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Consumer Express

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Contents

Click title to jump to article

5 Facial recognition technologies: Privacy considerations in retail settings

7 Navigating the classification of workers: The changing face of casual employment

10 Australia’s tobacco licensing reform: Moving towards a unified national approach

13 Prices too good to be true? Misleading price displays and recent enforcement action

16 *T&Cs apply! When your campaign stands out, your compliance should too

19 Buyer beware…of AI risks

22 Evaluating AI safeguards: Is more needed to strengthen consumer protection in the digital age?

26 Digital gold or legal minefield? Using stablecoins for business transactions

Welcome to the twelfth edition of Consumer *Express*

We are delighted to bring you the twelfth edition of Consumer *Express* - our final edition for 2025. As usual, we've packed it full of interesting legal analysis and updates on recent developments shaping the consumer sector.

It's hardly a surprise that online retail spending continues to surge. What is particularly remarkable though, is the exponential growth in mobile-first shopping, especially among women and younger shoppers. In this edition, we consider the recent ACCC enforcement actions targeting misleading price displays, aimed to protect consumers who shop online.

For our bricks and mortar retailers, we explore two issues of particular significance. Mitchell Wright and his team consider the implementation of facial recognition technology and other emerging technologies within Australian retail settings. Meanwhile, Alexandra Walker and John Nicolas discuss recent changes to tobacco licensing, which are set to alter how retailers can sell tobacco and create a uniform national approach.

The changing face of casual employment and challenges relevant to the classification of workers are ongoing issues for our clients. Many clients have sought advice from Jonathon Hadley and our expert employment lawyers on recent updates to the *Fair Work Act 2009* (Cth), which redefine casual employment and introduce a pathway to permanent roles. These amendments notably impact employers in retail and hospitality. This edition provides a clear summary of these key changes.

Artificial Intelligence (**AI**) continues to make its mark on the consumer experience. Dudley Kneller and his team look closely at risks and benefits of AI. For example, chatbots may save companies valuable time and money, but there are plenty of risks that need to be understood, including liability for misleading statements and 'hallucinations'. Earlier this month Treasury, released its Review of AI and the Australian Consumer Law (**ACL**) report. Sinead Lynch and our tech experts have examined the report's findings and reforms that may be implemented to the ACL to address AI technologies.

This edition also features an overview from our Financial Services Regulation and Compliance team on digital assets, including stablecoins, which are becoming more prevalent in Australia amid evolving regulations and increasing business and consumer interest in digital payment solutions.

Gadens continues to support clients across Australia with their trade promotions, registrations and associated terms and conditions. This is a highly regulated space, and the technicalities of the law are often misunderstood. Antoine Pace and his team provide more detail and analysis in their article.

We hope you enjoy this edition of Consumer *Express* and have a smooth run into the holiday period. Please reach out if you have any questions or feedback – we love hearing from you.

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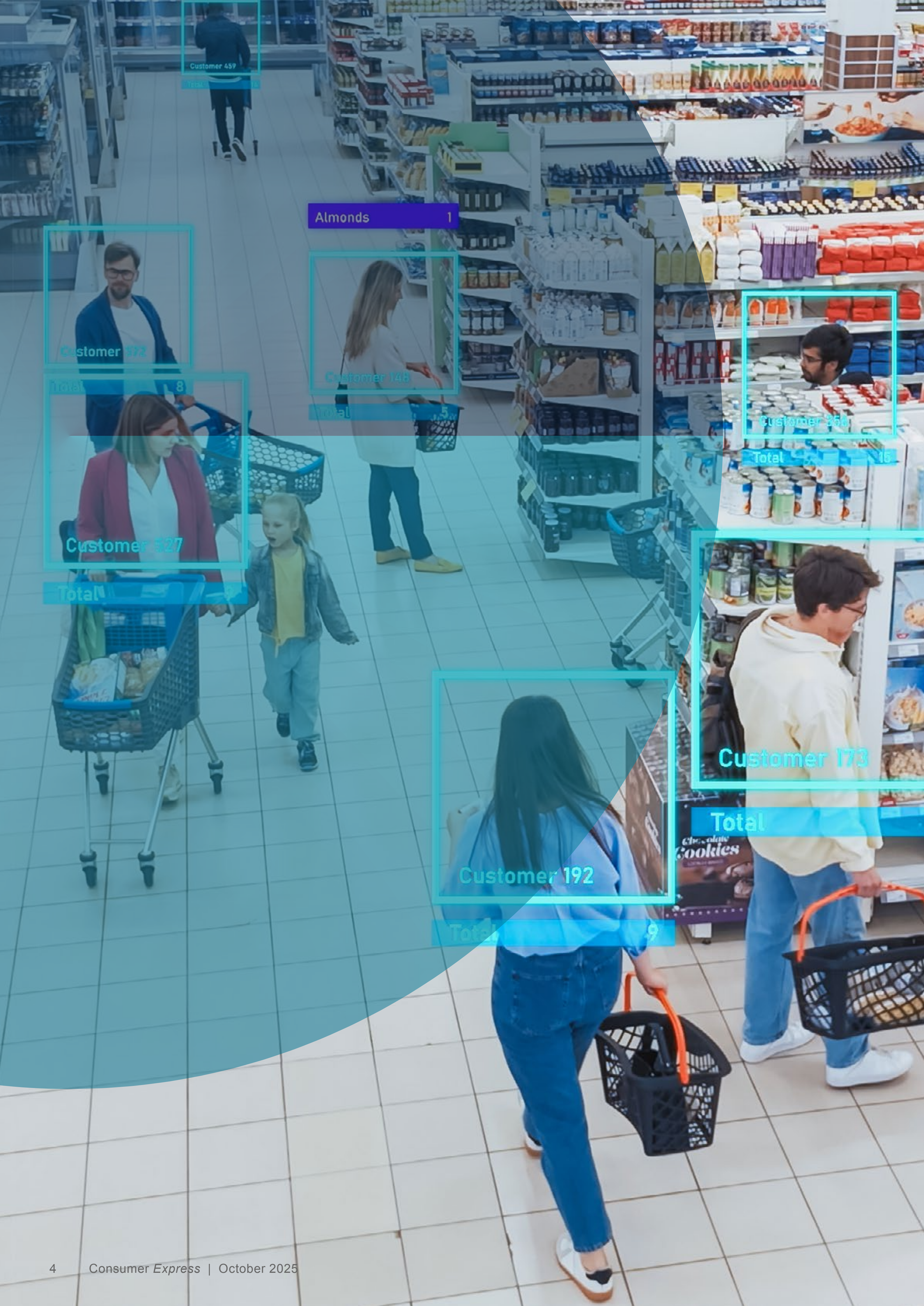
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Facial recognition technologies: Privacy considerations in retail settings

By Mitchell Wright, Partner, Stephanie Brown, Senior Associate and Loretta Dagna, Graduate

Privacy Commissioner Carly Kind (the Commissioner) recently delivered her determination regarding Kmart's deployment of facial recognition technology across several of its stores. This decision comes on the heels of the Commissioner's findings late last year concerning Bunnings' use of Facial Recognition Technology (FRT) to support staff and customer security. In this article, we explore the key takeaways from the Commissioner's determinations and discuss the implications for retailers considering the adoption of technologies that may involve collecting customers' sensitive information.

The Commissioner determined that both Bunnings and Kmart had breached individuals' privacy by collecting their personal and sensitive biometric information without obtaining customer consent. She further found that neither retailer had taken adequate steps to inform individuals about the reasons, circumstances, or intended purposes behind this data collection.

Under the Australian Privacy Principles (**APPs**) (set out in Schedule 1 to the *Privacy Act 1988* (Cth)) unless an exception applies an APP entity must not collect sensitive information unless the individual consents and (in the case of an organisation) the information is reasonably necessary for one or more of its functions and activities.

What is FRT?

FRT is a form of biometric software designed to identify individuals by analysing and comparing the unique patterns of their facial features. The system captures an image of a person's face and pinpoints key markers, such as the distance between the eyes, the shape of the cheekbones, and the contours of the lips, chin, and forehead. This information is then transformed into a distinctive biometric template, which can be used to confirm someone's identity—such as when a person's face is captured by CCTV.

How was Bunnings using FRT?

Bunnings conducted a trial of FRT in 62 stores across Victoria and New South Wales between 6 November 2018 and 30 November 2021. The primary aim of Bunnings' use of FRT was to monitor specific individuals perceived to pose a risk to inventory, property, or the safety of customers and staff within its stores. Bunnings' system operated by capturing an image of every person entering the store via CCTV, then using FRT to generate facial vector points and compare them to a database of individuals suspected of, or reasonably believed to have engaged in, fraudulent, violent, or threatening behaviour. When a match was identified, an alert was sent to in-store staff. If no match was found, the captured data was deleted, typically within just 4.17 milliseconds.

How was Kmart using FRT?

Kmart carried out a similar FRT trial in 28 stores from 22 June 2020 to 15 July 2022. Kmart's system collected facial recognition data at two points: upon entry and at the returns counter. Kmart claimed this was solely to detect and prevent fraudulent refunds by identifying individuals previously involved in refund scams, including those who had displayed violence or made threats towards staff. When the system found a match with someone in Kmart's database, store staff at the returns counter would be notified.

