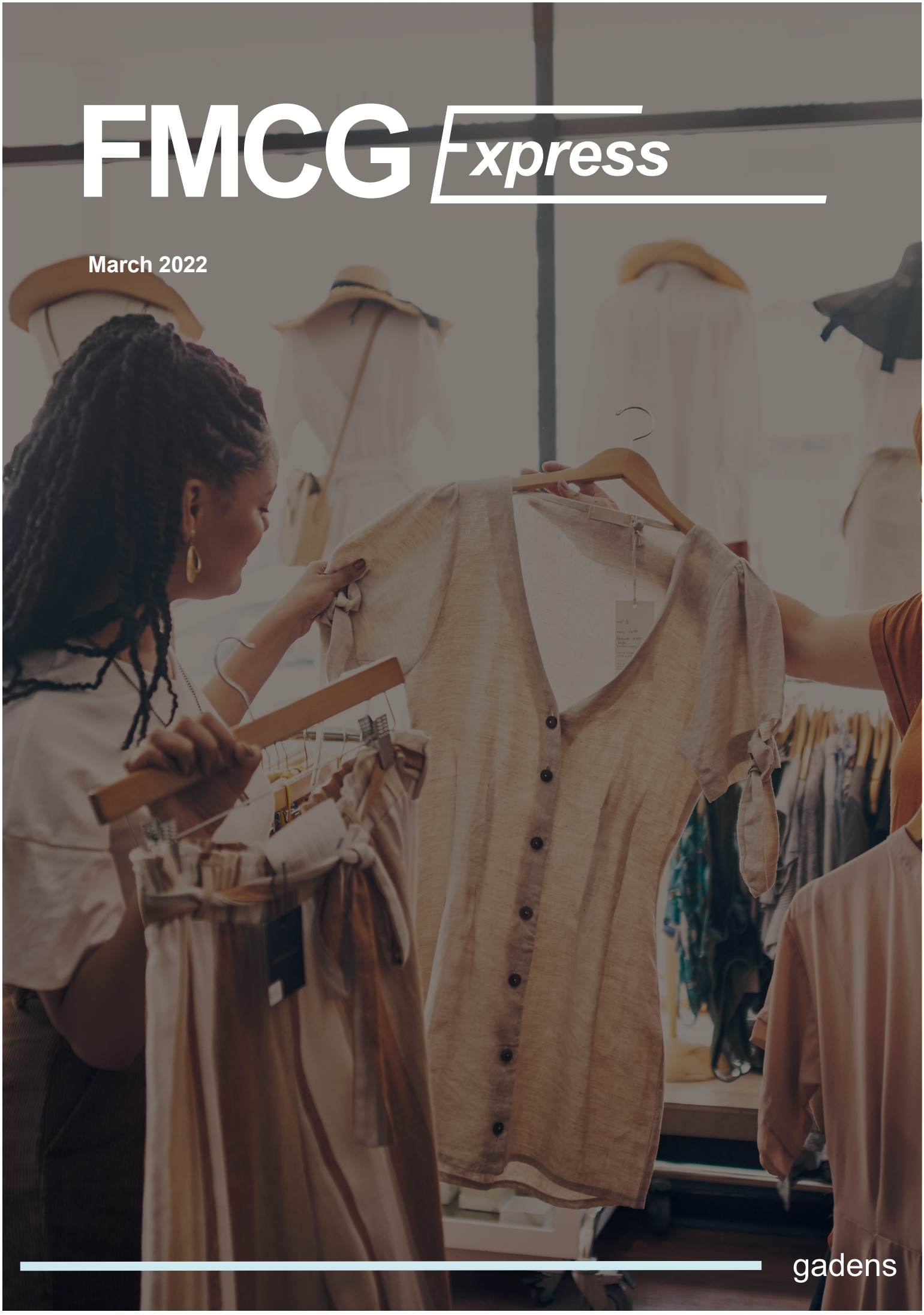
FMCG Express

March 2022



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Welcome to the fifth edition of FMCG *Express*. While I have enjoyed contributing to and learning from the previous publications, I am delighted to take over the Editor role going forward. Our previous Editor, Hazel McDwyer, has returned to practice law in Ireland, and we thank her for her efforts in establishing this informative and well-received publication.

What's in store for the first edition of 2022? We hope you as our readers appreciate the contributions from our brilliant team, catching up on the issues facing our clients, and reviewing potential legal developments in the FMCG space. With many COVID-related restrictions now lifted, we expect to see a return to in-person events and experiences, which is great news for our hospitality and retail clients.

David Smith provides an interesting analysis of the proposed changes to the unfair contracts regulatory regime. The government has stated that the current regime is clearly not acting as a sufficient deterrent to businesses, with unfair terms still prevalent in standard form contracts. If implemented these changes will have wide reaching, and potentially very expensive, ramifications. The ACL certainly has the government's attention, with repair and warranty law reforms also mooted, and Joseph Abi-Hanna has provided a summary of those proposed changes.

Siobhan Mulcahy and her team have provided some helpful tips on labour management in the 'new, new normal' phase of the pandemic response. Alexandra Walker has also reviewed Victorian rent relief provisions for small businesses and the impact those provisions may have, and Janine Santamaria has provided some commentary on the situation in NSW.

We hope you enjoy this edition of FMCG *Express*. Please reach out if you have any questions or feedback – we love hearing from you.

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Unfair contract terms – big changes one step closer as Bill introduced

By David Smith, Partner and Eve Lillas, Associate

On 9 February 2022 the Commonwealth Government introduced to Parliament the Treasury Laws Amendment (Enhancing Tax Integrity and Supporting Business Investment) Bill 2022 (Bill), including the much anticipated changes to the unfair contract terms regime.

The Explanatory Memorandum and Second Reading Speech accompanying the Bill emphasise that the amendments to the Australian Consumer Law (ACL) and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) aim to strengthen the existing unfair contract terms provisions, expand the class of contracts covered and introduce civil penalty provisions.

The government has stated that the current regime is clearly not acting as a sufficient deterrent to businesses, with unfair terms still prevalent in standard form contracts. Bearing in mind the new civil penalty provisions, which could see large penalties apply, businesses should look to review their standard form contract terms.

Background

The current unfair contract terms regime is contained in the ACL and, for financial products and services, in the ASIC Act. The regime applies to a 'standard form contract' that is a 'consumer contract' or 'small business contract' as defined under the regime. Further details regarding what types of contracts the regime applies to can be found in our previous article here.

In November 2020 relevant Commonwealth, State and Territory consumer affairs ministers announced their intention to amend the current unfair contracts regime under the ACL and the ASIC Act. Following the release of an exposure draft of the legislation, the government requested stakeholder views on the proposed amendments.

