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Contents

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General Editor's note

Karen Lee *LEGAL KNOW-HOW*

We are now well into the warmer months of the year. Here are some great articles to read on any summer day.

Back in the cooler month of March, the Australian Securities and Investments Commission (ASIC) commenced proceedings in the Federal Court against Westpac to test the responsible lending provisions of the National Consumer Credit Protection Act 2009 (Cth) (NCCP Act). Many of us would remember that the matter was heard in May 2019 and attracted a lot of media attention. In August 2019, the much-anticipated decision was handed down by Perram J. In dismissing ASIC's application, Perram J notably said a lender "may do what it wants in the assessment process" relating to loans. What else did the court find, particularly with regard to ASIC's construction of the NCCP Act and the facts it alleged amounted to the contravention of the responsible lending provisions? Editorial Board member **Andrea Beatty** and **Gabor Papdi** (Piper Alderman) have penned a case note for us — this is a must read!

The government's commitment to extending the unfair contracts regime to insurance contracts has been very much in the spotlight. With the publication of the exposure draft of the Treasury Laws Amendment (Unfair Terms in Insurance Contracts) Bill 2019 (Cth), financial services providers need to start work on matters such as identifying products that would be captured by the proposed regime. In his article, Editorial Board member **Mark Radford** (Radford Lawyers) answers some key questions to help us get ready, for example, what are the changes and their impact, and what are the exceptions?

The use of digital platforms is not something foreign to financial services providers. This makes the Australian Competition and Consumer Commission's (ACCC) Final Report in relation to the Digital Platforms Inquiry both relevant and interesting to legal advisors to financial services providers. This report examines and makes recommendations for reform across a wide range of emerging issues relating to digital platforms. What are the key recommendations we should be aware of? **Mathew Baldwin** (Clayton Utz) takes a look at the report for us in his article "Shake up in store for Australian Privacy Laws: Digital Platforms Inquiry Final Report".

Enjoy your summer reading!

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Karen Lee is the General Editor of the Australian Banking & Finance Law Bulletin and the Financial Services Newsletter. She also partners LexisNexis in other capacities, including as Specialist Editor for precedents in banking and finance, mortgages and options, and as contributing author of a number of other publications, including Australian Corporate Finance Law, Halsbury's Laws of Australia and Practice Guidance for General Counsel. Karen established her legal consulting practice, Legal Know-How, in 2012. She provides expert advice to firms and businesses on risk management, legal and business process improvement, legal documentation, regulatory compliance and knowledge management. Prior to this, Karen worked extensively in-house, including as Head of Legal for a leading Australasian non-bank lender, as well as in top-tier private practice, including as Counsel at Allen & Overy and Clayton Utz.

Australian Securities and Investments Commission v Westpac Banking Corp (Liability Trial)

Andrea Beatty *and* ***Gabor Papdi*** *PIPER ALDERMAN*

On 13 August 2019, the Federal Court of Australia (Perram J) delivered its decision in the civil penalty proceedings brought by the Australian Securities and Investments Commission (ASIC) against Westpac Banking Corp (Westpac) in respect of alleged contraventions of s 128 of the National Consumer Credit Protection Act 2009 (Cth) (NCCP Act). ASIC's application was dismissed with costs, Perram J having found against ASIC both on its proffered construction of the NCCP Act and the facts it alleged amounted to the contravention.[1]

Procedural history

ASIC commenced civil penalty proceedings against Westpac in March 2017 in relation to alleged breaches of responsible lending obligations in respect of Westpac's home loan application assessment processes between December 2011 and March 2015. Specifically, the following conduct was alleged to have breached responsible lending obligations:

- In applying the Serviceability Rule in its automated decision system, Westpac used the Household Expenditure Measure (HEM) benchmark value, instead of the amount of living expenses that the consumer stated in their loan application, in computing the consumer's monthly cash surplus or shortfall (living expenses issue).
- In relation to loans with an initial interest-only period, Westpac computed monthly repayments for use in the serviceability calculation on the basis that the principal amortised over the entire term of the loan, rather than the residual term of the loan after the expiry of the initial interest-only period (interest-only loans issue).

The alleged contraventions concerned 261,987 loans. ASIC and Westpac agreed on a settlement in which Westpac would pay a pecuniary penalty of $35 million plus ASIC's costs. However, in a decision on 13 November 2018,[2] Perram J refused to make the orders sought by Westpac and ASIC, as the statement of agreed facts submitted by ASIC and Westpac did not disclose any contravention of the NCCP Act. That decision is explained in an earlier case note.[3]

The case was then argued on its merits before Perram J, leading to the decision that is the subject of this case note.

Issues

At the core of both the living expenses issue and the interest-only loans issue is the allegation that Westpac contravened its obligation under s 128(c) of the NCCP Act to make an assessment in accordance with s 129 covering the day on which the credit contract is entered into. Section 129 requires such an assessment to specify the period that it covers and assess whether the credit contract will be unsuitable for the consumer if the contract is entered into or its credit limit increased during that period. Section 131(2) sets out the circumstances in which a credit contract will be unsuitable for a consumer. Relevantly for the living expenses issue and the interest-only loans issue, a credit contract will be unsuitable for a consumer if, at the time of assessment, it is likely that the consumer could not comply with their financial obligations under it or could only comply with substantial hardship.[4] ASIC's case rested on the proposition that Westpac's assessments of the 261,987 loans were so defective that they did not amount to an "assessment" under s 129, leaving the s 128(c) obligation unfulfilled at the time of entry into the credit contract. This turned on the proper construction of ss 128(c), 129 and 131(2)(a) of the NCCP Act.