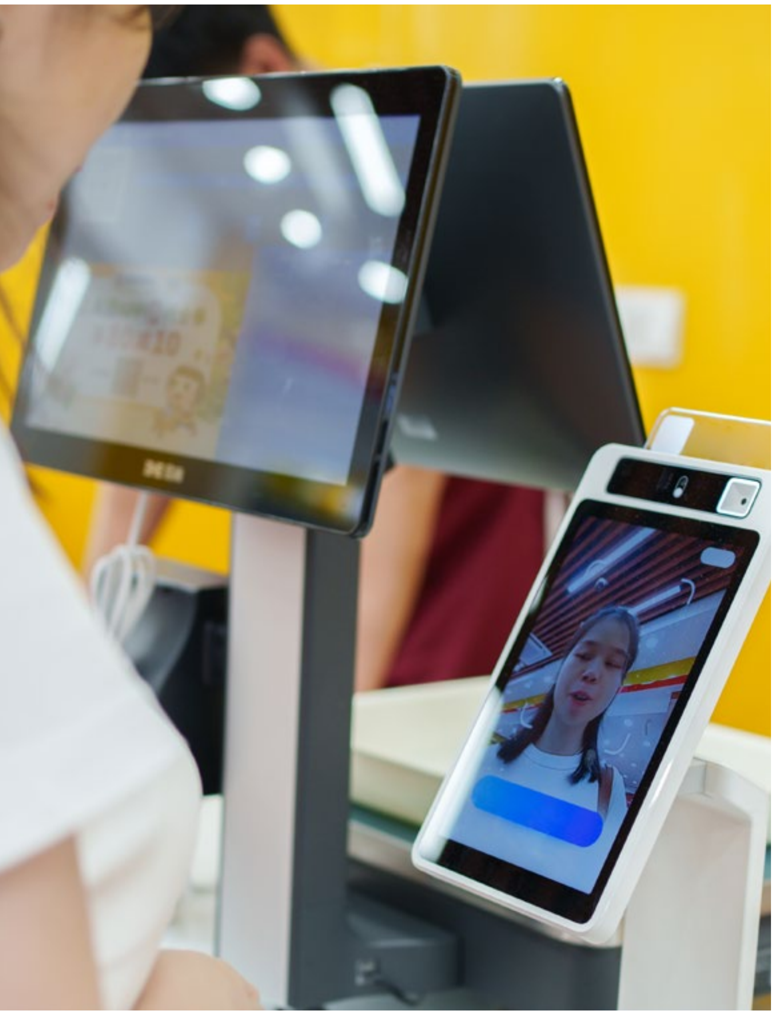
Permitted general situations for the use of sensitive information

Both Bunnings and Kmart sought to justify their collection and use of sensitive information without consent by relying on the 'permitted general situations' exception outlined in section 16A of the Privacy Act. These exceptions allow such data handling without consent where this is necessary to lessen or prevent serious threats to life, health and safety or to take action in relation to suspected unlawful activity or misconduct. However, the Commissioner concluded that in these cases, collecting and using information without consent was disproportionate to the privacy impact to individuals, especially given that feasible, less invasive alternatives were available.

While these decisions might appear to effectively prohibit the use of FRT in retail environments, the Commissioner clarified in a recently published article that the decisions do not amount to a ban of this type of technology (noting that the Privacy Act is technology neutral). Rather, the takeaway is that the collection and deployment of FRT—and similar technologies—must be both proportionate to the privacy risks involved and transparent to those individuals affected.

Key considerations

The federal privacy regulator, the Office of the Australian Information Commissioner, has recently released guidance on deploying FRT. This guide highlights essential privacy considerations for retailers implementing such technologies. It underscores the importance of a



‘privacy by design’ approach and conducting a privacy impact assessment before introducing any new system likely to collect personal or sensitive information to ensure compliance with the Privacy Principles. Key points to address during this assessment include:

Necessity and proportionality

The use of FRT cannot be justified solely on the grounds of convenience or desirability. It should only be employed when it is genuinely necessary, and where the intended outcome cannot be achieved by less privacy-intrusive means. The benchmark for what is considered ‘reasonably necessary’ rests on whether a reasonable person would agree that collecting such information is warranted in the circumstances.

Consent and transparency

Consent and transparency are fundamental when dealing with the collection of personal or sensitive information. Organisations must be upfront about the information they gather and how it is used, and individuals should be able to provide informed, meaningful consent regarding the collection of their sensitive data. Notably, these decisions have highlighted that obtaining informed consent and displaying clear signage at collection points - such as store entrances - could not only facilitate the legitimate use of FRT but also deter potential incidents of fraud and violence by warning individuals that monitoring is in place.

Accuracy, bias, and discrimination

It is essential that businesses ensure FRT does not unfairly target individuals or groups due to inherent biases within the technology. Continuous monitoring and assessment is required to minimise risks of discrimination and to uphold fairness.

Governance and ongoing assurance

Robust privacy policies and effective governance structures are vital for maintaining ongoing compliance with privacy principles. Regular reviews and clear accountability mechanisms help ensure responsible and lawful use of FRT over time. In the Commissioner’s determination on Kmart’s use of FRT, she found Kmart’s privacy policies were lacking because, although they mentioned some of the kinds of personal information that was collected by the FRT system, they did not clarify that additional data, such as metadata, was generated from facial images. Additionally, while the policies stated that personal information was collected through CCTV, they failed to mention, even generally, that this collection was done using an FRT system.

Key takeaway

Advancements in technology provide organisations with opportunities to improve efficiency, minimise risks, and deliver better experiences for customers. However, it is crucial to thoroughly consider privacy concerns before rolling out new technologies, ensuring that all actions taken comply with the Australia Privacy Principles. Businesses must strike a balance between protecting the safety of staff and customers and maintaining proportionality and transparency when collecting personal and sensitive information.

For an in-depth analysis of the privacy ramifications arising from the Bunnings decision, you can explore what lessons can be learned from Bunnings’ use of facial recognition technology and its breach of the Privacy Act here, as detailed by our team.

Contact our team if you need support to assist your business in staying compliant in the rapidly evolving technological environment.

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Navigating the classification of workers: The changing face of casual employment

By Jonathon Hadley, Partner, Edwina Kaupa, Senior Associate and Alexander Greig, Paralegal

The definition of casual employment under the *Fair Work Act 2009* (Cth) (FW Act) has been amended through recent changes, including changes to the pathway available to casual employees for conversion to permanent employment. These amendments have significant implications for how employers engage and manage casual employees in their workforce, particularly for employers operating in industries such as retail and hospitality. This article will assist employers with understanding these amendments and navigating the complexities involved with engaging casual employees.

We will review the recent amendments as they relate to casual employees, specifically:

1. the new definition of casual employment; and
2. the pathway to permanent employment for casual employees.

Who is a casual employee?

A casual employee is an employee that has no guarantee of weekly hours, works as needed by their employer and is only paid for the hours they work. In lieu of entitlements afforded to permanent employees such as paid leave and redundancy, casual employees are usually paid a 25% loading on their base rate of pay.

Just over a year ago, on 26 August 2024, the current definition of casual employment took effect as a result of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth). This amendment affects around 21% of employees in Australia who work on a casual basis, with over-representation in the hospitality, retail, agriculture and recreation industries.[1]

This amendment to the FW Act will be a significant change for businesses that engage casual employees and will likely have an impact on how casual employment has historically been viewed, and best practice for the management of casual employees in the future.

To be considered a casual employee under the new definition prescribed by the FW Act, an employee is a casual employee only if:

1. the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and
2. the employee would be entitled to a casual loading or a specific rate of pay for casual employees.[2]

A determination as to whether an employee is a casual, is now characterised by 'an absence of a firm advance commitment to continuing and indefinite work', which effectively requires consideration of the totality of the employment relationship. What this means is that historical factors such as references to casual employment in an employment agreement and payment of casual loading are not the determinative factors of casual employment anymore.

While the phrase 'an absence of a firm advance commitment to continuing and indefinite work' could be considered vague and open to wide interpretation, the FW Act does provide guidance on this point. When evaluating whether the employment relationship is characterised by an 'absence of a firm commitment to continuing and indefinite work', the following are relevant criteria for consideration:

1. the real substance, practical reality, and true nature of the employment relationship;
2. the basis that a firm advance commitment can be in the form of the contract of employment or, in addition to the terms of that contract, in the form of a mutual understanding or expectation between the employer and employee not rising to the level of a term of that contract (or to a variation of any such term);
3. whether there is an inability of the employer to elect to offer, or not offer, work or an inability of the employee to elect to accept or reject work (and whether this occurs in practice);
4. whether, having regard to the nature of the employer's enterprise, it is reasonably likely that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee;
5. whether there are full - time employees or part - time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee; and
6. whether there is a regular pattern of work for the employee.[3]

In effect, the assessment of whether an employee is a casual or not goes beyond a review of an employment agreement and now extends to a multi-factorial assessment that will scrutinise the totality of the employment relationship. The requirement to take into account the totality of the employment relationship means that an employment relationship that was previously considered casual, may no longer be considered casual in light of the new definition.

