

# The dangers of airing your opinions on social media — *Seafolly Pty Ltd v Madden*<sup>1</sup> and *Nextra Australia Pty Limited v Fletcher*<sup>2</sup>

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### Take away tips:

- Online comments should be treated the same way as comments made on paper or in a public forum.
- Beware the dangers of extending casual communications from social media to a business context.
- Recent changes to Australia’s defamation laws mean they do not apply to corporations that employ less than ten employees.<sup>3</sup> Thus, they may need to rely on misleading or deceptive conduct laws under the Australian Consumer Law<sup>4</sup> (ACL) rather than defamation. This can become particularly relevant if disparaging comments are made about a company in the context of social media.
- An opinion may meet the definition of “in trade or commerce” if it has a commercial flavour.
- The line between statements of fact and statements of opinion can be difficult to draw. The purpose of the comments may be secondary if readers are led to error.
- Employers should consider having clearly drafted and well-communicated social media policies in place.
- When using social media, employees need to be encouraged to make it clear that any opinions they express are their own, rather than their employer’s.
- In short, inhouse counsel need to remind management and staff to always think twice before posting anything online — the internet never forgets!

### Introduction

*Social media gives large and small businesses a direct way to interact with existing and potential customers, and promote their products and services. Businesses using social media channels like Facebook, Twitter and YouTube have a responsibility to ensure content on their pages is accurate, irrespective of who put it there.*<sup>5</sup>

Imagine that you are inhouse counsel for a company and you discover an employee has been making disparaging comments about a competitor on their personal social media page or blog. Would the company be

liable? What if the comments had been posted the company’s social media page? What could you have done about it and how do social media policies potentially fit in?

These are all live questions that need to be considered in an internet age, where comments can go viral and do damage to a company’s reputation within hours.

Jarrold Bayliss-McCulloch, Associate at Baker & McKenzie has commented that: “...in modern times ... our words can fly on the wings of the internet, beyond the village or town we live in to the most distant parts of the world, before coming to rest in a permanent record”.<sup>6</sup>

The effect of this permanent record can have a lasting impact on a businesses’ reputation and recent cases in Australia indicate that the courts recognise this.

This article discusses recent cases which show that comments made via social media or blogs can have legal consequences if what is said turns out to be inaccurate, unsubstantiated, misleading or deceptive and highlights the importance of social media policies.

### *Seafolly Pty Ltd v Madden* [2012] FCA 1346 and *Madden v Seafolly Pty Ltd* [2014] FCAFC 30

The *Seafolly* case, along with the appeal<sup>7</sup> established that while *Seafolly*’s swimwear designs may well be flattering, false comments that the swimwear giant copied someone else’s swimwear range are certainly not.

### What happened?

It all began in September 2010, when Leah Madden, the owner of an Australian swimwear label called *White Sands*, saw a copy of *Gold Coast Panache Magazine* which featured well known model Samantha Harris (an ambassador for the *Seafolly* swimwear label at the time) modelling a bikini.<sup>8</sup>

Significantly, Madden’s “immediate thought”, as put in the case, was that the model was wearing one of her *White Sands* bikinis, only to realise later it was a *Seafolly* design.<sup>9</sup> Apparently, at the time of seeing the image, Madden also recalled a *Seafolly* buyer viewing her range at an international swimwear show in the US.

On the same day that she had seen the *Gold Coast Panache Magazine*, Madden posted on her personal Facebook page an album of photos with the heading “The most sincere form of flattery?” The album juxtaposed photographs of Seafolly’s garments (reproduced from its website and catalogues) with those of White Sands. Below the photos, she included a caption about why allowing buyers to take photos of your range is a bad idea at a trade show.

