

NEWSLETTER

May 2014

Commercial Litigation Newsletter

Welcome to our May Commercial Litigation newsletter

This quarter we have included news on:

- the recent privacy law amendments – is your business prepared?
- Privacy Awareness Week and what you should be doing to protect your privacy
- caveats and the decision of *Deutsch v Rodkin & Ors* [2012] VSC 450
- a success story outlining our involvement in helping a national retailer defend proceedings brought against it for breach of contract.

Please do not hesitate to contact us if you would like more information on any topic, whether covered in this newsletter or not. We hope you find the newsletter informative and useful.



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Privacy law amendments: is your business prepared?

The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* introduces various changes to the *Privacy Act 1988*. The amendments come into effect on 12 March 2014.

What has changed?

New Australian Privacy Principles (APPs) will provide a stronger regime to govern the collection, handling and disclosure of personal information. An improved complaints procedure will also commence, as well as a greater ability for an individual to access and correct personal information.

The amendments allow a more comprehensive amount of personal information to be collected, such as whether an individual meets their obligation to make monthly payments regarding consumer credit and, if not, the day that the individual makes the payment, together with what an individual's current credit obligations are.

The Australian Privacy Commissioner will be given wider powers of investigation and also be able to seek a civil penalty order against organisations or individuals.

In the case of repeated interferences with an individual's privacy, the Commissioner can seek a penalty against a company of up to \$1.7 million. Further, the Commissioner may undertake an audit to ensure compliance with the APPs.

The overriding principle behind the changes is that personal information is to be managed and controlled in an open and transparent manner.

What entities are required to comply with the new Australian Privacy Principles?

The APPs will be exempt for businesses that have a turnover of \$3,000,000 or less in a financial year.

Exceptions exist, such as businesses that provide a health service and hold health information or businesses that collect and hold personal information for a benefit, service or advantage.

A business that does not meet the turnover threshold but is related to a business that does have a turnover reaching the threshold will still need to comply with the APPs.

How do the changes affect your business?

If your business sends personal information overseas (eg to an outsourced service provider or parent 'head office' company), your business may be liable for any breach made by the overseas recipient of the information.

Each business to which the APPs apply must be readily able to identify the reasons, uses and intended disclosure of personal information and also how that personal information was obtained.

An individual now has the right to contact your business and access personal information and obtain details as to how personal information came into your business' possession. Your business must be readily able to provide the source of the personal information.

Where you seek to use personal information for the promotion and sale of goods and services directly to new and existing customers, you must be aware that the use will now be heavily regulated. No direct marketing is allowed unless: it is collected

from the individual directly; the individual would reasonably expect the information to be used and disclosed for the purposes of marketing; and the individual is provided with a simple avenue to opt-out from the marketing.

What you can do to ensure your business is compliant

We strongly suggest that you undertake a review of your privacy policy, collection statement and training procedures for officers and employees of your business.

Your privacy collection statements must be carefully reviewed and updated to ensure they set out the reasons, uses and intended disclosure of personal information, and notify an individual that they can access their personal information and seek corrections. You must also notify an individual of their right to make a complaint about a privacy issue and how they can go about making a complaint.

It is important that you are aware of how your business uses and discloses personal information and what information you hold will be considered 'personal information'.

It is vital that your business keeps accurate and up-to-date business records when holding personal information, and that the information is held in such a way that you and your employees are able to access it in a timely manner.

If you require further assistance regarding the changes, please do not hesitate to contact us.

Author: Jenny Gearing, Associate



Privacy awareness update

Background

The week that commenced on 4 May 2014 was Privacy Awareness Week (PAW) across the Asia-Pacific region.

This is an annual event that is designed to remind the public sector, the private sector and the community in general of the importance of protecting private information.

This year mobile apps are the focus of the Asia-Pacific Privacy Authorities Forum, and the Office of the Australian Information Commissioner (OAIC) called on Australians to take steps during PAW to protect their privacy when using mobile apps.