Important to understanding the decision are the things that ASIC did not plead in these proceedings. ASIC did not allege that any of the 261,987 loan contracts entered into by Westpac were unsuitable for those consumers. ASIC also did not allege that Westpac's assessment attempted to consider something other than whether the consumer could likely comply with their financial obligations under the home loan or that they could only do so with substantial hardship (referred to as "the s 131(2)(a) Questions" throughout the judgment).

Decision

On the living expenses issue, it was held that the NCCP Act does not require a licensee to use the consumer's declared living expenses when assessing whether or not the credit contract will be unsuitable under s 131(2)(a). On the interest-only loans issue, it was held that the NCCP Act does not require a licensee to use expected repayment amounts at the expiry of the initial interest-only period in preference to any other amount in determining whether or not the credit contract will be unsuitable under s 131(2)(a). All that is required under s 129 is for the licensee to ask and answer the s 131(2)(a) Questions and, in relation to both issues, Westpac did ask and answer those questions.[5]

It was also held that the assessment under s 129 is a "thing" resulting from the process of assessment, rather than a legal construct. Consequently, the NCCP Act does not impose any threshold conditions on an assessment of unsuitability (other than those set out in the text of s 129), below which the assessment is invalid and therefore not an assessment for the purposes of s 128. How the credit provider carries out that assessment is a matter within its discretion.[6]

ASIC's case also failed on the facts on the living expenses issue. Central to that case was that by using the HEM value instead of the consumer's declared living expenses in the Serviceability Rule, Westpac failed to have regard to the consumer's financial situation in carrying out that assessment. However, in another rule in its automated decision system — the "70% Ratio Rule" — Westpac did take into account the consumer's declared living expenses.[7]

Reasons

Living expenses issue

Section 129(b) of the NCCP Act requires a licensee to assess whether the credit contract will be unsuitable for the consumer — that is, whether it will satisfy any of the criteria in s 131(2). Section 130(1) requires a licensee to, *before the making the assessment*, make reasonable inquiries about the consumer's financial situation (among other things). It was noted that each of the things that a credit provider must inquire into under s 130(1) link directly to particular criteria for unsuitability in s 131(2) — specifically, the requirement to make reasonable inquiries about the consumer's financial situation links directly to the whether the consumer will be unable to comply with their financial obligations under the contract or only able to comply with substantial hardship.[8]

However, all that follows from the links between information items in s 130(1) and unsuitability criteria in s 131(2) is that the NCCP Act requires a licensee to collect information for the purpose of assessing whether or not a credit contract is unsuitable, rather than for its own sake. It does not follow that that purpose can only be achieved by taking into account all information collected, regardless of its relevance or materiality to the assessment of unsuitability.[9] Perram J gave examples of the other kinds of information, such as irregular income or capital assets, which are no less "about the consumer's financial situation" than declared living expenses, but which can rightly be disregarded in considering the s 131(2)(a) Questions because of their low relevance to loan serviceability. So far as Pt 3-2 Div 3 of the NCCP Act prescribes any mandatory matters to be taken into account in an assessment under s 129(b), it is only those aspects of a consumer's financial situation that are necessary to determine whether or not the credit contract will be unsuitable.[10]

It was not accepted that the consumer's declared living expenses are necessary to determine whether or not the consumer could comply with their financial obligations under the credit contract or could only comply with substantial hardship. Simply labelling something as a living expense, and the fact that the consumer incurs that expense on their current lifestyle, does not make them an unchangeable aspect of the consumer's financial situation. Some expenses are entirely discretionary in nature, and represent a standard of living significantly above any objective concept of "substantial hardship". A consumer may choose to, and can be expected to, forgo particular living expenses in order to meet their financial obligations under a credit contract.[11]

Perram J held that the only way that a consumer's declared living expenses can be necessary to answer the s 131(2)(a) Questions is if there are some living expenses which cannot be forgone or reduced below some minimum value. However, this is again not determined by the mere labelling of an expense item. Perram J illustrated the reasoning with the "Wagyu beef … washed down with the finest shiraz"[12] example that made headlines in the immediate aftermath of the judgment. Everyone has to eat so there is a minimum amount that a consumer must spend on food. However, it does not follow that all food expenses declared by the consumer must be used in the assessment at their stated values. If a consumer currently dines extravagantly, they can reduce their expenditure on food without suffering substantial hardship. Whilst the Wagyu beef and shiraz example is an extreme one (and lightens up otherwise dry, technical analysis of Ch 3 of the NCCP Act), the reasoning is equally applicable to less opulent discretionary expenditure. The mere labelling of expenditure of being a particular category is not determinative; more information is needed to assess whether or not it can be

forgone or reduced by the consumer.[13] The HEM benchmark, as "an estimate of the level of household expenditure that [a] consumer could reasonably be expected to spend to participate fully in society with a reasonable standard of living",[14] could be relevant to this inquiry, but this did not need to be decided because of the finding that an assessment under s 129 is a "thing" that cannot be invalid.

Interest-only loans issue

On this construction of the NCCP Act, ASIC's case on the interest-only loans issue also fell away. First, except in the case of a fixed rate loan, the actual amount of repayments at the end of the initial interest-only period are not known, as interest rates may change in the intervening period. To use the interest rate at the time of loan inception would be to assume that they are functionally equivalent to fixed rate loans, and to require one estimate of future repayments to be used in preference to another estimate. Though the consumer's entire financial position is not a mandatory consideration for answering the s 131(2)(a) Questions as part of the s 129 assessment, ASIC's position would have required Westpac to disregard one part of the consumer's financial situation (repayments during the initial interest-only period) in favour of another, more uncertainly, part of the consumer's financial situation (the expected repayments at the expiry of the initial interest-only period). This position is internally inconsistent unless there is some implied requirement of conservatism in the s 129 assessment obligation. Once it was accepted that the manner of conducting an assessment was within the credit provider's discretion, this position could not succeed.