Given the change in the assessment of casual employment, it is imperative that employers who engage casual employees review their processes and procedures for engaging casual employees and confirm whether their current casual employees meet the statutory definition of a casual employee. This will involve the consideration of the totality of the employment relationship and potentially whether offers of permanent employment should be made

Pathway to permanent employment

Further to the amendments of the FW Act to provide a new definition of casual employment, casual employees now have a new pathway to access permanent employment. The pathway to permanent employment is called the 'employee choice pathway'.

Since 26 February 2025 (or 26 August for small employers with less than 15 employees), casual employees have been able to access the employee choice pathway, for conversion to permanent employment, provided they meet the following criteria:

1. they have been employed for at least six months (12 months for small businesses with less than 15 employees); and
2. they believe that their employment no longer meets the new definition of casual employment.[4]

To enliven the employee choice pathway, a casual employee who meets the above criteria must provide written notice to their employer. Upon receipt of written notice from a casual employee, employers are required to:

1. consult with the causal employee regarding relevant aspects of the proposed change from casual to permanent engagement, (e.g. full-time or part-time, hours of work and when conversion will take place); and
2. provide written confirmation regarding acceptance or rejection of the conversion request within 21 days of it being received.[5]

If an employer rejects an employee's request for conversion, the written response is required to include the employer's reason for refusing the conversion request. Employers are limited in their reasons for their refusal, and such refusal must be made on reasonably defensible grounds, as employees can challenge their employer's refusal by application to the Fair Work Commission.

Grounds on which an employer can refuse a conversion request are limited to:

1. the employee still meets the definition of a casual employee;
2. there are fair and reasonable operational grounds for not accepting the notification, such as:
   a. substantial changes would be required to the way work in the employer's business is organised;
   b. there would be significant impacts on the operation of the employer's business; or
   c. substantial changes to the employee's employment conditions would be necessary to ensure the employer doesn't break rules (such as in an award or agreement) that apply to the employee;
3. accepting the change would mean the employer won't comply with a recruitment or selection process required by law.[6]

Another important consideration for employers responding to conversion requests is the fact that an employee's right to access the employee choice pathway is a workplace right under the FW Act.

This means that the right to access the employee choice pathway is protected under the FW Act and an employer cannot take adverse action against an employee, which could potentially include terminating or refusing a conversion request, because they have exercised or intend to exercise their right to access the employee choice pathway.

Therefore, the employee choice pathway will require employers to carefully consider and manage casual employees that access the employee choice pathway. Accordingly, employers need to ensure they have adequate internal policies and procedures to ensure compliance with their obligations under the employee choice pathway.

The key takeaways for employers

The new definition of casual employment and employee choice pathway is a significant departure from the previous approach to casual employment.

With these changes to the laws, it will be important for employers with historically casual workforces, such as employers in retail and hospitality, to understand the changes to the definition of casual employment and how to navigate the management of casual employees in light of these changes. In addition to the complexity of navigating a new assessment of casual employment, accessing the employee choice pathway is a workplace right, which provides casual employees protection from adverse action should they exercise or indicate an intention to exercise this workplace right.

The Gadens Workplace Advisory and Disputes team can assist with drafting and reviewing casual employment contracts and arrangements, as well as comprehensive reviews of your workforce planning and workplace policies to ensure compliance with the Fair Work Act.

1 Ai Group Factsheet: Labour market dynamics in Australia
2 *Fair Work Act 2009* (Cth) s 15A(1).
3 Ibid s 15A(2).
4 Ibid s 66AAB.
5 Ibid s 66AAC(1)-(2).
6 Ibid s 66AAC(4).

Australia’s tobacco licensing reform: Moving towards a unified national approach

By Alexandra Walker, Partner, John Nicolas, Partner and Maria Anenoglou, Special Counsel

Australia’s tobacco licensing landscape is undergoing its most significant transformation in decades.

Historically, tobacco licensing requirements in Australia have varied by state and territory. While states such as South Australia, Western Australia, Tasmania and Queensland have long required retailers and wholesalers to be licensed, New South Wales (NSW) and Victoria previously operated under less stringent notification and registration schemes. This patchwork approach created enforcement challenges and allowed some retailers to operate outside the regulatory framework.

With sweeping reforms now in effect in NSW and Victoria—and further changes progressing through Parliament in Queensland—a new era of regulatory scrutiny is being brought into effect. These reforms mark a decisive shift from fragmented state-based schemes to a more unified, enforcement-driven model aimed at curbing illicit tobacco trade and bolstering public health protections.

A key feature of the NSW reforms is the introduction of statutory powers allowing landlords to terminate leases where closure orders have been issued due to unlawful tobacco activity. Similar rights exist in South Australia, and Queensland is proposing comparable powers as part of its crackdown on illegal tobacco operations.

A summary of the state-by-state requirements are set out below.

State/Territory	Licence required for	Statutory landlord rights to terminate lease?
NSW	Retailers and wholesalers of tobacco and non-tobacco smoking products	Yes – if closure order is issued
VIC	Retailers and wholesalers of tobacco products	No
QLD	Retailers and wholesalers of tobacco and non-tobacco smoking products	Currently proposed in parliament for a landlord to terminate a lease if a closure order is issued
SA	Retailers and wholesalers of tobacco and non-tobacco products	Yes – if a closure order is issued
WA	Retailers and wholesalers of tobacco products	No
TAS	Retailers and wholesalers of tobacco and non-tobacco smoking products	No
ACT	Retailers and wholesalers of tobacco and non-tobacco smoking products	No
NT	Retailers and wholesalers of tobacco products	No

Further details on the more recent changes brought in in NSW and Victoria and those proposed in Queensland are set out below.

NSW: A new licensing regime and landlord termination rights

From 1 July 2025, the NSW Government implemented a comprehensive tobacco licensing scheme that applies to all retailers and wholesalers of tobacco and non-tobacco smoking products. This scheme replaces the former Retailer Identification Number (**RIN**) system and introduces:

- mandatory licensing for each physical or online premises;
- criminal background checks and annual licence renewals; and
- significant penalties for non-compliance: up to $11,000 for individuals and $220,000 for corporations.

A grace period allows businesses to continue trading until 1 October 2025, provided they submit a valid licence application before that date. From 2 October 2025, trading without a licence is prohibited.

Also of significance is the introduction of a landlord lease termination right where a tenant is found to be selling illicit tobacco or operating without a valid licence.

The legislation, which was given royal assent in September, has introduced the following changes:

- If a closure order is issued against a premises (for example, due to illegal tobacco sales), the lease is automatically deemed to include a clause allowing the landlord to terminate the lease. Closure orders can be issued on a short-term basis (up to 90 days) or a long-term basis (up to 12 months).
- The landlord can terminate the lease by giving at least 28 days' written notice.
- A tenant whose lease is affected by a closure order will not have access to mediation, dispute resolution, or compensation rights under NSW's *Retail Leases Act 1994, Small Business Commissioner Act 2013*, or *Real Property Act 1900*.
- Tenants cannot sue the landlord for terminating the lease under this provision.

These powers will apply to both leases and licences, whether they were signed before or after the new laws came into effect.

Victoria: New licensing scheme and tenant disclosure obligations

Victoria also introduced its first mandatory tobacco licensing scheme on 1 July 2025.

Key features include:

- Separate licences are required for each premises and for retail versus wholesale operations.
- Applications opened 1 July 2025. From 1 February 2026, it will be an offence to sell tobacco products without a licence.
- Licences issued in 2025–26 are valid until 30 June 2027, with annual renewals required thereafter.
- Licensees must notify the regulator, Tobacco Licensing Victoria (**TLV**), of any changes to the corporate structure of the licensee within 14 days of the change occurring.

While the Victorian reforms do not currently include lease termination rights for landlords, the changes impose significant compliance obligations on tenants. Landlords are encouraged to identify affected tenants and support early compliance to avoid operational disruptions and reputational risk.

Queensland: Proposed landlord powers and expanded enforcement

As noted above, Queensland has already implemented a licensing requirement for all retailers and wholesalers of smoking products as of 1 September 2024. However, the Tobacco and Other Smoking Products (Dismantling Illegal Trade) and Other Legislation Amendment Bill 2025 recently introduced into Parliament proposes sweeping new powers to combat illicit trade.

Key proposed reforms include:

- A statutory right for landlords to terminate a lease if a closure order is issued against the premises, applicable to all leases—written, oral, or informal—entered into before or after the legislation commences.
- Expanded powers to allow the chief executive of Queensland Health to shut down non-compliant businesses via a short-term closure order for up to three months (previously 72 hours). The Bill also broadens the grounds for a closure order to include the possession of illicit tobacco or illicit nicotine products, in addition to their supply.
- Expanded powers to allow a Magistrate to order the closure of premises for up to 12 months (previously six months).
- New criminal and civil offences for landlords who knowingly lease to tenants engaged in illegal tobacco sales. If a landlord is aware that a tenant is selling illicit products or operating without a licence and fails to act without a reasonable excuse, they may face penalties under the new laws.
- Increased penalties for all parties involved in illicit trade, including landlords who are complicit or negligence.

What tenants should do moving forward

If you are a tenant involved in the retail sale or wholesale of tobacco or non-tobacco smoking products, you should:

- Do your due diligence – check if you are required to hold a licence.
- Apply for and obtain the required licence and provide a copy to your landlord.

