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**Practice Group(s):**

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## Franchising Newsletter – May 2013

*By Chris Nikou, Murray Deakin, and Anna Trist*

### Overview

There have been several franchising developments since our last update in February.

This edition discusses:

- minimising the risks when marketing through social media
- comments from the ACCC regarding changes to the Franchising Code, in particular pecuniary penalties
- information regarding the ACCC's new Guidelines on its use of infringement notices
- renewed interest in bullying – something that affects all employers
- the move to the enforcement phase of the Unfair Contract Terms legislation
- an update regarding privacy laws
- an injunction granted to a franchisor to deal with a rogue franchisee defection in New Zealand.

Those interested in expanding overseas or already operating overseas, may be interested to know that in the last two months, K&L Gates have added two more offices, Delaware and Houston, as well as significantly expanding our Hong Kong and Palo Alto offices.

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### Minimising Risks When Marketing Through Social Media

Creating an effective social media advertising campaign is the holy grail of large and small business alike, and for good reason.

According to a recent study conducted by The Nelsen Company, use of smart phones increased more than 400% during the last four years. In the same time period, the number of Facebook accounts swelled by more than 900%, and the number of Twitter accounts exploded by more than 29,000%. With figures like these – and the exceedingly low economic barrier to entry for businesses – it's no wonder creating effective social media advertising is an imperative for any going concern.

While the advent of social media possesses endless possibilities for a myriad of businesses, several potential legal hurdles and issues should be considered as one ventures into the realm of social media advertising and promotion.

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The law in this area – like many laws involving the intersection of technology and commerce – is dynamic and continually evolving, but here are 10 tips you should consider before you set out on your journey for social media prominence.

### 1. Register trademarks

Registering your company's trademarks (brands, logos, tag lines) as early as possible has always been important. Registration takes on increased importance in the context of social media promotions given the vast reaches of this media.

The filing and registration fees for trademarks are low, and the application process is relatively straightforward (through IP Australia). K&L Gates can assist clients with the trade mark registration process. File early and often.

### 2. Truthful advertising

Any ad campaign that takes place through social media is still subject to the same rules and regulations that would be applicable had the campaign taken place through more traditional advertising means. The Australian Competition & Consumer Commission (ACCC), Consumer Affairs Offices and Offices of Fair Trading monitor the marketplace to ensure that commercial advertising isn't going to deceive consumers.

Advertisements that make claims about how products work must be adequately "substantiated", that is, you must have a sufficient basis to be able to make the advertising claim in question. [Click here](#) for more information on what the ACCC expect of advertising campaigns.

### 3. Endorsement and testimonials

Social media advertising lends itself to others "promoting" or "liking" your company's products or services – so, is it permissible for you to solicit others to like or endorse your product? The answer generally is yes. Where products are being offered to American consumers, there are government regulations that require you to disclose certain "material connections" that you may have with the endorser. For example, suppose there is a blog or popular Facebook page that rates products and services, and that you would like your product or service to receive the imprimatur or approval, of this blog or page. If you compensate this third party in the form of, for example, providing free products or demos if the review is favourable; that is likely to be a "material connection" that must be disclosed by you in any advertising where you rely on the endorsement.

If you are considering using endorsements or testimonials in your social media ad campaign which will attract American customers, you will need to review the Federal Trade Commission's (FTC) Guides Concerning the Use of Endorsements and Testimonials in Advertising. The guides are easy to understand and contain useful examples as to what you can and cannot do when using endorsements and testimonials in your social media ad campaign. There is not yet an equivalent guide that applies in Australia.

### 4. Third-party affiliate marketers

Another important rule to keep in mind is that if you use third parties to market or promote your product, you have an obligation to make sure that what they are saying is truthful.

If one of your affiliates has pushed the envelope and disseminates false or misleading information about your product, then you too, may bear legal responsibility for what was distributed on your behalf.

### 5. Social media sites policies

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Facebook, LinkedIn, YouTube, and all other major social media sites have terms of use you agree to abide by when you create your account. There are specific rules that these sites have regarding what users can and cannot do in terms of advertising and promotion.

You will want to read these carefully to make sure any product or service promotion you undertake through these sites is harmonious with the terms to which you're asked to agree.

