



media, entertainment & arts alliance
the people who inform and entertain

21/05/2010

Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia
by email: economics.sen@aph.gov.au

Dear Senate Committee

Re: Trade Practice Amendment (Australian Consumer Law) Bill (No.2) 2010

The Media, Entertainment & Arts Alliance (the Alliance) is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, dancers, symphony orchestra musicians, and freelance musicians.

I am writing to you to raise my concerns regarding elements of the Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010.

The Alliance refers to the proposed Section 29 deals with false or misleading representations about goods or services. Section 29(1)(e) states that a person must not:

"make a false or misleading representation that purpose to be a testimonial by any person relating to goods or services"

Section 29(1)(f) states that a person must not:

"make a false or misleading representation concerning (i) a testimonial; or (ii) a representation that purports to be such a testimonial; relating to goods or services."

The Alliance is concerned that the inclusion of the words "by any person" widens the ambit of the law to such an extent that any actor that plays a character in an advertisement may be at risk of breaching the law if they do not use or enjoy the product, goods or service being endorsed.

The nature and role of an actor is to play another person, to pretend to be somebody they are not. They are skilled in emoting, representing feelings and taking on other personas. When a celebrity is being used in a testimonial, they may be drawing on these skills but they are representing themselves. This is not the case with most commercials using either unknown or relatively unknown actors playing a role of for example a generic mother, a generic father, or generic child in a commercial.



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The Alliance believes that these two sections should not be extended to actors playing characters.

Concomitant to this issue is that of the Right to Personality. The Right of Publicity is defined as the right to control the commercial use of one's identity. I note that Section 29(1)(h) states that:

"A person must not ... make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation;"

This seems to be touching upon issues surrounding Right of Personality but falls far short.

In the US most states have Right of Personality laws that seek to protect somebody's name, image and likeness from exploitation without permission. This right extends to everybody not just celebrities.

In Australia there is limited trademark and "passing off" case law around the Right of Personality. Under the Corporations Regulations 2001 Reg 2B.601 a company name is unacceptable for registration if:

"In the context in which it is being proposed to be used, suggests a connection with
(i) *a member of the Royal Family; or*
(ii) *...*
(iii) *...*
(iv) *Sir Donald Bradman"*

This regulation with respect to Bradman, introduced by the Howard Government, seeks to protect the Right of Personality of one deceased person. The Alliance believes that if this can apply to one person then this should apply to everybody.

The Alliance believes that the principle captured by this regulation should be extended to a broad Right of Personality with respect to an individuals name, image, likeness, voice, signature, photograph, distinctive appearance, gestures or mannerisms, be they alive or dead (up to 50 years as recognised under US state law). A Right of Personality law should cover such uses as commercial representations in advertising, sponsorship, trading names or any other commercial or non-commercial use.

Yours sincerely

Simon Whipp
National Director