What landlords should do moving forward

If you lease premises to retailers or wholesalers who sell tobacco or non-tobacco smoking products, you should:

- Do your due diligence – check if your tenant has a valid licence.
- Update your lease agreements – in particular, include clauses that require tenants to comply with all tobacco-related laws and termination rights if the relevant approvals have not been obtained.
- Avoid turning a blind eye, and take action if there is illegal trading – if authorities believe you were aware (or should have been aware) of illegal trading and failed to act, you may be liable.

Please don't hesitate to reach out to our national property and leasing team if you would like assistance with tenant communications or reviewing your lease terms in light of these updates.

Prices too good to be true? Misleading price displays and recent enforcement action

By Breanna Davies, Partner, Lucy Hardyman, Lawyer, Audrey Daoud, Graduate and Kalarni Orr, Graduate

Following the Australian Competition and Consumer Commission's (**ACCC**) recent crackdown on misleading retail pricing activity, there have been a number of high-profile penalties and Federal Court proceedings which have emphasised the legal and reputational risks associated with deceptive pricing practices. Recent actions include the $13.5m penalty against The Good Guys Discount Warehouses (Australia) Pty Ltd (**The Good Guys**) for misleading store credit promotions, Webjet Marketing Pty Limited's (**Webjet**) $9m penalty for misleading statements about the total price of flights, and Dendy Cinema Pty Ltd's (**Dendy Cinema**) recent infringement notice for failing to prominently show the total price of movie tickets sold online.

The ACCC has made it clear that tackling unfair trading practices, including misleading pricing practices and deceptive advertising, will remain a key enforcement priority through 2025-2026. As such, businesses should stay up to date with their legal obligations under the Australian Consumer Law (**ACL**), review their current promotional programs, and ensure marketing teams are regularly trained on ACL compliance.

Australian Consumer Law

The ACL aims to ensure that consumers are treated fairly when buying or selling goods and services by legislating a set of consumer rights and protections, and by requiring that goods and services meet certain guarantees (such as being fit for purpose and of an acceptable quality). Misleading pricing is captured by the ACL – in particular, section 18 which prohibits misleading or deceptive conduct, and section 29 which prohibits misleading representations in connection with the supply of goods or services.

Common forms of misleading pricing captured under the ACL includes drip pricing, was/now pricing and component pricing.

Misleading price displays

Misleading price displays often involve displaying prices that are wrong or likely to create a false impression.[1] For example, a displayed price can be misleading in the following circumstances where a business:

- states that a good or service has been marked down from a higher price in circumstances where it was not initially sold at that price for a reasonable period of time (was/now pricing);
- compares a displayed price with the wrong cost or wholesale price;
- compares a displayed price to a recommended retail price that the relevant product was never sold at (was/now pricing);
- advertises a price that is not the total price of the good/s or service/s (component pricing);
- advertises a total price that does not include additional booking fees or credit card surcharges which arise throughout the purchase process (drip pricing); or
- promotes a product as being discounted when the displayed price is actually the normal price (was/now pricing).

To ensure that your business is communicating clear and accurate prices to consumers prior to them making a purchasing decision, it is important to be aware of the following concepts:

Component pricing	Occurs when a business does not advertise a single, all-inclusive price, and instead advertises the price in component parts. For example, a phone carrier advertises a plan for $50 per month but separately charges an additional mandatory $10 access fee per month (rather than advertising $60 per month).
Drip pricing	Occurs when a business advertises a low initial price but then adds mandatory fees and charges step-by-step during the purchase process or online checkout. This often happens when unavoidable service charges or booking fees are not included in the advertised price, causing consumers to pay more than they intended.[2] Drip pricing takes advantage of consumers' cognitive decision-making process by encouraging them to start a purchase based on the lower price. Once committed to the process, consumers are more likely to accept the higher final price revealed at the end of checkout. To compare, where component pricing reveals multiple costs upfront as separate components, drip pricing gradually reveals extra fees throughout the course of checking out (especially in online transactions).
Was/now pricing	Also known as 'strike through pricing', was/now pricing is the act of showing the original price ('was') alongside the current sale price ('now'). Was/now pricing can be misleading or deceptive in circumstances where the good or service was never offered at the 'was' price for a reasonable period of time before the sale commenced, or the good or service was never, or rarely, sold at the 'was' price.

Recent enforcement action

The ACCC has intensified its scrutiny of misleading pricing practices in recent months, with the latest enforcement action taken against The Good Guys, Webjet and Dendy Cinema for various misleading pricing practices.

The Good Guys

In September 2025, the Federal Court ordered that The Good Guys pay $13.5m in penalties and provide redress to consumers for misleading conduct after failing to provide store credit to more than 20,000 eligible consumers following its 'StoreCash' promotions. The promotion failed to advertise or adequately disclose the store credit expiry (in some cases only 7 or 10 days), or that customers were required to 'opt in' to marketing communications to receive the credit. The ACCC argued that consumers may have made purchase decisions based on this promotion over other retailers and may not have done so knowing the terms of the promotion.

Marketing teams should ensure that any conditions or limitations are made clear to consumers from the outset to avoid engaging in misleading or deceptive practices.

Webjet Marketing Pty Ltd

In July 2025, the Federal Court ordered online travel agency, Webjet, to pay $9m in penalties for making false or misleading statements about airfare prices which failed to include additional compulsory fees on its website, promotional emails and social media posts.[3]

The Federal Court proceedings against Webjet alleged that the travel agency had:

- engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of section 18(1) of the ACL; and
- made false or misleading representations with respect to the price of the booking and services in contravention of section 29(1) (i) of the ACL.

The Court found that Webjet displayed airfare prices on the Webjet platforms, social media and in promotional emails, representing to consumers that it was possible to purchase a promoted flight by paying **only** the promoted price, failing to include and sufficiently disclose compulsory ‘servicing fees’ and ‘booking price guarantee fees’. In most instances, the promotional prices had an asterisk without explanation or a disclosure that prices were ‘subject to change without notice’.[4]

The Webjet judgment reinforces that misleading or deceptive claims about price can severely undermine consumer confidence, not to mention wasting consumers’ time and enticing them to complete purchases for a higher cost than originally anticipated. Businesses must ensure the information presented to consumers regarding price is clear, accurate and does not mislead by omission.[5]

Dendy Cinema Pty Ltd

Dendy Cinema has paid a $19,800 penalty after the ACCC issued an infringement notice for allegedly failing to prominently show the total price (as a single figure) of movie tickets sold online. Instead, the ACCC argued that Dendy Cinema omitted the unavoidable booking fee which should have been displayed at the earliest opportunity in the booking process. The ACCC stated that by only displaying part of the total price for a movie ticket, Dendy Cinema reduced the ability of consumers to make an informed purchasing decision and engaged in the practice of ‘drip pricing’.[6]

This serves as a clear reminder to businesses that they must not mislead or deceive consumers during the transaction process by hiding unavoidable booking fees, and that they should ensure the total ticket price is disclosed upfront.

Pricing tips

- Communicate clear and accurate prices prior to purchase.
- Ensure all surcharges are displayed.
- If multiple prices are displayed for the same item, the lowest price must be charged.
- Display the total price upfront, including all taxes, duties and unavoidable or pre-selected extra fees.

Practices to avoid

- Displaying a marked down price for an item that was never sold at the original price;
- Advertising a price that is not the total price a customer will pay; and
- Promoting a sale price which is actually the usual price.

Pricing tips to avoid contravening the ACL

These decisions serve as a timely reminder for businesses, especially those with an e-commerce arm, that all pricing must be transparent and that all fees, surcharges and additional costs are required to be disclosed upfront as opposed to only being included late in the purchase process.

Businesses should verify that all advertised prices are accurate, inclusive and not subject to hidden costs. When advertising the total price of goods and services, all mandatory fees should be displayed at the **earliest opportunity** in the purchasing process to allow consumers to be well informed.

1 Australian Competition and Consumer Commission, ‘Price Displays’, *Pricing (website)* www.accc.gov.au/consumers/pricing/price-displays.
2 Ibid.
3 Australian Competition and Consumer Commission, ‘Webjet to pay $9m in penalties for misleading statements about airfare prices and bookings’, Media Releases (website) Webjet to pay $9m in penalties for misleading statements about airfare prices and bookings | ACCC.
4 *Australian Competition and Consumer Commission v Webjet Marketing Pty Ltd* [2025] FCA 867, 14.
5 Ibid 59.
6 Australian Competition and Consumer Commission, ‘Dendy pays penalties for alleged ‘drip pricing’ practices’, Media releases (website) www.accc.gov.au/media-release/dendy-pays-penalties-for-alleged-drip-pricing-practices.

*T&Cs apply!
When your campaign stands out, your compliance should too

By Antoine Pace, Partner, Chris Girardi, Associate and Jade Lamb, Paralegal

If you are considering an activity that is aimed at promoting your new product, increasing your sales, expanding your market share, or creating brand awareness, then you, along with many others in the industry, may turn to a trade promotion – a competition run by your business to achieve those goals.

It sounds simple, but trade promotions exist in a highly regulated space. In addition to not being allowed to charge an entry fee, Promoters need to be aware of the complex interplay between the Australian Consumer Law (**ACL**) and various state and territory specific regulations. Promoters generally manage compliance through their T&Cs, but there's more to this picture than a brief 'T&Cs apply'.

