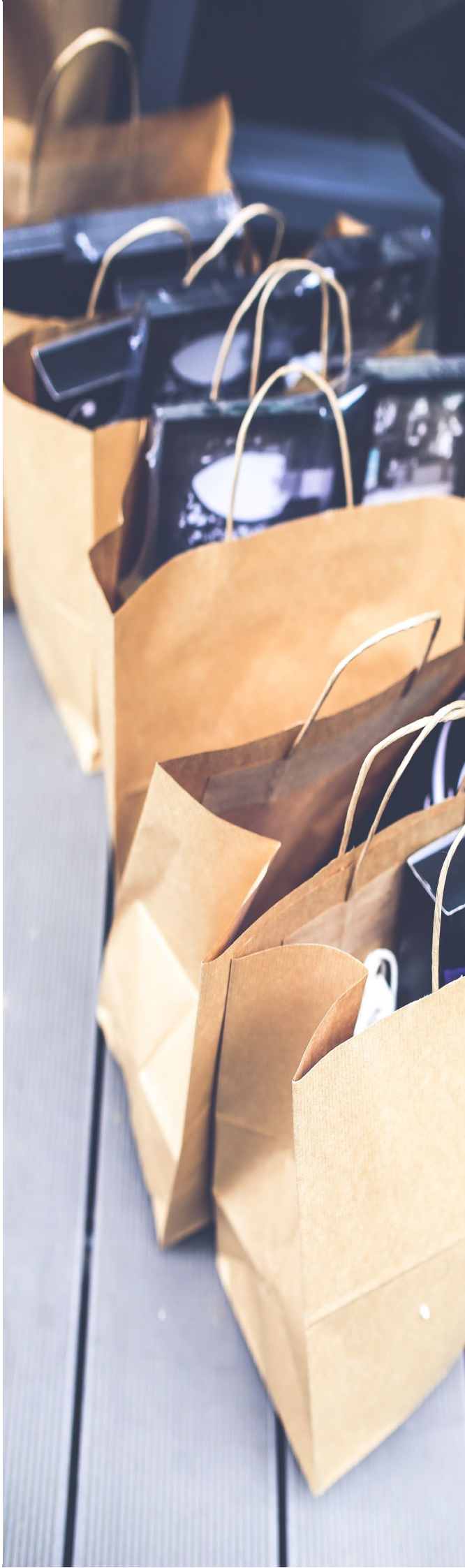
ADDISONS

Direct Selling Legal Update 2023

December 2023

Addisons delivers commercially-minded legal solutions that help drive the ongoing business success of our Australian and international clients.



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Welcome to the December 2023 edition of the Addisons Direct Selling Legal Update.

With 2024 just “around the corner”, now is a good time to look at some of the legal issues which have been relevant in 2023 to those operating in the direct selling sector in Australia. Issues which we have regularly advised on include how to conduct a product recall in Australia; identifying unfair terms in contracts and amending them to reduce risk; steps to take to be privacy compliant; and guidance on undertaking comparative advertising in a compliant way. If you have any questions or would like to discuss or provide feedback, please reach out to any of Addisons’ Direct Selling team.

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The Addisons Difference

Delivering bespoke legal solutions drives us every single day – and has done for over 140 years. Passionate and committed to ensuring your success, we excel in helping clients to achieve business outcomes with solutions underpinned by commercially-sound legal advice.

Building and nurturing relationships is in our DNA. Our immersion approach facilitates a detailed understanding of your business, culture and operations so we can support your commercial opportunities and help you navigate market challenges.

We're proud to be a diverse group of experts who work together to ensure all your needs are seamlessly managed. Our partners actively lead every engagement proudly supported by our lawyers to ensure you experience the ultimate levels of accountability and service.

Our commitment to sustainable and organic growth ensures we attract and retain like-minded individuals committed to the long-term needs of our clients.

Direct Selling Expertise

The Addisons team has been extensively involved in assisting the direct selling sector for many years. We have an intimate understanding of the business issues faced by the sector.

The Addisons team advises on the structure of global and Australian multi-level marketing and direct selling organisations in relation to their Australian operations, taking into account all applicable laws and their relationship with distributors and customers. We also assist on all aspects of marketing and advertising law in relation to product development, branding, packaging and promotion.