### The public response

The reaction by the public when they saw Madden’s comments was significant and included comments such as:

*“Nasty! Shame on ’em! Won’t be buying Seafolly. WHITESANDS all the way. X”*

*“seafolly own everything! sunburn, miraclesuit and gottex and they used to own jets but sold it recently! and unfortunately they do rip off everyone, they have copied a design 2 chillies has been doing for years! a little frilly triangle, its so bad!”*

*“Disgusting! How people look at themselves in the mirror is beyond me.”<sup>10</sup>*

### Further remarks to the media

Following this, Madden sent emails to media outlets such as *The Sunday Telegraph* newsletter, *Ragtrader* magazine, the *Gold Coast Bulletin* using the same words “The most sincere form of flattery?” in the subject line of each email.

These emails led to yet more media commentary, and responses from readers included:

*“This sort of thing is happening ALL the time. Large corporations no longer have ‘designers’ but ‘product developers’ that source indie designs, copy and mass produce them.”*

*“Yeah right Seafolly — you really expect us to believe this garbage?...”*

*“...WHY did they continue in the same direction upon discovering that White Sands had released an almost identical line. A rat isn’t all I smell.”*

*“...Quite embarrassing on Seafolly’s behalf I think.”<sup>11</sup>*

### Seafolly’s response

Not ready to “drown” in the face of criticism, Seafolly immediately issued a press release denying the allegations of copying:

*“Seafolly notes that many of the designs which Ms Madden claims Seafolly has copied were released into the marketplace by Seafolly before White Sands Swimwear released its relevant swimwear garment.”<sup>12</sup>*

Even though White Sands responded by stating (on Facebook) that it had never specifically accused Seafolly of “plagiarism” (as had been stated by the media), from Seafolly’s perspective the allegation of copying was clearly implied.

Seafolly wanted to set the matter straight. It issued a second press release to journalists from *Pedestrian TV*, *The Age*, and the *Gold Coast Bulletin* to confirm that Seafolly’s designs had been “substantially progressed” at the time that Madden alleged the copying, stating that:

*“Seafolly denies these claims and says that they are completely false and without foundation. Seafolly says that these claims have been made maliciously to injure Seafolly and its business. Five of the designs which Ms Madden claims Seafolly has copied were released into the market place by Seafolly in March 2010... White Sands Swimwear held their fashion parade in May 2010 and as the Seafolly garments alleged to be copies of the White Sands Swimwear garments were either already released to market or nearly completely designed, it is impossible that Seafolly copied the White Sands Swimwear that was on display during this parade.”<sup>13</sup>*

### Court action

Seafolly then instituted legal proceedings in the Federal Court of Australia alleging:

- misleading or deceptive conduct (in relation to Madden’s emails to the press);
- injurious falsehood (namely, that Madden’s comments and posts had caused damage to Seafolly’s reputation and thus economic loss); and
- copyright infringement (for reproducing photos from Seafolly’s catalogue).

Madden cross-claimed<sup>14</sup> for defamation and misleading or deceptive conduct based on the content of Seafolly’s press release.

### Opinion versus fact — a blurry line

Madden alleged that her heading “The most sincere form of flattery?” was merely an “opinion” rather than a statement of fact, as the reader was left to draw their own conclusions about her suggestive heading.

Justice Tracey disagreed. He took the view that Madden should have adopted a more cautious approach given that the relevant class of consumers include:

*“...the astute and the gullible, the intelligent and the not so intelligent, and the well educated and the poorly educated”<sup>15</sup>*

Madden further alleged that she was not making the comments “in trade or commerce” so the misleading or deceptive provisions did not apply.

Again, the judge disagreed as the setting was clearly in a competitive context. Madden’s comments were “a serious assault on Seafolly’s business integrity”.<sup>16</sup>

# Inhouse Counsel

Seafolly's Chief Executive Officer also had a word to say about this, commenting that:

*"in this day of internet, where things go viral... no amount of logical reasoning actually matters any more... I couldn't win. Once she put that up there, I was finished anyway... the damage had been done."*<sup>17</sup>

Disparaging comments can do far greater damage in the online environment than any other context as they reach beyond the intended audience and get misinterpreted when social media users air their own thoughts in response.