In this article, we step through key considerations when planning your trade promotion, to ensure your compliance is in as great shape as your product.

What is a trade promotion?

There are four main categories of trade promotions that are commonly run in Australia, with each being regulated slightly differently. Specifically:

1. **Games of chance** – a promotion where the winners are determined at random, and each entrant has a **fair and equal chance** of winning a prize. For example, this can be a prize draw (e.g. 'first validly drawn entry') or an instant win promotion (e.g. 'scan your unique code').

   Permits may be required if the prize pool exceeds a certain value (this varies across each state and territory), or if the promotion involves a certain type of entry mechanic (e.g. instant win promotions in South Australia). We step through this in more detail below, but beware – your promotion will be considered by the regulators to be a 'game of chance' where **any** element of chance determines the winner.

2. **Games of skill** – a promotion where winners are determined by individual merit, knowledge or skill (i.e. how well they have met any judging criteria set by the Promoter), and not by chance (i.e. random draw). Entries into game of skill competitions usually require some sort of participation, input or creative element from the entrant – for example, answering a question 'in 25 words or less', submitting videos, photos, artwork or designs, creating merchandise displays etc.

3. **Gift with purchase** – a promotion where consumers either spend a certain amount, buy a specific product, or subscribe to a mailing list or database to receive a gift.

   However, this sort of promotion can also be a game of chance if there is a chance that a consumer may miss out on a gift during the offer period (e.g. limited supplies etc.). Permits may be required in this case, however this can also depend on where the offer is running (e.g. in-store or online), the specific entry mechanic used, and the number of gifts available.

4. **Trade incentive** – a promotion run on a business-to-business or business-to-employee basis, instead of business-to-consumer. These are generally directed at employees, retailers, or wholesalers to encourage growth or sales in certain areas, for example, to encourage staff to complete training, to incentivise retailers to increase sales, or to support a separate business-to-consumer promotion. Trade incentives are a great way to encourage buy-in from employees, retailers, or wholesalers, but trade promotion rules and regulations (including permits) may still apply!

The regulations

Each of these categories of promotions is regulated – but, the scope of that regulation will vary. Regardless, the key takeaway is that it's not enough to just say 'T&Cs apply.' You will need more than that… and the regulators check!

Consumer law – misleading or deceptive

The Australian Consumer Law (**ACL**) in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) underpins all trade promotions activities. Promoters need to take care that they do not do anything in connection with a trade promotion that can mislead or deceive consumers/entrants.

At its core, regardless of the category of promotion, Promoters need to be clear as to:

1. who can enter a promotion;
2. how those people can enter the promotion;
3. the prize that they can win; and
4. how the Promoter will determine who the winner is.

This is true for **all promotional materials**, including social media posts, flyers, posters, packaging and on-pack artwork, and it's for this reason that a simple 'T&Cs apply' generally will not suffice. Rather, it's critical to have enough information on all promotional materials for entrants to understand these key matters, and the nature of the promotion more generally.

This can be done by 'reducing' the size of your longer T&Cs into something more appropriate for smaller campaign assets. Care must be taken to ensure those minimal T&Cs are not, themselves, misleading or deceptive, by leaving critical or onerous information out – i.e. it is possible to breach the ACL by deciding to leave something out, not just by saying something that is incorrect.

State and territory regulations

Trade promotions are also regulated by state and territory gaming legislation. This legislation generally will apply to **games of chance**, given their proximity to 'gambling' in a traditional sense. But it is helpful to ensure games of skill are consistent with most of these requirements to help mitigate the risk of misleading or deceiving consumers through unclear terms.

Requirements under these regulations vary significantly in each state or territory. They non-exhaustively include specific requirements regarding:

1. the operation of, or requirement to operate, unclaimed (and unwon) prize draws;
2. record keeping in relation to the promotion;
3. notification/publication of winners;

4. advertising materials – including some radio – and TV-specific requirements;
5. the operation of your prize 'draw' (including the nature of any electronic systems, and the need to have certain kinds of 'scrutineers' present); and
6. inclusion of a permit/authority number, issued by the relevant state or territory regulator.

Fees will apply to obtain any necessary permits/authorities, as well as in cases where T&Cs need to be amended after the original permit/authority was obtained. For reference, the Gadens team has provided a full listing of current state and territory permit fees effective July 2025 here. These permits/authorities are one further example of information required on **all promotional materials**, meaning relying on 'T&Cs apply' on its own might just draw the ire of a number of state and territory regulators as well.

Privacy and intellectual property

Savvy Promoters will note that T&Cs are also required to manage various other risks that arise in a trade promotions context. This includes:

1. managing privacy and spam risks – for example:
    a. the *Privacy Act 1988* (Cth) (**Privacy Act**) requires certain entities to, among other things, be clear as to how they will use any personal information collected during a promotion, and include a privacy collection statement that complies with the Australian Privacy Principles; and
    b. together, the Privacy Act and *Spam Act 2003* (Cth) require entities to have a clear right to send individuals direct marketing (e.g. email or SMS marking), and to use their personal information for that purpose; and
2. managing other rights (including intellectual property rights) in entrants' materials – for example:
    a. ensuring the Promoter will have the right to reproduce and use any photos, videos, artwork, feedback or other ideas entrants share when entering; and
    b. requiring entrants to take part in additional promotional activities (e.g. a photo shoot or interview).

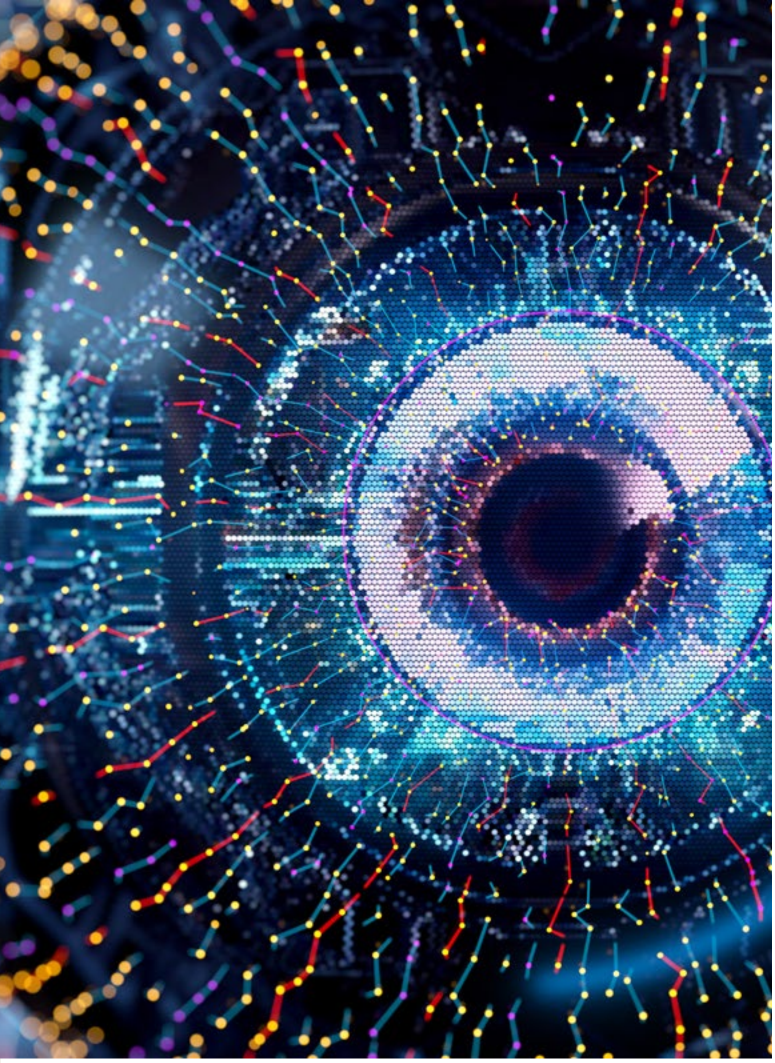
A simple 'T&Cs apply' won't be sufficient to manage these risks, particularly if surrounding materials don't include enough information so as to ensure entrants actually 'sign up' to the T&Cs when entering. Additionally, it's critical to ensure those rights are 'reasonable,' to avoid any carefully crafted T&Cs falling foul of the 'unfair contract terms' regime in the ACL.

Where we can help

It is the Promoter's responsibility to ensure all aspects of a trade promotion comply with these requirements – including ensuring you have compliant T&Cs on all materials, a scrutineer to oversee your prize draws to ensure legal compliance and impartiality, and an approved electronic draw system. There's significant nuance here. For example, there are specific scrutineer requirements for promotions running in New South Wales and South Australia. Promotions involving a draw in Queensland also need to ensure the draw is conducted via an electronic draw system that is approved by the Queensland regulator. Gadens can provide end-to-end coverage for your Trade Promotion, including preparation of T&Cs, managing permit applications, reviewing artwork, conducting prize draws, and arranging scrutineers – all in accordance with those regulations.

Goodbye 'T&Cs apply' and hello compliance!

Questions? Feel free to get in touch with our team here.