The OAIC will participate in an international mobile app privacy sweep, which is an initiative of the Global Privacy Enforcement Network. This will involve an examination of 50 of Australia's most

popular apps to check whether each app explains why it collects personal information and what it will do with it.

The exercise will serve as a timely reminder to companies in Australia to ensure their privacy policies are updated and properly enforced internally. The amendments to the *Privacy Act 1988* (Act) that came into effect on 12 March 2014 represent the largest changes to Australian privacy legislation in recent years.

The recent changes to the Act provide enhanced powers for the OAIC, which include:

- seeking civil penalties of up to \$1.7 million for corporations and \$340,000 for individuals in the case of serious or repeated breaches of privacy; and
- conducting assessments of privacy compliance for both Australian government agencies and some private sector organisations; and accepting enforceable undertakings.

The changes provide for a new set of 13 Australian Privacy Principles (APPs), which set out how private organisations and Australian government agencies must handle your personal information. There are also changes to the way your credit information can be collected and used.

Given that information about an individual's finances and credit-worthiness is an extremely sensitive category of personal information, the biggest changes under the new privacy legislation affect businesses involved in credit.

There are still changes that affect many other businesses. However, those businesses with an annual turnover of \$3 million or less are exempt, unless an exception applies (eg, businesses that provide a health service or hold health information or that provide

personal information to another entity in exchange for a benefit, service or advantage).

How changes to the *Privacy Act 1988* affect you

The following summary of how the privacy law changes affect individuals was recently issued by the OAIC. For more information, please see here: <http://www.oaic.gov.au/privacy/privacy-resources/privacy-fact-sheets/other/privacy-fact-sheet-24-how-changes-to-privacy-law-affect-you>.

Openness

Under the new laws, entities have greater responsibility to manage information in an open and transparent way.

They must have a clearly expressed and up to date privacy policy explaining what they are going to do with your personal information. They must explain the kinds of personal information they collect and use, what they are going to do with it, and whether they are likely to disclose it overseas. They must also say how you can access and correct your personal information and make a privacy complaint.

This privacy policy will usually be available on their website. If you do not have access to the internet, you can call and ask for a copy.

Entities should also give you a 'privacy notice' when they collect your personal information.

The privacy notice should tell you who the entity is and how to contact them, why they are collecting your personal information, if there are consequences to not providing it, who they are likely to give it to, and whether they are likely to



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disclose it to an overseas organisation or agency.

Your identity

Under the new laws, you have the right to deal with an entity anonymously (without giving your name) or pseudonymously (using an assumed name), unless it is not appropriate for the type of interaction you are having.

You have this right when talking to all entities that are covered by the Act, but it may not always be possible. For example, if you wish to open a bank account or receive a government benefit, you will usually have to provide proof of your identity.

Direct marketing

There are new rules about how entities can use or share your personal information to direct market you their goods and services. They are only allowed to do this in certain circumstances.

If they do they must give you a simple way to ask them to stop. They must stop if you ask them to (remember to keep a record). And if you ask them, they must also tell you where they got your personal information from.

Entities are not allowed to use sensitive information about your health, who you vote for, your ethnicity or your sexual orientation without your prior consent.

Disclosing personal information overseas

If an entity discloses your personal information to an overseas organisation or agency, they need to make sure that it will be handled in accordance with Australian privacy law.

If your personal information is mishandled by the overseas

organisation or agency, the entity that disclosed your information may be legally responsible for this.

These obligations do not apply in some circumstances, such as where you specifically agree to your information being disclosed to an overseas organisation or agency.

Accurate and up to date records

People now have greater rights to access and correct records containing their personal information.

If an entity holds personal information about you and you ask to access it, they must give it to you except in some limited circumstances.

They must respond to your request for access within a reasonable period (generally less than 30 days). They should also give you access in the manner you have requested. If they refuse to give you access, they must give you a written notice that includes reasons for that refusal.