## In trade or commerce

Madden contended that none of the statements had been made "in trade or commerce," this being a necessary element for liability to arise under the ACL, as they were more of a personal nature.

However, given that White Sands is in direct competition with Seafolly, and Madden had, according to the judge, sought to "influence the attitudes of customers and potential customers of Seafolly",<sup>18</sup> her argument failed.

## The decision

Seafolly succeeded in its arguments concerning misleading or deceptive conduct.

While Madden had evidently convinced herself that Seafolly had copied her designs when first making the Facebook statements, the judge reiterated the principle that it is not a question of whether the person making the representations believed they were acting honestly or reasonably, but rather whether potential members of the relevant class would be at serious risk of being misled or deceived.<sup>19</sup> This latter question was answered in the affirmative.

Madden said the judge had acted hastily, without taking any prudent steps to check the accuracy of her accusations, observing that:

*"Before posting her views she failed to take a number of steps which would have elicited facts inconsistent with the notion that any copying of her garments had occurred. She could, for example, have made enquiries of retailers to establish when the Seafolly garments were placed on the market. She could have attended a retail outlet and examined some, at least, of the Seafolly garments. She could have made enquiries of Seafolly with a view to ascertaining when the costumes which she considered had been copied had been designed and released to the market..."*<sup>20</sup>

Had even some of these steps been taken, Madden may have become aware that some of Seafolly's costumes had been placed on the market before hers. She

was "reckless in giving public expression" to opinions for which she had "no adequate foundation".<sup>21</sup>

## Injurious Falsehood

Seafolly also sought to establish a cause of action against Madden for injurious falsehood, which is similar to defamation to the extent that it involves a harmful imputation.<sup>22</sup>

Defamation protects one's personal reputation while injurious falsehood protects interests in the disposability of a person's property, products or business, the later requiring proof of actual damage generally in the form of economic loss.<sup>23</sup>

While Seafolly's reputation had suffered as a result of the statements made by Madden, it had not been able to point to any actual pecuniary loss arising from her acts. Thus, this claim could not be substantiated.



## Order for damages

Even though the Facebook posts were effectively up for some 30 hours, and Madden claimed that her emails went no further than to "raise questions and invite the reader to form his or her own conclusions",<sup>24</sup> Madden was ordered to pay Seafolly damages in the sum of \$25,000.<sup>25</sup> In addition to injunctive and declarative relief, she was also ordered to pay Seafolly's costs of the application for a trial that lasted a number of days.

## The Aftermath

But the matter did not end there, and to date the dispute has been the subject of a total of six judgements of the Federal Court.<sup>26</sup>

On the first appeal, the Full Court essentially agreed with the trial judge's finding, however, reduced the award of damages payable to Seafolly from \$25,000–20,000.<sup>27</sup>

On further appeal, however, the court accepted Ms Madden's counter-claim and found that Seafolly was in fact liable for misleading or deceptive conduct itself due to its press releases that accused Ms Madden of "maliciously" making false claims. Seafolly was ordered to pay Madden \$40,000 in damages.<sup>28</sup>

The latest judgement goes to show that it's not just statements made online, but how you react to them offline which can create liability.

Awards for costs between the parties are still yet to be determined, but considering the length and number of cases involved in this dispute, it can safely be said that neither party will emerge as winners.

## *Nextra Australia Pty Ltd v Fletcher [2014] FCA 399*

Swimwear aside, in April 2014 the question of whether a blog post could constitute misleading or deceptive conduct in trade or commerce arose. The Federal Court case of *Nextra Australia Pty Ltd v Fletcher*<sup>29</sup> stands for the principle that, like Facebook posts, blog posts or articles can also be misleading or deceptive if found to be in the context of trade or commerce.

## What happened

The parties to the dispute were newsagency franchise *Nextra*, and Mark Fletcher, blogger and shareholder of a competing newsagency franchise *NewsExpress*.