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Buyer beware… of AI risks

By Dudley Kneller, Partner, Raisa Blanco, Special Counsel and Chris Girardi, Associate

AI tools are bringing paradigm-shifting opportunities that will transform the way we work and interact.

In a recent McKinsey survey, 78% of respondents indicated that their organisation uses at least some AI tools – an increase from only 50% prior to the generative AI boom of late 2022, spurred on by the public release of OpenAI's ChatGPT. Generative AI use has also skyrocketed, with 71% of respondents now using this technology in some capacity, compared to only 33% just two years ago.

At the risk of prematurely pushing you into the 'trough of disillusionment', as defined in Gartner's famed 'hype cycle', we believe there's a bit more to the puzzle. This is particularly so when looking to procure 'off the shelf' AI products, given your business will be relying on AI developers to have addressed key risks responsibly.

In this article, we set out key technical, legal and ethical risks that can arise depending on your architecture and integration decisions when developing or procuring AI tools. With that in mind, we walk through a case study on how to manage these risks in the context of procuring an increasingly common technology – a consumer chatbot – highlighting critical steps to ensuring you procure AI tools in a commercially responsible manner and in line with community expectations.

Risks

We see risks cropping up in two key areas of your AI workflow – **architecture risks** related to the type of system you choose, and **integration risks** related to the way in which you implement that system.

Architecture risks – what kind of system are you buying?

The Federal Government's voluntary AI safety standard identifies that AI tools can be either general purpose AI systems (**GPAI**) or 'narrow' AI systems (**Narrow AI**). Although voluntary, this is a helpful framework for identifying broad categories of AI tools, which each bring unique risks.

GPAI systems are more flexible, trained to handle a broad range of tasks (like OpenAI's ChatGPT, Google's Gemini or Microsoft's Copilot). However, this breadth and flexibility may pose a number of challenges, including:

1. **Precision** – the tool may provide helpful generic information but perform poorly on specialised tasks;
2. **Hallucination** – the tool may generate plausible but inaccurate information, given it relies on non-specific training data, and often generates outputs based on the probability of a string of words being helpful rather than being factually correct; and
3. **Integration** – broadly integrated tools can create new avenues for malicious activity, including via 'prompt injection' which can cause GPAI tools to behave in unexpected ways and release confidential information.

By contrast **Narrow AI** systems are more targeted, trained to perform specific tasks (like a tool that categorises customer segments, based on certain datapoints). These tools carry unique risks, including:

1. **Overfitting** – the tool may accurately handle specific tasks (e.g. specific customer types) but not generalise to all your intended use-cases (e.g. all customer categories);
2. **Fragility** – the tool's utility may degrade where inputs and integrations vary even slightly from training data or environments; and
3. **Context** – the tool's narrow capabilities and training data may mean it lacks awareness of your commercial, operational and legal context.

Integration risks – where and how are you using that system?

Regardless of whether a system is better classified as GPAI or Narrow AI, the way that the AI system is integrated into your workflow can also pose a number of risks. Some of these risks include:

Risk	Explanation
Accountability and black boxes	Opaque algorithmic decision-making may yield helpful outputs but is not readily explainable to stakeholders and obscures liability in complex or outsourced supply chains. This gives rise to regulatory non-compliance risks (especially where AI tools are used to make decisions about consumers – such as their eligibility for certain products or services).
Bias	Biased models and data may skew outputs, raising accuracy, fairness and discrimination risks. This could also include risks of contravening prohibitions against unfair practices under the Australian Consumer Law, such as misleading and deceptive conduct, unconscionable conduct or breach of statutory guarantees.
Cybersecurity	AI tools may not be sufficiently secure, raising regulatory non-compliance risks relating to specific laws and regulations that impose prescriptive risk management and cybersecurity obligations.
Environment	AI tools require significant energy and water in order to function, raising sustainability risks and contractual non-compliance in respect of any net zero or decarbonisation obligations.
Intellectual Property	Complex licensing arrangements may threaten ownership of models, input data, and generated outputs. Further complexity will arise to the extent that input data and output data involve personal information.
Privacy	AI tools may process and handle individuals' personal information, raising privacy and data breach risks. The nature of certain AI tools may run contrary to the data minimisation principle and transparency requirements under the *Privacy Act 1988* (Cth).

Given these risks, we expect that the government and regulators will consider introducing specific laws and regulations in respect of the development and implementation of AI tools. This is aligned with community expectations, noting that a recent survey in the UK showed that 75% of the public believed that the government and regulators should oversee AI safety and 88% of the public considered it appropriate that the government and regulators should have the power to stop the use of an AI tool if it is deemed to pose a risk of serious harm to individuals.

Management strategies – a case study on customer facing chatbots

Chatbots are a straightforward example of AI that is generally 'ready to ship' – it's easy to connect modern large language models to your business' knowledge base, FAQs and brand voice, to create a new first point of contact for customers. This can save valuable time and money when responding to common queries about payments, shipping and returns.

However, although they're easy to implement, these tools are far from risk free. They need to be carefully assessed and managed to ensure responsible implementation and management. We'll step through a few of these key practical challenges, and steps you can take to manage them.

'Quick' doesn't necessarily mean 'safe'

Many 'off the shelf' customer chatbots have been developed to go to market quickly. In fact, AI tools are now being used to develop new AI tools, like those chatbots. This can create significant risks for your business if you implement an AI tool without robust pre-procurement assessment.

As one example, United Airlines recently experienced a 'prompt injection' vulnerability where a customer was able to obtain a refund by introducing cleverly phrased text into their conversation with a customer service bot.

Regardless of whether United Airlines developed this tool in house, or procured it from a third party, it is clear that more testing needed to be done to ensure it was able to handle the reality of daily customer interactions, and protect the business. These kinds of attacks could potentially result in disclosure of sensitive company information, or personal information, if strong security controls are not in place.

The takeaways: It's critical to complete robust due diligence of any potential tool – especially those 'off the shelf,' over which you have less control. Assuming it did not develop this tool in house, United Airlines could have helped mitigate the risk of this attack through:

1. **A due diligence checklist** – a process to proactively assess the chatbot's functionality and vulnerabilities, as well as how the relevant chatbot vendor complies with key legal and ethical requirements (including its own AI policy, and key privacy laws).

2. **A targeted security questionnaire** – a further process to assess the relevant vendor's security controls, data protection measures, incident response plans, and compliance certifications (e.g. ISO 27001). Questions here could have been tailored to the risk of incorrect information or services being accessible to customers (e.g. via prompt injection), with those questions being tailed by the kinds of data the AI tool may handle.
3. **Dynamic oversight** – a regular review of the relevant vendor, AI tool and its implementation, to ensure the tool remains fit for purpose. This means United Airlines would need to regularly reassess its goals, and vendors' compliance, to ensure they reflect its needs (including the need to mitigate these kinds of vulnerabilities, and respond to evolving technology use patterns).

You'll be liable for representations by your chatbot

Hallucination risks can lead to substantial liabilities, given restrictions on how businesses deal with customers.

For example, Air Canada was recently forced to honour a fake ticket refund policy hallucinated by its chatbot. Perhaps frustratingly, this issue progressed to the Civil Resolution Tribunal of British Columbia. This highlights the critical need for businesses to consider how they will manage these kinds of AI mishaps responsibly – ideally thereby mitigating a potentially costly legal battle.

The takeaway: In addition to the above processes to manage the tool itself, Air Canada could have considered preparing ethical frameworks and guardrails (e.g. an 'AI Policy') to ensure it acted on stakeholders' expectations when AI gets it wrong. This would have potentially enabled Air Canada to target its response to the relevant customer before the lawyers get involved.

A word on privacy and IP

Customer chatbots are at the 'frontline' of a business. Because of that, they handle a lot of customers' information and feedback – many of which can become your business' valuable IP. This can mean, in addition to your organisation, personal information is being accessed by (or transferred to) the AI tool's vendor. In addition to obligations and requirements that apply under applicable privacy laws, there are also community expectations that consumers' personal information will be handled by businesses (including their vendors) in a responsible way. This should be a critical consideration when selecting and procuring the right AI tool for your business.

For example, Cloudflare recently reported its Salesforce instance was accessed by security vulnerabilities in a third party customer chatbot. These kinds of vulnerabilities highlight how commercially sensitive feedback or information may be accessible to both vendors and threat actors alike.

The takeaways: Exposure of this information can be risky, both in terms of compliance with privacy laws, and management of sensitive commercial information and IP. To manage this, it's critical to:

1. **Complete a privacy review** – proactively identify and mitigate privacy risks early in the procurement process to understand how the proposed chatbot will affect the collection, use, and disclosure of personal information. Pay close attention to risky overseas transfers – such as to overseas data centres; and
2. **Consolidate IP licences** – update relevant agreements with customers, staff and suppliers to ensure ownership of input data and generated outputs is managed as intended. This is particularly critical for customer-facing tools that collect or share information with/from people outside of your business.

What's next?

Managing an emerging technology is, of course, an ongoing challenge. We'll continue to provide useful tips to help businesses succeed with AI. Meanwhile it is critical for businesses to review their approach to implementing AI tools, and to consider whether key risks are being managed effectively. Please do not hesitate to contact our team if you would like any further assistance, or to explore these ideas further.

This article was adapted from a piece originally published on Gadens' website.