Our key areas of focus:

- Independent consultant agreements
- Compensation Plans and Policies and Procedures
- Pyramid selling issues
- Branding and trade mark strategies
- Pre-vetting creative concepts
- Website development and e-commerce issues
- Marketing and promotional materials
- Packaging and labelling
- Sponsorship, trade promotions and events
- Consumer protection issues
- Structuring and business establishment in Australia
- Data protection and privacy compliance
- Regulatory and compliance issues

ACCC publishes new recall guidelines – they are clear, practical and helpful

Authors: Sarah Best and Lisa Csomore

Earlier this year, the ACCC updated its product safety recall guidelines for suppliers of consumer goods. The new guidelines step through the voluntary recall process from start to finish, provide suppliers with greater clarity on what the ACCC expects for an effective recall, include helpful templates for suppliers to use for communications to stakeholders and provide good detail on the ACCC's role throughout the recall process.

The number of voluntary recalls each year remains significant. Last year, there were 365 voluntary recalls.[1] That's one a day. When the necessity for a recall becomes clear, it's best to be prepared. The ACCC's new product safety recall guidelines provide much welcomed certainty for suppliers unsure of how to navigate the recall process.

The guidelines make it easier for suppliers to know when the ACCC will be responsible for leading a recall or, if not, which government agency will have that responsibility. Food recalls are clearly the responsibility of Food Standards ANZ, therapeutic goods recalls are the responsibility of the Therapeutic Goods Authority. Many other recalls though remain the responsibility of the ACCC.

In the guidelines, the ACCC reinforces the importance of setting up a recall plan and template recall communications ahead of time (as noted in our previous article Addisons' top ten tips for managing a product recall). There is a new focus on prevention, with the inclusion of guidance on what suppliers can do to reduce the risk of safety issues arising with their products.

The guidelines also provide far more guidance than was previously the case by taking suppliers through each step of the recall process, their obligations under the *Australian Consumer Law* and the ACCC's expectations of suppliers during a recall. In particular, the guidelines emphasise the ACCC's expectation that suppliers constantly evaluate and adjust their recall plan throughout the process to reach more consumers and increase the number of products returned by consumers, for example, by trying more incentives and different communication styles and channels.

Helpfully too, the guidelines include a step-by-step guide to the European Union RAPEX risk assessment tool, which can be used by suppliers to assess the hazards and risk level associated with a product and to determine the details of their recall plan and communications plan in response to that level of risk.

The guidelines have also been significantly modernised, now taking into account the use of social media and e-commerce to sell products, including through the use of online marketplaces, and how online platforms can be used to promote a recall.

A number of useful tools have been added to the guidelines, including

- a checklist outlining the process for conducting a recall that suppliers can modify to suit their business;
- a sample recall plan;

- a recall communications package, which contains sample messages and communications to consumers, guidance on words and phrases to avoid using in a recall message and how social media communications and Quick Response (**QR**) codes can be used to increase the reach of a recall message; and
- guidance on recall messages targeted towards to Aboriginal, Torres Strait Islander and Tiwi people living in remote communities and multicultural communities.

Recalls can be costly and stressful and require suppliers to think and act quickly, so it's best to be prepared. The ACCC's new guidelines can certainly help suppliers both before and during the recall process. We commend them to you.

[1] ACCC and AER, Annual Report 2021-22 (October 2022) p 108.

Do your contracts contain any terms which are potentially unfair? Significant penalties now apply!

Authors: Cate Sendall

The *Australian Consumer Law* (**ACL**) contains provisions concerning unfair contract terms in both consumer agreements **and** small business agreements (which include independent contractor agreements). If a Court declares that a contract term is unfair, the term will be void and not enforceable. Historically, having unfair contract terms in a contract had not been illegal and consequently Courts could not impose penalties as a deterrent.

However, since **9 November 2023** substantial penalties for breaching the unfair contract terms provisions now apply. The **maximum penalties** are:

- For companies – the greater of (i) $50 million, (ii) three times the value of the benefit derived from the breach (if the Court can determine the value), or, (iii) if the value cannot be determined, 30% of the company's turnover during the period it engaged in the conduct; and
- for individuals – $2.5 million.

When is a term unfair?