Public consultation on the exposure draft legislation closed on 20 September 2021. A number of interested parties provided submissions regarding the proposed changes including the Australian Automotive Dealer Association, the Australian Finance Industry Association and the Telecommunications Industry Ombudsman.

The Bill introduced to the House of Representatives on 9 February 2022 is substantially similar to the draft legislation, with some changes including:

- further changes to the definition of a 'small business contract' under the ASIC Act;
- a broadening of what can be considered when determining whether a contract is a 'standard form contract'; and
- additional exclusions of certain contracts from the unfair contract terms regime.

Key changes

The key changes to the current unfair contract terms regime under the Bill are:

a. An unfair contract term will no longer be simply void and unenforceable – it will be unlawful and the courts will be able to impose a remedy such as a civil penalty. Courts will also be able to make orders to vary or refuse to enforce a contract in order to prevent likely loss or damages. This will significantly raise the risk for businesses. Consumer advocacy groups, and regulators such as the ACCC, have advocated for this change to provide a stronger incentive to businesses to remove unfair terms from their standard form contracts.

   For a company, the maximum amount of the penalty will be the greater of:

   - $10 million;
   - three times the value of the benefit the company obtained from the breach of the law (if the court can determine the value of that benefit); or
   - if the court cannot determine the value of that benefit, 10% of the company's annual turnover.

   For a person other than a company (e.g. a sole trader or partnership), the maximum penalty will be $500,000.

   Further, each unfair contract term in the same contract will give rise to a separate breach of the law and at least theoretically, could trigger a separate penalty.

b. Many more contracts will be considered 'small business contracts'.

   Essentially, a business contract will fall within the regime if one party to the contract (importantly, this could be either the supplier or the customer) has either:

   - fewer than 100 employees; or
   - annual turnover below $10 million.

   However under the ASIC Act (which applies in relation to financial products and services) there will be an additional requirement that must be met, being that the upfront price payable under the contract does not exceed $5 million.

c. A contract may be considered a 'standard form contract' despite the opportunity for:

   - a party to negotiate minor changes to the contract;
   - a party to select a term from a range of options provided; or
   - a party to another contract or proposed contract to negotiate terms of the other contract or proposed contract. This is to clarify that if some (but not all) consumers or small businesses can negotiate the terms of a contract that is issued to them, the contract could still be a standard form contract.

d. Certain types of contracts will be excluded from the unfair contracts regime:

   - the operating rules of licensed financial markets;
   - the operating rules of licensed clearing and settlement facilities;
   - real time gross settlement systems approved as payment and settlement systems by the Reserve Bank of Australia; and
   - certain life insurance contracts.

If passed by the Commonwealth Parliament, the amended unfair contract terms regime will take effect 12 months after the legislation receives the Royal Assent. It will then apply to standard form contracts that are new or renewed. Otherwise it will not apply to existing standard form contracts, except to terms that are amended after the legislation commences.

The government has extended this 'compliance period' from 6-12 months from the initial draft legislation. This is to allow businesses time to make necessary changes to comply with the updated regime.

What next?

Businesses should start planning for the fact that they will probably need to implement a project to:

- identify all of their contracts that might be considered 'standard form contracts' that are entered with consumers or small businesses, for example standard terms of sale, app licensing terms, loan agreements or standard purchase order terms; and
- have them reviewed and amended to remove any 'unfair' terms, whilst minimising any commercial disadvantage to the business from these amendments.

For a large business that may use numerous template agreements and sets of standard terms across its operations, this could be a substantial project.

Hotspots in labour management: Managing the new, new normal

By Siobhan Mulcahy, Partner, Diana Diaz, Special Counsel and Sara Demetrios, Lawyer

For the last two years, governments and businesses alike have been managing the risks associated with COVID-19 by requiring workers to take steps such as working from home where possible, maintaining social distancing and working in reduced density workplaces.

While several Australian States and Territories took steps to end lockdowns and reopen their economies at the end of 2021, in 2022 we are now facing a stage in this pandemic that will likely see life and work return to (almost) normal.

Below we discuss two key ways in which this new phase of the pandemic response is affecting business responses to labour management issues.

Managing tensions in COVID-19 risk management

Despite the easing of government pandemic restrictions, the risks associated with COVID-19 have not changed.

What has changed is the level of risk that governments now consider to be acceptable, and this is evident in the continued relaxing and winding back of many longstanding public health order restrictions (e.g. the definition of who is considered a 'close contact' and is required to isolate).

These changes to the public health response will make managing employers' occupational health and safety (OHS) obligations tricky.

Although by now employers are acutely aware of the steps they must take to manage their OHS obligations during the pandemic, the difficulty is more likely to come from managing employee expectations.

This is where employer policies must play a part – these should be updated to reflect the business' response to changing public health orders while ensuring that the business continues to meet its OHS obligations. Working alongside company policies, businesses will also need to focus on the way that they communicate any changes to employees, and provide managers with the tools to empower them to have frank discussions with employees and respond to any employee concerns.

Absence management

As more and more of us return to pre-pandemic patterns, the country heads towards winter and the virus continues to spread, short-term labour shortages are likely to be an ongoing theme throughout 2022.

The reopening of international borders should provide some reprieve as workers and students return to Australia. However, a well thought out absence management strategy should go further than merely relying on using foreign workers to plug gaps.

For example, employers with enterprise agreements that are due to expire in 2022 should consider whether their agreements provide them with the flexibility needed to manage labour shortages. For example:

- Does the agreement limit the use of casual or labour hire workers?
- Do classifications allow for employees to be temporarily redeployed to perform other roles or duties? Noting that introducing this flexibility may affect the cost of labour if not properly managed.

For businesses that rely on labour hire workers engaged under an 'Odco' model (where workers are engaged as independent contractors and on-hired to clients of the labour hire provider), the recent decision of the High Court in the Personnel Contracting[1] case will mean that many of these arrangements will be scrutinised in the coming months. While this is unlikely to result in significant day-to-day changes for businesses that host labour hire workers, the decision may lead labour hire providers to reconsider their business model and this may have flow on financial effects for clients.

For businesses that rely on directly-engaged casual labour to deal with labour shortages, the introduction of casual conversion provisions in the National Employment Standards in 2021 may affect how much reliance a business places on this part of the labour pool in the medium to long term.

Lastly, a heavy reliance on temporary and short-term labour must also be considered from the perspective of an employer's OHS obligations. Supervising and training a revolving door of new workers while businesses are already stretched will continue to create challenges. Businesses that have not considered these additional risks would do well to take a step back and understand whether enough is being done to comply with the employer's legal obligations and safeguard the health and safety of these temporary employees.

