NEWSLETTER

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Corporate & Commercial Newsletter

Welcome to our December Corporate & Commercial newsletter

In this edition we have included news on the:

- *Corporations Amendment (Crowd-sourced Funding) Bill 2015* presented in parliament on 3 December. If passed, the legislation will establish a regulatory framework to facilitate Crowd Sourced Equity Funding by small unlisted public companies
- recently enacted unfair contract terms regime (for small business contracts) that will commence on 13 November 2016. It is anticipated that 95 per cent of contracts with small businesses will be covered by the new regime
- Australian Government's release of an exposure draft of the *Privacy Amendment (Notification of Serious Data Breaches) Bill* which seeks to strengthen the privacy laws in Australia

Please do not hesitate to contact us if you would like more information on any legal matter, whether covered in this newsletter or not.

*Click on image to view Dean's profile

Dean Katz
Partner
Phone (direct) **+61 3 9608 2253**
Mobile **+61 413 497 225**
Email **d.katz@cornwalls.com.au**

Crowd Sourced Equity Funding Regime

The *Corporations Amendment (Crowd-sourced Funding) Bill 2015* was presented in parliament on 3 December 2015. If passed, the legislation will establish a regulatory framework to facilitate Crowd Sourced Equity Funding (*CSEF*) by small unlisted public companies. CSEF is an emerging style of funding whereby a large number of investors provide a company with a small financial contribution and in return they are offered a shareholding in the company.

Why introduce CSEF?

Overseas, there has been a strong trend of introducing legislation to facilitate online equity crowd-funding. For example, Canada, the United States, Britain, New Zealand and a number of European countries have already implemented similar legislation.

The House of Representatives is of the view that CSEF should be introduced in Australia because it has the potential to stimulate the Australian start-up entrepreneurial sector by providing finance for innovative business ideas and provide less experienced investors or 'retail investors' with market access.

General outline of the proposed legislation

The proposed amendments establish a new regime by inserting a new Part into Chapter 6D of the *Corporations Act 2001* (Cth), which will deal with:

- eligibility requirements for a company that wants to make an offer under the CSF regime; and
- the process to make a CSF offer, including the role and obligations of the CSF intermediary.

Further, the amendments will address prohibitions, liabilities and investor protections applying to CSF offers.

Eligibility requirements

The proposed eligibility requirements for making CSF offers are as follows:

- the offer must be for the issue rather than the sale of securities;
- the company that makes the offer must be an eligible CSF company, that is, the company must satisfy the following conditions:
    i. the company's principle place of business and its directors location is Australia;
    ii. the company is an unlisted public company limited by shares; and
    iii. the value of the company's consolidated gross assets is less than $5 million and the company has a consolidated annual revenue of less than $5 million.

Additionally, the funds raised must not be intended to be used for investing in securities or interests in other entities or schemes.

Process of making a CSF offer

Under the regime, all CSF offers must be made by publishing a CSF offer document on the platform of a single CSF intermediary.

The offering company must not arrange for publication of the CSF offer document until they obtain the consent of each director or proposed director and the offering company may only publish one offer at a time.

Role of a CSF intermediary

The CSF intermediary is a person who operates a crowd-funding platform. Under the new regime, the intermediary will be required to hold either an Australian Financial Services Licence or an Australian Market Licence. The intermediary's obligations include but are not limited to the following:

- must act as a 'gatekeeper' - this involves conducting proscribed checks against CSF companies prior to publication of an offer and refusing publication where the intermediary is not satisfied of particular matters, such as the good fame or character of the offering company's directors;
- must display risk warnings to inform investors of the risks associated with, and the high failure rates of, start-up companies; and
- must ensure that information relating to the retail investors cooling-off rights appear prominently on the offer platform.

Investor protections

Given the potential to expose investors to financial risks, part 6D affords protections to investors such as:

- an investor cap of $10,000 per issuer via a particular intermediary within a 12-month period;
- a five day 'cooling off period' to withdraw after accepting an offer;
- a prohibition on providing financial assistance to enable investments in CSF offers; and
- the requirement to sign a risk acknowledgment statement prior to accepting a CSF application.