### 6. User-generated content

Social media is a great way to harness the creativity of consumers in developing or enhancing a particular ad campaign. Many businesses encourage consumers to post their ideas and/or content online that will then be used in various advertising endeavours.

While this can be a very economical way to develop a campaign and promote brand awareness, companies need to be vigilant about making sure that they have the rights to then use or modify that user-generated content.

The best practices typically include requiring consumers to acknowledge through some sort of click-through agreement that the company owns the rights to the content that is being generated, and that they understand the company is being granted a license to use and modify the content in the future.

### 7. Contests and promotions

Be careful of offering competitions or contests through social networks, especially if you are offering a cash prize to the winner. Each state and territory in Australia has specific laws that apply to such competitions.

### 8. The rise of "cause marketing"

Cause marketing is the practice by a for-profit company of donating a portion of the purchase price of an item or service to a charity. Cause marketing is becoming increasingly popular via social media outlets.

### 9. Great to be "green"

While the law still is developing on this front, it's generally thought best that the terms of the campaign should be clearly and prominently disclosed, the marketing material should include the amount to be donated to the charity per action, the name of the charity, the dates of the campaign and any minimum or maximum amount to be donated.

Developing and selling ecologically friendly services and products is on the rise. It is important that any "green" claims are not misleading or deceptive. [Click here](#) for more information on Green claims, which are discussed by the ACCC in detail in a speech given last year.

### 10. Employees and social media

Companies may be liable for the statements made by employees on social media sites if those remarks relate to the course and scope of the employee's employment.

For this, it is a good idea to develop an employee social media policy that outlines what type of information about the company, if any, employees are allowed to disclose on social media sites.

Social media poses a number of unique and exciting opportunities for businesses. With a bit of diligence and attention to detail, you and your business should be able to thrive in creating and deploying a socially legal advertising campaign.

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*This article was originally written by Michael Keyes, a partner of the Spokane office at K&L Gates and has been amended by Anna Trist, a senior associate of the Melbourne office at K&L Gates.*

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### ACCC Publishes Guidelines on Its Use of Infringement Notices

The Australian Competition and Consumer Commission (ACCC) have published much needed guidance on its use of infringement notices issued under the *Competition and Consumer Act 2010 (Cth)* (CCA).

This guidance is timely because:

- the ACCC has actively issued infringement notices to the business community, having collected approximately AUD620,000 in penalties under infringement notices up to December 2012<sup>1</sup>
- the amount of penalties sought by the ACCC under infringement notices has recently increased by more than 50%.

A copy of the Guidelines, titled "Guidelines on the use of infringement notices" (Guidelines), can be found [here](#).

#### *What are Infringement Notices?*

The ACCC has stated that infringement notices are designed to provide "a timely, cost efficient enforcement outcome in relation to relatively minor contraventions of the Act".

The ACCC is empowered to issue infringement notices where it has "reasonable grounds to believe" that a person has contravened certain consumer protection provisions, including:

- unconscionable conduct provisions
- unfair practices provisions (save for certain sections, such as misleading and deceptive conduct provisions)
- certain unsolicited consumer agreement and lay-by agreement provisions
- certain product safety and product information provisions.

The ACCC may also issue an infringement notice to a person in relation to:

- the failure to respond to a substantiation notice; or
- the provision of false or misleading information to the ACCC in response to a substantiation notice.

#### *What are the Infringement Notice Penalties?*

The penalty amount in each infringement notice will vary depending on the alleged contravention, but in most cases is fixed for each individual contravention at:

- AUD10,200 for a corporation (or AUD102,000 for a listed corporation)

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<sup>1</sup> Page 21 of ACCCount 1 October to 31 December 2012

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- AUD2,040 for an individual.

Different penalties apply in connection with substantiation notices.

Infringement notice penalties are calculated by reference to the value of penalty units set by the *Crimes Act 1914*. From 28 December 2012, the value of a penalty unit increased from AUD110 to AUD170. Therefore, the infringement notices relating to conduct prior to 28 December 2012 attracted lower penalties than what will now be recovered.