The dispute arose when Mr Fletcher posted an article on his blog (Australian Newsagency Blog) titled "Nasty campaign from nextra misleads newsagents."

He wrote that *Nextra* had partaken in a "nasty" advertising campaign, based on rumours designed to mislead newsagents into becoming *Nextra* franchisees.<sup>30</sup>

Fletcher implied that *Nextra* was promoting its franchise with false information. He also commented that:

*"the Nextra leadership team would be better off spending time making their group more appealing on results rather than trying to talk down a competitor".<sup>31</sup>*

In response to these statements, *Nextra* claimed that Fletcher's comments constituted misleading or deceptive conduct<sup>32</sup> and sought injunctions pursuant to s 232 of the ACL.<sup>33</sup>

## The issue

One of the key issues in this case was whether Fletcher's comments were made "in trade or commerce",<sup>34</sup> this being an important threshold question in the proceeding, and, for that matter, any proceeding concerning misleading or deceptive conduct.<sup>35</sup>

Fletcher claimed his blog was simply "for the purpose of information and discussion,"<sup>36</sup> as opposed to in trade or commerce.

The court conceded that blog posts provided for the interest of readers are not necessarily in trade or commerce, and just because a person is involved in a certain industry does not prohibit them from self-publishing articles or commentary relating to that industry.<sup>37</sup> However, in this case, Fletcher's blog promoted his commercial interests, and thus his conduct fell within the ambit of being in trade or commerce.<sup>38</sup>

## The decision

The court found that Fletcher's conduct on his blog was of a commercial nature and breached s 18 of the ACL.<sup>39</sup> As such, Fletcher was ordered to remove the article from his blog, and was prevented from publishing the article in any other form.<sup>40</sup>

Fletcher reported to the media that the court case had cost him "many tens of thousands of dollars" in legal costs.<sup>41</sup>

## The lesson

In addition to monetary losses, Fletcher, his blog and *newsXpress* also suffered damage to reputation from negative publicity. One article was titled "Blogger liable for misleading and deceptive conduct,"<sup>42</sup> while another referred to the situation as a "franchise war between newsagency rivals *Nextra* and *newsXpress*".<sup>43</sup>

The *Nextra* case demonstrates that care needs to be taken when posting comments online concerning a competitor, especially if such comments may have the indirect effect of promoting your own commercial interests.

It also highlights the difficulty in drawing the line as to whether comments on social media and blogs are made in trade or commerce for the purposes of the ACL.

Fletcher himself has stated since the case, that he "now questions each time he sits down to write about something".<sup>44</sup>

The lesson from *Seafolly* and *Nextra* is simple: stop, and investigate your claims in order to ensure that representations made online are true and supported by facts.

## Social media policies

Today, businesses need to accept the reality that most of their staff will use social media in some way on a daily basis, and their activities online can be attributed to the business directly.

Being reckless when making a statement online can result in liability. Companies therefore need to have procedures and protocols in place to ensure that their employees do the right thing.



# Inhouse Counsel

Having a well laid out and clear social media policy provides a legal basis for any disciplinary action such as termination for an employee's wrongdoings.

Further, in an employment context it is necessary to have guidelines and employee training around the use of social media in order to safeguard the company's public image — employees also learn what is expected of them in this context.<sup>45</sup>

The case of *Pearson v Linfox Australia Pty Ltd* [2014] FWC 446 reinforced the importance of having a social media policy in place.

In the context of considering whether a worker's dismissal by Linfox Australia Pty Ltd was unfair (the employee, Mr Pearson had, among other things, refused to sign the Linfox's social media policy), Commissioner Gregory of Fair Work Australia strongly approved social media policies.