The unfair contract term provisions in the ACL apply to standard form contracts (contracts provided on a 'take it or leave it' basis with little or no negotiation). A term risks being unfair if it:

1. would cause a significant imbalance in the parties' rights and obligations, which arise under the contract;
2. is **not** reasonably necessary to protect the legitimate interests of the party that would be advantaged by the term; **and**
3. would cause detriment to a party if it were applied or relied upon.

What types of terms are unfair?

The Australian Competition and Consumer Commission (**ACCC**), the primary regulator responsible for enforcing the ACL, considers that the following types of terms (among others) risk being unfair:

- terms permitting the auto-renewal of a contract;
- a term allowing a party to unilaterally vary terms in an unconstrained manner or to unilaterally vary the characteristics of goods or services being provided;
- terms imposing broad indemnities or excessive limitations or liabilities;
- a term which limits a party's rights to sue any other party; and

- a term which limits one party's vicarious liability for its agents.

How does this impact Direct Selling agreements?

In a direct selling context, the types of agreements which need to comply with these ACL requirements include:

- customer sale agreements;
- 'Preferred Customer' agreements;
- autoship and subscription agreements;
- independent contractor agreements with your salesforce, including any Policies and Procedures; and
- the terms of use for website and digital tools, such as mobile app.

If you have **not** considered recently whether any of your Australian agreements contain terms which risk being unfair, we recommend that you do so now so that any changes to the terms to reduce risk can be made **and** implemented as soon as possible. You will also need to give advance notice of the changes (before the changes take effect) to ensure that the changes themselves are fair!

The Future of Privacy Law

Authors: Donna Short and Cate Sendall

The Government released its response to the Review of the Privacy Act (**Review**)[1] on 28 September 2023 (**Response**)[2]. The Response sets out changes that the Government proposes to make to the *Privacy Act 1988* (Cth) (**Privacy Act**) which will strengthen the protection of personal information and the control individuals have over their information. These changes to the Privacy Act still need to be introduced into the Parliament and many of the proposals also note that significant consultation is required to finalise the details of particular measures. Consequently, we expect that any changes to the Privacy Act may take more than a year to come into force.

In this Insight, we will summarise the key changes being proposed by the Government and suggest some key actions that organisations, large and small can take now, to prepare for the changes when they come about.

Key changes being proposed by Government

Small business exemption: Currently the Privacy Act applies only to businesses with an annual turnover above $3 million. The Response proposes that this limit should be removed, meaning that all businesses no matter how small that collect data from individuals must be compliant with the Privacy Act. These changes will be the subject of consultation with small businesses and relevant representatives, but the Response clarifies that where the information being captured represents higher risks that the Government expects to bring those small businesses into the Privacy Act regime quickly.

Employee record exemption: Enhanced privacy protections to be extended to private sector employees. The Government aims to provide improved transparency to employees regarding their personal information and extend the Data Breach Notification Scheme to apply to employee records. As this change will impact all businesses, the Government intends to conduct further consultation.

Fair and reasonable personal information handling: The Review proposed that the Privacy Act should no longer rely entirely on individuals taking responsibility for managing the information they provide to businesses. This is because the Review determined that many services and companies could not provide many of these services without that data and at least some of those circumstances included essential goods and services. The Response proposes that the Privacy Act be amended to include a new requirement that collection, use and disclosure of personal information must be fair and reasonable in the circumstances. The OAIC will provide guidance about what is fair and reasonable. The Government considers that this will assist with protecting individuals from 'dark patterns' which guide individuals to select privacy settings which are intrusive when using digital services and that privacy settings for online services should be 'privacy-by-default'. This means that the simple act of presenting a collection statement will, in some cases, no longer be satisfactory and that businesses will have to consider what is "fair and reasonable" information to be collected in the circumstances.

A new right of erasure: A right for individuals to request the erasure of any of their personal information held by a business is proposed in the Response. Along with the existing rights to access and seek amendment of information held by a business about a person, the Response proposes that, individuals will

have a right to require the deletion of information held about them by a business. Any such amendment will need to be considered in light of the existing credit related provisions of the Privacy Act and in the context of other laws like the Anti-Money Laundering and Counter Terrorism Financing Act.

Direct marketing, targeting and trading: Some businesses yield revenue from user engagement with targeted content and advertising, which enables them to provide consumers with access to content or services for free or at a lower monetary cost. The trading of personal information underpins these activities. The Response proposes to define direct marketing, targeted advertising, targeting and trading and to place new controls on how advertisers can use, and trade data acquired by (or that use) those marketing techniques. These may include an obligation to provide individuals with an unqualified right to opt-out of receiving targeted advertising.

