

## Retail Therapy:

### *2024 Insights and Forecasts for the Australian Retail Market*

*May 2024*

#### Transcript of Retail Therapy Episode 6:

Nicola	<p>Hello and welcome to Bird &amp; Bird's Retail Therapy podcast – where we explore the trends, changes and legal aspects of the retail &amp; consumer industries.</p> <p>I'm Nicola Conway and I'm a Senior Associate in Bird &amp; Bird's R&amp;C team.</p>
Sana	<p>And I'm Sana Malik, I'm a Trainee Solicitor also at Bird &amp; Bird.</p> <p>In today's episode: We're going to discuss our Australian Retail Trend Predictions for 2024. We're joined by Shehana Wijesena who Partner in our Bird &amp; Bird Intellectual Property team in Sydney. Shehana, would you like to kindly introduce yourself and a little bit about your role and your practice.</p>
Shehana	<p>Yes, thank you. I'm Shehana Wijesena and I focus on retail and consumer legal issues, and I have a particular passion for brand management.</p>
Nicola	<p>Before we get started, we need to mention that this podcast is intended to be an open forum for conversation – it does not and is not intended to constitute legal advice. If you do want any legal advice, just reach out to us or your usual B&amp;B contact. We're always happy to support you and your business however we can. Let's get into this episode...</p>
Nicola	<p>So we recently did a similar podcast episode but focusing on 2024 retail trends for the UK so it's a great opportunity for us to have a similar discussion but this time focusing on one of my favourite places in the world – Australia! Shehana, I know you've listened to our previous UK episode, were there any UK trends that we spoke about that you thought in particular also ring true in Australia?</p>
Shehana	<p>Oh absolutely Nicola. One trend in particular where we share a similar sense of direction is in relation to environmental and sustainability claims. Specifically, the Australian Competition &amp; Consumer Commission (or the ACCC) – which is Australia's competition regulator and consumer law</p>

	<p>watchdog is cracking down on Greenwashing claims – which is when a business makes false or misleading claims that make them appear more environmentally beneficial than they indeed are.</p> <p>Interestingly, back in 2023, the ACCC published its findings of a 2022 internet sweep of environmental claims and found that 57% of businesses were making concerning claims. The main sectors making such claims were cosmetic and personal care, fashion and food and beverage.</p> <p>By way of example, a cosmetics manufacturer might make a claim on its packaging that “this product does not harm the environment”. In actuality, the bottle is made from recycled material, but the cap and external packaging are not, nor are the contents in the bottle.</p> <p>The claim “does not harm” exaggerates the benefits and is likely to give a false or misleading impression about the impact of the business’s product.</p> <p>The business could instead claim that aspects of its packaging “Reduces harm to the environment” and then disclose which parts of the product are made from recycled material to avoid misleading consumers.</p> <p>Greenwashing claims are a particular focus – which is when a business makes false or misleading claims that make them appear more environmentally beneficial than they indeed are.</p> <p>This was a particular area of focus for the ACCC in 2023 with it issuing its final Green Guidelines to educate businesses about their obligations under the Australian Consumer Law. Some takeaways include – any claims made must be:</p> <ul style="list-style-type: none"> <li>• accurate,</li> <li>• should be able to be substantiated,</li> <li>• should only be made for a real benefit, and</li> <li>• should make it clear whether claimed benefits refer to packaging or content.</li> </ul>
Nicola	<p>That’s fascinating that the green washing element that you mentioned in relation to product packaging is something we’re advising more and more on at the moment in the UK too. Actually there’s a whole range of claims that brands use on their packaging that regulators are cracking down on and requiring brands to substantiate and in some cases remove. All of these sorts of claims are under high scrutiny for us too.</p> <p>And sticking with claims but pivoting from unsubstantiated green claims to unsubstantiated health claims; are your regulators and authorities also cracking down on these too?</p>
Shehana	<p>Absolutely! Australia’s Therapeutic Goods Administration (TGA) which is akin to the Medicines and Healthcare products Regulatory Agency in the UK, has put out warnings to consumers on how to spot dodgy health product advertising. In particular, how to spot misleading claims, if a product is unapproved or if social influencers are making claims about health products</p>