### *How Active Have the ACCC Been in Issuing Infringement Notices?*

Since April 2010, the ACCC has issued approximately 95 infringement notices and received approximately AUD620,000 in penalties.<sup>2</sup>

Examples of infringement notices issued by the ACCC include:

- **SingTel Optus Pty Ltd:** 27 infringement notices totalling AUD178,000 in relation to representations it made in the promotion of its 'Max Cap' mobile phone plans. The ACCC's Media Release can be found [here](#)
- **Foxtel Management Pty Ltd:** seven infringement notices totalling AUD46,200 for running a nationwide advertising campaign that the ACCC believed was misleading. The ACCC's Media Release can be found [here](#)
- **Advanced Lifestyle International Retail Pty Ltd:** three infringement notices totalling AUD19,800 in relation to false or misleading representations to consumers during in-home sales presentations for its massage wands, cushions, chairs and beds. The ACCC's Media Release can be found [here](#).

### *When Will the ACCC Likely Issue an Infringement Notice?*

Issuing an infringement notice signifies that the ACCC considers a contravention of the CCA has occurred that requires a more formal sanction than an administrative resolution (eg resolution of issue by agreement), but also believes the matter may be resolved without legal proceedings.<sup>3</sup>

However, an infringement notice is only likely to be issued in circumstances where the ACCC would be willing to commence legal proceedings if the recipient of the notice elected not to pay the infringement notice penalty.<sup>4</sup>

The Guidelines indicate that the ACCC is more likely to consider the use of an infringement notice in place of legal proceedings in the following circumstances:

- the ACCC forms the view that the contravening conduct is relatively minor or less serious
- there have been isolated or non-systematic instances of noncompliance
- there have been lower levels of consumer harm or detriment
- the facts are not in dispute or the ACCC considers the circumstances giving rise to the allegations are not controversial

<sup>2</sup> ACCC Annual Report 2010-2010 published 13 October 2011; ACCC and AER Annual Report 2011-2012 published 16 October 2012; ACCC website; ACCC media releases

<sup>3</sup> Page 50 of ACCC and AER Annual Report 2011-2012

<sup>4</sup> Item 3 of the Guidelines

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- infringement notices form part of the broader industry or sector compliance and enforcement program following the ACCC raising concerns about industry wide conduct.<sup>5</sup>

### *What Are the Implications for Businesses?*

#### **Substantial Monetary Penalties**

Despite criticism, the ACCC may continue its practice of issuing multiple infringement notices where it considers it is appropriate to do so. This may occur where the ACCC believes there have been multiple contraventions, where the contraventions have occurred in multiple states or territories, where contraventions have involved different types of media, or where it is considered desirable to deter similar conduct by the specific business involved or the broader industry.<sup>6</sup> The payment of multiple infringement notice penalties may result in payment of a substantial amount of money (especially given the increase in penalty unit rates from December 2012).

#### **Court Proceedings and Additional Remedies**

There is no legal obligation on a recipient to pay an infringement notice. However, nonpayment of infringement notice penalties will expose the recipient to the prospect of proceedings arising from the ACCC's concerns. Infringement notice penalties are lower than the maximum penalty a Court could impose should the recipient be found to have contravened the CCA.<sup>7</sup> In fact, should the ACCC be successful, the business may be liable to pay a penalty of up to AUD1.1 million for each contravention in addition to legal costs.

Where appropriate, the ACCC may also seek additional remedies, including Court enforceable undertakings.<sup>8</sup>

#### **ACCC Infringement Notice Register and Media Releases**

The ACCC operates a public "Infringement Notice Register" of paid infringement notices on its website. Entries on the register ordinarily list the person or business that paid the notice, the date paid and the section of the relevant legislation. Additionally, the ACCC often issues a media release that confirms payment has been made and includes details of the alleged matters and the amount paid.<sup>9</sup> Given the affect this may have on a businesses reputation, it is vital that all options are carefully considered prior to payment of the penalty.

### *What Should a Business Do If It Receives an Infringement Notice?*

When issued with an infringement notice, the recipient will be provided with information including the nature of the alleged contravention, the amount to be paid and the period for payment if the recipient wishes to avoid Court action.<sup>10</sup> On receipt of an infringement notice, it is advisable for the business to obtain legal advice as to the appropriate response.