Consent: It is unlikely that the requirement for consent to a collection will be substantially expanded, the view being that individuals may become overwhelmed by frequent consent giving and thus pay too little attention to circumstances where sensitive information (which currently requires consent) is being collected. However the Response proposes to more clearly require that consent should be voluntary, informed, current, specific and unambiguous. This may impact on how businesses manage sensitive information collection and the maintenance of such information, especially in circumstances where facial recognition technology is in use.

A new direct right of action: The Response proposes that people who have had their privacy interfered with should have a direct right of action, with their complaint being heard by the Federal Court (after first making a complaint to the OAIC or through an external dispute resolution scheme and having the complaint assessed as being unsuitable for conciliation) The Government believes that a direct right of action would increase the avenues available to individuals, who suffer loss or damage as a result of an interference with their privacy to seek compensation.

A new statutory tort for serious invasions of privacy: The Response proposes that the new cause of action be available where there is a serious intrusion into an individual's seclusion or a serious misuse of private information. The tort would be based on the model proposed by the Australian Law Reform Commission in Serious Invasions of Privacy in the Digital Age (Report 123)[3]. Consultation with media organisations on further safeguards to protect public interest journalism will occur.

Greater organisational accountability: The Response proposes that businesses will be required to enhance the records of decisions that are made and kept about the collection, management and use of information about individuals. Organisations will also be required to appoint or designate a senior employee as having specific responsibility for privacy within the organisation.

Other changes: Some other changes proposed by the Response:

- notifiable data breaches will have to be reported to the OAIC within 72 hours;
- privacy policies will be required to set out the types of personal information that will be used in substantially automated decisions;
- require businesses to conduct privacy impact assessments for activities they wish to conduct which have high privacy risks (for example if the activities involve sensitive information);
- enhancements to privacy rights for vulnerable people and children;

- clarification of a range of definitions and simplifying some obligations especially by formally recognising the distinction between data processors and data controllers;
- expand the use and flexibility of privacy "Codes" made by the Privacy Commissioner; and
- additional capability will be given to the OAIC to enforce the Privacy Act.

Some ways to prepare for the changes when they become law

1. Review your existing privacy and cyber security approaches. Any business that relies on customer data should already have robust privacy and cyber security policies and controls. These should be reviewed to ensure that they are up to date and are commensurate with the risks associated with the data your business holds.

2. Conduct a detailed assessment of what information you hold and whether you really need or use it. Having high quality systems to manage data governance and data accuracy will be critical defences against some of the expanded rights and the proposed rights of action.

3. If you are a small business owner start considering what kind of information you collect about customers and whether it really adds value to your business. When (and if) the Privacy Act is extended to small businesses the compliance costs you face will increase, so it is critical that you have a clear view of the value add from the information you hold. If it doesn't add value, then you should consider not collecting that information any longer.

4. Consider how you will enhance the processes you use for making decisions about information collection, management and use, including the records that you make and keep about these matters. The earlier you start to build the muscle necessary to do this well, the lower your risk will be when these matters become compliance obligations.

5. Appoint a Privacy Officer soon. Before the proposals in the Response become law you should designate a Privacy Officer and ensure that whoever is charged with that responsibility has the skills and capability to assist not only in the transition to the new privacy rules but can also support the organisation in the long run.

6. Start to consider whether your business will need to reconsider the technologies it has available for storing and managing information about individuals. This may be especially relevant in respect of employee data in view of enhanced privacy protections being extended to private sector employees, particularly given the prevalence of outsourced HR operations.

The changes being proposed by Government will still be the subject of substantial consultation and detailed policy development which can be time consuming and mean any changes that must be complied with by businesses are some way off. However, taking some preparatory actions now will limit the impact of legislative changes and smooth the implementation processes in your business.

[1] Review of the Privacy Act 1988 | Attorney-General's Department (ag.gov.au)

[2] Government response to the Privacy Act Review Report | Attorney-General's Department (ag.gov.au)

[3] Australian Law Reform Commission, Serious Invasions of Privacy in the Digital Era (ALRC Report 123), https://www.alrc.gov.au/publication/serious-invasions-of-privacy-in-the-digital-era-alrc-report-123/

Comparative Advertising – It Sells Products but only if the Comparison is Clear and True!