An assessment as a "thing" rather than a legal construct

Though the question did not arise because Westpac was found to have taken into account the consumers' declared living expenses and considered to the s 131(2)(a) Questions in its assessment, Perram J gave obiter dicta reasons for why an assessment under s 129 is a "thing" rather than a legal construct capable of invalidity.

Section 132(1) requires a licensee to give the consumer a copy of the assessment on request by the consumer, with non-compliance punishable by a civil penalty. If it follows that a defective assessment is invalid and therefore not an assessment, there would be nothing that a consumer would be entitled to in the case that the licensee carried out a defective assessment, or that it would be impossible for the licensee to comply with their obligation under s 132(1).[15] Rather, what s 132(1) requires a licensee to give to a consumer is a copy of the thing that results from the process of assessment. That an assessment can be copied also supports the view that it is a thing rather than a legal construct.

Perram J also held that construing an assessment as a "thing" rather than a legal construct is also more consistent with the text of ss 128 and 129, specifically the lack of any civil penalty attached to s 129. Construing "assessment" as a legal construct capable of invalidity would transform failure to comply with s 129, which does not carry a civil penalty, into contravention of a civil penalty provision. An intention to make contravention of s 129 punishable by a civil penalty could be more naturally expressed by making s 129 a civil penalty provision.[16]

Significance of the case

The authors consider the case to be less significant than what some of the commentary that immediately followed the decision suggests. Perram J applied orthodox approaches to statutory interpretation to determine the proper construction of s 129, and then applied them to Westpac's conduct. It does not follow that this represents any lessening of responsible lending obligations. Rather, it recognises that the legislation allows credit providers considerable discretion in how they assess whether or not a credit contract is unsuitable for a potential debtor.

On the living expenses issue, it would appear to be a common-sense position (to the authors at least) that a consumer can be expected to forgo or reduce discretionary expenses in order to be able to afford repayments under a credit contract. This is particularly the case where the credit finances a necessity such as housing. Whether the reasoning in this decision applies in as strong terms to other kinds of credit, particularly personal lending financing discretionary expenditure, is a question for a future case. The reference to Wagyu beef and shiraz is illustrative and does not purport to represent the average consumer — it would have similar force if Wagyu beef and shiraz were replaced with takeaway food and mass-market beer.

On the interest-only loans issue, it is unobjectionable to acknowledge that future repayments under a variable rate loan are uncertain and any incorporation into a present assessment of unsuitability necessarily involves forecasts and estimates. It would be a very interventionist interpretation of the NCCP Act to imply into it a requirement to use a particular forecast of the future, or the most conservative foreseeable estimate of the future. Followed through to its logical end, requiring repayments at the end of the initial interest-only period based on present interest rates to be used in the serviceability calculation would also justify using expected income at

the end of the interest-only period, with adjustments for expected wage growth and industry-specific information, to be used in the calculations answering the s 131(2)(a) Questions. However, nobody of note appears to be promoting this approach, and justifiably so as forecasts of the future are inherently uncertain.

Lastly, this case does not necessarily render responsible lending laws unenforceable. Any consideration of the Federal Court's decision must acknowledge that ASIC did not plead that any of the 261,987 loans in question were unsuitable in contravention of s 133(1) of the NCCP Act. ASIC also did not plead that Westpac failed to make reasonable inquiries into the consumers' financial situations or take reasonable steps to verify their financial situations before entering into the loans. The essence of ASIC's case was that the assessment process was defective and therefore any purported assessment was invalid, even though it did not result in an unsuitable credit contract being entered into. The main consequence is that, going forward, ASIC will likely need to pursue a similar case by identifying failures to make reasonable inquiries or take reasonable steps to verify information and seeking penalties for contravention of ss 128(d) and 130(1), or to identify unsuitable credit contracts entered into and seeking penalties for contravention of s 133(1). This is not necessarily undesirable, as it would result in ASIC's enforcement activities being focused on cases of genuine harm, rather than merely suboptimal conduct or reasonable exercises of discretion.

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Footnotes

1. *ASIC v Westpac Banking Corp (Liability Trial)* [2019] FCA 1244; BC201907218 at [6], [8] and [11].
2. *ASIC v Westpac Banking Corp* (2018) 132 ACSR 230; [2018] FCA 1733; BC201810662.
3. A Beatty and G Papdi "Responsible lending update: ASIC v Westpac Banking Corp" (2019) 34(10) *BLB* 180.
4. NCCP Act, s 131(2)(a).
5. Above n 1, at [8].
6. Above n 1, at [89]–[91].
7. Above n 1, at [86].
8. Above n 1, at [61].
9. Above n 1, at [62].
10. Above n 1, at [70]–[71].
11. Above n 1, at [74]–[75].
12. Above n 1, at [76].
13. Above n 1, at [77]–[79].
14. Above n 1, at [46].
15. Above n 1, at [88].
16. Above n 1, at [90].

Treasury Laws Amendment (Unfair Terms in Insurance Contracts) Bill 2019 (Cth)

Mark Radford *RADFORD LAWYERS*

Executive summary

In response to recommendation 4.7 of the Financial Services Royal Commission,[1] the government has committed to extending the unfair contract term (UCT) regime to insurance contracts that are covered by the Insurance Contracts Act 1984 (Cth) which are also standard form consumer or small business contracts (as defined).