There are of course no easy answers and businesses will need to continue to be agile when responding to the ever evolving pandemic landscape. However, by taking the time to engage in strategic workforce planning, businesses can give themselves an opportunity to manage workforce shortages.

1 https://eresources.hcourt.gov.au/showCase/2022/HCA/1

Green is the new black. But how green is too green?

By Antoine Pace, Partner

Human society's impact on the environment and sustainability are increasingly front of mind for Australian communities and consumers generally. In turn, brands are keen to highlight their environmental credentials to win consumers' hearts and minds (and wallets). However, the tendency of some marketers to overstate a product's green credentials (or just plain lie about them) can undermine the community's confidence in claims of this nature.

How far is too far? What can a brand to do highlight its green credentials?

AANA Environmental Claims Code

To provide some guidance, the Australian Association of National Advertisers (**AANA**) established the AANA Environmental Claims Code (**Code**), whose aim is to guide advertisers and marketers when making 'environmental claims' in 'advertising or marketing communications' and to increase consumer confidence for the overall benefit of consumers, the environment and industry.

There are three elements to the Code in relation to environmental claims in advertising and marketing communications:

1. **Truthful and factual representation**

   The advertiser must ensure that the claim is not misleading or deceptive, and that all disclaimers are presented in a manner that can be clearly understood by consumers.

   The Practice Note to the Environment Code states that:

> **"It is not intended that legal tests [will] be applied to determine whether advertisements are misleading or deceptive or likely to mislead or deceive, in the areas of concern to this Code. Instead consideration will be given as to whether the average consumer in the target market will be likely to be misled or deceived by the material."**

2. **Genuine benefit to the environment**

   Environmental claims must clearly explain the significance of the claim. That significance must not be overstated.

3. **Substantiation**

   An advertiser must be able to substantiate and must verify its environmental claims. Any testimonials must reflect genuine, informed and the current opinion of the person.

It is important to note that the Code only applies to advertising or marketing communications. It does not extend to product labels and packaging. However, if images of labels or packaging appears in an advertisement or marketing communication, the Code will apply.

Illustrations

These principles were tested in a case involving billboard ads for natural gas published by the Australian Gas Network. The ads featured a picture of man in a kitchen holding a tray of lasagne and the words:

> **“Greener than anything you’re cooking tonight. Love Cleaner Energy, Love Natural Gas”**

Members of the community complained that the ads fell foul of the Code for various reasons, including the fact that natural gas is carbon intensive, and that certain extraction methods used caused harm to the environment. The advertiser countered, arguing that natural gas had a smaller environmental impact compared to grid electricity, citing the Department of Environment and Energy, National Greenhouse Accounts Factors report.

However, the Ads Standards Community Panel ruled (by a majority) that this was not the overall effect of the billboard. The Panel concluded that an average member of the community would consider the advertisement to be a claim that gas was greener than all other energy sources, including renewables, and that this was misleading. The Panel also stated that when considered in combination with the phrase ‘Love Cleaner Energy’ and in the context of an advertisement for natural gas, the statement ‘greener than anything you’re cooking tonight’ was likely to be interpreted by a reasonable person as a statement that suggested that natural gas was greener than any other potential cooking method, including renewables.

Validation

In other cases, the Panel has concluded that Environmental Claims that can be validated with independent research will not be seen to breach the Code. See for instance, the decisions in Vitasoy and in Reckitt Benckiser’s Finish Quantum Ultimate Pro ads, as well as Carlton and United Breweries’ ‘VB Brewed with 100% Solar’ campaign.

Puffery

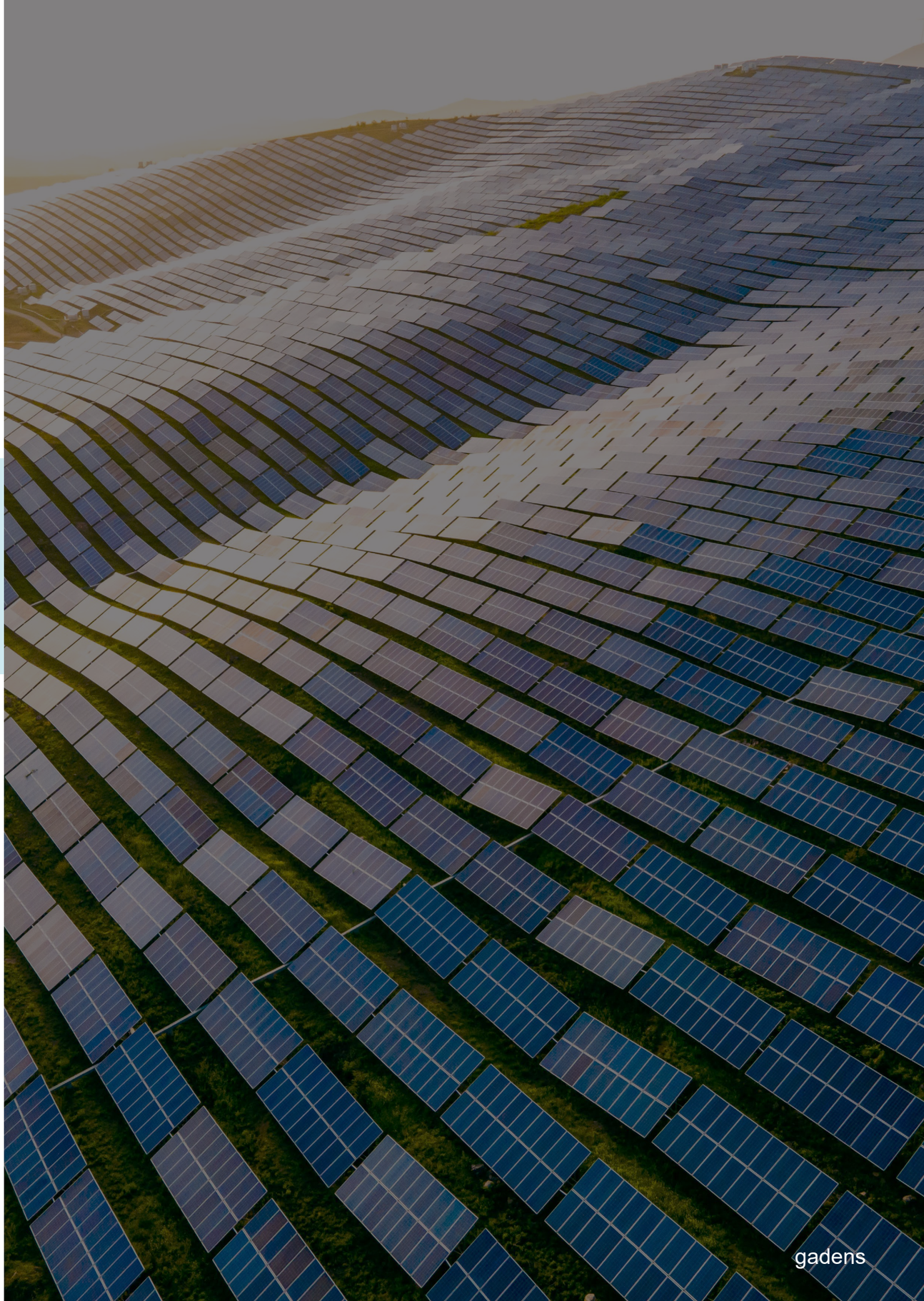
Of course, general puffery might not breach the Code, but some care needs to be taken. The Panel has concluded in a number of cases that general puffery is a way of exaggerating the benefits of the product/service being promoted in a factual way. The conclusion was reached in relation to SodaStream’s ‘Save the Planet’ ad campaign, and Telstra’s ‘Blocks of CO_2’ advertisements.