Potential CSEF framework for private companies

The current legislation limits the manner in which private companies can raise funds and effectively restricts their ability to make effective use of CSEF legislation (which is an issue as most start-ups commence as proprietary company and therefore would not be able to access crowd-funding).

In August this year, the Treasury released a consultation paper seeking stakeholder views on whether to extend the impending CSEF framework to proprietary companies. The general trend in stakeholder feedback was a preference for proprietary companies to be able to make effective use of CSEF, though this has not yet been fulfilled.

Notwithstanding, the legislation aims to balance the flexibility of companies to access funds from a substantial pool of people while protecting retail investors from risky (or fraudulent) activity by companies.

Author: **Jennifer Amy**
Contact: **Dean Katz**

Unfair Contract Terms in Small Business Contracts

The recently enacted unfair contract terms regime (for small business contracts) will have a significant impact on most businesses. It is anticipated that 95 per cent of contracts with small businesses will be covered by the new regime. The new regime means that any unfair contract term in a standard form small business contract will be invalid. The changes follow the establishment of the unfair contract regime (for consumer contracts) in the ACL in 2010.

This change comes in response to perceived vulnerability of small businesses when dealing with larger businesses. The start date of the new legislation is 13 November 2016. All businesses would be well advised to commence reviewing their small business contracts now to ascertain their position under the new laws and to ensure on-going compliance when the legislation commences next year.

What types of contracts are covered?

The legislation will apply to standard form small business contracts for the supply of goods, services, land, financial products or financial services.

What is a small business contract?

For the purposes of the legislation, a contract is a "small business contract" if:

(a) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and

(b) either of the following applies:

(i) the upfront price payable under the contract does not exceed $300,000; or

(ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed $1,000,000.

For the regime to apply, the contract must be entered into, renewed or varied after 13 November 2016.

What is a standard form contract?

There is no strict definition of "standard form contract", however, section 27 of the ACL gives the following factors which may indicate that a contract is of standard form:

- one of the parties has most or all of the bargaining power;
- one party offers a pre-prepared contract before entering any discussion with the other;
- the contract is offered for the other part to accept or reject on its terms;
- the contract is offered on a 'take it or leave it' basis;
- the other party was not given opportunity to negotiate.

What is an unfair term?

A term will be "unfair" if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied upon.

What is unfair will also depend on the circumstances, for example, the following may be deemed unfair without reasonable grounds:

- a unilateral right to vary contract terms;
- a unilateral right to terminate the contract;
- terms which stipulate random or unsubstantiated costs;
- terms which stipulate unfair pay-out requirements or penalties; or
- other obligations without reasonable grounds.

What are the effects of an unfair term?

Under the protections, a Court will be empowered to strike out a term of a standard form business contract if it is considered unfair. The unfair term would be void, unenforceable and treated as if the term never existed. The contract would otherwise remain valid and continue to bind the parties.

What should business do?

The unfair contracts term regime will significantly influence the Australian business environment. We recommend that large businesses (dealing with small businesses) begin to review their contracts to ensure they are compliant with the new laws and a strategy should be worked out to deal with this new legislation. Small businesses should become familiar with their increased rights for when the laws take effect this time next year.

Author: **Noah Bender Bennett**

Contact: **Dean Katz**

Mandatory Data Breach Notification Set to Commence

The Australian Government released an exposure draft of *Privacy Amendment (Notification of Serious Data Breaches) Bill* (**Bill)** on 3 December 2015 for public consultation until 4 March 2015. However, it is not yet known if or when the Bill will come into effect as law.

Under current legislation, companies can voluntarily report a breach of data security. The Bill seeks to strengthen the privacy laws in Australia by creating a mandatory obligation for companies to disclose a breach of personal information where "there is a real risk of serious harm to any of the individuals" whose personal information has been accessed, disclosed or mismanaged.