It has released for public consultation exposure draft legislation[2] to give effect to this extension by changes to the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) and the Insurance Contracts Act.[3]

The Bill also amends the ASIC Act to tailor the existing UCT regime's application to such insurance contracts as follows:

- *Carveout for main subject matter* — currently, terms that define the main subject matter of a contract are exempt from the UCT regime. The ASIC Act has been amended to provide that in relation to insurance contracts only, the main subject matter is limited to the description of what is being insured, ie, it reduces what might otherwise have been excluded as part of the main subject matter.

  Unfortunately for insurers, the Bill did not adopt the European Union (EU) approach that had been supported by the insurance industry because it carved out terms which "clearly define or circumscribe the insured risk", since these restrictions are taken into account in calculating the premium paid by the consumer.
- *Carve out for transparent excess terms* — terms that set the quantum or existence of the excess or deductible in an insurance contract are exempt from the UCT regime as long as they are presented *transparently*.
- *Third party beneficiary* — third party beneficiaries are allowed to bring actions against insurers under the UCT regime where the contract with the insured otherwise falls within the relevant criteria as explained below.

Fortunately for industry, the government has not adopted the proposal to change the existing "legitimate interests" qualifier carveout from what it currently is. These changes had been opposed by the insurance industry for practical reasons.

Otherwise, the regime will operate as it currently does for other types of affected contracts (see below for a summary).

The Regulation Impact Statement for this reform surprisingly assesses that compliance costs for insurers are likely to be low. It is estimated that there will be upfront costs of under $4 million in the first year to implement the reform with no ongoing costs for insurers.

What is the timing?

The legislation is to be finalised and introduced into parliament after consideration of feedback received on the proposed legislation. The amendments will take effect the day after the end of the period of 18 months beginning on the day the Act receives Royal Assent.

The amendments will not apply to contracts entered into before the commencement of the Act.

However, the amendments will apply to contracts that are renewed on or after commencement in relation to conduct that occurs on or after the renewal day. The amendments will also apply to terms of contracts that are varied on or after commencement in relation to conduct occurring on and after the variation.

What is the effect of the change?

Insurance contracts have always been specifically excluded from the UCT regime. The legislation will extend the UCT protections to all insurance contracts covered by the Insurance Contracts Act where:

- the contract is a *consumer contract* or *small business contract*
- the contract is a *standard form contract*
- the contract is:
  - a *financial product*, or
  - a contract for the supply, or possible supply, of services that are financial services

The changes aim to prevent insurers from including terms in their standard form contracts that are unfair to the other party. The contract will continue to bind the parties if it is capable of operating without the unfair term.

What are consumer and small business contracts?

A *consumer contract* is a contract where at least one of the parties is an individual whose acquisition of what is supplied under the contract is wholly or predominantly an acquisition for personal, domestic or household use or consumption.

A contract will be a *small business contract* if:

- at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons
- either of the following applies:
  - — the upfront price payable under the contract does not exceed $300,000
  - — the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed $1 million

In calculating the number of persons a business employs, a head count approach (regardless of an employee's hours or workload) is used. Casual employees are to be counted only if they are employed on a regular or systematic basis, to account for seasonal variations.

"Upfront price" is the consideration that is provided, or is to be provided, for the supply under the contract, and which is disclosed at or before the time the contract is entered into. However, it does not include any amount that is contingent on the occurrence or non-occurrence of a particular event. Any interest payable under the contract is not to be considered.

Contracts between businesses are excluded from the scope of the unfair contract terms provisions except in respect of "sole traders".

The definition of consumer contract and small business contract are broader than the Insurance Contracts Act Standard covers and Corporations Act Retail client covers and Code Retail insurance definition.

We note that certain types of insurance contracts, including private health insurance contracts, marine insurance, state and Commonwealth Government insurance contracts and re-insurance contracts which are not covered by the Insurance Contracts Act will be exempt from the application of these additional amendments. These contracts will be subject to the existing UCT regime without the amendments.

What is a standard form contract?

A contract is presumed to be standard form unless a party to the proceeding alleges otherwise. In addition to using its discretion in determining whether a contract is a standard form, a court is required to consider:

- whether one of the parties has all or most of the bargaining power relating to the transaction
- whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties
- whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented
- whether another party was given an effective opportunity to negotiate the terms of the contract
- whether the terms of the contract take into account the specific characteristics of another party or the particular transaction

An insurance contract will still be a standard form contract even if a consumer can choose between several options such as levels of premium, excess or sum insured, as long as the consumer does not have the ability to negotiate the underlying terms and conditions governing the contract.

Similarly, an insurance contract can still be a standard form contract if it is intermediated by an insurance broker, as long as the circumstances above for determining whether a contract is a standard form contract are met.

The Explanatory Memorandum provides the following examples:

> *Example 1.1*
> Matthew is a consumer wishing to purchase home and contents insurance. He requests a broker to recommend the best insurance policy. The broker, acting for Matthew, seeks contracts from several insurers. The contracts are prepared by the insurer, do not take into account Matthew's specific characteristics and the broker does not negotiate on Matthew's behalf. As such, the contracts would be considered standard contracts and Matthew, as the party to the contract, can bring action under the UCT regime.
>
> *Example 1.2*
> BBB Limited is a small business seeking professional indemnity insurance. BBB Limited requests a broker to recommend the best insurance policy. The broker, acting for BBB Limited, seeks quotes from several insurers. In preparing the contracts, the broker negotiates specific clauses due to the nature of BBB Limited's business. As such, the contract is not considered a standard form contract and BBB Limited, as the party to the contract, cannot take action under the UCT regime.[4]

What is an unfair contract term?