Substantiation

Presenting factual information on the environmental benefits of a product/service will not be seen to breach the Code. The Panel reached this conclusion in Carlton and United Breweries’ ‘VB Brewed with 100% Solar’ campaign. Further, the Panel has concluded that Environmental claims that provide supporting information in a website link will not be seen to breach the Code provided that the material accessible in that link itself complies, as demonstrated in its decision in Tyre Stewardship Australia’s ‘Synthetic Sports Field Surface’ ad.

Conclusion

In summary, making environmental claims in advertising is not for the faint-hearted. There will be many members of your audience – both consumers and competitors – who will carefully scrutinise your claims, and make a complaint if they are sufficiently aggrieved. Of course being able to make claims of this nature can substantially benefit your business, if made in compliance with the Code.



Drafting and enforcing early termination clauses

By Breanna Davies, Partner and Brittany Dorney, Lawyer

An early termination clause confers a right to end a contract prior to the contract naturally concluding or before the terms of the contract have been satisfied. Depending on the bargaining positions of the contracting parties, this right can be mutual or only available to one party. Early termination clauses may provide for such termination with cause or without cause (i.e. for convenience).

How to terminate a contract early

There are various ways in which a contract may be terminated early, including:

- contractual right – where an event that must occur under the contract, does not occur such that the contract is prevented from commencing or a right to terminate is triggered;
- breach of contract – under common law, if a serious breach of the contract occurs or an essential term is breached;
- force majeure clause – where an extraordinary circumstance or event (such as a natural disaster, drought, war etc.) occurs such that the contract cannot be performed;
- repudiation – where the other party repudiates the contract;
- termination for convenience – unilateral termination of the contract without cause; and
- by agreement – where the parties mutually agree to terminate the contract.

Drafting early termination clauses

If not correctly drafted, there is a risk that an early termination clause may be unenforceable.

When drafting an early termination clause the following should be considered:

- whether the early termination right should be mutual or to the benefit of one party only;
- that the trigger event/s are drafted in an unambiguous manner, including whether the breaching party is afforded an opportunity to remedy the breach/es;
- identification of the termination mechanism to be effected including the issue of notice;
- whether compensation should be payable, and if so clearly articulate the compensation mechanism; and
- express any waiver rights a party may have under the early termination clause and whether the entitlement to terminate early will persist if performance under the contract continues.

Early termination and good faith

> **Where a party elects to terminate a contract for cause, as opposed to termination for convenience, there may be an implied duty to act in good faith.[1]**

The imposition of good faith requires a party to act honestly, reasonably and to cooperate in relation to matters where the contract does not define rights and obligations. Acting dishonestly, capriciously and / or acting for an extraneous purpose may be considered to be indicators of failing to act in good faith.[2]

The courts however, have clarified that the duty of good faith does not go so far as to require the party to act in the interests of the other contracting parties or to subordinate the party's own legitimate interests.[3]

In contrast, it is less likely that a duty of good faith will be implied for termination for convenience, especially where the parties are sophisticated commercial entities. In these circumstances, the Courts will look to apply the express terms of the contract.

Early termination and compensation

Adequate compensation needs to be provided in a termination for convenience clause to ensure that the clause is not unenforceable for want of consideration. Despite the prevalence of termination for convenience clauses, there is limited guidance from the Courts as to whether compensation needs to be provided to the terminated party, and if so, what the quantum of such compensation needs to be. If not adequately articulated, the Court may need to imply what is a reasonable amount of consideration. Inclusion of a termination payment obligation may help to avoid a dispute as to whether an agreement containing a termination for convenience clause is void for a lack of consideration (and may even demonstrate that the exercise of the right was in good faith).

Australian Consumer Law

Also, if the Australian Consumer Law is applicable to the contract, there is the potential that a termination clause (particularly a termination for convenience only in favour of the more powerful party) could be void.

Alternative options

The commercial objectives of the contracting parties may be such that performance of the contract outweighs the benefit of terminating it early. Could terminating the contract early detrimentally affect relationships with third parties and stakeholders? Should alternative dispute resolution options be considered? Would a court order for an injunction or specific performance be more appropriate?

Legal opinion should be sought before any agreement is terminated, particularly when seeking to rely on a termination for convenience clause. If you would like us to review any termination clauses in your standard form agreements, we can assist.

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1 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 – 279-280 per Priestly JA.

2 *Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd* [2007] VSC 200.

3 *Sundarajah v Teachers Federation Health* (2011) 283 ALR 720.

Privacy reforms for the social media age: Online Privacy Bill

By Dudley Kneller, Partner, Raisa Blanco, Senior Associate, Stephanie Rawlinson, Senior Associate and Joseph Abi-Hanna, Associate

The Australian Government is increasingly interested in regulating the collection and handling of consumer data by social media platforms, data brokers and online platforms that rely on the collection of personal information or trade in personal information as part of their business model.

The Attorney-General's Department has released the exposure draft of the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill (Online Privacy Bill).

The Online Privacy Bill sets out amendments to the *Privacy Act 1988* (Cth) (Privacy Act) to introduce a framework for the development and enforcement of a binding online privacy code (OP Code).

The purpose of the OP Code is to provide greater protection to consumers who use social media and online platforms that rely on the provision of consumer data against misuse of their personal information.

The OP Code could apply to businesses that provide platforms that enable social interactions between end users and allows end users to post material on such platforms. This broad ambit could potentially include mobile applications that permit reviews or comments, and those that permit the publication of other user generated materials.

Who will need to comply with the OP Code?

