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FINANCIAL LINES REVIEW

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INTRODUCTION

The second half of 2010 saw the enactment of a number of new Commonwealth and State acts which are relevant to financial lines issues. While the replacement of the **Trade Practices Act 1974 (TPA)** by the **Competition and Consumer Act 2010 (Cth) (CCA)** is probably the most significant, all the legislation set out in this Review has the potential to significantly impact on the financial lines arena.

Much of the new legislation is already in force, while certain provisions will come into operation over the next 12 to 18 months. In future Reviews we will refer to specific issues which will undoubtedly arise from the new legislation. The intent of this Review is to provide an introduction and oversight of this new legislation.

COMPETITION AND CONSUMER ACT 2010 (Cth)

The CCA came into operation on 1 January 2011 and applies to all relevant conduct after that date. Schedule 2 of the CCA is entitled The Australian Consumer Law (ACL) which provides all encompassing consumer protective legislation which replaces the TPA and a range of other state and territory consumer protection laws. It also introduces amendments to the ASIC Act and the Corporations Act to create uniformity.

The ACL is more than just a renamed TPA and introduces some significant new provisions and concepts which can apply to both corporations and individuals. The majority of the key provisions of the TPA are unchanged or have only minor amendments which are intended to clarify rather than affect the established interpretation. There is a link on our website at www.wottonkearney.com.au to a comparative table that we have prepared, which allows easy cross reference between those TPA provisions which were most regularly encountered and the corresponding CCA/ACL provisions. It should be noted that the TPA and state based legislation continues to apply to causes of action that arose prior to 1 January 2011.

The primary changes brought about by the ACL are:

- a new national law on unfair contract terms (which came into force on 1 July 2010 in NSW/Vic/Cth and 1 January 2011 for other jurisdictions);
- new and enhanced national consumer protection provisions;
- a new product safety regime;
- significantly enhanced remedial provisions; and
- significantly enhanced enforcement powers to the ACCC and ASIC.

Unfair Contract Terms

The key features of the unfair contract terms provisions are that:

- it applies only to unfair terms in standard form consumer contracts with “consumer contracts” being defined as contracts for the sale of goods and services to an individual wholly or predominantly for personal domestic or household use of consumption - but with no monetary limit;
- while “standard form” is not defined, guidance is provided (such as terms not being negotiable) and a consumer contract is presumed to be a standard form contract unless the contrary is established;
- a term is unfair and therefore void (i.e. treated as never existing) if it causes a significant imbalance in a party's rights and obligations under the contract, it is not reasonably necessary to protect a party's legitimate interest and it will cause detriment (financial or otherwise) to a party if applied;

- in deciding whether a term is unfair the court may take account of any relevant factor, but must also take account of the transparency of the term (or the lack thereof – however a lack of transparency does not automatically mean that it is unfair – and visa versa) and the term has to be considered in the context of the entire contract; and
- available remedies are a declaration that a contract in whole or in part is void, the contract can be rewritten, injunctions granted, compensation orders and possible orders for redress of non-parties.

Consumer Protection

The consumer protection provisions:

- apply to “consumers” which are relevantly defined as a person (including a corporation) which acquires goods or services that are either of a kind ordinarily acquired for personal, domestic or household use or have a price not exceeding \$40,000 (it is important to note that there are different definitions of consumer depending upon which part of the ACL is applicable);
- introduce the new concept of statutory guarantees (replacing the implied conditions and warranties in the TPA) that cannot be excluded, restricted or modified by contract;
- apply a range of express guarantees to the supply of all products and product related services other than financial services; and
- provide that a supplier's liability can be limited by contract only in limited circumstances and otherwise provides a range of remedies based on whether there is a “major failure” or “non-major failure”, which is an entirely new concept.

Product Safety

The product safety provisions are unlikely to have a direct impact on the financial lines arena, but do provide:

- an important new requirement that any supplier of a consumer good or service must provide mandatory notification within 48 hours of becoming aware of any known or alleged death, serious injury or illness resulting from the use, or reasonably foreseeable misuse, of any good or service supplied by it;
- that such a notice is confidential unless subject to Court order which means that it is likely to be disclosed pursuant to discovery orders in proceedings or a subpoena/notice to produce; and
- the contents of a notice cannot reduce an insurer's liability (which is presumably directed at any prejudice incurred by way of any admissions in the notice) (section 133). However section 133 is likely to have minimal effect as it appears to be contrary to section 15 of the **Insurance Contracts Act 1984 (Cth) (ICA)** which provides that only the ICA governs insurance contracts.