An entity is not allowed to charge you for asking for access. Australian government agencies are also not allowed to charge for giving you access, but private sector organisations may impose a reasonable charge.

If an entity holds personal information about you that is incorrect, you can ask them to correct it.

You can ask them to correct your personal information if it is: inaccurate, not up to date, incomplete, irrelevant or misleading.

Entities must respond to your request for correction within a reasonable period (generally less than 30 days). If they refuse to make the correction, they must give you a written notice

that includes reasons.

If your personal information is held by an Australian government agency, you may be able to get access to it or ask that it be corrected under the *Freedom of Information Act 1982*. However, many requests for access and correction can be dealt with informally and quickly – a phone call or email may be all that is required.

Steps to protect your privacy on a mobile device

In aid of this year's PAW, the Asia Pacific Privacy Authorities Forum has provided six simple steps that users can take to protect their privacy on their mobile device (see <http://www.privacyawarenessweek.org/resources.html>).

These are:

1. **Beware of untrusted apps** – only use apps from reputable sources.
2. **Avoid apps that leak your information** – check what permissions the app wants to use before installing it. Do you really want it to copy the details of all your contacts?
3. **Use anti-virus software** – some apps can contain viruses and malware. Always ensure your devices have up to date anti-virus and malware protection.
4. **Clear out unused apps** – if you do not use an app, why keep it? It takes up memory and could still be operating in the background.
5. **Erase all apps before you recycle** – when you are no longer using a mobile device, delete all its apps and restore it to its original factory settings.



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6. **Protect your device** – make sure you have a PIN or other form of access control. Without it, what would happen if you lost your mobile device or had it stolen?

Comment – if you have not already done so, you should:

- Update your privacy policy on your website. This is important because your website is highly visible to any regulator who will be able to undertake a quick audit to check that you have made the necessary changes.
- Update your 'privacy notices' or 'collection statements'. Businesses generally require two privacy notices – one relating to employment/volunteer candidates and the other for general use.
- Update or implement a written privacy compliance guide. This

should cover issues such as dealing with complaints about privacy and requests for access to data.

- Commission a review of a high risk area of your business (eg direct marketing, transferring information overseas, managing unsolicited personal information). We have provided practical, outcome-focused advice to a number of high profile clients regarding particular aspects of their business that constitute a material risk of non-compliance with the new privacy regime.
- Conduct training for staff on the new privacy laws. The Privacy Commissioner's website (<http://www.oaic.gov.au>) offers free training materials (refer to: <http://www.oaic.gov.au/news-and-events/privacy-awareness-week-2014/resources-2014#training>). If you have not undertaken training and would like any assistance, please let us know – we can arrange a specific and tailored workshop for your organisation.
- If you are a lender, you will also need to ensure that your privacy policy complies with the Credit Reporting Code.

Authored by: Gino Potenza, Litigation Specialist

Contact: Gino Potenza, Litigation Specialist or Joel Masterson, Partner

Caveators – a tale of conspiracy

Case note – *Deutsch v Rodkin & Ors*

Caveators BEWARE!

The system of land ownership in Victoria, known as the Torrens

system, is enshrined in the *Transfer of Land Act 1958* (Vic) (TLA), which allows for registration of interests over a Certificate of Title (proof of ownership).

The registration system provides for caveats (s 89 of the TLA), allowing a person claiming an interest in land to register a caveat, constituting notice to other parties searching the title and providing the interest holder with some protection. Some interests in land are not capable of being registered, so caveats are an effective tool to give notice to third parties of the interest being claimed and to preserve priority.

Importantly, even after registration on title, a caveat does not give the caveator an actual interest in the land – it operates to give notice to other parties. Derived from Latin, a caveat serves as a warning.