A finding by a court that a term is unfair, and therefore void, means that the term is treated as if it

never existed. However, the contract will continue to bind the affected parties to the extent that the contract is capable of operating without the unfair term.

A term will be unfair if it:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract
- is not reasonably necessary in order to protect the legitimate interests of the party that would be advantaged by the term
- would cause detriment to a party if it were to be applied or relied on

Before deeming a term unfair, a court is also required to consider:

- the extent to which the contract is transparent — that is, if the term is expressed in reasonably plain language, legible and presented clearly and readily to the party affected by it
- the contract as a whole

In relation to insurance contracts, examples of terms that could be unfair have been noted in the Explanatory Memorandum as including:[5]

- a term that allows the insurer to, instead of making a repair, elect to settle the claim with a cash payment calculated according to the cost of repair to the insurer, rather than how much it would cost the insured to make the repair;
- a term in a contract that is linked to another contract (for example a credit contract) which limits the insured's ability to obtain a premium rebate on cancelation of the linked contract; or
- a term that would allow the insurer to require the insured to pay an excess, before the insurer pays the claim.

While it is ultimately a matter for the court to determine whether a term is unfair, many terms in insurance contracts will be reasonably necessary to protect the legitimate interests of the insurer. For example, a term in a life insurance contract that allows an insurer to unilaterally increase premiums would not be considered unfair if that term was used to protect the legitimate interests of the insurer in response to a change in the actuarial pricing of risk required to underwrite the policy.

Other product-neutral examples of terms that may be unfair are defined in the Bill to include:

- a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract
- a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract
- a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract
- a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract
- a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract
- a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract
- a term that permits, or has the effect of permitting, one party unilaterally to vary financial services to be supplied under the contract
- a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning
- a term that limits, or has the effect of limiting, one party's vicarious liability for its agents
- a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent
- a term that limits, or has the effect of limiting, one party's right to sue another party
- a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract
- a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract
- a term of a kind, or a term that has an effect of a kind, prescribed by the regulations

Exemptions from the regime

The following types of contracts are excluded from the operation of the UCT regime:

- a contract that is the constitution of a company, managed investment scheme or other kind of body
- a small business contract that is covered by a law of the Commonwealth, a state or a territory that is a law prescribed by the regulations — none currently prescribed

The following terms are exempt from the operation of the UCT regime:

- the main subject matter of the contract
- the upfront price payable

- any term required by a law of the Commonwealth or a state government
- if the contract is an insurance contract subject to the Insurance Contracts Act, any transparent terms that set an amount of excess or deductible under the contract

Main subject matter

Terms defining the main subject matter of any financial product or service contract are excluded by the UCT regime to ensure that a party cannot challenge a term concerning the basis for the existence of the contract. This recognises the fact that the party had a choice whether or not to enter the contract on the basis of what was offered.

In relation to insurance contracts, the Explanatory Memorandum to the Bill states that the main subject matter will be limited to the extent that the term describes what is being insured, eg, the house, car or person that is insured.

The Explanatory Memorandum provides the following examples:

> *Example 1.3*
> Isla purchases home insurance for a house at 17 Drayton Street. The policy describes the house as a four bedroom, brick veneer freestanding house. This description (a four bedroom, brick veneer freestanding house at 17 Drayton Street) is the main subject matter of the contract and is not subject to the unfair contract regime.
>
> *Example 1.4*
> Jess purchases car insurance. The policy describes the car as a 2018 Kia Carnival S 2.2-litre four-cylinder turbo-diesel with a modification to take wheelchairs. This description (a 2018 Kia Carnival S 2.2-litre four-cylinder turbo-diesel with a modification to take wheelchairs) is the main subject matter of the contract and is not subject to the unfair contract regime.[6]

It does not appear to be intended to extend to the "usage" of the dwelling or insured item, eg, domestic or business usage and so on.

The limitation creates a regime that is harsher on insurers than other industries. It creates an unfair playing field. Policy limitations, conditions precedent to cover and exclusions that affect the scope of cover would not be considered part of the "main subject matter" and would be open to review.

The current UCT regime leaves the courts to fairly decide what the main subject matter of a contract is and when the legitimate interests test is met. Courts generally limit the main subject matter to those matters central to the consideration that passed between the parties when the contract was formed.

The proposed narrow limitation:

- exposes terms which clearly define the insured risk and the insurer's liability to challenge under the UCT regime
- is contrary to the position taken for other industries with no justification provided for doing so
- is inconsistent with the UK and EU and New Zealand where the terms which clearly define or circumscribe the insured risk and the insurer's liability are not caught
- makes it virtually impossible for an insurer to safely price its insurance and for reinsurers to do the same — this will increase costs to insureds and affect the type of insurance that can be offered safely

Upfront price payable

The phrase "upfront price" is defined as the consideration that is provided, or is to be provided, for the supply under the contract, and which is disclosed at or before the time the contract is entered into. However, it does not include any amount that is contingent on the occurrence or non-occurrence of a particular event. Any interest payable under the contract is not to be considered.

The definition of "upfront price payable" will apply to insurance contracts, meaning that the insurance premium paid cannot be considered unfair as long as it meets the definition in the ASIC Act. However, "upfront price payable" does not encompass the excess or deductible of an insurance contract due to the exclusion from the definition of any consideration that is contingent on the occurrence or non-occurrence of a particular event.

Transparent terms that set an amount of excess or deductible under the contract

Terms that set an amount of excess or deductible under the contract *and* which are transparent at the time of purchasing the contract are exempt from the UCT regime.