ACCC Powers

The ACCC has enhanced powers in relation to contraventions or suspected contraventions of the ACL.

Insurance Implications

- As with all legislation it will take some time before the full impact of the ACL can be properly assessed from an insurance perspective. However, at the outset insurers and insureds should ensure that their Policy wording provides cover for claims under both the ACL and TPA (and state based legislation).
- Insurers ought require the cost of initial compliance with the ACL to be borne by insureds (which could be achieved by appropriate disclosure/representation requirements to the effect that an insured is ACL compliant (to the best of their belief)) rather than by insurers in the form of claims.
- While the unfair contract term provisions do not currently apply to insurance contracts (by reason of section 15 of the ICA) there is significant government pressure for that to change (see the ICA section below).
- It should be assumed that the ACCC will make full use of its new powers which is likely to result in increased investigations and penalty orders – this will impact upon the “Investigation Costs” cover provided by D&O and PI policies which can be a significant exposure.
- The new financial penalty provisions allow for fines up to \$1.1 million for corporations and \$330,000 for individuals. The immediate question which will arise out of these new penalties is whether your policy provides cover for such fines and whether they are insurable at law. (Public policy dictates that the punitive or deterrent based element of fines and penalties cannot be insurable as it defeats the intended purpose).
- The anticipated increased number of warnings, substantiation and infringement notices are likely to be used as potential flags by litigation funders and plaintiff lawyers.
- The change from implied warranties under the TPA (with the associated cause of action being breach of contract) to statutory guarantees (with the relevant cause of action being a breach of the CCA) may impact upon the effectiveness of a contractual exclusion.
- The mandatory 48 hour notification under new product safety provisions is onerous and will require significant communication between insurers and insureds to ensure neither party is prejudiced by the content of the notice.
- Company directors and officers have an increased direct and indirect exposure under the ACL which has the potential to translate to an increase in D&O claims.

NATIONAL CONSUMER CREDIT PROTECTION ACT 2009 (CTH)

The **National Consumer Credit Protection Act 2009 (Cth) (NCCPA)** was promulgated in late 2009 but the majority of the provisions only came into operation on 1 April 2010. Schedule 1 to the NCCPA is the National Credit Code (**Code**) which replaces the various State based codes.

The NCCPA imposes significant obligations on lenders and intermediaries in the consumer credit process which, coupled with the appointment of ASIC as the sole regulator of the new Act, is already having an impact on entities caught by the NCCPA. The NCCPA presents a radical departure from the former consumer credit regime by imposing obligations on intermediaries (such as mortgage brokers) as well as lenders and establishing a uniform, national, centrally regulated system. Notably, we are already seeing litigated matters where plaintiffs have brought causes of action relying on breaches of the Code.

The NCCPA provides that:

- ASIC will become a national regulator for consumer credit and finance broking;
- anybody who engages in certain credit activities should have registered with ASIC between 1 April and 30 June 2010 (inclusive); and
- registered credit participants as at 1 July 2010 should have applied for an Australian Credit Licence (**ACL**) from ASIC by 31 December 2010. Any new entrant to the credit market after 1 July 2010 will need to apply for an ACL.

An entity will need to hold an ACL or be authorised by an ACL holder if it engages in “*credit activities*”. “*Credit*” is confined to credit (deferred debt obligations) provided for personal, household or domestic purposes or residential investments.

Credit activities are:

- the provision of credit;
- benefiting from mortgages or guarantees;
- providing “*credit services*”; or
- activities in relation to credit contracts and consumer leases.

Credit services involve:

- giving “*credit assistance*” to a consumer; or
- acting as an intermediary between a lender/lessor and a consumer.