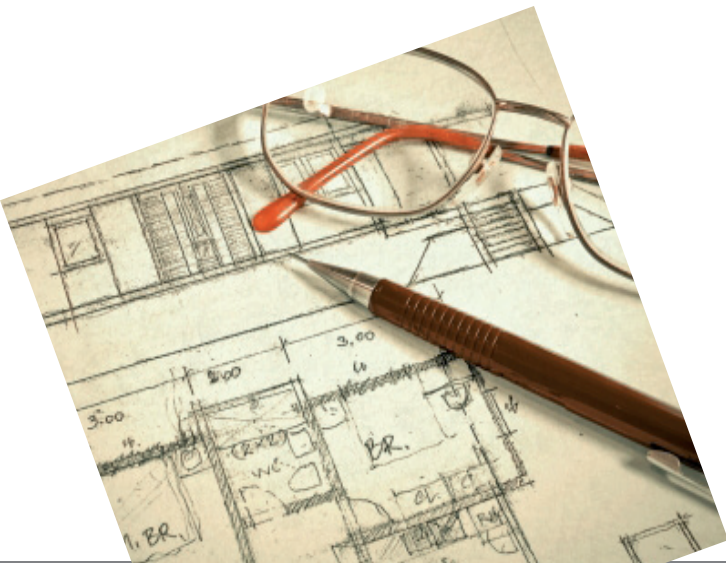
Caveats should only be used where parties have a recognised caveatable interest; this is because any person lodging a caveat without reasonable cause can be liable to any person who sustains damage for compensation under s 118 of the TLA.

The case of *Deutsch v Rodkin & Ors* [2012] VSC 450 serves as a reminder that caveators should exercise diligence when deciding whether or not they have grounds for claiming any estate or interest in land, prior to lodging a caveat.

Background

One of the caveators, Robert Deutsch, was involved in a legal dispute with his brother (the plaintiff's husband). Members of Mr Deutsch's family (the defendants) placed five caveats in successive order over the plaintiff's property.

A part of the litigation between the families involved the



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plaintiff, Mrs Deutsch (the registered proprietor of a house in North Caulfield), filing an application for removal of the caveats and subsequently for compensation under s 118 of the TLA, or alternatively for damages on the basis that the defendants 'conspired to cause her damage' *Deutsch v Rodkin & Ors* [2012] VSC 450 at [13] by lodging the caveats. The plaintiff also claimed exemplary damages.

The decision – conspiracy

The tort of conspiracy, described by Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* at [6], is satisfied if 'acts done in execution of an agreement entered into by two or more persons [are] for the [dominant] purpose not of protecting their own interest but of injuring the interests of the plaintiff'.

His Honour found that none of the caveators had an interest in the property that was capable of supporting any of the caveats. Rather,

His Honour found that the defendants *conspired* to lodge each of the caveats for the dominant purpose of injuring 'Tziporah and her family' *Deutsch v Rodkin & Ors* [2012] VSC 450 at [43].

Damages

The finding of conspiracy made it unnecessary for His Honour to consider whether the plaintiffs were liable to pay compensation 'for the purposes of s 118 of the Act'. To this extent, the plaintiff was awarded:

- \$300,000 for the reduction in the sale price of the property;
- \$51,497.99 for interest paid to the mortgagees; and
- \$8,607.40 for the costs of a cancelled auction.

Exemplary damages

'Exemplary damages are damages over and above those necessary to compensate the plaintiff. They are awarded to punish the defendant' *Carter and State of Victoria v Walker* [2010] VSCA 340. His Honour awarded exemplary damages of \$25,000. In his view, the amount of damages was otherwise insufficient. However, His Honour awarded the exemplary damages on the grounds that 'the caveats were lodged in circumstances where it was known that the property was a family home; ... that the family had income insufficient to maintain the two mortgages; [and] the caveats and their consequences would cause Tziporah to suffer increased stress': *Deutsch v Rodkin & Ors* [2012] VSC 450 at [82].

Comments

If you are considering lodging a caveat, please contact Cornwall Stodart for advice.