	<p>that are incorrect or dangerous. This is also an area of focus for the ACCC, and it will take action against a business is making misleading claims about the health benefits of product or service.</p>
Sana	<p>It's so interesting to listen about that overlap with kind of health products and social influences.</p> <p>It sounds as though the Australian Competition &amp; Consumer Commission (ACCC) is quite at the moment in terms of seeking to better protect or enforce consumer rights. Are they most interested in focusing on the activities of bigger companies or are they also scrutinising influencer marketing?</p>
Shehana	<p>Of course, the big fish are always going to be under scrutiny, but the social influencers are well and truly in the ACCC's line of fire!</p> <p>At the end of 2023, the ACCC released its Findings of its internet sweep of testimonials and endorsements by influencers. A key takeaway from these findings was that 81% of influencers were making posts that raised concerns from a consumer law perspective e.g. making incorrect statements about brands, products or services in their posts or not disclosing brand relationships in their posts.</p> <p>Interestingly, the sectors with the greatest number of concerning posts were fashion influencers, home and parenting influencers and travel and lifestyle influencers.</p> <p>As a result, the ACCC plans to release a targeted guidance document for influencers and businesses involved in influencer advertising sometime this year. It will also undertake education, compliance and enforcement activities where appropriate.</p> <p>There is also industry led guidelines which provide a standard for Australian influencer businesses and advertisers. For example, the Australian Association of National Advertisers (AANA) has developed a voluntary Code of Ethics as part of its advertising and marketing self-regulation.</p>
Sana	<p>Thanks Shehana. Were definitely seeing some overlaps in Australia with what we're seeing in the UK and actually also with what our EU colleagues are seeing across the member states as well. Are there any trends or issues to note that perhaps we didn't touch on for the UK?</p>
Shehana	<p>One topic you didn't explore in the last episode, is the proliferation of Australian trademark filings for emerging technologies e.g. in relation to virtual goods, the metaverse and NFTs. This has taken off in Australia with the Australian Trademarks Office issuing a guideline on how best to classify goods and services related to these emerging technologies.</p> <p>Another topic which has been in the news is credential stuffing -which is a cyber-attack in which credentials obtained from a data breach on one service are used to attempt to log in to another unrelated service. That is login details stolen from one platform, then used to log into another one and for example, place orders. It's worthwhile for businesses who trade online to look into what they can do to strengthen security and avoid being subjected</p>

	<p>to this becoming a headline. For example, regular software updates or mandatory 2 factor authentication for logging in.</p>
<p>Sana</p>	<p>That's really interesting to hear and of course, just again emphasising the importance of data security and how that's basically the new currency today- data and the importance of protecting it.</p> <p>Another thing that we've been watching with interest in the UK is the changing framework in Australia for unfair contract terms – I wonder if you could share a little bit about that for any listeners who are contracting with an Australian business or targeting Australian based consumers?</p>
<p>Shehana</p>	<p>Something you really have to be aware of when targeting Australian consumers is businesses in the retail industry, including manufacturers, wholesalers and retailers, that enter into standard form consumer and small business contracts with customers in Australia also now need to ensure that their standard form contracts are in compliance with the requirements of the unfair contract terms regime in Australia (which forms part of the Australian Consumer Law (ACL) (UCT Regime). As of 10 November 2023, significant pecuniary penalties will apply in relation to the use of unfair contract terms in standard form contracts entered into with Australian consumers.</p> <p>Under the UCT Regime, a term of a standard form consumer or small business contract is considered to be unfair if it:</p> <ul style="list-style-type: none"> <li>a. causes a significant imbalance in the parties' rights and obligations under the contract;</li> <li>b. is not reasonably necessary to protect the legitimate interests of the party advantaged by the terms; and</li> <li>c. would cause financial or other detriment to a party if applied or relied on.</li> </ul> <p>So there is lots happening in this space and it's really important to make sure that your contracts are compliant with this regime or suffer the wrath of the Australian Consumer Law coming down on you.</p>
<p>Nicola</p>	<p>I think this trend towards Consumer protection authorities globally getting more power to impose financial sanctions is more and more prevalent, so in the UK for example, our consumer protection authority, well one of one of the most important consumer protection authorities for us is the CMA- the competition markets authority. And our enforcement landscape is changing sometime this year I think and so at some point soon the UKCMA will be able to impose fines up to 10% of global annual turnover for certain levels of consumer protection legislation breach but it's a graded system so obviously when it's a less severe infringement on consumer protection right it would be a lower fine and if it's if it's very significant it would be higher but we were waiting to see how it all plays out because the law hasn't yet changed and so when it does change, we're all kind of very curious to see who will be made an example of first and how they actually make those calculations so it's interesting to see what everyone else is doing elsewhere because i think we will be taking influence from what regulators are doing.</p>