He stated that:

"the establishment of a social media policy is clearly a legitimate exercise in acting to protect the reputation and security of a business".<sup>46</sup>

Notwithstanding Mr Pearson's adamant statement that "...Linfox do not pay me or control my life outside of my working hours, they cannot tell me what to do or say outside of work, that is basic human rights on freedom of speech",<sup>47</sup> Commissioner Gregory took the view that:

'Gone is the time (if it ever existed) where an employee might claim posts on social media are intended to be for private consumption only. An employer is also entitled to have a policy in place making clear excessive use of social media at work may have consequences for employees<sup>48</sup> ... it is difficult to see how a social media policy designed to protect an employer's reputation and security of the business could operate in an "at work" context only'.<sup>49</sup>

Thus, it is clear that social media policies certainly have their place in the workforce.

As to what such policies should cover, a company's social media policy should emphasise their employee's responsibilities online. Employees should make it clear who they work for and that their opinions are their own and not their employer's. Furthermore, employees should ensure the content they publish is accurate as well as being respectful to others that they interact with online. Style guides, rules around copyright and image sourcing and practical examples of what not to do can also be useful. Some industries which are highly regulated such as health, finance and alcohol may require additional rules.

At the same time, any policy should encourage employees and staff to consult inhouse counsel if they are in any doubt.

Telstra Corporation Limited's social media policy is a good example of a well laid out social media policy based on the "3 Rs"; representation, responsibility and respect.<sup>50</sup>

## Conclusion

Social media and blogs provide a platform for an instantaneous online community and enormous opportunities for businesses to communicate messages to customers.

However, as the two cases above demonstrate, the line between information and opinion versus misleading or deceptive statements is blurred. Clearly, the Courts lean towards a broad interpretation of the phrase "in trade or commerce" such that it appears that anything that has a sniff of being commercial in character could be caught under the umbrella of misleading or deceptive conduct.

Thus blog entries, tweets, and even YouTube clips could amount to misleading conduct for the purposes of the ACL if they have the potential to lead people into error.

The *Seafolly* cases confirmed that an opinion made recklessly may amount to misleading or deceptive conduct in circumstances where the defendant's statements could have a negative impact on someone else's trading or commercial activities.

In the *Nextra* case, even though the motives of Fletcher's blog posts were mixed, the fact that some of them were potentially misleading and damaging to his competitor, ultimately lead to liability on his part.

For inhouse counsel, this translates to one thing: having clear and unambiguous social media policies in place that are reviewed and updated regularly, with these policies communicated to staff, is strongly recommended.