This is because such excesses or deductibles which the insured chooses to increase or decrease would form the basis for the existence of the contract.

For example, a customer may renew an insurance policy, paying a $500 premium. Where a "basic" excess of $1000 is payable when any claim is made and is clearly presented in the quote and the renewal notice, the *quantum* of the excess ($1000) is not subject to challenge under the UCT regime.

Court declarations third party beneficiaries

Under the existing UCT regime, a court can only declare that a term is unfair on application by a party to the contract or ASIC.

The amendments provide that third party beneficiaries of insurance contracts (which are not parties to the insurance contract and get their rights under s 48 of the Insurance Contracts Act) have the ability to bring actions against insurers under the UCT regime, as there are circumstances where they will be required to take action in place of the contracting party.

The Explanatory Memorandum states as an example that death benefit nominees under a life insurance policy or individuals covered under certain group insurance policies (eg, a policy purchased by small sporting associations on behalf of club members to cover personal injury incidents) are likely to be able to bring actions under the UCT regime in relation to contracts covered by the regime.

A third party beneficiary is defined in the Insurance Contracts Act as a person who is not a party to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends.

The definitions of consumer and small business and definition of standard form contracts (s 12BK of the ASIC Act) continue to relate to the parties to the insurance contract, not third party beneficiaries. This means that while third party beneficiaries can bring actions, the actions will only be successful if the tests of unfairness and standard form contracts are met with reference to the parties that negotiated the contracts, not the third party beneficiaries.

The Explanatory Memorandum provides the following example:

> ... a contract for insurance purchased on a group basis by a large superannuation trustee would likely not be covered by the regime. A superannuation trustee would be unlikely to meet the definition of a small business or consumer, and is likely to have significant bargaining power in negotiating such contracts so the contract would not meet the definition of a standard form contract.[7]

The end result

Insurers (or those they rely on to create their wordings) have a lot of work to do and this will come at a significant cost and risk, despite what the Regulatory Impact Statement estimates. These are of course not the only reforms insurers are dealing with, and many are connected.

Expect consumers and their representatives to test an insurer's reliance on the policy terms as an alternative to, or in addition to, their Insurance Contracts Acts rights. How the various rights under both Acts will interact will be very interesting.

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Footnotes

1. Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry *Final Report* (February 2019) https://financialservices.royalcommission.gov.au/Pages/reports.aspx#final Vol 1.
2. Treasury Laws Amendment (Unfair Terms in Insurance Contracts) Bill Exposure Draft, 2019, https://treasury.gov.au/sites/default/files/2019-07/c2019-t372650-ed-uct.pdf.
3. See also The Treasury, Extending unfair contract terms to insurance contracts, https://treasury.gov.au/consultation/c2019-t372650.
4. Explanatory Memorandum, Treasury Laws Amendment (Unfair Terms in Insurance Contracts) Bill 2019 (Cth) https://treasury.gov.au/sites/default/files/2019-07/c2019-t372650-em.pdf at 9–10.
5. Above, at 10.
6. Above n 4, at 12.
7. Above n 4, at 14.

Shake up in store for Australian Privacy Laws: Digital Platforms Inquiry Final Report

Mathew Baldwin *CLAYTON UTZ*

Significant change is on the horizon for privacy laws in Australia with the release of the Australian Competition and Consumer Commission (ACCC) Final Report in relation to the Digital Platforms Inquiry (the Report).

The Report examines and makes recommendations for reform across a wide range of aspects relevant to digital platforms, including market power, interactions with advertisers, news and media business, removal of copyright infringing materials, disruption on news and journalism, consumer information, scams and other emerging issues.

The Report also contains a number of recommendations targeted at reform of current privacy laws in Australia, in particular the current Privacy Act 1988 (Cth) (the Privacy Act). These recommendations target areas of concern in relation to the emergence of digital platforms, but go much further than this to recommend review of the entire system for regulation of privacy in Australia. They reflect the attention and broad public concern in this area as a result of significant social media and other data breaches, also reflecting the new "best practice" on the protection of privacy in jurisdictions such as the European Union and California.

What comes next?

Although not all of the Report's recommendations are assured of being implemented, the Office of the Australian Information Commissioner (OAIC) has published a media release welcoming the recommendations to strengthen Australia's privacy laws. It quotes the Australian Information Commissioner and Privacy Commissioner Angelene Falk, saying that the recommended changes would strengthen the ability to protect personal information under the Privacy Act, helping to close the gap between community expectations and privacy practices falling short of those standards.

The Report's recommendation to increase penalties has already been committed to by the Australian Government in March 2019, and it was noted by OAIC that the Australian Government is finalising its further response following a 12-week public consultation. If the other key recommendations are adopted, it would be the largest shake up since the Privacy Act was first implemented, bringing Australia closer to equivalency with the European Union's best practice standard under the General Data Protection Regulation (GDPR).[1]

What are the key areas of reform?

Privacy reform and greater protection for individuals' personal information has been on the agenda for a number of years, with the *For Your Information* report in 2008 by the Australian Law Reform Commission (ALRC)[2] examining a number of aspects of the Privacy Act, leading to the eventual establishment of the Australian Privacy Principles (APPs) in 2014 that strengthened privacy laws for the private sector. However, the pace of change has been slow, and with the emergence of digital platforms there are clear gaps between the standard required for compliance with the Privacy Act and the standard required to both meet public expectations and what is now regarded as "best practice". High profile data breaches, and emerging technologies such as artificial intelligence and drones, continue to highlight these gaps.