Credit assistance involves:

- “*suggesting*” that a consumer:
 - apply for a particular credit contract or a lease with a particular provider;
 - apply for an increase in the limit of a particular credit contract; or

- remain in a particular credit contract; and
- assisting “a consumer with any such application”

An ACL holder’s obligations will largely mirror those of an Australian Financial Services Licence (AFSL) and will include acting efficiently, honesty and fairly, compliance with licence conditions and relevant legislation, adherence to an External Dispute Resolution (EDR) membership scheme and adequate compensation arrangements. It is anticipated that most ACL holders will meet the requirement for adequate compensation arrangements by way of professional indemnity insurance. ASIC has issued Regulatory Guide 208 describing what it regards as the minimum level of insurance cover necessary to meet an ACL holder’s obligations in this regard.

One of the most important aspects of the **Credit Act** which is likely to lead to increased claims is the introduction of responsible lending criteria (applicable from 1 July 2010)¹ which require:

- making reasonable enquiries of a current consumer about their financial requirements, needs and situations;
- making a preliminary assessment (credit assistant providers) or final assessment (credit providers) about whether their proposed credit contract is “not unsuitable” for the consumer. A contract will be unsuitable if a consumer would be unable to repay it without substantial hardship or it would not meet the consumer’s requirements or objectives. “Substantial Hardship” is not defined and ASIC has not provided any definitive formulation of what it means; and
- that credit providers and credit assistant providers provide a credit guide to consumers containing prescribed information about the licensee and some of the licensee’s obligations under the Act.

An ACL holder that breaches the responsible lending requirements may incur various penalties including:

- criminal penalties for up to 2 years;
- civil penalties up to \$220,000 for an individual or \$1.1 million for a corporation; and
- injunctions, compensation orders, adverse publicity orders, suspension or cancellation of credit licence.

Insurance Implications

The most immediate implication for insurers is the requirement that an ACL holder have adequate compensation arrangements and the associated expectation on ASIC’s part that this be met by acquiring professional indemnity insurance. In providing cover to an ACL holder, insurers must contend with what ASIC has stipulated is “compliant” insurance cover (Regulatory Guide 208).

From a liability perspective, any entity which is a credit or credit services provider now requires an ACL which exposes it to:

- licensing requirements and potential strict liability if such licensing obligations are not adhered to. Accordingly, insureds and insurers need to ensure that all licensing requirements are initially complied with and thereafter adhered to;
- determinations at an EDR scheme level; and
- allegations that the provision of credit and/or credit service caused substantial hardship and was therefore contrary to the responsible lending criteria. It will be incumbent on the insured credit or credit service provider to show that it made all reasonable enquiries to establish that the credit/service provided was not “unsuitable” which means that appropriate contemporaneous enquiries and records should be undertaken and maintained.

A further complication for insurers will be addressing the additional exposure for professionals such as accountants or financial advisers who are indirectly involved in activities which may constitute credit services but do not hold an ACL.

CORPORATIONS LEGISLATION AMENDMENTS/ FINANCIAL SERVICES MODERNISATION ACT 2009 (CLA)

This applies Chapter 7 of the **Corporations Act (Cth) 2001 (Corporations Act)** to all margin lending for retail clients. Margin lending is defined by s761EA of the Corporations Act and includes standard margin loan facilities (MLF) and non-standard MLF (which includes where interest in securities are transferrable - for example, in the Opes Prime matter) and any facility deemed by ASIC to be a MLF.

The CLA requires that:

- issuers and advisers of MLF are to be licensed by ASIC under an AFSL;
- advisers provide advice which is appropriate to a client’s individual circumstances;
- margin lenders must meet new responsible lending requirements (as set out above);
- consumers must have access to an EDR; and
- new and existing margin lenders have to have applied for an AFSL by 30 June 2010 otherwise they cannot provide margin lending services. The licence requirements are similar to those that presently apply for financial services.

¹ For authorised deposit institutions (ADIs) and registered financial corporations (RFCs) the obligations apply from 1 January 2011.

Insurance Implications

Prior to the CLA the financial advice relating to the proceeds of a margin loan was subject to AFSL requirements and potentially the pro-consumer determinations of FOS (subject to issues of jurisdiction) but not the margin loan itself, although a common law duty of care may still have been owed.