Shehana	Oh absolutely. maximum penalties for a company contravening their UCT is the greatest of AU\$50 million or three times the value of the reasonably attributable benefit obtained from the conduct or 30% of adjusted turnover during the breach period.
Nicola	Wow so it could be 30% of turnover. that a lot!
Shehana	Yeah, so it's the greatest so it's significant.
Nicola	I think such great financial sanctions are quite daunting for businesses because at least in the UK this the framework has been such that it was quite hard to enforce compliance or as it's about to be quite easy for a fine to be levied, so from a business perspective of this can be quite daunting, but from a consumer protection perspective these things are quite promising so it's a bit of weighing and balancing in terms of what you could do ahead of time to get yourself ready so that you're not going to be at risk of getting those fines.
Shehana	Well that's right. There was a long lead up to this UCT regime coming into place and a lot of discussion and analysis in the news and within legal circles so hopefully we were able to pass on the message to our clients that this is something to be aware of, get ready for and not come as a shock come 10 November last year and have their ducks in a row but is daunting on everyone who hasn't had a chance to do that or could do that so there's a risk of large fines and also reputational damage but there is this real need as you say to balance the right of consumers alongside the commercial rights of businesses.
Nicola	Yeah, it will be an interesting space to watch globally, I think. I'm still a bit stuck on, and I realise I'm going out of order here, but I'm still stuck on that statistic you gave us earlier when you said some of the statistics by the ACCC said the 81% of influencers were making posts that raise concern from a consumer law perspective. That's a lot, almost all of them!
Shehana	Yeah. I mean are you surprised?
Nicola	I think I think for us in the UK and the EU people have been getting reprimanded for quite a while now and I do think, or maybe I'm just being a bit too optimistic, but I do think that people are falling in line a bit more here using the correct hashtags and disclosure statements because the brands can get into a lot of trouble even if it's the actual individual influencer who is making a wrong statement and so I think we've seen quite a lot of correction on our side but I don't have a stat for the UK so maybe ours is the same or worse!
Sana	I think 81% makes sense because we're seeing, as Shehana said, we're seeing such a trend towards- it's not just kind of social media, the OG social media influencers, it's like kind of like these parents now who doing parenting podcasts and influencing and lifestyle influencing which just means the scope is massive so 81% in terms of the opportunity I think makes sense but agree with you Nicola there is such a business reputational impact going on in the UK where brands are being directly under fire now for associating themselves with XYZ celebrity that I think there is a little bit more caution.

Shehana	Yeah, perhaps that's coming for us too, we could just be trickling behind in that regard in terms of the fall out for brands. When this guideline comes in there is no excuses. It would be very clear what is acceptable and what is expected.
Nicola	Fascinating stuff and I think that the overlaps are something that we can keep an eye on in the coming year and beyond and we can maybe do the similar update same time next year!
Nicola	Let's close the episode with a fun little question – Shehana and then Sana, what's something that you purchased or were gifted recently and loved?
Shehana	I was recently gifted with Aesop's delightful reverence handwash. It has a lovely botanical fragrance and little bit of exfoliating pumice grain in it that makes handwashing a luxe experience. Particularly rewarding after changing a nappy!
Sana	Oh my God, I love Aesop!  So for myself, I've actually repurchased REN's overnight recovery balm, which is like quite a thick oil, it's quite an oily, balmy substance which is helping kind of repair any sharp exfoliation on the face during the day or sensitive skin or any kind of blemishes that kind of thing, so you wake up the next day looking like a shiny new button basically, so I definitely recommend it. What about you Nicola?
Nicola	I actually finally changed my gym membership, so I've got a new gym membership and I'm really pleased with it, so I went to F45 for several years and I really like it. I still like it. I just fancy the change and I recently just moved over to Third Space, and I love it I really like it. I like going to the classes. I like that they've made it kind of a lifestyle thing that you can go, and you can work from there. You can go and sit in the café and have chats, so it's not just a gym it's somehow more than that. It's a little bit like a private members club but not that far if you see what I mean so yeah, loving that so far.
Sana	Alright that's the end of our episode – thanks for joining us! If you'd like to join us for more Retail & Consumer discussions, don't forget to subscribe or follow wherever you listen to your podcasts so that you're notified when the next episode goes live. Bye for now!

# Thank you

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