Authors: Laura Hartley and Aidan Gilling

In April 2023, Procter & Gamble (**P&G**) was forced to take its then new Fairy "30 Minute Miracle" (**Miracle**) dishwashing tablets off the supermarket shelves after Reckitt Benckiser (**Reckitt**) taught it an expensive lesson on comparative advertising.

Reckitt's Allegation

Reckitt took issue with P&G's Miracle detergent packaging and sought an urgent interim injunction claiming the packaging misled consumers in breach of the *Australian Consumer Law* due to:

- the product name *"30 Minute Miracle"*;
- the statement *"Better Cleaning^ even in 30 minutes"* on the front of pack;
- the use of a fine print statement attempting to qualify the front of pack claim being "^Tested vs. All in One", another P&G dishwashing product; and
- the depiction of Miracle and its features in a scientific graph on the back of the pack.

Reckitt sells the market leading "Finish" branded dishwashing products.

The Federal Court Decision

The Federal Court granted the interim injunction on the basis that Reckitt had established a prima facie case of P&G engaging in misleading and deceptive conduct.

Performance tests conducted by the parties and independent laboratories as well were put before the Court, comparing the Miracle product to Finish and other products of P&G branded under the Fairy brand being P&G's Fairy "All in One" product and its Fairy "Platinum Plus" product. While the Court did not think it necessary to determine the reliability of these tests, the Court held that P&G's own testing did not demonstrate any difference between its new Miracle product and P&G's Fairy "Platinum Plus" product, when used in a 30 minute washing cycle.

The Court was satisfied based on the evidence before it, and assessed from the point of view of the ordinary and reasonable consumer, that Reckitt had a strong prima facie case that the overall impression created by the Miracle packaging was that Miracle was better at cleaning in a 30 minute cycle than all other Fairy branded products sold by P&G, when this was not the case.

Lessons for Marketers and Lawyers Advising Marketers

1. **Know when a claim is comparative**

Words such as "better", "cleaner" and "faster" are all examples of comparative language. If you are using those words in your advertising, you need to be able to substantiate them against whatever other products a reasonable consumer would believe they are being compared against.

2. **Realise your competitors are watching – very closely!**

It's not just the ACCC to look out for with comparative campaigns – your competitors will be watching you even more closely. Any comparative campaign will run a significant risk of being challenged by your competitors, so understand that risk when you make these claims. P&G paid a very high price here as Reckitt reminded everyone of the fast-acting and commercially damaging nature of interim injunctions – the new Miracle product was ordered off the shelves barely a month after its release.

3. **Fine print disclaimers do not always work to qualify headline claims**

Fine print disclaimers on fast moving consumer product packs can have serious limitations. The threshold for misleading advertising is low if you are relying on qualifying language that appears small font and that may be obscured by other aspects of packaging. Reason being: most reasonable shoppers will form a general impression of a products' packaging rather than carefully analysing its fine print.

P&G's defence relied upon the use of the chevron (ie "^") in the claim *"Better Cleaning^ even in 30 minutes"*, which they argued alerted consumers to seek more information on the pack and therefore, find the linked claim, *"^Tested vs All in One"*, another of P&G's products. P&G's testing showed that its Miracle product did perform better than its All in One product. P&G also argued that reasonable customers would be used to a *"certain amount of puffery"* within the detergent industry.

However, these arguments didn't amount to sustainable defences.

Firstly, the Federal Court held that a consumer reading Miracle's packaging would not be aware of the fine print qualification, *"^Tested vs All in One"*, as this information was "barely visible", printed in small font and was obscured by the cardboard trays when the Miracle product was displayed on supermarket shelves. Further, it would only be seen after *"prolonged inspection of the packaging – circumstances which are unlikely … in the normal shopping experience of a great many customers."*

Secondly, puffery must be outlandish (such as *"Redbull gives you wings")* or meaningless for a consumer to interpret it as such. In this case, "Better cleaning^ even in 30 minutes" was held to be a claim.