There are a number of steps a recipient may take once they receive an infringement notice:

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<sup>5</sup> Item 4 of the Guidelines

<sup>6</sup> Item 4(a) of the Guidelines

<sup>7</sup> Item 9 of the Guidelines

<sup>8</sup> Item 4(b) of the Guidelines

<sup>9</sup> Item 8 of the Guidelines

<sup>10</sup> Item 6 of the Guidelines

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- **Request an extension to comply with the infringement notice.** The compliance period for payment of an infringement notice penalty is 28 days. This may be extended for a maximum of a further 28 days. Any extension request made to the ACCC should be made as soon as possible.
- **Request that the infringement notice be withdrawn.** If a business believes that they have not engaged in the conduct alleged by the ACCC or there is additional information the ACCC should consider, a recipient may request that the infringement notice be withdrawn. Any withdrawal request must be provided to the ACCC as soon as possible and it is advisable that the business obtains legal advice to maximise the potential for a successful outcome. Any information provided to the ACCC in response to an infringement notice should be carefully considered and must not be false or misleading.
- **Pay the infringement notice penalty.** Payment of the infringement notice is not taken to be an admission of wrong doing by the recipient and involves no Court finding of any contravention of the CCA. Further, the ACCC cannot commence Court proceedings in relation to the alleged contravention. However, this does not impact on the rights of action other parties may have against the recipient<sup>11</sup> and the recipient should consider the possible implications of paying the penalty - discussed above.
- **Not pay the infringement notice penalty.** There is no legal obligation on a recipient to pay an infringement notice. However, nonpayment of an infringement notice during the compliance period will expose the recipient to the prospect of ACCC initiated Court proceedings in relation to the alleged contravention detailed in the infringement notice once the compliance period expires.<sup>12</sup> The recipient should seek legal advice before taking such action (or inaction).

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## Pecuniary Penalties Likely for Breaches of the Franchising Code

Second on ACCC chairman Rod Sims' "to do" list for 2013 is the ACCC seeking new powers to fine franchisors as more franchisees complain of businesses operating a franchise system under the guise of a licensing or distribution arrangement in an attempt to bypass the Franchising Code.

The ACCC would prefer an enforceable Franchising Code that carries pecuniary penalties.

To enforce the Franchising Code, the ACCC currently has to go through the process of bringing a case before the court and getting a court ruling, then bringing another case before the court, proving that the franchisor has breached the prior court ruling. For obvious reasons, it takes a significant amount of time and resources to enforce the Franchising Code.

ACCC deputy chairman Michael Schaper is quoted in Business Review Weekly (21 -27 March, 2013) as stating that "Codes remain an intention of good practice and good behaviour, and most adhere to the code but there will be some who realise they can breach the code without penalty".

In its submission to the review of the Franchising Code the ACCC outlined why it should be granted wider enforcement capabilities, including pecuniary penalties. The review of the Franchising Code is

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<sup>11</sup> Item 7 of the Guidelines

<sup>12</sup> Items 6 & 9 of the Guidelines

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considering (among other things) the enforcement of the Franchising Code and a full report is due to be released by 15 May, 2013.

K&L Gates will keep you informed regarding the content of the report and any changes to the pecuniary penalty regime.

*This article was written by Anna Trist, senior associate of the Melbourne office.*

### Bullying: A Message for all Employers

The Australian Federal Workplace Relations Minister, Bill Shorten, recently announced changes that will allow employees to seek assistance in respect of workplace bullying from the Fair Work Commission (FWC).

The proposed new laws seek to cut through the current complex processes available to employees under state health and safety laws and seek early intervention in bullying claims. The new changes will require the FWC to deal with any application urgently.

#### *The Potential Changes*

The Commonwealth Government has announced it will hurry through amendments to the *Fair Work Act 2009 (Cth)* (FW Act) creating a new cause of action in relation to workplace bullying.

The amendments are proposed to take effect from 1 July 2013.

#### *Definition of Bullying*

The changes will adopt the definition of "bullying" set out in the Draft Code of Practice Preventing and Responding to Workplace Bullying. "Bullying" will be defined as "repeated, unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety". Importantly, the changes will clarify that the definition of bullying does not include reasonable management action, including performance management conducted in an appropriate and reasonable manner.

#### *Process to Resolve Complaints*

Mr Shorten announced that the new process will permit workers who believe they have been bullied to make a complaint to the FWC, which will be required to list any application within 14 days of the complaint. The changes will also enable the FWC to make orders in relation to the complaint, and/or to refer the complaint to the relevant state health and safety regulator.