Now both the margin loan advisers and the providers:

- have greater exposure to claims and adverse FOS judgments, including potential claims arising out of the responsible lending criteria; and
- need to be mindful of the higher standard of advice and inquiry which the CLA now requires regarding margin lending. As with all other financial products recommended to clients, they will now need to consider whether a margin loan is appropriate in the circumstances of each retail client and whether the client will be able to service the margin loan.

Financial planners, margin loan advisers/providers and their respective insurers are likely to see an increase in claims for either failing to provide any or adequate advice about a client's margin loan and/or in providing an unsuitable margin loan.

CIVIL DISPUTE RESOLUTION BILL 2010 (Cth)

The **Civil Dispute Resolution Bill 2010 (Cth) (Civil Dispute Bill)** was introduced into the House of Representatives on 30 September 2010. It has been passed by both legislative assemblies and we are expecting it to be made law later this year.

The objective of the Civil Dispute Bill is to require that parties take "genuine steps" to resolve disputes before commencing certain civil proceedings¹ in the Federal Court or Federal Magistrates Court. Parties to civil proceedings will be required to file a genuine step statement (**the GS Statement**) setting out the steps which have been undertaken in an attempt to resolve the issues in dispute, or setting out the reasons why no such steps have been taken.

Examples of the genuine steps which a party may take to resolve a dispute include:

- notifying the other party of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute;
- responding appropriately to any such notification;
- providing relevant information and documents to the other party to enable that party to understand the

issues involved and how this dispute may be resolved; and

- considering alternate dispute resolution processes.

The Civil Dispute Bill provides that a respondent is to be given a copy of the GS Statement and must then file a similar statement in response prior to the date specified in the application. The respondent's statement must:

- state whether the respondent agrees with the GS Statement filed by the applicant; or
- if the respondent disagrees, specify the respect in which, and the reasons why, the respondent so disagrees.

Under section 9 of the Civil Dispute Bill, lawyers have a duty to advise their client of the requirement to file a GS Statement and to assist their client to comply with that requirement. Any failure of that duty can result in a personal cost order against the lawyer (section 12(3))².

A failure to file a GS Statement does not invalidate the application or any subsequent response. However, in exercising its powers and performing functions the court may have regard to whether a person filed a GS Statement and whether that person took genuine steps to resolve the dispute. This may be particularly relevant in the exercise of the court's discretion to award costs.

NSW Courts

In NSW the pre-litigation requirements are introduced through an amendment of the **Civil Procedure Act 2005 (NSW) (CPA)** by the **Courts and Crimes Further Amendment Act 2010 (NSW)**.

These provisions will apply to proceedings that are commenced after 1 October 2011 which means that it will be necessary to give careful consideration to complying with the pre litigation requirements for relevant disputes (in the District and Local Court – see below) that may end up being litigated after 1 October 2011.

However pre-litigation requirements will only apply to District and Local Court proceedings as the Supreme Court proceedings are expressly excluded by reason of the **Civil Procedure Amendment (Excluded Proceedings) Regulation (2011) NSW**³.

Under the NSW regime relevant parties have to comply

² Any costs awarded against a lawyer personally because of a failure to advise its client of the requirements of the Bill cannot be recovered from the lawyer's clients.

³ However, the Equity Division Practice Note 3 already requires a plaintiff in the Commercial List and Technology and Construction List to file a List Statement which identifies the nature of the dispute, the issues which may arise, the primary contentions, the questions appropriate to be referred for inquiry and report, and a statement as to whether the parties have attempted to mediate or whether the plaintiff is willing to mediate.

¹ Part 4 of the Bill sets out excluded proceedings to which the Bill does not apply.

with pre-litigation protocols which impose pre-litigation obligations such as undertaking “reasonable steps” to:

- notify the other party of the issues in dispute;
- respond to the party which raised the issues, with a view to resolving them;
- exchange pre-litigation correspondence, information and documents critical to the resolution of the dispute;
- consider negotiations and alternative dispute resolution processes; and
- take part in alternate dispute resolution processes.