Key takeaways

The interim injunction imposed on P&G provides a stark reminder of the scrutiny that competitors place on each other's comparative advertising and the speed with which competitors may act. In this case, the Miracle product was launched around 20 March 2023, the application for an interim injunction was filed on 3 April 2023 and the hearing was held on 23 April 2023. Further, to win these cases, companies must ensure their comparative claims are specific, make clear what they are comparing themselves against and are fully substantiated to avoid unwanted implicit comparisons with other products.

“Super complaints” rights to the ACCC for advocacy groups slated to become law by July 2024

Authors: Laura Hartley and Renee Shipp

Businesses should brace themselves for greater enforcement of the *Australian Consumer Law* by the Australian Competition & Consumer Commission (**ACCC**) following the Federal Government’s announcement that it will roll out the first phase of a “super complaints” process for advocacy groups.

As it currently stands, there is no formal process in place for advocacy groups (such as CHOICE) to make complaints to the ACCC. These groups are treated like any other person wishing to make a complaint to the ACCC. They stand in the queue with thousands of other complaints the ACCC receives each year. However, from July 2024, a designated complaints mechanism will be introduced whereby certain consumer and small business advocacy groups nominated by the responsible Government minister will have the right to submit complaints to the ACCC where they have strong evidence of systemic issues under our consumer laws.

Very little is known at this stage about the exact process or the groups that will be nominated as recipients of these “super complaint” powers. The Federal Government has indicated that it will release further details of this initiative in coming months.

However, a “super complaints” concept is not entirely new. A similar mechanism has operated in the UK for almost two decades and it certainly seems that the Federal Government has drawn on that experience in proposing an Australian version of such a process. In 2021, an Australian Productivity Commission report[1] also recommended that the Government should enable designated consumer groups to lodge “super complaints” to the ACCC on systemic issues.

The Productivity Commission’s report noted that consumers often find it difficult to exercise their rights under consumer guarantees and that it is largely left to consumers to be aware of their rights and be willing to pursue a remedy, which is often too costly and complex for many consumers to pursue. In recommending a “super complaints” mechanism, the Productivity Commission proposed that, once a complaint is lodged with the ACCC by a consumer group, it should be fast tracked by the ACCC, who should then be required to provide a response within a specified period (e.g. 90 days) as to how it intends to deal with the complaint and whether any action will be taken.

Whilst the Productivity Commission report was focused on consumer guarantees, based on the Federal Government’s recent announcements, it appears that the scope of these “super complaints” rights may extend further to include other areas of our consumer laws e.g. unfair contract terms and misleading and deceptive conduct.

Key takeaways

This new process for complaints heightens the ever-present need for businesses to prioritise compliance with the Australian consumer laws. In particular, we recommend that businesses:

- review their standard terms and conditions for compliance with consumer laws;

- ensure that their policies and procedures (e.g. for returns of goods and ways in which to promote discounted pricing) are compliant with consumer laws; and
- conduct a review of their performance to ensure that their policies and procedures are being followed in practice.

[1] Productivity Commission Inquiry Report, Right to Repair: Overview & Recommendations, No 97, 29 October 2021

Limitations on Set-Term Agreements Loom Near: What Employers Need to Know

Authors: Martin O'Connor and Brandon Chakty

Late last year, we published an Insight summarising the changes made to the ***Fair Work Act 2009*** (Cth) under the Fair Work Legislation Amendment (***Secure Jobs, Better Pay***) Act 2022 (Cth). Most of these changes have now taken effect but one still looms near, being the limitations on the use of set-term employment agreements, which will take effect on and from 6 December 2023.

In this Insight, we explore these limitations in greater detail and set out the steps employers should take as soon as practicable in preparation for these changes.

Overview of the Limitations

On and from 6 December 2023, employers will be prohibited from engaging an employee on a set-term agreement where:

1. the agreement operates for a period of greater than 2 years;
2. the agreement provides an option to extend or renew the agreement more than once or for a period of greater than 2 years; or
3. it would result in the employee being engaged under two consecutive set-term agreements that cumulatively exceed 2 years, or under multiple consecutive set-term agreements, where the employee is performing the same, or substantially similar, work and there is substantial continuity between the relevant employment periods.

These limitations, particularly the limitation on consecutive set-term agreements, can be difficult to understand. We elaborate on how these limitations will apply in practice below.

