

Disputing beer brands and the Australian Consumer Law

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Previously we discussed reputation in a trade mark and the law of trade mark infringement under the Trade Marks Act.

Next, we consider reputation and its treatment under the Australian Consumer Law and the case between rival brewing companies Brick Lane Brewing Co Pty Ltd (**Sidewinder**) and Torquay Beverage Co Pty Ltd (**Better Beer**).

What is the Australian Consumer Law?

Broadly, the Australian Consumer Law (ACL)¹ is legislation that protects consumers and applies to anyone conducting a business in Australia. A core protection for consumers contained in the ACL is the prohibition of misleading or deceptive conduct, whereby a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.²

Facts

The Applicant, Sidewinder, is an independent brewing company who started in the beer business in 2017. In 2020, Sidewinder began to develop a new range of no and low alcoholic beer, launching two products Sidewinder Hazy Pale and Sidewinder XPA Deluxe in July 2021.

The get-up of the Sidewinder range consisted of an off-white 355ml can with a vertically curving three striped design in retro shades of blue, yellow and orange, with each can marked with 'Sidewinder' lettering and the 'Super Ultra Low Alc' script.

Independently, the Respondent, Better Beer, also developed and launched a new beer product in the middle of 2021, announcing to the Australian Securities Exchange in July 2021 the release of Better Beer, with retail sales of Better Beer larger in 355ml cans commencing in October 2021.

The get-up of the Better Beer lager similarly consisted of an off white 355ml can, with a horizontal curving striped design consisting of the same three colours, and dark blue lettering of the 'Better Beer' brand name.

Both products were sold in major retailers such as Dan Murphy's and BWS.



Sidewinder filed an application in the Federal Court of Australia pursuant to section 18 of the ACL, claiming that the similar get-up of the Better Beer larger was misleading or deceptive, and was capable of leading consumers into the error that the beer products were the same, or that there was an association between them, seeking damages, injunctions and corrective advertising as relief.

Decision

The Court dismissed the claim of Sidewinder finding that the production, advertising, and sale of Better Beer lager, with its associated get-up, was not misleading or deceptive conduct under the ACL. The court acknowledged the striking similarities between the get-up of the beer products however noted that each product bore a distinct brand name.

¹ Schedule 2 of the Competition and Consumer Act 2010 (Cth)

² Section 18, Australian Consumer Law

On the issue of reputation specifically, the Court found that as of July 2021, Sidewinder had not established a reputation in the get-up of its Sidewinder beer products, having only just launched in the market, and therefore there was no real possibility that a purchaser of beer could be misled or deceived into thinking that the two products were the same, given the lack of knowledge in the market of the Applicant's product and get-up. For the purpose of section 18 of the ACL, without reputation in the mind of a consumer, there is no possibility that the consumer can be misled, and on this basis, Sidewinder's claim failed.

Key Takeaway

This case highlights the importance of having an established reputation in your get-up when bringing actions under the ACL. While the ACL can be utilised in a brand protection strategy, its purpose is to protect consumers and therefore any action should be assessed on that basis.

This case reinforces the importance of registering your core trade marks, whether that be your logo, get-up, or a combination of distinct packaging (shape and colour), particularly in circumstances where you are yet to establish a reputation in the market. A registered trade mark not only assists in deterring copycat competitors in the market, but is also a valuable business asset and once registered generally strengthens your market position.

Finally, the case reinforces the differences between claims under the ACL for misleading or deceptive conduct, passing off, and trade mark infringement, which together are used as part of a comprehensive brand enforcement strategy for our business clients.

To discuss how best to protect your business and brand assets please contact [Jimmy Gill](#) or your usual ClarkeKann contact.