The Report addresses these issues by suggesting a significant rebalancing of current legal obligations to better protect the privacy of individuals. It remains to be seen how the Australian Government will implement change in a way that achieves an appropriate balance of interests. Key recommendations in the Report include:

- establishing an enforceable code under the Privacy Act
- strengthening the requirements for privacy notices when collecting information
- clarifying the meaning of key terms such as personal information and consent
- individuals' rights to deletion of their data
- a right for individuals to bring actions directly in relation to serious privacy infringements

There are also calls for a broader review of the Privacy Act, and creation of a statutory tort for serious invasion of privacy, which was examined in the ALRC's June 2014 Report into Serious Invasions of Privacy in the Digital Era.[3]

Recommendation 16: strengthen protections in the Privacy Act

This recommendation identifies a number of specific changes to the Privacy Act to address perceived gaps in the current regulation. These include:

- updating the definition of personal information to capture technical data and online identifiers that may be used to identify an individual
- strengthen notification requirements
- strengthen consent retirements and pro-consumer defaults
- requirements for erasure of personal information
- direct rights of actions for individuals
- higher penalties for breach of the Privacy Act

Many of these changes closely reflect the positions that currently apply under the GDPR. However, it will be difficult to implement some of these in isolation, without a more significant shift in the way that privacy is regulated in Australia.

Recommendation 16(a) — update personal information definition

The Privacy Act defines personal information partly by reference to information that is "about" an individual. For a long time this was not thought to have great significance, but it has emerged as an issue in the context of considering whether or not online identifiers and other metadata that track a person's use of digital platforms are regarded as information "about" that person. This issue also came to the forefront following the case of *Privacy Commissioner v Telstra Corp Ltd*[4] and there has been considerable thought given to exactly what is required in order for information to be "about" an individual and hence subject to privacy laws in Australia. It has also resulted in deeming laws to ensure information captured under data retention laws is within the scope of personal information under the Privacy Act.[5]

The Report recommends that the definition of personal information should more clearly capture information like IP addresses, device identifiers, location data and other online identifiers. This is more aligned with the GDPR definition of personal data that looks at whether the information is "relating" to rather than "about" the individual.[6] This will expand the information that is subject to protections under the Privacy Act.

Recommendation 16(b) — strengthen notification requirements

A key recommendation is to require all collection of personal information to be accompanied by a privacy notice from the entity collecting the personal information, unless the consumer already has the information, or there is an overriding legal or public interest reason. At a high level, this seems to reflect the existing requirements in the Privacy Act under APP 5. However, the recommendation goes on to say that the notice must be concise, transparent, intelligible and easily accessible, written in clear and plan language, provided free of charge and set out clearly how the information will be collected, used and disclosed. It also notes the language used in notices must be targeted where children are likely users, and recommends the use of multi-layered notifications or standardised icons or phrases.

These requirements expand on the requirements of APP 5. If implemented, they would give further legislative force to many of the existing best practice approaches recommended by OAIC in its guidance. It further emphasises the need for privacy statements to not only "tick the box" against the list of items in APP 5, but also meet a more subjective standard, of providing to individuals in a meaningful and readily understood way. This is also consistent with the GDPR, which requires a much more throughout and transparent approach to identifying the data processing arrangements and the legal basis on which they are taking place.[7]

Recommendation 16(c) — strengthen consent requirements

Another key area of criticism under the Privacy Act has been lack of clarity around requirements for consent. Although the existing APPs recognise the need for consent in a number of situations, including relating to sensitive information such as in the health sector, the Privacy Act provides relatively little by way of a description of what consent means.

The Report recommends consent be required whenever personal information is collected, used or disclosed, unless necessary for the performance of a contract to which the consumer is a party, or required under law, or otherwise necessary for an overriding public interest reason. A key aspect is to define consent as requiring an affirmative act that is freely given, specific, unambiguous and informed (including providing information about the consequences of withholding consent). This is a significant increase to the standard under the Privacy Act, which currently allows for consent to be either express or implied. Again, the recommendation is based closely on the definition of consent in the GDPR.[8]

This recommendation is particularly significant, requiring rework to the basis on which the current APPs exist under the Privacy Act. Although the proposed definition is based on the GDPR, a key difference is that the GDPR does not mandate obtaining "consent" and in many instances to do so will not be appropriate. Rather, the GDPR requires that data be processed lawfully, which

includes a range of permitted scenarios including where genuine consent is obtained. It also allows processing of personal data where necessary for the legitimate interests of the data controller (collector) or a third party, balanced against the rights of the individual. Collecting or dealing with personal information on the basis of consent has the added consequence that the individual can withdraw their consent, which may not be practical in certain situations. There will also be situations where it's not possible to obtain valid consent, for example in dealings with government or monopoly service providers if there is no realistic alternative for the individual.

No doubt a more nuanced requirement will be developed, but even as it extends to digital platforms, it will be difficult to set the right balance for consent without alterations to the Privacy Act.

Recommendation 16(d) — enable erasure of personal information

The recommendation to include a right to erasure of personal information fills a gap in the existing APPs that allow for rights of access to and correction of personal information (APP 12 and APP 13), but no express right to require deletion. Currently, there is an obligation for organisations under APP 11.2 to destroy or de-identify information where (subject to exceptions) the entity no longer needs it for any purpose for which it may be used or disclosed. However, if an individual were to withdraw consent it's not clear what the impact would be on the rights to retain, use and disclose personal information.

It will be important to consider how Recommendations 16(c) and 16(d) interact. As noted above, under the GDPR, the withdrawal of consent does not necessarily remove the legitimate basis for processing personal data. Rights for individuals to require deletion also need to be subject to appropriate exceptions.