Plaintiffs will be required to file a “dispute resolution statement” at the time an originating process is filed, which specifies the steps taken to resolve or narrow the issues in dispute and providing reasons, if no steps were undertaken. The defendant will be required to file a dispute resolution statement at the time of filing a defence in which it must state whether it agrees with the dispute resolution statement filed by the plaintiff or explain why it disagrees. Non compliance has the potential to impact on the cost orders or procedural steps that a court may make.

Although the proposed wording of the amended CPA differs to that utilised in the Civil Dispute Bill, the legislative intent is essentially the same, namely to encourage resolution of disputes prior to litigation or alternatively to narrow the issues in dispute. However we expect that the use of different terminology may mean that different practical issues may arise between litigated matters in the Federal, District and Local NSW Courts.

Victorian Courts

The Civil Procedure Act 2010 (Vic) (Vic CPA) commenced operation on 1 January 2011 with a 6 month transition period. The pre-litigation requirements were to commence on 1 July 2011, however there is currently a bill before the Victorian Parliament (which looks likely to be passed) for the repeal of the Victorian pre-litigation requirements because of concerns that they add to the complexity, expense and delay of bringing legal proceedings.

However, any amendment to the Vic CPA will not repeal the “*overarching obligations*” which compels parties (including insurers) to achieve the just, efficient, timely and cost effective resolution of the issues in dispute. These “*overarching obligations*” include but are not limited to acting honestly, minimising delay and not making frivolous or vexatious claims. The aim of these overarching obligations are said to mean that steps ought be taken to settle matters before they reach the courts, alternatively, to narrow the issues in dispute.

Insurance Implications

The insurance implications are likely to be substantial as they will:

- require that the insured:

- make timely notification to insurers of all circumstances that could give rise to a claim, and not merely await renewal; and
- at a very early stage provide the insurer with as much information as necessary in order for the insurer to determine indemnity and consider liability, quantum and potential settlement in order to be able to provide instructions for a possible early resolution of the claim;
- require that the insurer assess each and every notification of a circumstance as and when made;
- prevent insurers merely awaiting the letter of demand or filing of proceedings prior to acting on a notified circumstance; and
- make an early determination of indemnity and assessment of liability and settlement and prevent any prolonged reservation of rights.

From a practical point insurers:

- should obtain all relevant information from insureds at the outset regarding any notified claim and/or circumstance;
- should potentially instruct lawyers at a very early stage (possibly upon notification) in order to allow sufficient time for an assessment of indemnity, liability, quantum and settlement in order to be able to provide insurer’s input into the pre-litigation protocol; and
- will likely initially incur greater monitoring and defence costs by reason of the matters outlined above. However, if handled correctly, the initial increased costs ought to lead to eventual significant cost savings by reason of less litigation and potentially better settlements (as at the very least significant claimant’s costs and ongoing interest obligations will be minimised).

INSURANCE CONTRACTS ACT 1984 (Cth)

A review into the ICA was commissioned as long ago as 2003. Progress on the implementation of changes was glacially slow but the **Insurance Contracts Act Amendment Bill 2010 (Cth) (the ICA Bill)** finally reached the second reading stage in the Senate in July 2010 only to be delayed by the Federal Election.

From a financial lines perspective, the proposed amendments to the ICA are more interesting for what proposed changes were excluded from the ICA Bill.

Crucially, the proposed changes to section 40(3) and section 54 which would have inserted a new definition of “*claims made and notified*” policies and granted insureds a 28 day period to notify facts and circumstances beyond the expiry of the policy did not make it into the ICA Bill. There is some irony in this because the review of the ICA was initially prompted by the High Court’s interpretation of

these sections in the *Australian Hospital Care* matter.

The proposed changes which are relevant to the financial lines arena included:

- section 13 –was proposed to be amended to extend the duty of utmost good faith to a third party beneficiary. Section 14A which would allow ASIC to inquire into an insurer’s failure to comply with the duty of utmost good faith as if this was a failure to comply with the financial law;
- the objective test under section 21 of the ICA, which deals with the insured’s duty of disclosure, would be amended to include the Court taking into consideration various but non-exclusive factors in determining the objective test;
- section 51 was intended to allow a third party who has a damages claim against an insured, but who has died or who cannot be found, to recover directly against the insurer; and
- section 67 amendments were proposed to remove the uncertainty surrounding the priority of proceeds from a subrogated recovery claim.