OP Organisations

The Explanatory Paper to the Online Privacy Bill provides that the OP Code will apply to private sector organisations (**OP Organisations**) that:

a. provide an electronic service which has the sole or primary purpose of enabling social interaction between two or more end-users;

b. allows interactions between end-users; and

c. allows end-users to post material on the service.

These OP Organisations would include organisations that provide social media services, organisations that provide data brokerage services and large online platforms.

Social media services include social media platforms, dating applications, online content services, online blogging or forum sites, gaming platforms that enable end users to interact with other end users, and online messaging and video-conferencing platforms.

Examples of data brokerage services include organisations that collect personal information from an individual via an electronic service, organisations that collect personal information from another entity that collected the personal information via an electronic service (including a social media service), and organisations that collect personal information for the sole or primary purpose of disclosing the personal information in the course of providing a service.

While large online platforms include organisations that collect personal information about an individual in the course of or in connection with providing access to information, goods or services by use of an electronic service, organisations that have more than 2.5 million end users in Australia in the previous 12 months, or organisations that have 2.5 million end users in the current year (if they did not carry on business in Australia in the previous year).

Who does not need to comply?

The OP Code does not apply to Australian Government agencies. These agencies are subject to the *Privacy (Australian Government Agencies – Governance) APP Code 2017*.

The OP Code also does not apply to organisations who undertake an act or practice done:

a. under contract with an Australian Government agency; or

b. outside of Australia, in compliance with an applicable foreign law.

Extraterritoriality

At present, the *Privacy Act 1988* (Cth) will only apply to foreign organisations if they 'collect or hold' personal information from sources in Australia.

If the Online Privacy Bill is passed, any foreign organisation that carries on business in Australia, but which may not 'collect or hold' personal information from sources in Australia, will be required to comply with the *Privacy Act 1988* (Cth).

What is required under the proposed OP Code?

Existing Australian Privacy Principles that the OP Code must address

The OP Code is required to set out how the following Australian Privacy Principles (**APPs**) are to apply to OP Organisations:

a. **APP 1.4(c):** The OP Code will require OP Organisations to ensure their privacy policies are clear and explain the purpose for which they collect, hold, use and disclose personal information.

b. **APP 5:** A requirement that all notices provided to individuals about the collection of individuals' personal information is clear, understandable, current and provided in a timely manner.

c. **APP 3 and APP 6:** The OP Code will set out how OP Organisations are required to comply with APP 3 and APP 6, including in relation to consent. For categories of personal information the Privacy Act treats as 'sensitive information' organisations will also need to seek renewed consent periodically or when circumstances change.

New requirements in the OP Code

a. **Ceasing to use or disclose personal information upon request**

OP Organisations will be required under the OP Code to take such steps as are reasonable in the circumstances to not use or disclose, or not to further disclose, an individual's personal information if requested by the individual. For example, this may occur if an individual does not want their personal information disclosed for the purposes of direct marketing. This does not amount to a right to be forgotten (as is seen in some other jurisdictions) but rather that an OP Organisation should cease to use or disclose personal information if requested to do so.

b. **Vulnerable groups and children**

The OP Code will also include specific provisions that relate to children and other individuals who are physically or legally incapable of giving consent to the collection, use or disclosure of personal information and how children and their parents/guardians will be able to provide consent to the collection, use or disclosure of the child's personal information.

The OP Code may also set out what constitutes 'reasonable steps', or maters to take into account when considering whether the collection, use or disclosure of a child's personal information is fair and reasonable in the circumstances.

Optional requirements that may be included in the Code

The OP Code-making powers provide that, if the Commission or the OP Code developer wish to use them, they may expand or clarify the obligation and procedures of the Code.

How does the OP Code and APP Code or OP Code and Consumer Data Right interact?

Currently, the Privacy Commissioner has the power to create:

a. an APP Code, which details the specific requirements that certain entities must comply with in relation to one or more APPs; or

b. a credit reporting code (**CR Code**), which provides further information on the manner in which the Privacy Act's credit reporting provisions will apply.

The OP Code would represent a third category of mandatory codes, which may be created under the Privacy Act. As multiple codes may apply to the same entity, technical amendments must be made to the Privacy Act to clarify which code will apply in the event of any inconsistency between the OP Code and any other code.

The Online Privacy Bill provides that the OP Code will take precedence to the extent of any inconsistency with an APP Code. At this stage, the Online Privacy Bill does not provide guidance on inconsistencies between the OP Code and the CR Code.

What are the consequences for non-compliance?

The maximum penalty under the Privacy Act is currently $2.1 million. If the Online Privacy Bill is passed, the maximum penalty will be increased to:

a. $10 million; or

b. three times the value of any benefit obtained through the misuse of the information; or

c. 10% of the breaching entity's Australian turnover.

Practical steps

The Online Privacy Bill and ongoing review of the Privacy Act is part of a trend across the globe, and particularly in the European Union, towards greater consumer control and regulatory intervention to ensure transparency and compliance by social media companies and online platforms that trade in personal information.

While we wait to see if the Online Privacy Bill receives assent through parliament, and ultimately what amendments are made to the Privacy Act, the Online Privacy Bill acts as a timely reminder to businesses that collect and process large volumes of user data to be accountable to and comply with the requirements of the Privacy Act.

In particular, we recommend that businesses who are likely to be considered OP Organisations for the purpose of the Online Privacy Bill:

a. update their privacy policies and notices to ensure that they clearly explain for what purposes they collect, hold use and disclose personal information;

b. ensure that any privacy policies are readily accessible by both users and non-users of their services;

c. provide clear, understandable, current and timely notice to consumers of whom they collect personal information from, where that personal information is stored and for how long;

d. be transparent with consumer about the instances where personal information is disclosed, including to what related companies and for what purpose; and

e. seek prior express consent from individuals from whom they collect, use or disclose personal information from.

Approved by who? Referring to government in advertising

By Joseph Abi-Hanna, Associate and Alistair MacLennan, Paralegal

Two noteworthy developments provide a timely reminder of the importance of exercising caution when referring to government in advertising:

a. In January 2022, the Australian Competition and Consumer Commission (ACCC) filed an appeal against the decision of the Federal Court to impose a penalty of $1 million on Employsure Pty Ltd for falsely representing that it was affiliated with Fair Work Australia and the Fair Work Ombudsman.[1] The ACCC contends that the penalty order is manifestly inadequate, having previously sought a penalty of $5 million.[2]

b. In September 2021, the Therapeutic Goods Administration (TGA) published guidance to clarify that therapeutic goods advertising must not use statements such as 'TGA approved' or 'TGA registered', among other things. The new TGA Advertising Code (Code) came into effect in January 2022 and prohibits the giving of endorsements about therapeutic goods by governments or government bodies in therapeutic goods advertising in the absence of appropriate permission.[3]

ACCC v Employsure[4]

The Australian Consumer Law prohibits engagement in misleading or deceptive conduct or the making of certain false or misleading representations when advertising goods and services. If a business claims that it is endorsed by, affiliated with or otherwise associated with a government body, when this is not the case, there is a risk that these claims will fall within the scope of these prohibitions. The Full Federal Court's decision in ACCC v Employsure provides a useful case study in this regard.