Evaluating AI safeguards: Is more needed to strengthen consumer protection in the digital age?

By Sinead Lynch, Partner, Wen Wong, Lawyer, Megan Grimshaw, Graduate and Tilly Dalton, Graduate

The Australian Government has been actively reviewing the intersection of artificial intelligence (AI) and consumer protection, recognising the transformative potential of AI technologies and the need for robust legal frameworks to safeguard consumers. This includes producing key reports from the Productivity Commission (PC), Treasury and Commonwealth Scientific and Industrial Research Organisation (CSIRO), which when read together, provide a good insight into the way in which the government is currently leaning, in terms of achieving a balance on harnessing the innovative impact of AI and the need for future legal safeguards to protect consumers and others on usage.

The PC has been tasked, as part of a broader reform agenda, with considering AI's impact on Australia's economy and productivity, and its recent interim report, released in August 2025, has received a flurry of attention. For reference, Gadens recently released an insight article on this topic here.

The PC review runs alongside a number of ongoing regulatory reviews of AI usage, also being undertaken across various sectors. Notably, the Therapeutic Goods Administration (**TGA**) has undertaken a review to identify potential enhancements to its legislative framework, aiming to both mitigate future risks and leverage opportunities associated with AI in the therapeutic goods sector, particularly in relation to software used as medical devices.

The 14 key findings from the TGA's review released in July 2025 can be found here. Overall, the TGA's review broadly confirms that its current frameworks and processes for regulating medical devices incorporating software, along with its ongoing continuous assessment regime, remain appropriate, with only minor legislative changes necessary.

The Department of Health, Disability and Ageing has also published the final report from its overarching review of the use of AI in healthcare settings on their website in March 2025. For reference, that report can be found here.

Further, last week, the Treasury concluded its review on the sufficiency of the Australian Consumer Law (**ACL**), as set out in the *Competition and Consumer Act 2010* (Cth), in protecting consumers and adapting to new digital technologies.

This review included considerations of the adequacy of key sections of the ACL, including prohibitions against misleading and deceptive conduct, false and misleading representations, consumer guarantees to ensure goods and services meet minimum standards, and liability for manufacturers for faulty goods. The Treasury's review concluded that the ACL, when combined with other laws, continues to offer a robust framework for consumer protection in the context of AI. However, ongoing monitoring is essential to ensure its effectiveness as AI technologies evolve.

Before delving further into the Treasury's ACL review and report, it is worth looking at the recent interim output from the PC on its assessment of AI as a key opportunity to mitigate Australia's declining productivity growth.

The PC interim report

The PC Interim report, titled 'Harnessing data and digital technology' (**PC interim report**) released in August 2025, was one of the first government reviews and reports into the usage of AI in Australia. The PC interim report outlines a transformative vision for Australia's digital future, focusing on the economic and productivity potential of digital technologies, especially AI.

Broadly, it concluded that AI is a transformative force for Australian business and can unlock productivity growth, but its benefits depend on strategic implementation and workforce readiness. It warns that over-regulation is likely to stifle innovation and calls for greater clarity and transparency from regulators.

Relevant key insights for consumers

Inquiry	Finding
AI as a driver of productivity and how to enable its productivity potential	The PC estimated that multifactor productivity gains of above 2.3% over the next decade, translating to about 4.3% labour productivity growth.[1] However, the PC emphasised the need for balances and forward-thinking policy frameworks and highlighted that poor regulation could potentially limit these benefits.[2]
Gap analyses	The government should undertake gap analyses on current rules and regulations in relation to the use and risk of AI.
Risks of regulatory overreach	Overly prescriptive or premature regulation could stifle innovation. AI-specific regulation should only be a last resort, where existing regulatory frameworks are unable to be sufficiently adapted to handle the issue and technology-neutral frameworks are not feasible.
Consumers and businesses must trust AI systems	Transparency in algorithmic decision-making and accountability mechanisms are essential.

The Treasury's review of the ACL

The Treasury released the 'Review of AI and the Australian Consumer Law' discussion paper on 15 October 2024, and conducted a review which considered how the ACL is currently positioned to minimise AI harms and establish liability, between releasing the discussion paper and 12 November 2024.

The review aimed to seek stakeholder views on:
- understanding how the ACL applies to AI-enabled goods and services;
- assessing whether the existing ACL protections remain suitable for consumers in the context of AI; and
- the mechanisms for allocating liability among manufacturers and suppliers of AI-enabled goods and services.

On 3 October 2025, the Treasury published the 'Review of AI and the Australian Consumer Law' final report (Treasury final report), which detailed the findings from the review and stakeholder submissions.

The Treasury final report concluded that the ACL, particularly when considered alongside other relevant laws, can continue to protect consumers effectively in the context of AI goods and services. It also concluded that the ACL is broadly capable of adapting to the increasing uptake of AI-enabled products and services. Whilst the review identified several opportunities to improve clarity and certainty in certain provisions, the breadth and flexibility of the ACL's principles-based consumer protections was found to 'remain fit for purpose.'[3]

In confirming the report's findings, Assistant Minister for Productivity, Competition, Charities and Treasury, the Hon Dr Andrew Leigh MP, stated:

"Artificial intelligence should not feel like the wild west. Australians deserve the same consumer protections whether they are buying a toaster, streaming a movie, or using an artificial intelligence app. This review shows our consumer laws are strong enough to cover new technology, with only minor tweaks identified. That gives people confidence to try artificial intelligence, knowing the consumer laws still protect them, and it gives honest businesses clarity about how to compete on fair terms."[4]

Key findings from the Treasury final report

The Treasury final report considers stakeholder feedback and makes six key findings:

Key finding	Summary
Principles-based protections are well adapted for AI	The ACL's broad, technology-neutral protections are generally well adapted to address AI-related consumer risks. However, stakeholders raised nuanced concerns regarding: • psychological risks from AI interactions (e.g. chatbots or virtual assistants); • misleading conduct due to opaque algorithms or personalised advertising; • creative content generated by AI that may infringe on consumer expectations or rights; • consumer guarantees may not clearly apply to software or AI services; and • regulatory capacity to monitor and enforce compliance in fast-evolving AI markets. Despite these concerns, the flexibility of the ACL's consumer guarantees framework, guarantees of acceptable quality and fitness for purpose still apply to AI products, even if they are software-based.
Definitional uncertainty is a barrier	The ACL distinguishes between 'goods' and 'services', but AI-enabled products can often blur these lines due to their dual functionality. For example: • *Is a smart home assistant a good (hardware) or a service (software functionality)?* • *Is an AI-powered app a digital good or a service?* This ambiguity creates legal uncertainty for businesses and consumers. It may also discourage consumers from acquiring AI-enabled goods and services and prevent businesses from investing in AI to improve the goods and services they offer. To resolve such legal uncertainty, there was a recommendation to expand the current definition list of 'goods' within the ACL to expressly cover 'digital products' and other AI-enabled products.
Remedies and liability provisions remain appropriate	Ensuring a clear understanding of rights, remedies and obligations is particularly important to encourage uptake of AI by consumers and across the supply chain. The ACL provides consumers with remedies when goods or services fail to meet guarantees.[5] These include: • repair, replacement, or refund, or • compensation for consequential loss. However, AI can introduce complexity in the supply chain, by posing questions as below: • *who is the manufacturer when software is updated post-sale?* • *what if multiple parties or systems contribute to an AI system?*[6] The Treasury final report recommends clarifying the definition of 'manufacturer', to include digital product creators, which would help assign responsibility more effectively.[7]

Key finding	Summary
Manufacturer defences are broadly appropriate	Manufacturers have a defence under the ACL if they can show: • the defect did not exist at the time of supply, and • they were not responsible for the defect.[8] In the context of AI, manufacturers may retain post-supply control (e.g. remote updates or algorithmic changes). This challenges traditional notions of when a product is 'supplied.' The Final Report suggests technical amendments to ensure these defences operate as intended for software-enabled goods, especially where control continues after delivery.
No immediate need for new ACCC powers	The Australian Competition and Consumer Commission (**ACCC**) has current enforcement powers that are considered sufficient to address AI-related consumer harms. These include seeking injunctions and issuing public warning notices. However, the Final Report recommends ongoing review to ensure the ACCC remains equipped to handle emerging risks, especially as AI becomes more embedded in high-risk sectors.
Australia's protections compare well internationally	The ACL provides similar or better protections than those in the EU, UK, and Singapore - particularly due to the ACL's broad scope and strong enforcement mechanisms. With ongoing work to implement the Australian Government's responses to the recent amendments to the *Privacy Act 1988* (Cth), 2023-2030 Australian Cyber Security Strategy and the consumer recommendations of the ACCC's Digital Platform Services Inquiry, consumer protections may be further supplemented and strengthened via Australia's broader consumer protection framework.[9]

What's next?

Whilst generally supporting the operation of the ACL to regulate AI technology, Treasury recommends that future reforms to the existing ACL are needed to improve consumer safeguards and has called for the ACCC and other regulators to introduce further educational and regulatory guidance on AI and AI-generated goods and services.