Recommendation 16(e) — direct rights for individuals

The Report recommends that individuals have direct rights to bring actions and class actions in court to seek compensation for an interference with their privacy under the Privacy Act. This is in addition to Recommendation 19 for a statutory tort for serious invasion of privacy.

This change would amend the Privacy Act to more closely align with the position under the GDPR, which allows for individuals to seek court orders (including for compensation), in addition to the regulatory role of national supervisory bodies. This would also be a significant departure from the current process under the Privacy Act, which only allow the Information Commissioner to take court proceedings to supplement their own enforcement powers. Such a change would need to be linked to the broader review of the Privacy Act called for under Recommendation 17, as many of the current requirements are tied to (and appropriate in the context of) the role of the Information Commissioner and would need to be reviewed if individuals were given direct rights to take court proceedings. It may for example be appropriate that current guidance issued by the Information Commissioner on the APPs also becomes binding.

Recommendation 16(f) — higher penalties for breach

The Australian Government has already announced in March 2019 an intention to implement measures consistent with this recommendation, increasing the penalties under the Privacy Act for serious or repeated breaches to the greater of $10 million or three times the value of any benefit obtained through the misuse of information or 10% of annual domestic turnover.

This is a significant increase from the current maximum of $2.1 million, but is worth comparing to the equivalent under the GDPR which is €20 million or 4% of total worldwide annual turnover. It's also relevant that fines imposed under the GDPR do not require a court order and can be imposed by a national regulatory body. There is a clear willingness for regulatory bodies in the EU to exercise these rights, with the UK Information Commissioner's Office recently fining British Airways £183 million for loss of the details of 500,000 customers in a malicious criminal attack. Under the Privacy Act, to impose a fine the Information Commissioner will still need to make an application to the Federal Court, with the Australian Government announcing only modest infringement notice powers for the Information Commissioner of up to $63,000.

Recommendation 17: broader reform of Australian privacy law

Many of the specific recommendations made for reform to the Privacy Act go to the very nature of the regulatory system for privacy protection in Australia. This is reflected in Recommendation 17, which proposes a broader reaching review of the Privacy Act, aiming to place greater emphasis on privacy protections for consumers including against misuse of data and to empower informed choices. Key aspects identified include:

- whether the current exemptions from the Privacy Act should continue to apply, including for small businesses, employee records, and registered political parties — these exemptions are contentious on the basis that individuals should be entitled to protection no matter who they are interacting with. The exemption for employee records is credited

with preventing Australia from achieving equivalency recognition from the European Union, even before the GDPR raised the bar for best practice
- a requirement (or principle) that all use and disclosure of personal information must be by fair and lawful means — this is similar to the approach discussed above for the GDPR
- extending protections given to inferred information
- setting more defined standards for de-identification, anonymisation and pseudonymisation — developments in artificial intelligence make it increasingly easy to re-identify information by linking datasets in a way that was previously not anticipated
- strengthening requirements for the transfer of personal information out of Australia — the EU implements a much higher standard and requirements that must be met before personal data can be transferred outside of the jurisdiction
- considering whether a third party/independent certification scheme should be introduced

Recommendation 18: OAIC Privacy Code for Digital Platforms

A privacy code for digital platforms seems to be one of the more likely recommendations to be implemented, and would detail how many of the other recommendations described above would be implemented for digital platforms. This is likely to include requirements such as multi-layering of privacy notices, consent requirements, requirements for opt-out/opt-in (for example, a default opt-out unless consent is given), specific requirements for collecting children's data, information security requirements, retention periods and complaint handling expectations. It's possible that many of these changes could be implemented as part of the current regulatory processes in the Privacy Act.

Recommendation 19: statutory tort for serious invasion of privacy

This is the most ambitious recommendation, going beyond the existing framework of regulatory protections via the Privacy Act (and recommendations for allowing direct enforcement by individuals) to create a new statutory tort.

As noted above, the framework for this proposal was recommended in the ALRC's June 2014 Report into Serious Invasions of Privacy in the Digital Era. Adopting such a measure would be a significant rebalancing of the existing rights to privacy in Australia and represents quite a difficult legislative task to ensure rights and obligations are balanced between individuals and organisations that access their personal information.

Importantly the ALRC's recommendations in this area should be further considered if the other proposed changes to the Privacy Act are adopted, to confirm if those measures already address the need for a statutory tort. While the common law developments in the UK towards a tort for breach of privacy are noted in the ALRC report, the majority of attention in the UK is now directed to the rights of the regulator (and individuals) to take direct action under the GDPR (and via national implementing laws). It is much clearer and easier to enforce these rights than the rights that have developed under tort laws.

Where to now?

It's clear from the already announced reform to penalties under the Privacy Act and the backing of both the ACCC and OAIC that there will be further significant reform in the area of privacy and data protection in Australia. This is necessary in order to ensure that the law reflects both public expectations and developing international best practice.

What is not yet clear, is the degree to which the Australian Government is prepared to embark on significant reform to the Privacy Act, or if the reforms will be implemented over time in a more measured and gradual manner than that recommended by the ACCC.

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Footnotes

1. Regulation (EU) 2016/679 (General Data Protection Regulation).
2. Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* Report 108 (2008).
3. Australian Law Reform Commission *Serious Invasions of Privacy in the Digital Era* Report 123 (2014).
4. *Privacy Commissioner v Telstra Corp Ltd* (2017) 249 FCR 24; 347 ALR 1; [2017] FCAFC 4; BC201700165.
5. See Telecommunications (Interception and Access) Act 1979 (Cth), s 187LA.
6. Above n 1, Art 4.
7. Above n 1, Art 13.
8. Above n 1, Art 4.

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