Employsure used keywords such as 'fair work commission', 'fair work Australia', and 'fair work ombudsman' in their advertising on the Google Ads platform. This meant that when a person typed these terms into Google and pressed enter, they were presented with an Employsure advertisement at the top of the page. While such advertisements included an 'AD' icon, they also contained references to government bodies, represented that advice or help was 'free' and made no reference to Employsure or the fact that the link would take users to a private company.

The Court considered the target audience, or relevant class, for these advertisements. It found that members of the relevant class were from a diverse range of backgrounds with varying levels of intelligence, education, experience, digital and commercial sophistication and may be seeking employment advice in situations of urgency. Ultimately, the Court concluded that these advertisements did, and were likely to mislead the relevant class of business owners/employers seeking employment advice into believing that Employsure was affiliated with a government body.

Employsure was fined $1 million for this conduct. However, the decision has been appealed by the ACCC on the grounds that the fine is manifestly inadequate. The ACCC is seeking a larger penalty to deter online advertisers from misleading consumers about their identity. This case demonstrates the risks inherent in search engine marketing, where there is limited space to make representations to consumers. A strategy designed to drive up site traffic and build customer trust could be risky if it also misleads customers as to the nature of the business, products and/or services being advertised.

Therapeutic Goods Advertising

The TGA's guidance provides that therapeutic goods advertising must not:

a. use a government logo or imply that an Australian or foreign government endorses a therapeutic good;

b. use statements such as 'TGA Approved', 'TGA Registered' or 'FDA Approved'; and

c. make broad statements about being listed, registered or included in the Australia Register of Therapeutic Goods (**ARTG**) without including the ARTG number.

> **The TGA guidance is useful when considering the Code, which specifically prohibits endorsements being given (whether expressly or by implication) by a government or government body, unless otherwise permitted by law or by an employee or contractor of such a body.**

A reference to a government body may also contravene the Code's general requirements relating to therapeutic goods advertising. For example, the Code requires advertisements about therapeutic goods to be accurate, balanced and not misleading or likely to be misleading.

So what can I include in my advertising?

When referring to the government in advertising, you should always consider whether:

a. the claim you are making about your relationship with the government is true and accurate;

b. it is clear for the advertisement that goods or services are being offered by your business in a private capacity, and not by, or on behalf of, a government;

c. the advertising content and medium is appropriate having regard to the representations you wish to make; and

d. in relation to therapeutic good advertising:

   i. you are representing that a good is endorsed or approved by the TGA or a similar body (e.g. 'included on ARTG' or 'TGA approved'); or

   ii. you are referring to the good's ARTG entry in a compliant way (e.g. 'Product X is entered on the ARTG [ARTG No. X]').

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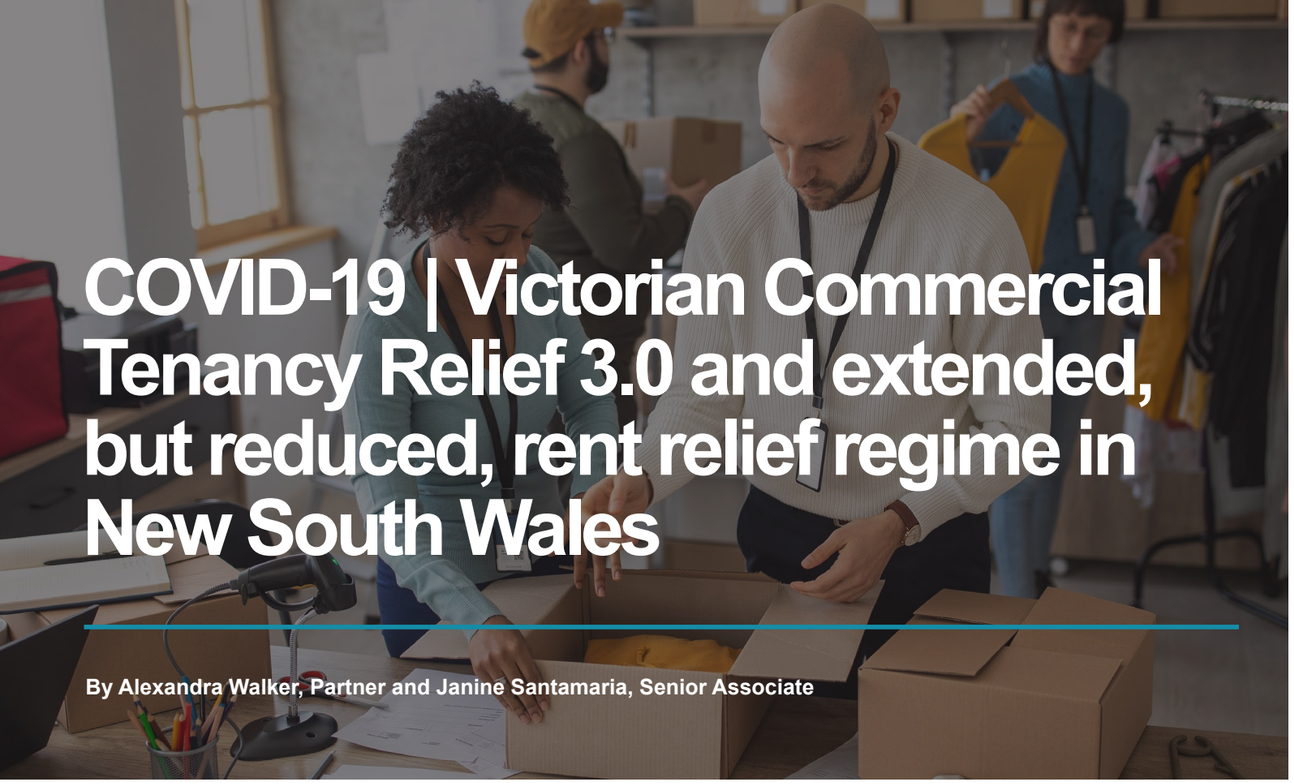
1 https://www.accc.gov.au/media-release/accc-appeals-1-million-penalty-in-employsure-google-ads-case

2 https://www.tga.gov.au/claim-tga-approved-must-not-be-used-advertising#:~:text=Advertisers%20must%20not%20use%20terms,of%20Arms%20is%20also%20prohibited

3 https://www.legislation.gov.au/Details/F2021L01661

4 *Australian Competition and Consumer Commission v Employsure Pty Limited* [2021] FCAFC 142



COVID-19 | Victorian Commercial Tenancy Relief 3.0 and extended, but reduced, rent relief regime in New South Wales

By Alexandra Walker, Partner and Janine Santamaria, Senior Associate

In response to the ongoing impact of COVID-19, the *Victorian Government has now released the Commercial Tenancy Relief Scheme Regulations 2022* (Vic) (2022 Regulations) which extends the entitlement to rent relief and related protections for certain small businesses.

