular focus on fashion, beauty and cosmetics, food and beverage, travel, health, fitness, wellbeing, parenting, gaming and technology. Reflecting the role and influence of social media platforms, the ACCC used its Facebook page to ask Australian consumers to identify influencers and social media content which raised concerns about the conduct said influencers and the transparency of their posts. These complaints and reports to the ACCC by Australian consumers reflect growing concern about influencer practices by Australian consumers and an increasing recognition by them that social media content should be transparent and honest. While the primary focus of the ACCC investigation is on influencers, it will also examine the extent to which other parties facilitate, promote, encourage, sponsor and pay influencers and this is likely to include brands and brand owners, advertising and marketing agencies and intermediaries and platforms such as TikTok, Facebook, Instagram and YouTube.

ONLINE PLATFORMS AND SOCIAL MEDIA – LOW HANGING FRUIT?

The ACCC Facebook page complaints have served as the spearhead for its investigations into influencer conduct, but brands, brand owners, marketing and advertising agencies and social media platforms should not consider themselves exempt from its investigation. Their role in encouraging, supporting and facilitating the conduct of influencers is likely to be a key focus for the ACCC. This would not be the first time it has investigated and prosecuted online platforms.

"By allowing or facilitating misleading and deceptive conduct by influencers, social media platforms will likely face the greatest risk of investigation and prosecution."

Online platforms, that do not operate onshore in Australia, are highly likely targets of the ACCC investigation. The fact that a platform targets Australian consumers from outside Australia has not proven any barrier to ACCC investigation and prosecution. The ACCC prosecuted Trivago in the Australian Federal Court for misleading conduct in its advertising and on its website, which constituted breaches of the *Australian Consumer Law* (the "ACL"). The prosecution revolved around claims that Trivago would enable Australian consumers to identify the cheapest hotel rates or best deals on hotels. The Federal Court found that Trivago's platform used an algorithm to promote and highlight hotel rates from which Trivago earned the highest commission or remuneration rather than displaying the lowest rates. In addition, the Trivago platform compared different categories of hotel rooms to create a false sense of savings. In 2020, Trivago was fined AU\$44.5m (approximately US\$29.9m) for these breaches of the ACL and Trivago's appeal was dismissed in 2022.

Critical to the judgment was that the conduct of Trivago, as the online platform which interacted with Australian consumers, had misled consumers in making recommendations as to hotel prices and whether the best or cheapest rate was being offered to them. By allowing or facilitating misleading and deceptive conduct by influencers, social media platforms will likely face the greatest risk of investigation and prosecution.

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A further aspect of the Trivago judgment was the need to ensure that online platforms were accountable for their content and that there was clear and transparent disclosure about content which would likely influence consumer behaviour. Trivago and other online travel agencies provide a platform and marketplace on which various travel and other services are offered and which are purchased by a consumer through their platforms and using their payment portals. Although the content posted by influencers on social media platforms does not necessarily use the same transactional structure, the ACCC is likely to examine the extent to which social media platforms play a role in misleading Australian consumers. While the ACCC could pursue individual influencers, its resources to do so are not infinite and its objectives may be more effectively and efficiently served by forcing social media platforms, advertisers and brands to agree to control or police content and for platforms, advertisers and brands to remove social media content which is not transparent and/or is misleading or deceptive or require influencers to modify their posts to remove misleading or deceptive content and to

ensure that advertising is clearly marked as such. Making social media platforms responsible for influencer conduct, such as through a code of conduct or in the platform's terms of use, may provide the ACCC with an effective means of indirectly curbing misleading and deceptive conduct by influencers.

The ACCC investigated and prosecuted Allianz for misleading and deceptive conduct in relation to travel insurance products offered through the Expedia platform. For more on this, please see our articles addressing the issues and the convictions and judgments [here](#) and [here](#). Expedia was not prosecuted and it is Allianz that faces civil and criminal penalties and sanctions. The basis on which Expedia was not prosecuted remains undisclosed. If the position is that the ACCC was unable to prosecute Expedia for content on its platform, this may provide other platforms with some means of avoiding prosecution by the ACCC. As this would effectively allow social media platforms to take little or no responsibility for content shared on their platforms, the ACCC is likely to be assessing how to address this under existing legislation or whether further changes are required to the legal and regulatory environment to ensure that it can prosecute platforms for content they host on their platforms. This issue may become more significant in the ongoing ACCC Digital Platform Services Inquiry.

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The experience of Australian consumers with misleading and deceptive claims about health and wellness treatments, notably in relation to Covid-19 and weight loss treatments, has made many consumers less willing to trust and rely on social media platforms. The complaints to the ACCC about influencer misconduct demonstrate and highlight this trust deficit. This is not unique to Australia and Australian consumers but the fact that such issues are a global trend and development will not provide any comfort or defence to an investigation by the ACCC, as is apparent from the prosecution of Trivago and Allianz. The impact of such investigations and prosecutions on social media platforms and their trustworthiness should not be underestimated.

WHAT SHOULD ONLINE PLATFORMS DO?

"Social media platforms should be prepared to respond to such investigations and be prepared for prosecution, which at the very least, will be conducted in the glare of public and media focus and scrutiny."

Social media platforms should be prepared to respond to such investigations and be prepared for prosecution, which at the very least, will be conducted in the glare of public and media focus and scrutiny.

In preparing to respond to such investigations, influencers, social media platforms, advertising and marketing agencies and intermediaries should consider the following:

- is advertising clearly identified as such?;
- are social media posts, blogs, articles and other content, which is or could be seen to be disguised advertising, clearly marked as advertising or sponsored?;
- does the content attract the attention of platform users in way which is intended to promote the product or service?;
- does the influencer, advertiser and/or brand comply with the Australian Influencer Marketing Council Code of Practice and/or the Code of Ethics of the Australian Association of National Advertisers?;
- does the influencer have permission to use brands and their IP when sharing content on the platform?; and
- to what extent does a brand, advertiser and/or marketing agency have a reasonable level of control over the social media content?

DEVILS AND DETAILS – CONTRACTS WITH INFLUENCERS

In any investigation of the role of influencers, the contractual arrangements between influencers and brands, advertising and marketing agencies/intermediaries and social media platforms are likely to be critical and to be closely scrutinised. In preparing to respond to such investigations, influencers, social media platforms, advertising and marketing agencies and intermediaries should consider the following in relation to contractual terms with influencers:

- are influencers required to disclose sponsorships and financial agreements with and benefits from brands, brand owners and in respect of the goods and services which they include, promote or refer to in their social media content on the platform?;
- are influencers required to comply with the Australian Influencer Marketing Council Code of Practice and/or the Code of Ethics of the Australian Association of National Advertisers?;
- if not, are influencers required to disclose in their content when that social media content is sponsored, an advertisement or a paid partnership?;
- how do the contract terms deal with social media content posted by influencers which does not comply with brand standards, guidelines or requirements?; and

"The contractual arrangements between influencers and brands, advertising and marketing agencies/intermediaries and social media platforms are likely to be critical and to be closely scrutinised."

- do the contract terms include provisions to address failures by influencers to meet these requirements, including dispute resolution, penalty and termination provisions?

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