Most recently the proposed amendments to the ICA have been delayed indefinitely because the legislative assembly is reviewing whether section 15 (which provides the ICA with exclusive jurisdiction over insurance contracts) should be amended to allow the unfair contract term provisions of the ACL to apply to insurance contracts.

NSW CLASS ACTION RULES

In our last review we discussed the plans announced to introduce new class action rules in NSW to remedy what are seen as deficiencies in the current court rules in dealing with class actions.

One of the more contentious of the proposed reforms was to allow for Cy-pres remedies which would have given the NSW Supreme Court the power to order that unclaimed damages from a successful class action be distributed to a charity or other public interest beneficiary. This proposed amendment has been dropped.

The NSW class action rules have yet to come into force.

SONS OF GWALIA - CORPS ACT AMENDMENT

The Corporations Amendment (Sons of Gwalia) Act 2010 (Cth) (SOG Act) came into force on 18 December 2010 and relevantly reverses the effect of the High Court’s decision

in *Sons of Gwalia v Margaretic*¹ (SOG Judgment) which held that shareholder claims against a company ranked equally with other unsecured creditor claims.

The SOG Judgment was criticised for favouring shareholders over creditors and for purportedly allowing liquidators easier access to insurance funds. The SOG Act now seeks to overcome the SOG Judgment by providing that:

“The payment of subordinate claims against a company is to be postponed until all other debts payable by, and claims against, the company are satisfied.” (s563A)

Importantly:

- “claims” are defined as a claim that is admissible to proof against the company;
- “debt” is defined as a debt that is admissible to proof against the company; and
- “subordinate claim” is defined as:
 - “(a) a claim for a debt owed by the company to a person in the person’s capacity as a member of the company (whether by way of dividends, profits or otherwise); or
 - (b) any other claim that arises from buying, holding, selling or otherwise dealing in shares in the company.”

The effect of the amended s563A of the Corporations Act is that payment of shareholder claims in an administration/liquidation is now postponed until after payment of all creditor claims has been made. The amendments raise 2 significant issues, namely:

1. its interaction with section 562 which provides that insurance money received by a company (from its third party insurance policy) in respect of its liability to a third party (including shareholders) is to be paid to that third party in priority of all other debts. In other words, pursuant to section 562 insurance proceeds received from a company’s liability policy have to be paid to shareholders (in respect of any shareholder claim), however pursuant to section 563A shareholders can only be paid by the liquidator after all creditors have been paid.

Section 563A does not prevent shareholders from being entitled to bring claims against a company (and/or its directors) and by reason of section 562, any proceeds of insurance applicable to any claims against the company ought to be ring fenced for the benefit of those claimants. At the very least the possible conflict between sections 562 and 563A raises issues about the timing of such payments.

2. Section 563A is only referable to “shares” rather than “securities” as defined in the Corporations Act. Accordingly section 563A is unlikely to apply to note holder or bond holder claims or indeed any

¹ [2007] 231 CLR 160

claim that is strictly not confined to shares in the company.

Effect on Insurance

The effect of the SOG Judgment has now been overturned for all causes of action occurring after 18 December 2010. While the SOG Act also removes the shareholder's right to vote at a creditors' meeting, unless expressly permitted by the courts (although the SOG Act is silent on when such permission can be provided), the principal impact of the SOG Act on insurers is the reversal of the finding that shareholders rank equally with unsecured creditors of the company.

While this removes the pressure that can be exerted on insurers by liquidators accepting shareholder claims and demanding payment of insurance money, it has created uncertainty regarding the ambit of section 563A (shares v securities) and its interaction with section 562. That uncertainty is likely to lead to:

- a race between shareholder claimants and the liquidator as to who can first bring claims and obtain judgment in their favour so as to obtain that 'pot of gold', being insurance monies. This is because the "first past the post" principle in respect of payment of insurance proceeds is still the only applicable law²; and
- shareholders are likely to focus more on claims against the directors (rather than against the company) which are not affected by section 563A. Claims solely against the directors are also now more likely to occur because side C 'entity cover' under a D&O Policy is becoming more restricted.

1 Cox v Bankside [1995] 2 Lloyd's Rep 437

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