

SOCIAL MEDIA RISKS AND INSURANCE

Most businesses now utilise the internet in some aspect of their day to day business, whether it be through the maintenance of a website, e-commerce or storing business records electronically. However more and more businesses integrate the use of social media sites, such as Facebook, Twitter or LinkedIn, into the way in which they communicate with their customers, market their services and build their brand.

At a basic level, social media is a type of internet or mobile based application or site that enables users to communicate, share information and interact with one another online. At its core is the ability for a user to communicate with others in a seemingly informal manner. On Facebook, users can post comments, republish articles and upload photos on almost any topic without regulation.¹ Twitter, which is an instant messaging system in which users send messages to their followers of up to 140 characters in length, is by its very nature even more informal.

However this informal, user generated, manner of communicating, comes with legal risks that many businesses are only now starting to appreciate. The risks are wide ranging and can arise out of, for example:

- *Trade Practices Act* / Australian Consumer Law breaches;
- workplace claims (such as harassment, bullying discrimination or unfair dismissal);
- defamation;
- breaches of intellectual property, confidentiality and privacy obligations;
- regulatory investigations and/or prosecutions;
- data mining²
- hashtag hijacking³

This paper discusses a few examples of such risks and examines some insurance coverage issues which may arise.

ACCC v Allergy Pathway Pty Limited⁴

In 2011 the Federal Court of Australia held a company, Allergy Pathway, and its sole director, to be responsible for certain comments published on its Twitter pages and Facebook wall. In 2009 Allergy Pathway was found to have published misleading or deceptive statements on its websites, in brochures and on a DVD, in relation to its testing for, and cure of, certain human allergic reactions. Allergy Pathway, and its sole director, were, amongst other things, ordered to restrain from engaging in similar misleading and deceptive conduct for a period of 3 years.

From July 2010 Allergy Pathway's clients had, to the director's knowledge, posted testimonials on Allergy Pathway's Twitter pages and Facebook wall. The question was whether Allergy Pathway could be held responsible for what was posted by its customers. Finkelstein J held that Allergy Pathway became the publisher of the testimonials on its Twitter pages and

¹ Most social media sites do have terms of use in which users agree to comply with certain 'rules of engagement' or 'community standards' which are generally aimed at the content of the material published by the user.

² A very basic definition of data mining is the retrieval and analysis of data about a user's online behaviour.

³ Hashtags (#) are used by Twitter to refer to a topic or company. Hashtag hijacking is where Twitter users use the hashtag to comment negatively about a company, for example McDonalds initially created a Twitter campaign #MeetTheFarmers to promote its support of local produce, however later that day rebranded it as #McDStories. This prompted a viral response of people tweeting about their McDonald horror stories.

⁴ *ACCC v Allergy Pathway Pty Limited* (No 2) [2011] FCA 74

Facebook wall when it became aware of them (and decided not to remove them) and therefore was in contempt of the orders made in 2009. Finkelstein J also held the sole director to be knowingly involved in Allergy Pathways' conduct and also was in contempt of the orders made in 2009. Allergy Pathway and its director were fined a total of \$15,000, ordered to publish corrective advertising on the front counter of each of its clinics, its website, its Twitter and Facebook pages and to send a letter to each of its customers explaining its actions. They were also ordered to pay the ACCC's costs on an indemnity basis.

The obvious practical lesson to be learnt from this case is that it would be prudent for businesses to have policies in place to monitor their social media sites regularly to ensure that comments posted on them by third parties are accurate and have in place a policy for the removal, or correction, of those comments if they are not. Certainly if a business becomes aware of third party content on its social media site that is incorrect, inappropriate or inaccurate, the risk of liability for that publication will be minimized if the decision to remove or clarify the content is made swiftly.

Given the finding of this case it is also important that businesses treat their social media sites in the same manner that they would a written publication. The same levels of authority and supervision that apply to any written publication should apply to the use of social media sites.

***Glen Stutsel v Linfox Australia Pty Limited*⁵**

Mr Stutsel was a truck driver for Linfox Australia who was terminated following his posting of offensive and racially derogatory comments about certain Linfox managers on his Facebook page. Linfox maintained that, amongst other things, Mr Stutsel had breached implied terms of his employment contract to act in good faith and not take any steps that would cause Linfox damage, and breached Linfox's Workplace Diversity policy. Mr Stutsel applied to Fair Work Australia alleging unfair dismissal based primarily on the assertion that he believed that he had the maximum security settings on his Facebook account and had no reason to believe that his comments could be viewed by people other than his friends (the managers were not Mr Stutsel's Facebook friends).