What has changed in Victoria?

Our previous publication on the *Commercial Tenancy Relief Scheme Regulations 2021* (**2021 Regulations**) can be found here.

The 2022 Regulations are substantively similar to the 2021 Regulations however certain key differences are evident. Those differences are summarised below:

1. Protection Period

The 2022 Regulations apply retrospectively for the **protection period** of 16 January 2022 to 15 March 2022.

2. Eligibility

The criteria for an eligible lease remains largely unchanged.

However, where previously an **eligible tenant** referred to an SME with an annual turnover less than $50 million, the 2022 Regulations rename this concept as a **small entity** and reduce the annual turnover threshold to $10 million. Criteria for an **eligible tenant** is otherwise unchanged.

An **eligible lease** is now a retail lease or commercial lease or licence:

- that was in effect on 16 January 2022;
- under which the tenant is an **eligible tenant**; and
- that is not excluded under the prescribed exclusions (e.g. an agricultural lease or a lease to a listed corporation).

Extensions, renewals and variations on substantially the same terms are still considered a continuation of an existing lease.

A tenant is now an **eligible tenant** if the tenant:

- is a **small entity** (the tenant's turnover for the financial year ending 30 June 2021 must be less than $10 million or, if the tenant did not carry on business for the whole of that financial year, its turnover for the financial year ending 30 June 2022 must be likely to be less than $10 million);
- carried on business in Australia as at 16 January 2022;
- satisfies the **decline in turnover test**; and
- is not excluded under the prescribed exclusions (e.g. a company in liquidation or an Australian Government agency).

The definition of turnover and the grouping provisions relevant to assessing the $10 million turnover threshold both remain unchanged from the 2021 Regulations.

3. Decline in Turnover Test

The decline in turnover test still requires a tenant to demonstrate a decline in turnover of 30% or more but the period for assessing this decline has changed.

In most cases the **turnover test period** is now, either:

- the month of January 2022, to be compared against the tenant's turnover for the month of January 2020; or
- if the tenant's business temporarily ceased trading in January 2020 for a week or more due to an event or circumstances outside the ordinary course of the tenant's business and the tenant's business resumed trading before 16 January 2022, the month of December 2021, to be compared against the tenant's turnover for the month of December 2019.

However, similar alternative comparison turnover methods still apply in cases where tenants have insufficient comparison turnover or where intervening factors have impacted turnover.

4. Deferred Rent

Payment of deferred rent (including any agreement to defer rent made under the 2021 Regulations or its 2020 predecessor) cannot occur before 16 March 2022 unless agreed otherwise by the parties.

The duration for payment of deferred rent remains unchanged, being payable over the longer of 24 months and the balance of the current term.

5. Reassessment

The requirement for a subsequent reassessment and adjustment of rent relief based on a change to the decline in turnover no longer applies.

Applying for relief

Eligible tenants must make a new request for rent relief under the 2022 Regulations, following the same two-step process applicable under the 2021 Regulations.

Unlike the 2021 Regulations there is no longer a fixed deadline (previously 30 September 2021) enabling tenants to secure retrospective relief. In view of this omission, tenants are encouraged to apply early however past experience suggests that a retrospective application will be valid.

What remains unchanged?

Additional key entitlements and obligations remain unchanged from the 2021 Regulations:

- a landlord must provide continued rent relief for the protection period in line with the reduction in turnover demonstrated under the **decline in turnover test**;
- at least half of the rent relief must be granted in the form of a rent waiver;
- a landlord must offer to extend the lease term for the period equal to the period in which rent is deferred;
- a rent review that falls within the **protection period** is voided and may never be claimed;
- the moratorium on eviction for failure to pay rent or outgoings in the **protection period** still applies, subject to the same conditions set out in the 2021 Regulations;
- a tenant under an **eligible lease** may reduce or cease trade during the **protection period** without breaching the lease (and that tenant need not satisfy the **decline in turnover test** to qualify for this protection); and
- the same dispute resolution process applies.

Extended, but reduced, rent relief regime in NSW

Commencing on 13 January 2022, the New South Wales Government introduced the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* (NSW) (**Updated Regulations**), which extends the protections, but reduces the entitlement to rent relief, granted to impacted lessees under the *Retail and Other Commercial Leases (COVID-19) Regulation 2021* (NSW) and the *Conveyancing (General) Regulation 2018* (**Earlier Regulations**) to 13 March 2022. The previously extended Earlier Regulations were due to expire on 13 January 2022.