Entering into Agreements Before 6 December 2023

Any set-term agreements that are entered into before 6 December 2023 will not be subject to the above limitations. In other words, an employer can enter into a set-term agreement with an employee prior to 6 December 2023 without any restriction in terms of:

1. the duration of that agreement (e.g., it could be for 3 years); or
2. the number of prior agreements on which the employee has been engaged (e.g., it could be the employee's third consecutive agreement).

Notwithstanding the above, employers should note that if one or more set-term agreements are entered into with an employee before 6 December 2023, those agreements will still be relevant to determining whether any future agreement that is entered into with the employee after 6 December 2023 is permitted under the above limitations. This is illustrated in the example in the next section.

Employers will also still need to be wary of the common law risk of an employee who is engaged on multiple-set term agreements, being deemed by a court or tribunal to be in practical reality, a permanent employee of the employer.

Entering into Agreements After 6 December 2023

Any set-term agreements that are entered on or after 6 December 2023 will be subject to the above limitations.

In relation to the limitation on consecutive agreements, if a current employee's set-term agreement expires after 6 December 2023, and this is the employee's only set-term agreement with the employer, the employer can enter into a further set-term agreement with the employee provided that the further agreement:

1. does not result in the employee being engaged for a total period exceeding 2 years (i.e., the total length of the current agreement and the new agreement cannot exceed 2 years); and

2. does not include an option for renewal or extension of the agreement.

On the other hand, if a current employee's set-term agreement expires after 6 December 2023 and:

1. the length of the current set-term agreement exceeds two years; or

2. the employee was engaged on at least one other set-term agreement prior to the current set-term agreement,

the employer cannot enter into any further set-term agreement with the employee.

For example, if an employee was first engaged under a set-term agreement from 1 January 2023 to 30 June 2023 and another set-term agreement from 1 July 2023 to 31 December 2023, the employer cannot engage the employee on another set-term agreement after the expiry of that latter agreement. This limitation may not apply if the employee is not performing the same or substantially similar work across the agreements.

Exceptions to Limitations

There are several exceptions to the above limitations, including where:

1. the employee is engaged to perform only a distinct task involving specialised skills;

2. the employee is engaged to undertake essential work during a peak demand period;

3. the employee is engaged to perform work during emergency circumstances or during a temporary absence of another employee; or

4. the employee earns above the high income threshold in the year the agreement is entered into (currently a base rate of earnings of $167,500 per annum).

Fixed Term Contract Information Statement

Employers must provide employees engaged on a set-term agreement with a copy of the Fixed Term Contract Information Statement before, or as soon as practicable after, the agreement is entered into. The Fair Work Ombudsman is yet to publish the Fixed Term Contract Information Statement.

Penalties

Employers will be exposed to civil penalties if they enter into a set-term agreement that contravenes the above limitations or if they fail to provide an employee with the Fixed Term Contract Information Statement. The maximum penalty that can be imposed is $18,780 per contravention for an individual (or $187,800 for a serious contravention) and $93,900 per contravention for companies (or $939,000 for a serious contravention). Further, if a set-term agreement is entered into in contravention of the above limitations, the term of the agreement that purports to terminate the agreement at a certain time will be ineffective, and the set-term agreement will be automatically treated as a permanent employment agreement.

Anti-Avoidance Mechanisms

An employer must not do any of the following to bypass the above limitations:

1. terminate an employee's employment for a period;
2. delay re-engaging an employee for a period;
3. not re-engage an employee and instead engage another person to perform the same, or substantially similar, work for the person as the employee had performed for the person;
4. change the nature of the work or tasks the employee is required to perform for the person; or
5. otherwise alter an employment relationship.

Disputes about Set-Term Agreements

If there is a dispute between an employer and employee about the limitations to the use of set-term agreements, the dispute is first to be resolved at the workplace level by discussion between the employer and employee. If the discussions at the workplace level do not resolve the dispute, either the employer or employee may refer the dispute to the Fair Work Commission. If the employer and employee agree, the FWC will arbitrate the dispute.

Key Takeaways for Employers

Time is quickly running out for employers to prepare for the introduction of these limitations on set-term agreements. Employers should take the following steps as soon as practicable:

1. review their existing set-term agreements to determine whether the employees can be employed on a further set-term agreement and if so, on what terms;
2. determine whether any of the above exceptions will apply to their employees; and
3. review and amend their template set-term agreements to ensure they are consistent with the above limitations.

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