Fair Work Australia accepted Mr Stutsel's belief that his Facebook account was private and accepted that he did not intend the comments to be hurtful as he did not expect them to be read by the manager. Commissioner Roberts appeared to take the view that a Facebook page was different in character to a web blog, which is intended to be on public display, and is more akin to:

'a group of friends letting off steam and trying to outdo one another in being outrageous ... it has much of the flavour of a conversation in a pub or cafe, although conducted in an electronic format'.

When considering whether Mr Stutsel's conduct amounted to serious misconduct, Commissioner Roberts noted, with dissatisfaction, that Linfox did not have a policy relating to the use of social media by its employees, he said:

'in the current electronic age, this is not sufficient and many large companies have published detailed social media policies and take pains to acquaint their employees with those policies. Linfox did not'.

Linfox was ordered to reinstate Mr Stutsel and pay his lost wages.

The characterisation of Facebook comments in this decision is somewhat more generous than the manner in which they were characterised in the Allergy Pathway decision, however the lesson to be learned is the same. Businesses now need to have in place firm policies relating to the use and monitoring of social media sites. The failure to have those policies in place may well result in a finding against the business.

Regulatory investigations and prosecutions

Regulatory bodies are also increasing their focus on the use of social media as a way of communicating with customers and marketing products. In February 2012 the Australian Securities and Investments Commission released Regulatory Guide 234 which provides 'good practice guidance' for the advertising of financial products and services. ASIC emphasises

⁵ [2011] FWA 8444

that the advertising of financial products should give a 'balanced message about the returns, benefits and risks' of a financial product.

The ability to do that in the informal and condensed medium of Facebook posts or Tweets may be somewhat of a challenge, however ASIC indicates that those physical limitations will not be an excuse for producing an advertisement that might mislead. RG 234.118 states that:

'promoters should consider the overall impression created by the advertisement when viewed for the first time. Promoters should carefully consider the appropriateness of some new media channels if content limitations mean that there is insufficient space to provide balanced information'

The indications are that ASIC will continue to maintain a close watch on internet advertising of financial products and services. All financial service providers will need to review their current advertising to ensure that it complies with RG 234 and would do well to include in that review the manner in which their social media sites are used to transmit information about their products and services.

A few coverage issues

The exposures that may arise out of social media sites can be both first and third party losses.

Many first and third party losses that arise out of the use of social media sites will be covered by existing professional indemnity, directors & officers and employment practices liability policies. This is because the trigger for these policies is generally quite broad and is activated when a claim is made by a third party arising from the performance of defined professional services or the conduct of the insured's professional business.

However a potentially significant limitation of such policies may be jurisdictional exclusions or limits. Many Australian businesses will hold policies that exclude liability for any claim made in, or determined pursuant to, the laws of the USA or Canada. Given the very nature of social media, comments, advertisements, or other commentary published on the internet will have a global reach. In Australia, since at least the High Court case of *Dow Jones v Gutnick*,⁶ it is accepted that the publication of a defamatory comment occurs in the location that the damage to reputation occurs, that is where it is read (or downloaded) and not the location at which it is published from. Similar laws have developed in the USA and Canada⁷. Therefore businesses posting items on social media sites in Australia may find themselves defendants to a claim made anywhere in the world, for which they may have no cover as a result of jurisdictional exclusion clauses.

More and more businesses are now considering supplementing their suite of policies with more bespoke policies that will also provide cover for losses arising out of the use of internet and other media platforms. While these policies will no doubt overcome jurisdictional exclusions, the potential for overlap with existing policies may in turn give rise to double insurance issues.

A further interesting issue that may arise is the extent to which consequential losses arising from the use of social media sites will be covered.

Social media platforms are undoubtedly becoming a powerful tool for communicating with customers and building a profile, however the potential exists for social media to be just as powerful at destroying a reputation, particularly if your business becomes the victim of a viral campaign against it.⁸ Many consequential loss policies are only triggered if the loss arises as a direct result of the physical damage to tangible property. Reputational damage arising out of social media campaigns against your business may not trigger such policies.

The law relating to the use of social media by businesses is relatively undeveloped and therefore the response of insurance policies to its risks is yet to be tested. However, one thing that is certain is that it will be important for businesses, brokers and insurers to watch closely

⁶ [2002] HCA 56

⁷ See for example *Zippo Manufacturing Company v Zippo Dot Com, Inc* 952 F Supp 1119 (WD Pa, 1997) and *Barrick Gold Corporation v Lopehandia* [2004] O.J. No. 2329

⁸ In 2010 Nestle faced one such campaign, orchestrated by Greenpeace. Thousands of protesters left comments on Nestlé's Facebook page, and via other social media sites, about Nestlé's use of products that were linked with rainforest destruction. The value of Nestlé's shares dropped and it ultimately was forced to change its business practices.

the manner in which technology is changing the way business is conducted and regularly assess how existing policy wordings respond to its unique potential first and third party exposures.

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