Early reports suggest that any new FWC processes would be similar to those currently in place for unfair dismissal and adverse action complaints. This would include a compulsory conciliation conference, which is intended to quickly resolve the dispute to the parties' mutual satisfaction and avoid the need for arbitration or court action.

Where conciliation is unsuccessful, the amendments to the *Fair Work Act* will enable FWC to make civil orders in respect of claims. Current penalties under the *Fair Work Act* are up to AUD33,000 per

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breach, however, the Minister has advised that he will consult with business before confirming such penalties will apply.

### *What does this mean for employers?*

Currently, victims of workplace bullying may seek to have their complaints addressed under many different legislative regimes. If an act of bullying is serious enough to pose a risk to health and safety, employers and employees may be liable under the relevant state health and safety legislation. In addition, in Victoria, legislation created as a result of the Brodie Panlock case enables criminal prosecutions in cases of serious workplace bullying. Both of these actions are initiated by state prosecution authorities rather than the individual employee.

The changes foreshadowed by the government suggest that for the first time individual employees (rather than regulators) will be able to bring claims against their employers for workplace bullying. This is a significant change in workplace law and if it proceeds is likely to result in an influx of claims from employees.

As yet, no draft legislation has been tabled regarding these significant changes. This is expected in the autumn session of parliament and we will provide a further update once the legislation is tabled.

*This article was written by Kathy Dalton, partner, Michaela Maloney, senior associate and Sam Jackson, lawyer, all of the Melbourne office.*

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## Unfair Contract Terms - ACCC Moves to Enforcement Phase

### *Overview*

The Australian Competition and Consumer Commission's (ACCC) period of grace concerning the use of unfair contract terms in standard form consumer contracts is over. Following an industry review which prompted some businesses to remove or modify identified problematic terms, the ACCC is now moving to an enforcement phase.

The ACCC has recently completed a review of standard form consumer contracts used in a number of industries and has now published its report entitled "ACCC's Unfair Contract Terms – Industry Review Outcomes", which, in addition to the outcomes of the review, provides guidance to businesses on how the ACCC will view certain terms in standard form consumer contracts. The industries subject to the ACCC's review were:

- airlines
- telecommunications
- travel
- fitness
- vehicle rental
- online retail.

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These industries were selected after consideration of a number of factors, such as the high level consumer complaints and potential for widespread consumer detriment.

The ACCC is understood to have received a good level of cooperation from businesses within these industries, many of which responded to the ACCC's concerns by removing or amending potentially unfair terms. However, the ACCC has reported that some businesses have not addressed problem terms and the ACCC will now consider taking further action to achieve compliance.

### *Unfair contract terms regime*

The national unfair contract terms regime is found in the Australian Consumer Law in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). The regime applies to standard form "consumer contracts" which are contracts for the supply of goods or services (or the sale or grant of interest in land) to a person who acquires it wholly or predominantly for personal, domestic or household use or consumption.

The regime does not apply to business to business contracts.

Since coming into effect in Australia on 1 July 2010, the regime provides that a term in a standard form consumer contract will be unfair where it:

- causes a significant imbalance in the parties' rights and obligations
- is not reasonably necessary to protect the legitimate interests of the party advantaged by that term
- would cause detriment (whether financial or otherwise) if it was relied upon or applied.

In assessing fairness, a court will consider the contract as a whole, and the extent of transparency in the term (eg. whether it is expressed in plain language and legible). Terms found to be unfair are void and unenforceable.

Remedies are available where there is detriment or substantial likelihood of detriment to consumers or a class of consumers. The ACCC, Australian Securities and Investments Commission (where financial services contracts are concerned) and Australian state and territory regulators are responsible for enforcement.

### *ACCC's 8 key issues*

During the industry review, the ACCC focused on eight key contractual terms, requiring businesses to remove or amend terms that:

- allow a business to change the contract without consent from a consumer
- cause confusion about the agency arrangement and that unfairly seek to absolve the agent from any liability
- unfairly restrict the consumer's right to terminate the contract
- suspend or terminate services being provided to the consumer under the contract
- make the consumer liable for things that would ordinarily be outside their control
- prevent the consumer from relying on representations made by the business or its agents
- seek to limit consumer guarantees

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- seek to remove the consumer's rights to a credit card chargeback facility when buying the service through an agent.