## About the writer

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## Footnotes

1. *Seafolly Pty Ltd v Madden* (2012) 297 ALR 337; 98 IPR 389; [2012] FCA 1346; BC201209325.
2. *Nextra Australia Pty Ltd v Fletcher* [2014] FCA 399.
3. Defamation Act 2005 (Cth) s 9 provides that corporations that employ more than 10 employees cannot sue for defamation, unless they are a not-for-profit organisation.
4. Embodied in Sch 2 to the Competition and Consumer Act 2010 (Cth).
5. Australian Competition and Consumer Commission, *Social Media Policy*, available at: [www.accc.gov.au](http://www.accc.gov.au), as quoted in Stephanie Benson, "Social Media and the ACCC," Ch 5 of "Social Media and the Law" LexisNexis Butterworths Australia, 2004.
6. Jarrod Bayliss-McCulloch "Free Speech, Internet Privacy and the 'Right to be Forgotten' in Australia", *Computers & Law*, December 2013 p 1.
7. *Madden v Seafolly Pty Ltd* [2014] FCAFC 30; BC201402065.
8. Above, n 1, at [4].
9. Above, n 1, at [4].
10. Above, n 1, at [10].
11. Above, n 1, at [57].
12. Above, n 1, at [19].
13. Above, n 1, at [31].
14. Above, n 7.
15. Above, n 1, at [40].
16. Above, n 1, at [96].
17. Above, n 1, at [87].
18. Above, n 1, at [83].
19. Above, n 1, at [27].
20. Above, n 1, at [68].
21. Above, n 1, at [72].
22. Above, n 1, at [110].
23. Above, n 1, at [111].
24. Above, n 1, at [36].
25. Above, n 1, at [2]. On 9 April 2013 (VID 764 of 2010), the Federal Court of Australia ordered that the enforcement of the costs order made against the Respondent on 29 November 2012 be stayed until the hearing and determination of the appeal (VID 1108 of 2012) without prejudice to the Applicant's rights to apply for taxation of those costs pursuant to Div 40.2 of the Federal Court Rules 2011 (Cth).
26. Above, n 1, *Seafolly Pty Ltd v Madden (No 2)* (2013) 99 IPR 539; [2013] FCA 46; BC201300387, *Seafolly Pty Ltd v Madden (No 3)* [2013] FCA 316; BC201301716, *Madden v Seafolly Pty Ltd* [2014] FCAFC 30; BC201402065, *Madden v Seafolly Pty Ltd (No 2)* [2014] FCAFC 49; BC201403075 and *Seafolly Pty Ltd v Madden (No 4)* [2014] FCA 980; BC201407551.
27. *Madden v Seafolly Pty Ltd* [2014] FCAFC 30; BC201402065.
28. *Seafolly Pty Ltd v Madden (No 4)* [2014] FCA 980; BC201407551 at [1].
29. Above, n 2.
30. Above, n 2, at [12].
31. Above, n 2, at [46].
32. Section 18 of the Australian Consumer Law, Schedule 2 to the Competition and Consumer Act 2010 (Cth) provides that "a person must not, *in trade or commerce*, engage in conduct that is misleading or deceptive or is likely to mislead or deceive" (italics added).
33. Australian Consumer Law, Schedule 2 to the Competition and Consumer Act 2010 (Cth). Section 232 provides that the court may grant injunctions "in such terms as the court considers appropriate", if the court is satisfied that a person has engaged in conduct which would constitute a contravention of a provision in Ch 2, 3 or 4 (this includes misleading or deceptive conduct).
34. Section 18 of the Australian Consumer Law, Schedule 2 to the Competition and Consumer Act 2010 (Cth) provides that "a person must not, *in trade or commerce*, engage in conduct that is misleading or deceptive or is likely to mislead or deceive" (italics added).
35. Above, n 2. at [28].
36. Above, n 2. at [19].
37. Above, n 2. at [31].
38. Above, n 2. at [30].
39. Above, n 2. at [109].
40. Above, n 2. at [103].
41. Cara Waters, "Blogger's court case highlights franchise war between rivals Nextra and newsXpress" *Smartcompany* 05 May 2014, available at: <http://www.smartcompany.com.au/legal/41780-blogger-s-court-case-highlights-franchise-war-between-newsagency-rivals-nextra-and-newsxpress.html>.
42. Margaret Ryan, "Blogger liable for misleading and deceptive conduct" *Phillips Ormonde Fitzpatrick Intellectual Property*, 01 September 2014, available at: <http://www.pof.com.au/blogger-liable-for-misleading-and-deceptive-conduct/>.
43. Cara Waters, "Blogger's court case highlights franchise war between newsagency rivals Nextra and newsXpress" *Smartcompany* 05 May 2014, available at: <http://www.smartcompany.com.au/legal/41780-blogger-s-court-case-highlights-franchise-war-between-newsagency-rivals-nextra-and-newsxpress.html>.
44. Cara Waters, "Blogger's court case highlights franchise war between newsagency rivals Nextra and newsXpress" *Smartcompany*

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05 May 2014, available at: <http://www.smartcompany.com.au/legal/41780-blogger-s-court-case-highlights-franchise-war-between-newsagency-rivals-nexta-and-newsxpress.html>.

45. *Pearson v Linfox Australia Pty Ltd* [2014] FWC 446 at [46].

46. Above, n 45, at [46].

47. Above, n 45, at [15].

48. Above, n 45, at [46].

49. Above, n 45, at [47].

50. Telstra's Social Media Policy, available at: <http://exchange.telstra.com.au/3rs/>. Current as at 9 September 2014.