This is in the context of other existing reforms that are underway to further strengthen the operation of the ACL for the benefit of consumers, suppliers and manufacturers, including touted reforms to unfair trading practices, the consumer guarantees, as well as supplier indemnification arrangements.[10] Alongside this, the Consumer Affairs Minister has agreed as a priority, to ensure consumer protections laws remains fit-for-purpose to protect consumers using AI-enabled products and services.

These ongoing government and regulatory reviews confirm that flexible regulation, which can evolve with technology and the digital age, is critical to balance consumer protection and safeguards – but achieving this balance does not necessitate new laws. A review and update of current laws, with fresh eyes and a futuristic mindset, appears to be all that is required at present.

1 Page 5, PC Interim Report.
2 Page 6, PC Interim Report.
3 Page 3, Treasury final report.
4 Review confirms consumer law protects Australians in the age of artificial intelligence | Treasury Ministers
5 Page 20, Treasury Final Report.
6 Page 23, Treasury Final Report
7 Note: The Treasury final report also discusses the evidentiary burden in proving liability surrounding AI. In doing so, it considers the EU's proposed Artificial Intelligence Liability Directive (**AILD**) as an attempt to resolve these issues. Whilst not yet implemented, if enacted, the AILD would provide a presumption for causation between the fault of the defendant and the failure of an AI system under certain circumstances. The Final Report concluded there is currently insufficient evidence to show that such an intervention is required in Australia, relying on the well-established principle of Australian common law that one party (the plaintiff) should not be able to hold another party (the defendant) liable for any loss suffered, unless the plaintiff can establish the defendant's conduct caused the plaintiff's loss.
8 Page 26, Treasury Final Report.
9 Page 30, Treasury Final Report.
10 For more information, see Unfair trading practices – supplementary consultation paper | Treasury.gov.au and Consumer Guarantees and Supplier Indemnification under Consumer Law | Treasury.gov.au.

Digital gold or legal minefield? Using stablecoins for business transactions

By Caroline Ord, Partner, Sinead Lynch, Partner, Patrick Simon, Senior Associate, Philip O'Brien, Senior Associate and Kalarni Orr, Graduate

Digital assets, including stablecoins, continue to gain momentum and broader adoption in Australia and globally. Businesses are increasingly exploring their potential use cases, not just as investment vehicles, but also as viable payment solutions. From major corporates to SMEs, businesses are exploring the efficiency and convenience these technologies offer.

Australia is somewhat lagging behind its global counterparts in terms of adoption of digital assets in business transactions, largely due to regulatory uncertainty and the strength of Australia's existing payments system infrastructure. However, recent legislative and policy developments signal a shift: digital assets are becoming an accepted part of the established financial system, with stablecoins in particular receiving support from the Federal Government and regulators.

Companies considering the use of digital assets in their business should nevertheless be aware of the current laws and regulations that may apply to their use. This article provides an overview of the current legal landscape, with a particular focus on stablecoins.

Understanding digital assets, including stablecoins and other cryptocurrencies

At a high level, the terms 'digital assets' and 'cryptocurrency' generally refer to intangible property recorded as entitlements on a cryptographically secured distributed digital ledger.

'Stablecoins' are a form of digital asset that are designed to 'peg' to a fiat currency like the U.S. or Australian dollar and maintain a stable value relative to the specified currency, typically via a one to one redemption mechanism made available to institutional clients. Provided the economic model underpinning a stablecoin functions as intended, this type of digital asset does not have the same price volatility and associated risks of other forms of digital tokens or assets, which makes them potentially attractive for use in business for facilitating payments and settlements.

Legal status of digital assets

Current status

The legal treatment of any particular digital asset depends on its function and structure, and whether it falls under one or more existing definitions of financial products under the *Corporations Act 2001* (Cth) (**Corporations Act**).

For example, ASIC has issued recent guidance and consultation papers which acknowledge that certain stablecoins may constitute 'non-cash payment facilities' under the current financial services law, a type of financial product as defined by the Corporations Act.[1]

Proposed new regulatory frameworks

The Federal Government has recently released exposure drafts of two proposed frameworks that are intended to clarify the legal characterisation of digital assets with certain features, and regulate certain conduct in relation to digital assets under Australian financial services law:

- Exposure Draft Treasury Laws Amendment (Regulating Digital Asset, and Tokenised Custody, Platforms) Bill 2025 (**Digital Asset Bill**) has settled on the terms 'digital assets' and 'digital tokens' as the basis for regulating issuers/operators of 'digital asset platforms' and 'tokenised custody platforms'. A 'digital token' is proposed to be defined as a 'digital object' over which one or more persons are capable of exercising control; and
- Exposure Draft Treasury Laws Amendment Bill 2025: Payments System Modernisation – amendment of the Corporations Act 2001 (**Payments Bill**) proposes to regulate stablecoins with certain features as a 'tokenised stored value facility'.

Once these draft frameworks become law:

- digital asset platforms (eg digital currency exchanges), tokenised custody platforms (e.g. platforms for tokenising real world assets) and tokenised stored value facilities will become subject to a raft of obligations under Australian financial services law; and
- digital assets, or arrangements involving digital assets, that have the features of one or more of the existing financial product categories will continue to be regulated as such under the Corporations Act.

Notably, the Federal Government and regulators have also taken a number of other steps to facilitate use of and consumer protections in relation to payment stablecoins and other digital assets in addition to the exposure draft legislation discussed above, including:

- the recognition of payments involving stablecoins as a payment system that can be regulated by the Reserve Bank of Australia (**RBA**) in the *Treasury Laws Amendment (Payments System Modernisation) Act 2025* passed on 19 September 2025 (**Payments System Act**);
- the launch of Project Acacia by the RBA, a pilot program involving range of organisations, including local fintechs and major banks, trialling the use of payment stablecoins and other forms of digital tokens; and
- ASIC granting an exemption in relation to secondary distribution of certain stablecoins under the *ASIC Corporations (Stablecoin Distribution Exemption) Instrument 2025/631*, which grants relief from regulatory action to specific distribution activities involving a single approved stablecoin, the AUDM. ASIC has also proposed adding a second stablecoin, AUDF, to the relief instrument, with the aim of extending it to other stablecoins

These initiatives reflect a broad commitment by the Federal Government and regulators to embracing the use of stablecoins and embedding them within Australia's existing payments infrastructure. This increasing regulatory clarity and institutional adoption indicates that stablecoins are set to become an increasing fixture for Australian payments systems, and by extension Australian businesses, in the not-too-distant future.

Why are business turning to stablecoins?

Businesses are increasingly using stablecoins for several reasons:

- **Payment efficiency**: Stablecoins can enable faster, near-instantaneous payments and settlements, particularly for cross-border transactions;
- **Reduced costs**: Stablecoins often involve lower transaction fees than banks and credit card issuers;
- **24/7 availability**: Unlike banks and traditional financial instructions with restricted operating hours, stablecoins can be used to transact at any time of day or night, which is also particularly valuable for cross-border transactions.

Does a business require an AFSL to use stablecoins?

The financial services regime under the Corporations Act is complex and an Australian Financial Services Licence (**AFSL**) is required to engage in certain conduct in relation to digital assets that are regulated as financial products.

Business that simply accept payments in stablecoins or use stablecoins to transact with other businesses are unlikely to be required to hold an AFSL.

There are however potential scenarios in which businesses could be deemed to be 'dealing' in regulated stablecoins, thereby triggering an obligation to hold an AFSL. For example:

- **Facilitating or arranging transactions**: If a business operates a platform or service that enables third parties to buy, sell, or exchange regulated stablecoins, it may be 'arranging' for others to deal in a financial product.
- **Custodial or wallet services**: If a business holds stablecoins on behalf of clients (for example, by operating a custodial wallet service or maintaining customer balances in regulated stablecoins pending payment), and facilitates the transfer, acquisition, or

disposal of those stablecoins, it may be 'dealing' in a financial product under the existing law, and may be treated as issuing a digital asset platform under the Digital Asset Bill.

- **Merchant acquiring**: If a business acts as a merchant acquirer or payment gateway, and in doing so, takes possession of regulated stablecoins from customers and subsequently exchanges or disposes of them (for example, converting them to fiat currency for settlement), this may constitute 'dealing'.

The treatment and assessment of whether an entity is 'dealing' in financial products under the Corporations Act is complex and will depend on a range of facts and circumstances, including the nature of its activities and the precise features of the stablecoin. Business that may be considering adopting stablecoins should ensure that they carefully assess the intended uses and seek legal advice prior to adoption.

Key takeaways

For business considering using stablecoins, the key takeaways are that:

- Stablecoins are increasingly being used by businesses to transact with customers and other businesses, particularly those operating in cross-border transactions.
- The Federal Government and regulators are actively working to clarify the Australian regulation of stablecoins.
- Businesses should however be aware that certain uses of stablecoins may trigger regulatory and licensing obligations, including the obligation to hold an AFSL.

As the digital asset sector continues to rapidly evolve, the associated regulatory regimes are attempting to keep pace. Businesses should carefully assess their intended uses of stablecoins and seek legal advice where necessary, to ensure they are compliant with the latest regulatory changes.

Gadens Financial Services Regulation and Compliance team can assist businesses that are considering using stablecoins with advice on the relevant laws and regulations that may apply.

1 ASIC Consultation Paper 381: Updates to INFO 225: Digital assets: Financial products and services, paragraph 21.

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