The report sets out examples of unfair terms. It also provides guidance on the ACCC's concerns and how the unfair terms might be remedied or amended to the satisfaction of the regulator. The report also highlights areas where the ACCC will continue to pursue concerns where businesses have failed to respond positively.

### *Additional consumer protection matters*

In the course of its unfair contract terms review, the ACCC also identified and sought amendments from businesses to address terms which:

- allow a business to use a customer's personal details for reasons greater than what is required for the supply of the service
- seek to limit the jurisdiction by which an online trading contract is governed
- seek to grant irrevocable, perpetual and royalty-free rights to an online trading business to use a consumer's correspondence/communications for any purpose
- need to be more transparent, in plain English and more accessible.

The ACCC also invites businesses to consider reducing the length and complexity of standard form consumer contracts in order to improve transparency and accessibility.

### *ACCC's enforcement phase*

The ACCC has foreshadowed enforcement action against those businesses that have not responded to its identified concerns during the review, and has singled out businesses operating in the vehicle rental industry. However, the ACCC has also warned that it is now entering an enforcement stage across the board.

### *Unfair terms review recommended*

The ACCC encourages businesses to review the terms and conditions in standard form consumer contracts in light of the findings and make amendments where necessary to ensure compliance. Accordingly, we recommend that businesses across all industries (including those contracting with Australian consumers online) review their standard form consumer contracts to ensure:

- compliance with the unfair contract terms regime, and in particular, the eight key issues identified by the ACCC as the focus of future enforcement action
- contracts and terms are transparent and accessible
- terms do not mislead consumers or breach statutory consumer guarantees.

*This article was written by Murray Deakin, partner, and Sylvia Ng, senior associate both of the Sydney office.*

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### Changes to Privacy Laws

Changes to the Australian *Privacy Act* are planned for 2014 and will impact each and every business dealing with customers information. Now is the time to be preparing for these changes and ensuring their policies and procedures are compliant.

The changes will come into effect on 12 March 2014 and particularly affect organisations in the healthcare, financial services, technology, media and consumer facing sectors.

#### *What this will mean for you*

- Organisations may be liable for disclosures made by third parties overseas.
- Powers of the Australian Information Commissioner will be expanded and new penalties introduced.
- Organisations that provide credit will be subject to new credit reporting laws.

While a year can seem like a long time, organisations should be thinking about the implications for their policies and procedures now to make sure they are compliant and don't risk fines and negative publicity next year.

Make sure you are considering this important issue in your organisation as soon as possible and seeking input from legal advisers with specific knowledge regarding privacy laws where needed.

#### *Consider*

- Are you aware of how the changes to the Privacy Act affect your business?
- Are you planning to move IT services to the cloud? If so what jurisdiction will apply to privacy issues and how strong are they?
- What plans do you have to develop your credit reporting policies?
- What plans do you have to review and assess the impacts of the Privacy Act amendments?
- Will your privacy policy still be compliant next year? When was it last reviewed?
- When did you last update your collection statement? Do you have the necessary consents to use this information?
- How comfortable are you that your direct marketing will still be compliant?
- Who "owns" privacy within your organisation?

K&L Gates can assist you to answer these queries and ensure that your organisation is ready for the changes to privacy laws.

*This article was written by Cameron Abbott, partner, and Rob Pulham, senior associate of the Melbourne office.*

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### Injunctions to deal with rogue franchisee defection in New Zealand

A New Zealand multi-site franchisee recently caused an uproar by rebranding 3 Club Physical gyms overnight to "Jolt Fitness", an independent brand, arguing that it was concerned about marketing conducted by the franchisor.

The franchisor of the New Zealand franchise, Club Physical, acted swiftly to successfully obtain an injunction from the New Zealand High Court requiring that the "Jolt Fitness" gyms be closed and the gyms be rebranded back to the Club Physical brand and operated by the franchisor as company-owned gyms.

The parties then negotiated a transfer of the leases and acquisition of the equipment to the franchisor to finalise the change.

This illustrates that breaches of franchise agreements will not be tolerated and can be enforced by swift and decisive legal action.

*This article was written by Anna Trist, senior associate of the Melbourne office.*

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