Authorised by: Joseph Carbone, Summer Clerk and Gino Potenza, Cornwall Stodart, Accredited LIV Commercial Litigation Specialist

A Successful Appeal

Quote

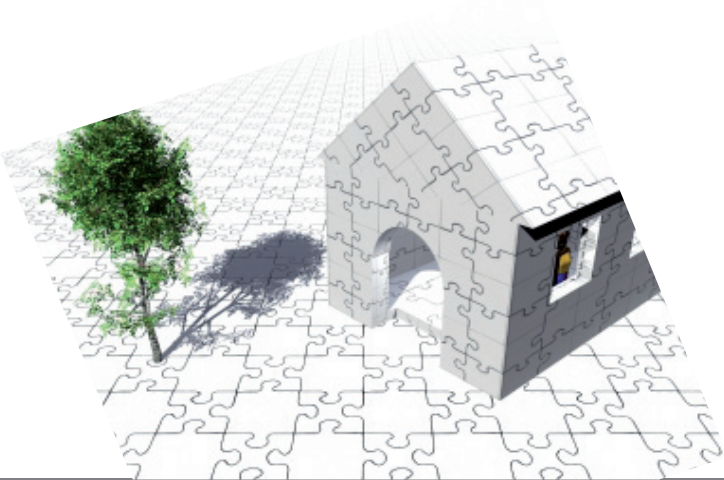
'In this case, our client defended proceedings brought against it for breach of contract. After the hearing, the court invited and allowed the plaintiff to file further evidence of loss. We successfully appealed this decision and the plaintiff's claim ultimately failed.'

Leneen Forde, Partner, Commercial Litigation

Dispute

Our client was a national retailer defending proceedings brought against it for breach of contract. The contract involved the roll-out of energy-saving devices through our client's national retail chain. The plaintiff in the proceeding claimed that it had suffered loss of almost \$2 million as a result of the alleged breach. It was clear to us that the plaintiff had not produced evidence of its loss, despite a number of attempts to do so.

A short time after the conclusion of a twelve day hearing in the Supreme Court of Victoria, the trial judge invited and allowed the plaintiff to file further evidence of loss. We advised our client to appeal this decision by the trial judge on the basis that the judge ought not to have initiated and thereafter allowed the plaintiff to file further evidence. The strategy we devised for the matter was very much influenced by our recognition that the plaintiff would



have difficulty proving loss and damage if in fact there had been a breach by our client.

Outcome

Our client was successful in its appeal. The Court of Appeal overturned the trial judge's decision to allow further evidence after the close of the trial. The result was that the trial judge was not able to consider the plaintiff's further evidence as to loss. He was required to deliver a judgment based only on the evidence given at the twelve day hearing.

The judge ultimately found that the plaintiff had suffered loss and damage as a result of the breach of contract, but due to its failure to properly quantify that loss and damage, only a nominal amount of damages of \$1 were awarded against our client.

The plaintiff was ordered to pay our client's costs of the trial and of the appeal.

Enhancing their success

We seek to advance the interests of our clients during every step of the trial processes and are willing to challenge decisions of the court where necessary to achieve results.

For more details, please contact: Leneen Forde, Partner

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Cornwalls' Commercial Litigation Team Member Profile

Gino Potenza, Litigation Specialist

Gino is a Law Institute of Victoria accredited Commercial Litigation specialist with over 20 years' experience in the banking and finance industry. He has also completed the LEADR course in mediation.

His areas of expertise include banking, property law, securities, consumer credit, insolvency, and particularly the enforcement of securities and contractual agreements. He has assisted a number of financial institutions in developing recovery procedures, training manuals and compliance audits under the Consumer Credit Laws.

Gino has an intimate knowledge of the law and the key players in the industry, including consumer advocates and enforcement arms. He thus understands and can quickly identify the relevant legal issues, and can anticipate any potential risks to his clients' reputations. He aims to protect those reputations, while reducing the costs invariably associated with litigation.

Gino's property litigation experience includes advising clients on the removal of caveats under the Transfer of Land Act, joint venture disputes, adverse possession claims, title boundary disputes and general contractual disputes from the sale of land, as well as applications for payment out of and into court.



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