The proposed mandatory notification requirements will apply to any entity regulated by the *Privacy Act 1988* (Cth) (**Privacy Act**), which includes federal government agencies and private sector organisations who have an annual turnover exceeding $3 million. The notification requirements will also apply to foreign corporations that process data offshore for Australian entities.

Serious data breaches

Under the Bill, it is proposed that entities which are bound by the Privacy Act will be required to notify the Privacy Commissioner, where they are aware, or ought to be aware, that there are "reasonable grounds" to believe that a "serious data breach" has occurred. If an entity is uncertain as to whether a breach has occurred, it is proposed that they be given a 30 day assessment period in which they are to conduct an investigation and assess whether a "serious data breach" has occurred.

Whilst the Bill is similar in most respects to predecessor bills (which were introduced in 2013 and 2014 respectively), this Bill emphasises the importance of accurately determining whether there has been a breach requiring notice. A key concept is the requirement to assess whether there are "reasonable grounds" for determining whether a "serious data breach" has occurred.

The Bill contemplates that a "serious data breach" will occur if there has been unauthorised access or disclosure of personal information obtained and held by an entity and there is a "real risk of serious harm" to the individual whose information has been accessed, disclosed or mismanaged. The proposed definition of "harm" includes physical, psychological, emotional, economic, financial or reputational harm.

The Bill outlines a number of factors that will determine the seriousness a breach, which include the type and sensitivity of information and whether the information accessed is in a form

"intelligible for an ordinary person" (which may operate to assist entities which take steps to encrypt data).

The final version of the Bill is also likely to set out categories of data which will require automatic notification (these categories have not yet been finalised).

Notification requirements

Notification of a "serious data breach" must include a description of the breach and what information was accessed or disclosed and any steps that individuals affected by the breach may take to mitigate any harm caused by the data breach.

Reasonable steps must also be taken to notify the individuals affected by the breach. If it is impracticable to notify individuals, the entity must publish a statement on its website and take steps to publicise the statement.

Non-compliance

The enforcement powers already held by the Privacy Commissioner may be applied to any entity that fails to provide notification of a serious data breach. The Privacy Commissioner's powers are discretionary and there are specific penalties that apply in response to particular types of data breaches. However, civil penalties of up to $1.7 million could apply in cases of serious or repeated data breaches.

Summary

The Bill seeks to balance the protection of individuals' privacy with the objectives of reducing businesses' compliance burden and maximising productivity in a global economy.

The introduction of the Bill is positive step for the protection of individuals' personal information. However, the extent to which the Bill adequately balances the protection of individuals' privacy and the objectives of reducing businesses' compliance burden and maximising productivity in a global economy remains to be seen. If your business collects, uses, stores or discloses individuals' personal information (in particular, "sensitive information" eg. health related information, details regarding race, religion, sexual preferences etc.) and you would like to discuss the possible implications of the Bill or you are considering preparing a submission in response to the Bill, we would be pleased to discuss this developing area of the law further with you.

Author: **Lesley Naik**

Contact: **Joel Masterson**

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+61 3 9608 2168

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Team Member Profile

Levent Shevki, Partner, Corporate & Commercial

Levent Shevki
Partner
Corporate & Commercial
Phone (direct) **+61 3 9608 2278**
Mobile **+61 419 504 317**
Email **l.shevki@cornwalls.com.au**

Levent has extensive Australian and international legal and business experience representing public and private clients in corporate and commercial matters. His clients value his ability to deliver efficient and commercial outcomes.

His experience and expertise create value for major organisations in many different industries, including the extractive industry, construction, energy and resources, and sports and entertainment.

Levent is a director of Astus Edge, a global business advisory firm, and in that capacity uses his business skills and international networks to assist clients in product development and to break into key overseas markets.

Levent is also a director of Twenty3 Sport and Entertainment Pty Ltd, a sports and entertainment consultancy.

Click here to view Levent's full profile.