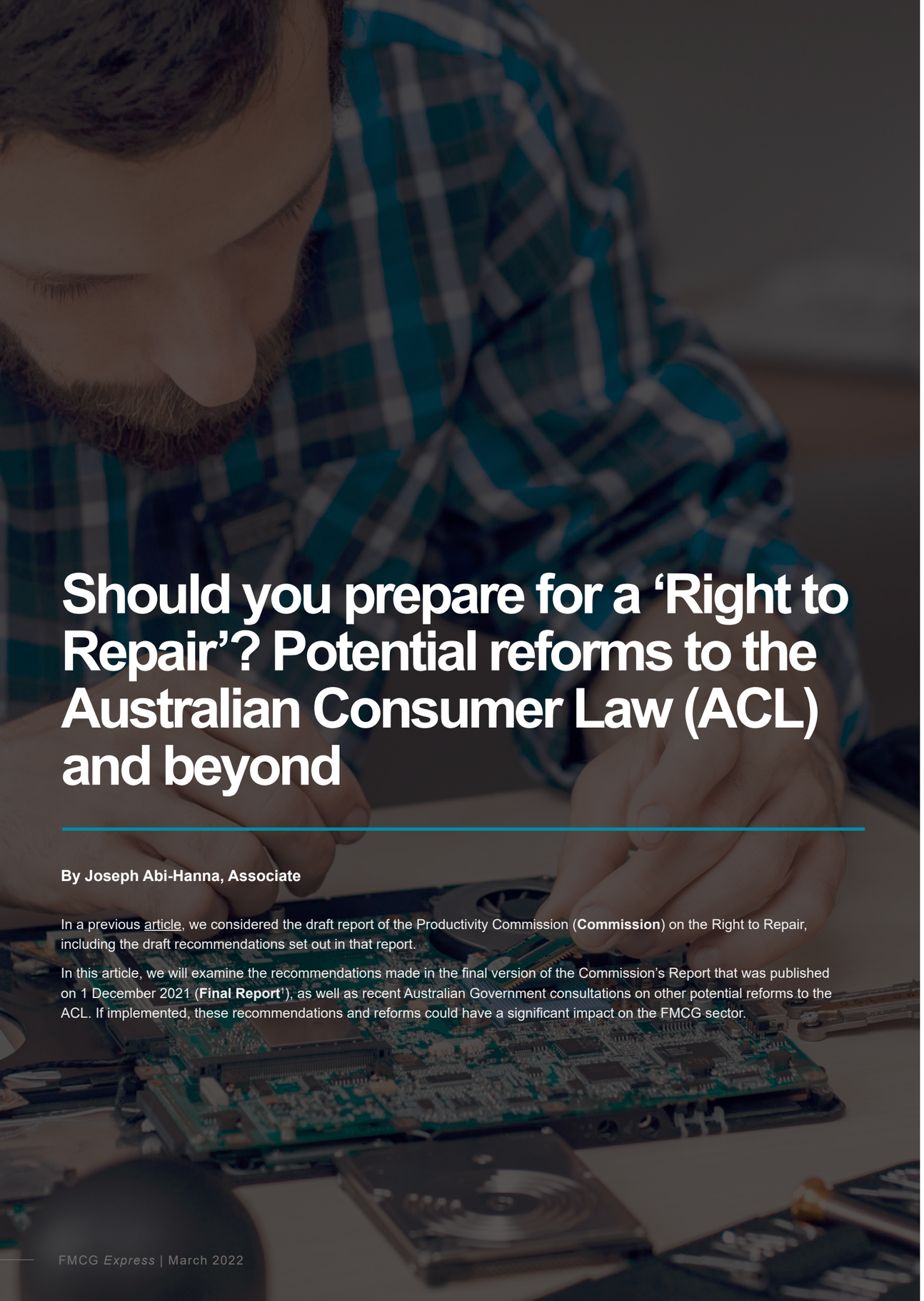
A key change under the Updated Regulations is the amendment of the annual turnover amount to be considered a qualifying 'Impacted Lessee' for rent renegotiation purposes, from $50 million (SME) to $5 million (Micro). This amendment significantly reduces the number of tenants eligible for rental renegotiation from 1 December 2021 until 13 March 2022.

Our publication on the Updated Regulations can be found here.

Our publication on the Earlier Regulations can be found here.

How can we help?

Our team is ready to advise and assist those dealing with rent relief negotiations and disputes. We invite you to contact our office should you require any assistance.



Should you prepare for a 'Right to Repair'? Potential reforms to the Australian Consumer Law (ACL) and beyond

By Joseph Abi-Hanna, Associate

In a previous article, we considered the draft report of the Productivity Commission (**Commission**) on the Right to Repair, including the draft recommendations set out in that report.

In this article, we will examine the recommendations made in the final version of the Commission's Report that was published on 1 December 2021 (**Final Report**[1]), as well as recent Australian Government consultations on other potential reforms to the ACL. If implemented, these recommendations and reforms could have a significant impact on the FMCG sector.

Final Report Recommendations

In the Final Report, the Commission recommends that the Australian Government:

a. implement a product labelling scheme to provide consumer information regarding product durability and reparability;

b. amend the ACL:

   i. to include a new consumer guarantee for manufacturers to provide reasonable software updates for a reasonable time period after purchase of a product, which cannot be limited or excluded; and

   ii. such that if a manufacturer or supplier fails to provide a remedy to a consumer when required, this failure will constitute a contravention of the ACL (and the Australian Competition and Consumer Commission (**ACCC**) may seek penalties and redress for consumers);

c. amend the text for warranties against defects[2] in relation to the supply of goods to include a statement that a consumer is not required to use authorised repair services or spare parts to be entitled to rely on the consumer guarantees under the ACL;

d. make changes to the *Copyright Act 1968* (Cth) and *Copyright Regulations 2017* (Cth), including to:

   i. amend the technological protection measures (**TPM**) framework to facilitate repairer's access to diagnostic and repair information required to conduct repairs which is currently protected by TPM, including by permitting the distribution of TPM circumvention devices for this purpose;

   ii. introduce a 'use' exception under the existing fair dealing regime which enables the reproduction and sharing of repair information; and

   iii. clarify that any contractual term restricting or preventing the use of copyright material under such an exception is unenforceable; and

e. establish a process for specified consumer groups to lodge expedited 'super complaints' with the ACCC on systemic issues relating to access to consumer guarantees.

The Commission also recommends that the repair practices of certain industries be investigated or reviewed, including the mobile phone and tablet, medical device and the watch repairers market. State and Territory Governments are encouraged to collectively identify opportunities for the enhancement of alternative dispute resolution processes relating to consumer guarantees. Other recommendations relate to e-waste management, evaluating the existing Motor Vehicle Service and Repair Information Sharing Scheme and agricultural machinery repair obligations.

Potential ACL Reforms

The Australian Government's consideration of the Final Report is likely to be informed by two consultations conducted by the Treasury regarding potential amendments to the ACL.[3] Both consultations commenced ended in early 2022 and sought feedback on:

f. potential improvements to the consumer guarantees regime with a view to incentivise businesses to comply with their obligations to provide remedies for breaches of these guarantees;

g. whether manufacturers should indemnify suppliers for providing remedies to consumers in circumstances where the manufacturer has failed to comply with consumer guarantees; and

h. potential measures to enable recognition of overseas product safety standards.

These potential reforms were preceded by the publication of draft legislation which, if enacted, would strengthen the unfair contract terms provisions under the ACL.[4]

What is next for the Right to Repair and the ACL?

Regardless of the outcome of the next federal election, it would come as no surprise if the Australian Government uses the Final Report and the Treasury consultations as a basis to propose reforms to the ACL and the broader regulation of consumer goods.

It would be prudent for businesses to review their current practices, including internal measures which they have implemented to comply with their existing obligations under the ACL, and consider whether they are equipped to respond to the implementation of potential reforms set out in this article.

1 https://www.pc.gov.au/inquiries/completed/repair/report.

2 See *Competition and Consumer Regulations 2010* (Cth), regulation 90.

3 Improving consumer guarantees and supplier indemnification provisions under the Australian Consumer Law and Supporting business through improvements to mandatory standards regulation under the Australian Consumer Law.

4 Unfair contract terms – big changes mean big risk for businesses.

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